CLE Materials

Choosing Wisely: The Challenge of Interim Measures in International Arbitration
This session is a collaboration of the New York Arbitration Week 2022 Co-Hosts, the Chartered Institute of Arbitrators New York Branch (CIArbNY) and the New York International Arbitration Center (NYIAC).

Courts and arbitral tribunals generally have concurrent jurisdiction to consider applications for interim measures in aid of arbitration. Parties and their counsel have to make important strategic choices about where to seek interim relief. This program will present two mock hearings in connection with applications for interim measures in a pending international arbitration seated in New York. One team of advocates will seek a temporary restraining order and preliminary injunction before a United States district court judge, while the other will seek similar relief before an emergency arbitrator. A discussion will follow examining the consequences of the choices made and the issues that should be considered by parties and their counsel before making these decisions.

Wednesday, November 16, 2022
11:30am-12:30pm: Catered Lunch | 12:30PM–2:00PM: Substantive Session
Program Hosts: NYIAC & CIArb-NY
Venue Host & CLE Provider: Skadden, Arps, Slate, Meagher & Flom LLP

Panelists:

- **Andrew J. Finn**, Partner, Sullivan & Cromwell LLP
- **Hon. Katherine B. Forrest (fmr.)**, Partner, Cravath, Swaine & Moore LLP
- **Grant Hanessian**, Independent Arbitrator, FCIArb
- **Kerri Ann Law**, Partner, Kramer Levin Naftalis & Frankel LLP
- **José F. Sanchez**, Partner, Vinson & Elkins LLP, FCIArb
- **Gretta Walters**, Partner, Chaffetz Lindsey LLP, MCIArb

Moderators:

- **Martin B. Jackson**, Partner, Sidley Austin LLP
- **Lea Haber Kuck**, Independent Arbitrator + Retired Partner, Skadden, Arps, Slate, Meagher & Flom LLP, MCIArb

Mock Fact Pattern

"Choosing Wisely: The Challenge of Interim Measures in International Arbitration"

The Parties

1. Plaintiff, SV Health Corporation ("SV Health"), is a New York corporation. SV Health imports and distributes over 1,600 different personal protective equipment ("PPE"), diagnostic equipment, healthcare supplies, surgical instruments, sanitary products, and hygiene products from over 100 brands. SV Health advertises itself as a top distributor of medical supplies and PPE in the United States. Defendant, Manufacturing's Best ("MB"), is a Malaysian company that manufactures N95 masks, vinyl gloves, and other PPE.

The Parties' Distribution Agreement

2. Prior to 2000, MB sold PPE only in Asia and it had no overseas presence or market share. In 2003, due to its increasing sales and success in countries throughout Asia, MB decided to expand its business to sell products in the United States. In order to market and sell its products in the highly regulated healthcare market in the United States, MB entered into an exclusive distribution agreement with SV Health to market, promote, sell and distribute its PPE in the eastern portion of the United States ("Distribution Agreement"). The Distribution Agreement with SV Health provided MB access to sell its PPE products to SV Health's extensive list of pharmacies and wholesale customers because of SV Health's highly experienced and motivated sales and marketing teams.

3. SV Health has been MB's exclusive distributor in the eastern half of the United States ("Territory") since 2003.

4. In December 2017, after several renewals of the initial Distribution Agreement, SV Health and MB entered into a new Distribution Agreement. Pursuant to the terms of the 2017 Distribution Agreement, SV Health agreed that MB would be SV Health's exclusive supplier of specified PPE products (including N95 masks, face shields, gowns, and latex gloves) for distribution in the Territory. The 2017 Distribution Agreement became effective on January 1, 2018, and expired on December 31, 2023 ("Term").

5. The 2017 Distribution Agreement contained a best-efforts provision that required SV Health to use its "best efforts to market, promote, sell, and distribute MB's PPE in order to maximize the sale of MB's PPE products in the Territory" ("Best Efforts Clause"). The Best Efforts Clause also required SV Health to use its salesforce to actively and effectively solicit all actual and potential PPE customers in the Territory on a regular and frequent basis.

6. The 2017 Distribution Agreement contained a termination provision, which provides that: "Upon a material breach of this Agreement by either party, which remains uncured for a period of sixty (60) days from receipt of written notice of the material breach, the non-breaching party may terminate this Agreement by providing written notice of termination to the party in material breach."

The Parties' Arbitration Agreement

7. The 2017 Distribution Agreement also included an arbitration agreement: "Any dispute, controversy, or claim arising out of, relating to, or in connection with this Agreement shall be settled under the New York Administered Arbitration Rules[1] by three arbitrators appointed in accordance with the said Rules. The seat and place of the arbitration shall be the City, County and State of New York. Prior to the constitution of the arbitral tribunal, any party may seek urgent interim or conservatory measures by filing an application for emergency relief, which application shall be heard by an emergency arbitrator who shall be appointed by the New York ADR Administering Institution within 2 days after such application has been filed. The emergency arbitrator may grant such interim or conservatory measures as the emergency arbitrator deems necessary to address the application, including injunctive relief. An application for emergency relief shall be without prejudice to the right of any party to seek interim or conservatory measures from a court of competent jurisdiction, which shall not be deemed a waiver of arbitration under this the arbitration agreement."

8. The 2017 Distribution Agreement also specified that it would "be governed by and construed in accordance with New York law."

Promotion and Sales of MB's PPE Products

9. Since 2003, SV Health's promotion and distribution efforts have resulted in MB PPE going from an unknown brand in the United States to becoming one of the most widely distributed PPE brands in the eastern region of the United States.

10. According to accounting records, by 2013 the gross sales value for MB's PPE products in SV Health's distribution territory in the eastern region of the United States exceeded $100 million, up 23% from the previous year. In 2014, the gross sales value for these goods was approximately $122,273,000, up $22% from the previous year. In 2015, the gross sales value for MB's PPE products was approximately $134,403,000, up 10% from the previous year. In 2016, the gross sales value was approximately $158,900,000, up 13% from the previous year. In 2017, the gross sales value achieved by SV Health was approximately $184,600,000, up more than 16% from the previous year. Thus, from 2013-2017, SV Health achieved double-digit growth on a yearly basis for sales of MB's PPE products in the eastern region of the United States and nearly doubled the total gross sales during this 5-year period.

11. In 2018, after entering into the 2017 Distribution Agreement, and coinciding with SV Health's 50% owner leaving the company, SV Health's growth rate for annual sales of MB's PPE products began to decline. For example, in 2018, the gross sales value of sales of MB's PPE products was approximately $197,420,000, up only 7% from the previous year. Then in 2019, sales of MB's PPE products in the Territory plummeted to only $146,150,000, down nearly 26% from the prior year.

12. From 2013 through 2019, sales of MB's PPE products accounted for between 5-10% of SV Health's total sales.

[1] The New York Administered Arbitration Rules and the New York ADR Administering Institution refer to a fictitious set of arbitration rules and arbitral institution solely for purposes of this mock exercise.

Notice of Material Breach

13. On January 10, 2020, after the significant drop in sales of MB's PPE products, MB wrote a letter to SV Health asserting that it (i) was extremely disappointed in SV Health's marketing, sales and distribution of its PPE products, (ii) considered SV Health's failure to modernize its promotional activities to be the primary cause of the significant decline in sales of MB's PPE products, and (iii) declared that SV Health's conduct constituted a material breach of the Best Efforts Clause. MB also informed SV Health that it was considering a termination of the 2017 Distribution Agreement if SV Health's promotional activities and corresponding sales of MB's PPE products did not improve.

14. Between January and March 2020, representatives from MB and SV Health met in New York several times to assess promotional activities and marketing strategies to improve SV Health's sales of MB's PPE products. During these meetings MB learned that SV Health had maintained substantially the same marketing and promotional activities for MB's PPE products from 2017 to 2019 but had not adopted the most advanced product management system for automated renewal of PPE orders. During the parties' negotiations, MB insisted that SV Health, at a minimum, should implement the product management system offered by other healthcare distributors.

15. In response to MB's demands, SV Health insisted that its overall gross revenue had increased from 2017 to 2019, based upon its continued emphasis on personalized service that was not provided by the product management systems. SV Health also argued that declining sales of MB's PPE products was a result of increased competition in the market. Finally, while SV Health emphasized its continued belief in utilizing a personalized approach to promotional activities, it disclosed that it would be rolling out a superior, next-generation product management system within the next 6-12 months, which had undergone more rigorous testing and had superior features and higher beta testing reviews than the current product management systems used by other distributors.

Notice of Termination

16. The parties' failed to reach any agreement during the negotiations on changes to SV Health's promotional activities for MB's PPE products. As a result, on March 16, 2020, MB sent a written notice of termination of the 2017 Distribution Agreement to SV Health by email (effective April 15, 2022), asserting that SV Health had breached the Best Efforts Clause and had failed to cure its material breach within 60 days of written notice.

17. The next day, on March 17, 2020, SV Health replied to MB's email and asserted that it had complied with its obligations under the 2017 Distribution Agreement and that MB's purported termination was invalid.

18. On March 20, 2020, MB responded and reiterated its position that its termination was proper. It also announced that it would be replacing SV Health with a new distributor. MB further requested that SV Health cease and desist all marketing and distribution of MB's PPE products and return all products that had not already been sold.

19. On March 25, 2020, SV Health sent MB a more detailed response contesting MB's right to terminate the 2017 Distribution Agreement. In its response, SV Health emphasized that,

pursuant to the 2017 Distribution Agreement, MB had an obligation to supply PPE to SV Health on an exclusive basis in the Territory. It also asserted that MB's failure to fulfill its supply obligations would prevent SV Health from fulfilling customer orders for PPE, especially due to the lack of alternative suppliers in the wake of the significant demand for N95 masks and other PPE as a result of the COVID-19 pandemic. SV Health also asserted that MB's wrongful termination would injure its customer relationships by eliminating its anticipated supply of PPE, which has been a key component of its healthcare supply offerings and accounts for nearly 8% of its total sales.

20. Prior to receiving SV Health's March 25 letter, MB had already agreed verbally to enter into a distribution agreement with another healthcare supplier, KSY (one of SV Health's competitors), to sell and distribute its PPE products in the Territory. KSY was started by the former 50% owner of SV Health and offers many of the same products, including PPE, in the United States market.

SV Health Commences Arbitration and Seeks Interim Measures

21. On April 3, 2020, SV Health initiated an arbitration under the New York Administered Arbitration Rules in accordance with the arbitration agreement in the 2017 Distribution Agreement and immediately sought emergency relief [from the federal district court or from an emergency arbitrator] in the form of an injunction to enjoin MB from entering into a distribution agreement with KSY and to require MB to continue to supply PPE products to SV Health on an exclusive basis in the Territory pending a final arbitral award on the merits.

22. SV Health alleges that if MB is permitted to discontinue its supply of PPE to SV Health and to contract with KSY as a distributor, then SV Health will be irreparably harmed. SV Health asserts that it will suffer loss of good will and damage to customer relationships, because it will no longer be able to supply MB's PPE, especially as customers' demand for PPE is increasing as a result of the COVID-19 pandemic. SV Health alleges that it will also lose its sustained investment in the promotion of MB's products, its good will with its customers, and its market share for healthcare products, if it cannot obtain N95 masks from MB because such masks are extremely difficult and may be impossible to obtain from other suppliers.

23. MB opposes the injunctive relief sought by SV Health on the basis that (i) MB properly terminated the 2017 Distribution Agreement as a result of SV Health's failure to cure its material breach within 60 days of written notice, and (ii) SV Health's application for injunctive relief is untimely because MB already provided written notice of termination and reached a verbal agreement to supply PPE products to KSY for distribution in the Territory, and (iii) while extremely difficult to obtain, SV Health asserts that anything (including N95 masks and other PPE products) can be obtained if you are willing to pay the right price no matter how high.

24. MB also opposes the injunctive relief sought by SV Health on the basis that (i) there are numerous other PPE suppliers in the Territory, (ii) SV Health's sales of MB's PPE products to its customers were significantly declining prior to the termination while it was increasing its overall healthcare product sales, and (iii) any lost profits can easily be compensated with money damages for the remaining Term of the 2017 Distribution Agreement as a result of more than 15 years of SV Health's sales of MB's PPE and its financial reporting of profit margins. A hearing has been set for Monday, April 13, 2020.

THOMSON REUTERS
PRACTICAL LAW™

Emergency arbitrators in international arbitration

by Practical Law Arbitration

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **us.practicallaw.tr.com/9-520-4691**
Request a free trial and demonstration at: **us.practicallaw.tr.com/practical-law**

This note examines the rules of the leading arbitral institutions on the appointment of emergency arbitrators. It discusses when emergency arbitrators are needed, how they are appointed, their powers, the procedure they follow and how their orders are enforced. It also looks at what happens when the full tribunal is subsequently constituted.

Scope of this note

An increasing number of the leading arbitral institutional rules now include provisions for the appointment of emergency arbitrators. Emergency arbitrators enable parties to obtain urgent relief before the tribunal is constituted and without having to go to court.

This note sets out the key features of emergency arbitrator procedure in general. It also summarises the principal provisions of arbitration rules of the leading institutions, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the International Centre for Dispute Resolution (ICDR).

If you are considering making an application for an emergency arbitrator under any of these rules, you should, in addition to this note and the overview provided in it, read the applicable rules in full.

This note does not examine expedited procedures under the institutional rules. For a discussion of those procedures, see Practice note, Expedited procedures in international arbitration.

When might emergency arbitrators be needed?

An emergency arbitrator may be needed where the arbitral tribunal has not yet been appointed or constituted and a party to the proceedings wants to obtain an order or an interim award for interim measures to prevent the other party from dissipating evidence or assets (including intellectual property (IP)), pending the full hearing of the dispute and the final award.

Some institutional arbitration rules permit the appointment of an emergency arbitrator before the arbitration is commenced (that is, before notice of arbitration or the equivalent is filed with the institution). Examples are the ICC Rules 2012, 2017 and 2021, the SCC Rules 2017, the Swiss Rules 2021, the Netherlands Arbitration Institute (NAI) Rules 2015 (referred to in these rules as Summary Arbitral Proceedings), the PRIME Finance Arbitration (PRIME Finance) Rules 2022 and the WIPO Arbitration Rules 2021.

Other institutions require that the application for an emergency arbitrator is filed concurrently with or after the filing of the notice of arbitration. Examples include the SIAC Rules 2016, the ICDR Rules 2021 and the Australian Centre for International Commercial Arbitration (ACICA) Rules 2021. Under the CIETAC Rules 2015, the application for the emergency arbitrator procedure must be made prior to the formation of the tribunal (*article 1(2), Appendix III, CIETAC Arbitration Rules 2015*).

The appointment of an emergency arbitrator does not necessarily preclude a party from seeking the assistance of the relevant national court. Most of the arbitration rules considered here contain provisions expressly protecting a party's right to seek the assistance of the national courts or "competent judicial authority" for interim measures or relief (see *article 9.12, LCIA Rules 2014 and article 19.3. LCIA Rules 2020*; *article 29(7), ICC Rules 2012, 2017 and 2021; article 37(5), SCC Rules 2017; article 30.3, SIAC Rules 2016; article 5(3), Appendix III, CIETAC Rules 2015; article 27(3), ICDR Rules 2021; article 7.1, Schedule 1, ACICA Rules 2021; article 29(5), Swiss Rules 2021; paragraph 22, Schedule 4,*

HKIAC Rules 2013, article 24.7, PRIME Finance Rules 2022; and article 48(d), WIPO Arbitration Rules 2021).

However, the requesting party may not want to seek the assistance of a national court because:

- It wishes to preserve the confidentiality of the arbitration.
- It has concerns about the length of time or costs involved in making an application to a national court.
- It has concerns about the impartiality or competence of the relevant national court.

How are emergency arbitrators appointed?

A feature of all the rules surveyed is that the emergency arbitrator is appointed by the institution administering the arbitration, following a party's application for emergency arbitrator relief.

The emergency arbitrator is usually appointed within a very short time frame: usually between 24 and 60 hours (or one to three business days) from the time the application for an emergency arbitrator is received by the institution. Institutional rules frequently require the payment of a deposit, registration and administration fees at the same time as an application for an emergency arbitrator is filed. In these cases, the application will not be dealt with until proof of payment is provided.

Some institutions (for example, the ICDR) have a special panel of arbitrators to deal with emergency applications, from which they will make the appointment.

What powers do emergency arbitrators have?

Power to rule on own jurisdiction

Under all the rules, the relevant institution will determine whether there are any obvious or manifest grounds why it should not deal with an application for an emergency arbitrator. Some rules provide that the emergency arbitrator also has the power to rule on his own jurisdiction (see *articles 9.13 and 23, LCIA Rules 2014 and articles 9.14 and 23, LCIA Rules 2020*; *article 6(2), Appendix V, ICC Rules 2012, 2017 and 2021*; *article 7(3), ICDR Rules 2021*; *paragraph 7, Schedule 1, SIAC Rules 2016*; *paragraph 10, Schedule 4, HKIAC Rules 2018*; *article 25.9, PRIME Finance Rules 2022;* and *article 49(f), WIPO Arbitration Rules 2021*).

No power to order ex parte relief

Apart from under the Swiss Rules 2021, an emergency arbitrator is not empowered to deal with ex parte applications for urgent or emergency relief. In fact, most rules expressly require parties to submit confirmation of notice to the other party along with the application for the emergency relief.

Power to amend own order

Under all the rules (apart from the NAI Rules 2015), the emergency arbitrator has the express power to amend or vacate the decision that they have made (see, for example, *article 6(8), Appendix V, ICC Rules 2012, 2017 and 2021*; *article 9(2), Appendix II, SCC Rules 2017*; *paragraph 8, Schedule 1, SIAC Rules 2016*; *paragraph 11, Schedule 4, and article 23.5 HKIAC Rules 2018*; *article 6(4), Appendix III, CIETAC Arbitration Rules 2015*; *article 7(4), ICDR Rules 2021*; *article 3.4, Schedule 1, ACICA Rules 2021*; *article 43(8), Swiss Rules 2021*; *article 25.10, PRIME Finance Rules 2022;* and *article 49(i), WIPO Arbitration Rules 2021*).

Under the LCIA Rules 2014 and 2020, the award of an emergency arbitrator is to take effect as "an award under Article 26.8", that is, as a final award (*article 9.9*). However, it may be confirmed, varied or discharged or revoked by the arbitral tribunal (*article 9.11, LCIA Rules 2014 and 2020*). The LCIA Rules 2020 provide that, prior to the formation of the arbitral tribunal, the emergency arbitrator may confirm, vary, discharge or revoke, in whole or in part, any order of the emergency arbitrator or issue an additional order (or both) (*article 9.12 (i)*).

Under the NAI Rules 2015, the tribunal hearing the summary arbitral procedure is empowered to render a final award on the merits (see *article 35(6)*).

Power to order that the party provide security

Under most of the rules, the emergency arbitrator has the express power to order that the party requesting the emergency interim measure should also provide some form of security to obtain the relief it seeks (see, for example, *article 6(7) of Appendix V to the ICC Rules 2012, 2017 and 2021; articles 1(2) and 32(2); article 37(2) of the SCC Rules 2017; paragraph 11 of Schedule 1 to the SIAC Rules 2016; article 5(2), Appendix III, CIETAC Arbitration Rules; article 7(4) of the ICDR Rules 2021; article 3.6 of Schedule 1 to the ACICA Rules 2021; article 29(2) and 43(1) of the Swiss Rules 2021; paragraph 11, Schedule 4, and*

article 23.6 HKIAC Rules 2018; article 35(3) of the NAI Rules 2015 and article 49(i) of the WIPO Arbitration Rules 2021).

The LCIA Rules 2014 and 2020 provide that the emergency arbitrator may make any order or award that the arbitral tribunal could make under the arbitration agreement. Under article 25.1(i) of the LCIA Rules 2014 and 2020, an arbitral tribunal has the express power to order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute.

No power to bind fully constituted arbitral tribunal

Under all the rules, the emergency arbitrator does not have the power to bind the full arbitral tribunal. This is because the fully constituted tribunal has the power to vacate, amend or modify any order, award or decision of the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal. However, apart from the ICC Rules (2012, 2017 and 2021) (which do not permit it at all) and the LCIA Rules (which are silent on the matter), all the institutional rules state that the parties may agree on the emergency arbitrator being appointed to the full tribunal.

What remedies can emergency arbitrators award?

The decision of an emergency arbitrator is referred to as an order, an interim award, an award or an interim emergency measure, depending on the institutional rules governing the dispute.

The rules also differ in describing what remedies the arbitrator may award but, in general, they provide the emergency arbitrator with a wide discretion to order whatever relief he or she considers necessary.

For example, under the ICC Rules 2012, 2017 and 2021, the emergency arbitrator may grant urgent or emergency interim measures or relief (*article 29(1)*). Under the rules of ICDR, SIAC, CIETAC, ACICA and WIPO, the emergency arbitrator is given the power to order or award any interim remedy or relief that they consider necessary (*article 7(4), ICDR Rules 2021*; *rule 3.3, Schedule 1, ACICA Rules 2021*; *paragraph 8, Schedule 1, SIAC Rules 2016; article 6(1), Appendix III, CIETAC Rules 2015;* and *article 49(i), WIPO Arbitration Rules 2021*). The LCIA, HKIAC, SCC and Swiss Rules grant the emergency arbitrator the same powers as a fully constituted tribunal would have under the relevant rules (*article 9.8 LCIA Rules 2014 and 2020*; *article 23.2 and paragraph 11, Schedule 4, HKIAC Rules 2018*; *articles 37(1)-(3), and article 1(2) of Appendix II, SCC Rules 2017;* and *article 43, Swiss Rules 2021*). Note that the LCIA Rules 2014 do not permit the emergency arbitrator to make an order or award relating to costs of the arbitration (*article 9.8*). Under the LCIA Rules 2020, the emergency arbitrator may determine the amount of legal costs relating to the emergency proceedings, and the proportions in which the parties shall bear those costs (*article 9.10*).

Under the NAI Rules 2015, the arbitrator may also make an award on the merits of the dispute, if the parties agree to this and request him to do so (*article 35(6)*).

What procedure will emergency arbitrators follow?

In general, the rules permit the emergency arbitrator to set his or her own procedure. Many of the rules expressly state that it will not be necessary to hold a formal oral hearing involving the exchange of written memorials. Many also recognise that it should be possible to conduct the hearing over the telephone or by video conference or other communications technology (see, for example, *articles 9.7 and 19.2 of the LCIA Rules 2014 and 2020; article 5(2) of Appendix V to the ICC Rules 2012, 2017 and 2021; article 7 of Schedule II to the SCC Rules 2017 and article 23; paragraph 7 of Schedule 1 to the SIAC Rules 2016 and article 7(3) of the ICDR Rules 2021*).

Several institutions specify a very short time frame in which the emergency arbitrator is expected to make their decision. For example:

- The LCIA 2014 and 2020 Rules specify no later than 14 days following the appointment of the emergency arbitrator.
- The ICC 2012, 2017 and 2021 Rules specify 15 days from the transmission of the file to the emergency arbitrator.
- The SCC Rules 2017 and the ACICA Rules 2021 specify five days from the referral of the application.
- The PRIME Finance Rules 2022 specify that the emergency arbitrator should render his or her emergency order or award within 15 days of that arbitrator's appointment.
- The HKIAC Rules 2018 specify that any decision, order or award be made within 14 days of the HKIAC transmitting the file to the emergency arbitrator.

- The SIAC Rules 2016 specify that an emergency arbitrator shall make his or her interim order or award within 14 days from the date of his or her appointment.
- The CIETAC Rules 2015 specify that the decision will be made within 15 days from the date of the emergency arbitrator accepting the appointment.

What happens when full tribunal is constituted?

Under the ICDR, the SIAC, CIETAC, ACICA, PRIME Finance and WIPO rules, the emergency arbitrator does not have any power to act after the full tribunal is constituted (*article 7(5)(6), ICDR Rules 2021*; *paragraph 10, Schedule 1, SIAC Rules 2016*; *article 5(3), Appendix III, CIETAC Rules 2015; article 5.1, Schedule 1, ACICA Rules 2021; article 25.12, PRIME Finance Rules 2022;* and *article 49(m), WIPO Arbitration Rules 2021*).

By contrast, under the ICC, HKIAC and Swiss rules, the fact that a tribunal has been constituted and "the file transmitted" to the tribunal, does not prevent an emergency arbitrator who has been appointed before the file being transmitted to the tribunal, from making an order or decision on emergency measures (see *article 2(2), Appendix V, ICC Rules 2012, 2017 and 2021*; *paragraph 13, Schedule 4, HKIAC Rules 2018*; *article 43(7), Swiss Rules 2021*.

The LCIA Rules 2014 do not expressly address this question. However, article 9.4 states that the emergency arbitrator is a "temporary sole arbitrator ... pending the formation or expedited formation of the Arbitral Tribunal". The LCIA Rules 2020 contain a further provision that states that the emergency arbitrator may "[p]rior to the formation of the Arbitral Tribunal" confirm, vary, discharge or revoke any order of the emergency arbitrator, make an additional award on any claim for emergency relief relating to the power of the emergency arbitrator.

Irrespective of this discrepancy between the rules, it is clear that under all the rules the full tribunal is not bound to accept or agree with the order of the emergency arbitrator, and will have the power to amend or vacate the order or award of the emergency arbitrator.

For example, under the ICC Rules 2012, 2017 and 2021:

- The "emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order" (*article 29(3)*).
- The arbitral tribunal is given the express power to decide "upon any party's requests or claims related to emergency arbitrator proceedings, including the reallocation of the costs of such proceedings" (*article 29(4)*).

Under the LCIA Rules 2014 and 2020, any order or award of the emergency arbitrator may be confirmed, varied, discharged or revoked by the fully constituted arbitral tribunal (*article 9.12 of the 2014 Rules and article 9.11 of the 2020 Rules*).

How is an emergency order or award enforced?

As with interim orders made by an arbitral tribunal, an emergency arbitrator does not have the power or ability to compel compliance with his or her order or award. Whether a court will enforce a decision of an emergency arbitrator will depend on the particular provisions of that country's arbitration laws.

In Singapore, for example, the International Arbitration Act was amended in 2012 so that emergency arbitrators are now within the definition of "arbitral tribunal" for the purposes of enforcement (see Singapore's International Arbitration (Amendment) Act 2012). The intention is that Singapore courts will enforce an order made by an emergency arbitrator in the same way as they would an order or interim award made by an arbitral tribunal.

More generally, though, it is unclear whether a national court would enforce the decision of an emergency arbitrator under the provisions of the New York Convention, as it is unlikely that this decision would be considered final and binding for the purposes of article V of the New York Convention. There is a possible exception to this under the NAI Rules 2015, in which the relevant provisions expressly state that the resulting decision on the issue of provisional relief by the summary arbitral proceedings may be "converted" into an arbitral award (although it is not entirely clear from that section whether the rules are referring to the tribunal of the summary arbitral proceedings or the subsequently appointed tribunal to hear the merits of the dispute (*article 35(4)*). Furthermore, where the summary proceedings arbitral tribunal has, at the request of the parties, issued an award on the merits (in accordance with article 36(6)) this will result in an arbitral award.

Similarly, article 9.9 of the LCIA Rules 2014 and 2020 states that an award of the emergency arbitrator shall take effect as a final and binding award made by an arbitral tribunal under article 26.8. Again, it remains to be seen whether a national court would enforce such an award under the New York Convention or whether it would consider it an interim order.

In *VEB.RF v Ukraine, Case No 824/178/19*, the Kyiv Court of Appeal appeared to accept that, in principle, the award of an emergency arbitrator, made under the SCC Rules, was capable of recognition and enforcement in Ukraine as a matter of principle. However, in that case it rejected the application for recognition and enforcement on three grounds provided for in the New York Convention, namely: lack of jurisdiction; Ukraine's inability to present its case; and public policy. Among other things, the court determined that international treaties ratified by Ukraine that refer to particular arbitral rules for resolving disputes, refer to the rules in force as at the day of ratification. It found that the Ukraine-Russia bilateral investment treaty (BIT) was concluded and ratified when the applicable SCC Arbitration Rules did not envisage a procedure for emergency awards. The SCC Arbitration Rules 2017, which contained the emergency arbitrator provisions, post-dated Ukraine's ratification of the Ukraine-Russia BIT. For further information see Legal update, Kyiv Court of Appeal denies enforcement of emergency award blocking sale of Russian investor's assets.

In *PDVSA and others v Refineria di Korsou and others (ECLI:NL:GHDHA:2021:1636),* the Dutch courts refused permission to enforce an emergency arbitral award ordering cessation of the enforcement of a judgment made within the Kingdom of the Netherlands. However, this decision was based on Dutch procedural law to the effect that a judgment made within that territory could be set aside only on the limited grounds set out in domestic procedural law. It should not impact the enforcement of awards in matters that have not also resulted in state court judgments rendered in the Kingdom of the Netherlands where those awards are otherwise found to be enforceable.

While it is currently not clear how easy it will be to enforce the order of an emergency arbitrator, there are other ways that the parties may feel compelled to comply with the order in practice. Under many of the rules, the parties expressly agree to be bound by the decision of the emergency arbitrator (see, for example, *article 9(1) of Schedule II to the SCC Rules 2017*). In addition, many of the rules state that the parties also undertake to comply with or carry out the order, interim award or emergency decision (see, for example, *article 29(2), ICC Rules 2017 and 2021*; *article 7(4), ICDR Rules 2021*; *article 9(3), Annex II, SCC Rules 2017*; *paragraph 12, Schedule 1, SIAC Rules 2016*; *articles 4.1 and 4.2, Schedule 1, ACICA Rules 2021;* and *article 25.11, PRIME Finance Rules 2022*).

The CIETAC rules go a step further. As well as providing that the parties are bound by the emergency arbitrator's decision, they provide that a party may "seek enforcement of the decision from a competent court pursuant to the relevant law provisions of the enforcing state or region". However, in relation to enforcing such a decision in China, the PRC Arbitration Law is yet to provide for emergency arbitrators, meaning that a party seeking emergency relief within China must apply to a Chinese court for appropriate preservative measures. Therefore, CIETAC's emergency arbitrator provisions are understood to apply primarily to arbitrations administered by the CIETAC Hong Kong Arbitration Center (see Practice notes, Resolving commercial disputes in China through arbitration: Emergency arbitrator provisions and A guide to the CIETAC Arbitration Rules (2015)).

While it remains unclear whether a national court will enforce an emergency arbitrator decision, a party may be reluctant to breach the undertakings in the rules if it considers that the arbitral tribunal may look unfavourably on such a breach, both in relation to its claim or defence in the main proceedings and in relation to any costs awards.

Practical tips for applying for appointment of an emergency arbitrator

Do the rules on emergency arbitrators apply?

Ensure that the emergency arbitrator provisions apply by checking the following:

- The date the arbitration agreement was entered into. Compare it with the date from which the relevant emergency arbitrator provisions apply.
- Is the respondent a signatory to the arbitration agreement, or (in the case of the ICC Rules 2012, 2017 and 2021) "successor(s) of signatories" to the arbitration agreement?
- Have the parties expressly opted out of or modified any relevant emergency arbitrator provisions either in the arbitration agreement or in any other contract?

Application for appointment

The relevant arbitration rules will specify what information must be included in the application. Ensure that each of these requests for information is complied with as fully as possible. It is a good idea to deal with each type of information request in a separate numbered paragraph, with cross references to any attached exhibits containing the supporting evidence.

Carefully consider what relief is being applied for and whether the emergency arbitrator can grant this relief against the party against which it is sought. For example, while an emergency arbitrator might be willing to grant an injunction, would it be enforceable if the party subject to the injunction refused to comply with it?

Apart from the ACICA Rules 2021, institutional rules do not provide specific guidelines or principles that the emergency arbitrator should apply in deciding whether to grant the emergency relief requested. An application should nevertheless contain clear and persuasive arguments about why the relief should be granted.

If the application is made before proceedings have commenced, ensure that the Notice of Arbitration and any supporting documents can be filed within the required time limit, as failure to do so may result in the emergency proceedings being halted by the relevant institution.

Ensure that the party has the funds to make the application. No application will be considered if the necessary fees and deposits do not accompany the application.

Ensure that sufficient copies of the application and supporting evidence are made at the outset. Verify who is to notify the respondent of the application (that is, the applicant or the institution?).

Consider whether concurrent court proceedings could or should be issued and if so, when these should be issued.

Practical tips for resisting appointment of 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 time limit provided.

There may be grounds to resist the grant of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to provide a full explanation of the case that the respondent has to answer.

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

- Jurisdiction of the emergency arbitrator.
- Application, on any of the following grounds (this list is not exhaustive):
  - the emergency arbitrator provision of the relevant rules do not apply (see Do the rules on emergency arbitrators apply?);
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if they complied with the order; 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.

The respondent may wish to consider insisting that the applicant provide adequate security. The respondent should consider both the amount of security and how it will be guaranteed.

International Chamber of Commerce (ICC) Rules 2012, 2017 and 2021

Key to the ICC Rules 2012, 2017 and 2021 are the provisions in article 29 and Appendix V that enable the parties to seek the appointment of an emergency arbitrator to deal with applications by a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. The procedure for these applications is set out in Appendix V.

The ICC also provide guidance on emergency arbitrator proceedings at the ICC in their note Emergency arbitrator and in an Emergency Arbitrator Order Checklist. In April 2019, the ICC Task Force also published a report on the use of emergency arbitrator procedures,. The which provides a detailed analysis of the first 80 EA applications made in the six years since the EA provisions were introduced. It aims to provide non-binding guidance such as case management techniques that the EA and the parties can use to promote efficiency of the EA proceedings (see Legal update, ICC Task Force publishes final report on Emergency Arbitrator Proceedings and *Blog, Seven years since "emergency" was declared by ICC: do we know what a real emergency is?*).

Application

The application should be sent (with sufficient copies for all the parties) to the Secretariat. It must contain the following information:

- A description of the circumstances giving rise to the application and of the underlying dispute.
- A statement of the emergency measures sought.
- Reasons why the relief sought cannot await the constitution of the tribunal.

- Proof of payment of the US$40,000 costs of emergency arbitrator proceedings.

(*Article 1(3), Annex V.*)

The application will not be notified until this payment has been received by the Secretariat (*article 7(1), Annex V*).

The President of the ICC will decide whether the emergency arbitrator provisions will apply. If they do, the Secretariat will transmit copies of the application and the documents to the responding party (*article 1(5), Annex V*).

If the applicant has not yet filed a request for arbitration at the time that it makes its application for emergency measures, it must do so within ten days of the Secretariat's receipt of the application. If it does not do so, the President will terminate the emergency arbitrator proceedings, unless the emergency arbitrator determines that a longer period of time is necessary (*article 1(6), Annex V*).

Appointment of emergency arbitrator

The President should appoint the emergency arbitrator within two days of the Secretariat's receipt of the application (*article 2(1), Annex V*).

The emergency arbitrator may not act as an arbitrator in any arbitration relating to the dispute that gave rise to the application (*article 2(6), Annex V*).

The parties may challenge the appointment of the emergency arbitrator, but this challenge must be made within three days of the notification of appointment or from the date when the party was informed of the facts giving rise to the facts and circumstances on which the challenge is based (*article 3(1), Annex V*).

Procedure

The emergency arbitrator should establish a procedural timetable within two days of receiving the file (*article 5(1), Annex V*).

Interim award or order

The emergency arbitrator's decision must take the form of a written order that should contain reasons on which it is based (*articles 6(1) and 6(3), Annex V*).

The order should be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator, although this time limit may be extended by the President of the Court either following a request by the emergency arbitrator or on the President's own initiative (*article 6(4), Annex V*).

The order will not bind the arbitral tribunal, which may modify, terminate or annul the order (*article 29(3), ICC Rules 2012, 2017 and 2021*).

Costs

The emergency arbitrator's order shall fix the costs of the proceedings and decide which of the parties shall bear them, or in what proportion they shall be borne by the parties (*article 7(3), Annex V*).

The tribunal has the power to reallocate the costs of the emergency proceedings (*article 29(4), ICC Rules 2012, 2017 and 2021*).

When will emergency arbitrator provisions apply?

ICC emergency arbitrator provisions apply automatically unless otherwise agreed. If parties wish to opt out of the provisions, they must do so expressly. Under the ICC Rules 1998, there was a pre-arbitral referee procedure, which parties had to expressly agree to use in their contracts. As a result, this procedure was rarely used.

ICC emergency arbitrator provisions will not apply if:

- The parties have agreed to opt out of the emergency arbitrator provisions.
- The arbitration agreement was concluded before 1 January 2012 (because the ICC Rules 2012 apply only to agreements concluded on or after this date).
- The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar procedures (ICC Rules 2012 and 2017).
- The arbitration agreement upon which the application is based arises from a treaty (ICC Rules 2021).

The London Court of International Arbitration (LCIA) Rules 2020

Unless otherwise agreed by the parties, the appointment of an emergency arbitrator is available to determine applications for emergency relief under article 9B of the LCIA Rules 2020, prior to formation or expedited formation of the arbitral tribunal. This provision first featured in the LCIA Rules 2014. The LCIA Rules 2020 extend the power of the emergency arbitrator to also deal with quantum and allocation of costs of the emergency proceedings (*article 9.10*).

The LCIA Court shall have the power to decide, at its discretion, all matters relating to the administration of the emergency proceedings that are not expressly provided for article 9B (*article 9.15*).

Notably, the 2020 rules clarify that the ability to appoint an emergency arbitrator does not prevent parties from exercising the right to apply for interim relief from the courts (*article 9.13*). In 2016, the English High Court cast doubt on the availability of court interim relief under the LCIA Rules 2014 when it held that English courts will not intervene to grant interim relief where an application could be made to an emergency arbitrator under these provisions (see *Gerald Metals SA v The Trustees of the Timis Trust & others [2016] EWHC 2327,* discussed in Legal update, LCIA emergency arbitrator provisions limit court's power to grant freezing injunction in support of arbitration (English Commercial Court) and *Blog post, Emergency arbitrators at the expense of urgent relief from the English courts: a trade-off worth making?*). It remains to be seen how the English courts will interpret the availability of interim relief under the AA 1996 in relation to arbitration under the LCIA Rules 2020.

Application

The application should be made to the Registrar in writing by electronic means. It should contain:

- A copy of the Request for Arbitration (where the claimant is making application) or a copy of the Response (where the respondent is making the application).
- Statements setting out the specific grounds for requiring the appointment of an emergency arbitrator, the specific claim, with reasons, for emergency relief.
- Confirmation that the applicant has paid, or is paying, the Special Fee prescribed in the Schedule of Costs. The Special Fee currently comprises £22,000 to cover the fees and expenses of the Emergency Arbitrator and £9,000 to cover the administrative fees and expenses of the LCIA.

  (*Article 9.5.*)

Appointment of Emergency Arbitrator

The application will be determined by the LCIA Court and, if granted, the Court should appoint an emergency arbitrator within three days of the Registrar's receipt of the application (*article 9.6*).

The appointment of the emergency arbitrator will be made in line with the way in which the LCIA Court appoints an arbitral tribunal, for example:

- While the LCIA Court alone may appoint the emergency arbitrator, under article 5.9, it should take into consideration any particular method or criteria of selection agreed in writing by the parties.
- The rules concerning nationality of arbitrators apply, that is, unless the parties agree otherwise, the emergency arbitrator may not be of the same nationality as any party.
- A party may challenge the appointment of the emergency arbitrator under article 10.

Procedure

The emergency arbitrator is empowered to conduct proceedings in any manner determined appropriate by the emergency arbitrator (*article 9.7*). In particular, the parties are not entitled to an oral hearing (whether in person, or virtually by conference call, videoconference or using other communications technology) and the emergency arbitrator may determine the claim for emergency relief based solely on the documentation submitted by the parties. However, the emergency arbitrator may decide that a hearing is appropriate in some cases.

A decision on the claim for emergency relief should be made by the emergency arbitrator as soon as possible, and no later than 14 days following the emergency arbitrator's appointment (*article 9.8*).

Form of award or order

An order must be made in writing and with reasons. The award must also comply with article 26.2 and therefore it must be dated, state the seat of the arbitration and be signed by the emergency arbitrator (*article 9.9*).

The award will take effect as an award under article 26.8 of the LCIA Rules 2020, which states that every award shall be final and binding on the parties. However, this is subject to article 9.11 (which states that any orders or awards may be confirmed, varied, discharged or revoked by an award or order made by the arbitral tribunal) and 9.12 (allowing the emergency arbitrator to confirm, vary, discharge or revoke any orders of the emergency arbitrator, to correct any errors and make additional awards).

Costs

Costs relating to the administration by the LCIA of the emergency proceedings (including the fees and expenses incurred by and payable to the emergency arbitrator) are

payable to the LCIA as part of the Special Fee that must be paid at the time the application for the appointment of the emergency arbitrator is made (*article 9.5*). The Special Fee paid by the applicant will form a part of the overall arbitration costs which, under article 28.1, will be determined by the LCIA Court (*article 9.10*).

The emergency arbitrator may determine the amount of the legal costs relating to the emergency proceedings, as well as the proportions of those costs that each party should bear. Alternatively, the emergency arbitrator may leave that determination to be decided by the arbitral tribunal (*article 9.10*)

When will the emergency arbitrator provisions apply

The LCIA emergency arbitrator provisions do not apply if the arbitration agreement was concluded before 1 October 2014, unless the parties have agreed in writing to "opt-in" to the emergency arbitrator provisions. The parties are also free to agree to exclude the emergency arbitrator provisions from applying to their arbitration agreement (*article 9.16, LCIA Rules 2020*).

Stockholm Chamber of Commerce (SCC) Rules 2017

The emergency arbitrator rules are contained in Appendix II of the SCC Rules 2017.

Application

A party may apply for the appointment of an emergency arbitrator before or after the arbitration has been commenced, but it must do so before the case has been referred to the arbitral tribunal (*article 1.1, Appendix II*).

The application must contain the following information:

- A summary of the dispute.
- A statement of the relief sought.
- Proof of payment of the costs of the emergency proceedings. Currently, these are the emergency arbitrator fee of EUR16,000 and the application fee of EUR4,000.

(*Articles 2 and 10, Appendix II*.)

The Secretariat will send the application to the other party as soon as it has been received (*article 3, Appendix II*).

Appointment of emergency arbitrator

The board of directors of the SCC (the board) should appoint an emergency arbitrator within 24 hours of receipt of the application (*article 4(1), Appendix II*).

The parties may challenge the appointment but this challenge must be made "within 24 hours from when the circumstances giving rise to the challenge of an Emergency Arbitrator became known to the party" (*article 4(3), Appendix II*).

The emergency arbitrator cannot act as an arbitrator in any future arbitration relating to the dispute, unless the parties agree otherwise (*article 4(4), Appendix II*).

Procedure

Once the emergency arbitrator has been appointed, the Secretariat shall promptly refer the application to him (*article 6, Appendix II*).

Decision

The emergency arbitrator has the same power to grant interim measures as a tribunal (*article 1.2, Appendix II*).

Any decision on interim measures shall be made not later than five days from the date on which the application was referred to the emergency arbitrator, although the board may extend this time limit (*article 8(1), Appendix II*). The decision should be made in writing and should state the reasons on which it was made (*article 8(2), Appendix II*). The decision is binding on the parties (*article 9(1), Appendix II*), who undertake to comply with it without delay (*article 9(3), Appendix II*).

The decision may be revoked or amended by the emergency arbitrator on a reasoned request by a party (*article 9(2), Appendix II*). The arbitral tribunal is not bound by the decision and reasons of the emergency arbitrator (*article 9(5), Appendix II*).

In 2021, seven applications for an emergency arbitrator were made, in which all were appointed within 24 hours, the average number of days for a decision from referral was 6.6 days and interim relief was granted in one and partially granted in two (see Legal update, SCC publishes caseload statistics for 2021).For examples of two conflicting SCC emergency arbitrator awards, see Legal updates, SCC emergency arbitrator dismisses interim measures application against Moldova and SCC emergency arbitrator grants interim measures against

Moldova. For an example of an emergency SCC award where the arbitrator granted an award to deal with a human rights issue see Legal update, SCC emergency arbitrator orders Mongolia to grant access to counsel.

Singapore International Arbitration Centre (SIAC) Rules 2016

The emergency arbitrator rules are in Schedule 1 to the SIAC Rules 2016.

In 2021, SIAC granted all 15 requests to appoint an emergency arbitrator (see Legal update, SIAC announces caseload statistics with publication of 2021 annual report).

Application

An application for interim emergency relief may be sought concurrently with, or following, the filing of a notice of arbitration (*paragraph 1, Schedule 1*).

The applicant should notify the Registrar of SIAC in writing of the nature of the relief sought and the reasons why the party is entitled to such relief is required (*paragraph 1, Schedule 1*).

The application must be accompanied by the appropriate fee, which is currently SGD 5,350 for Singapore parties and SGD 5,000 for overseas parties. The applicant must pay a deposit for the emergency arbitrator's fees and expenses when it applies for emergency relief. The deposit is fixed at SGD 30,000 and the emergency arbitrator's fees are capped at SGD 25,000, unless the Registrar otherwise determines pursuant to Schedule 1.

Appointment of emergency arbitrator

The President of SIAC should appoint the emergency arbitrator within one day of the Registrar's receipt of the application (*paragraph 3, Schedule 1*).

Any challenge to the appointment must be made within two days of the communication by the Registrar to the parties of the appointment (*paragraph 5, Schedule 1*).

The emergency arbitrator may not act as arbitrator in any future arbitration relating to the dispute, unless agreed by the parties (*paragraph 6, Schedule 1*). Once the tribunal is constituted, the emergency arbitrator "shall have no further power to act" (*paragraph 10, Schedule 1*).

Procedure

The emergency arbitrator should "establish a Schedule for consideration of the application for emergency relief" as soon as possible, but in any event within two days of appointment (*paragraph 7, Schedule 1*).

The emergency arbitrator is given the express power "to order or award any interim relief that he or she deems necessary" (*paragraph 8*).

Interim award or order

The decision of the emergency arbitrator is referred to as an interim order or award (*paragraph 9, Schedule 1*). The emergency arbitrator must give summary reasons for their decision in writing and may modify or vacate the interim award or order for good cause (*paragraph 8, Schedule 1*). Once constituted, the arbitral tribunal may also reconsider, modify or vacate the interim award or order (*paragraph 10, Schedule 1*).

The parties undertake to carry out the order or award immediately and without delay (*paragraph 12, Schedule 1*). Any order or award by the emergency arbitrator ceases to be binding if the:

- Tribunal is not constituted within 90 days of this order or award.
- Tribunal makes a final award.
- Claim is withdrawn.

Costs

The costs associated with any application may initially be apportioned by the emergency arbitrator. This is subject to the tribunal's power to finally determine the apportionment of these costs (*paragraph 13, Schedule 1*).

Security

The emergency arbitrator's award or order may be conditional "on provision by the party seeking such relief of appropriate security" (*paragraph 11, Schedule 1*).

Enforceability of emergency arbitrator orders and awards in Singapore

The International Arbitration (Amendment) Act 2012 was passed in Singapore on 9 April 2012. It amends Singapore's International Arbitration Act (IAA) and has a particular impact on emergency arbitrator relief, as it amends the definition of arbitral tribunal to expressly include emergency arbitrators. Therefore, the orders and awards of an emergency arbitrator are as enforceable in Singapore courts as those of an arbitral tribunal (see Legal update, Changes to Singapore's arbitration laws come into operation).

Hong Kong International Arbitration Centre (HKIAC) Rules 2018

The emergency arbitrator procedure is set out in Schedule 4 of the HKIAC Rules 2018, which should be read together with article 23 on interim measures of protection and emergency relief. Unless the parties agree otherwise, the HKIAC Rules 2018 apply to all arbitrations where the Notice of Arbitration is submitted on or after 1 November 2018. Accordingly, the emergency arbitrator provisions set out below will only apply in these circumstances.

Application

A party may apply for emergency arbitration before, at the same time as, or after, the Notice of Arbitration is filed (*paragraph 1, Schedule 4*). An application for emergency relief must set out certain prescribed information, including a description of the circumstances giving rise to the application and the relief sought (*paragraph 2, Schedule 4*).

The party making the application must provide two copies: one for HKIAC and one for the emergency arbitrator. The applicant must also serve the application on all other parties to the arbitration, and confirm to HKIAC that it has done or is doing so (*paragraph 2(j), Schedule 4*). The applicant must also pay a deposit (application deposit) in the amount set by the HKIAC on its website on the date the application is submitted. The Application Deposit consists of HKIAC's emergency administrative fees and the emergency arbitrator's fees and expenses (*paragraph 5, Schedule 4*).

Appointment of emergency arbitrator

If HKIAC accepts the application, it will seek to appoint an emergency arbitrator within 24 hours of receiving both the application and application deposit (*paragraph 4, Schedule 4*). The emergency arbitrator must fulfil the criteria that apply to members of the tribunal, including impartiality and independence from the parties (see *article 11, HKIAC Rules 2018*). HKIAC will transmit the file to the emergency arbitrator.

Procedure

The emergency arbitrator has discretion to conduct the proceedings in the manner they consider appropriate (*paragraph 10, Schedule 4*).

Decision

Any decision, order or award of the emergency arbitrator (emergency decision) shall be made within 14 days of the date on which HKIAC transmitted the file to the emergency arbitrator (*paragraph 12, Schedule 4*). An emergency decision must be in writing, reasoned, and signed by the emergency arbitrator (*paragraph 14*). An emergency decision has the same effect as an interim measure granted by the tribunal under article 23 of the HKIAC Rules 2018 (*paragraph 16*).

At the request of a party, the emergency arbitrator or the tribunal (once constituted) may modify, suspend or terminate the emergency decision (*paragraph 11 of Schedule 4 and article 23.5*). The emergency decision ceases to be binding in certain circumstances, including where the arbitral tribunal renders a final award, or where the tribunal is not constituted within 90 days from the date of the emergency decision (for the full list of circumstances, see paragraph 17 of Schedule 4). Once the tribunal is constituted, the emergency arbitrator generally has no further power to act (*paragraph 18*). The emergency arbitrator may not be a member of the tribunal, unless the parties agree (*paragraph 19*).

CIETAC Arbitration Rules 2015

The emergency arbitrator procedure is set out in Appendix III of the CIETAC Arbitration Rules 2015, which should be read together with article 23 on conservatory and interim measures.

However, in relation to enforcing an emergency arbitrator decision in China, the PRC Arbitration Law is yet to provide for emergency arbitrators, meaning that a party seeking emergency relief within China must apply to a Chinese court for appropriate preservative measures (see Practice note, Resolving commercial disputes in China through arbitration: Emergency arbitrator provisions). As such, CIETAC's emergency arbitrator provisions are understood to apply primarily to arbitrations administered by the CIETAC Hong Kong Arbitration Center.

Application

A party applying for the emergency arbitrator procedure must submit its application to the CIETAC Arbitration Court, or the arbitration court of the relevant sub-commission or arbitration center of CIETAC that is administering the case, prior to the formation of the tribunal (*article 1(2), Appendix III*).

The application must set out certain prescribed information, including a description of the underlying dispute, the reasons why emergency relief is required, a statement of the emergency measures sought and the reasons why the applicant is entitled to it. The relevant documentation and any evidence on which the application is based must be attached. The application and all attachments must be submitted in triplicate or more if multiple parties (*article 1(3), Appendix III*).

The applicant must advance the costs in the amount of RMB 30,000 (*articles 1(4) and 7, Appendix III*).

Appointment of emergency arbitrator

If the Arbitration Court decides to apply the emergency arbitrator procedures, the President of the Arbitration Court will appoint an emergency arbitrator within one day of receiving the application and the advance payment of costs (*article 2(1), Appendix III*).

Once appointed, the Arbitration Court will promptly transmit the Notice of Acceptance and the application file to the appointed emergency arbitrator and the party against whom the emergency measures are sought, as well as copying the Notice of Acceptance to all other parties and the Chairperson of CIETAC (*article 2(1), Appendix III*).

On acceptance of the appointment, an emergency arbitrator must sign a declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence (*article 3(2), Appendix III*). On receipt of this, a party has two days to challenge the arbitrator on any of the grounds disclosed (*article 3(4), Appendix III*). A party that has justifiable doubts as to the emergency arbitrator's impartiality or independence may challenge that arbitrator in writing within two days of receipt of the Notice of Acceptance or, where a party becomes aware of a reason for a challenge after such receipt, within two days of learning of that reason, but no later than the formation of the tribunal (*articles 3(5) and 3(6), Appendix III*). The President of the Arbitration Court will decide the challenge and, if accepted, will reappoint an emergency arbitrator within one day from the date of the decision confirming the challenge (*article 3(7), Appendix III*).

Procedure

The emergency arbitrator will establish a procedural timetable within as short a time as possible and within two days their acceptance of the appointment. The emergency arbitrator will conduct the proceedings in the manner they consider to be appropriate, taking into account the nature and the urgency of the emergency relief, and shall ensure that each party has a reasonable opportunity to present its case (*article 5(1), Appendix III*).

The emergency arbitrator proceedings will not affect the parties' right to seek interim measures from a competent court and they will cease on the date the tribunal is formed (*article 5(4) and 5(3), Appendix III*).

Decision

The emergency arbitrator has the power to order or award the necessary emergency relief (*article 6(1), Appendix III*) or to dismiss the application and terminate the emergency arbitrator proceedings (*article 6(5), Appendix III*). The decision will be made within 15 days from the date of accepting the appointment (which may be extended) and will contain reasons (*articles 6(2) and 6(3), Appendix III*). The decision will be binding on the parties and a party may seek to enforce the decision in a competent court pursuant to the relevant law of that state (*article 6(4), Appendix III*).

Upon a reasoned request of a party, the emergency arbitrator or the arbitral tribunal may modify, suspend or terminate the decision (*article 6(4), Appendix III*).

Article 6(6) sets out the circumstances in which the emergency arbitrator's decision will cease to be binding.

Costs

The applicant's advance of RMB 30,000 consists of the remuneration of the emergency arbitrator and CIETAC's administrative fee. The applicant may be required to advance other additional and reasonable actual costs (*article 7(1), Appendix III*).

A party applying to the CIETAC Hong Kong Arbitration Center for emergency relief must advance the costs of the emergency arbitrator proceedings in accordance with the CIETAC Arbitration Fee Schedule III, in Appendix II.

The emergency arbitrator will determine in what proportion the costs of the emergency arbitrator proceedings will be borne by the parties, subject to the tribunal's power to finally determine the allocation of such costs at the request of a party (*article 7(2), Appendix III*).

Security

The emergency arbitrator may order the provision of appropriate security by the party seeking the emergency relief (*article 5(2), Appendix III*).

International Centre for Dispute Resolution (ICDR) Rules 2021

Article 7 contains the emergency measure of protection provisions for arbitrations conducted under the ICDR Rules 2021, which apply to arbitrations under the ICDR Rules commenced after 1 March 2021. The emergency arbitrator provision was also available in article 6 of the ICDR Rules 2014.

Application

Emergency relief may be sought before the constitution of the tribunal (*article 7(1)*).

The party seeking emergency relief shall notify the ICDR administrator and the other parties in writing that:

- It is seeking emergency relief.
- What relief is being sought.
- Why it is required on an emergency basis.
- Why it is entitled to this relief.

(*Article 7(1)*.)

Appointment of emergency arbitrator

The ICDR administrator should appoint a single emergency arbitrator within one business day of receipt of notice of the application. Before accepting appointment, the prospective emergency arbitrator must disclose to the ICDR administrator any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. Any challenge to the appointment must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator (*article 7(2)*).

The emergency arbitrator may not sit as member of the tribunal unless the parties agree otherwise. Once a tribunal has been constituted, the emergency arbitrator has no further power to act (*article 7(5)*).

Procedure

Within two business days, the emergency arbitrator is required to establish a schedule for consideration of the application for emergency relief (*article 7(3)*).

The schedule must provide all parties "a reasonable opportunity ... to be heard". It may provide for proceedings by telephone or video, or for written submissions, as an alternative to a formal hearing (*article 7(3)*).

Interim award or order

The decision of the emergency arbitrator takes the form of an interim award or order. The interim award or order should contain reasons for the decision (*article 7(4)*).

The emergency arbitrator may modify or vacate the interim award or order (*article 7(4)*). Once an arbitral tribunal has been constituted, it may also reconsider, modify or vacate the interim award or order (*article 7(5)*).

Costs

The emergency arbitrator will apportion the costs of the application but the arbitral tribunal retains the power to determine the final allocation of costs (*article 7(8)*).

Security

The emergency relief may be conditional on the provision of appropriate security (*article 7(4)*).

Swiss Rules 2021

The rules on emergency relief are contained in article 43 of the Swiss Rules of International Arbitration 2021, and should be read together with article 29 (which contains the provisions on interim measures).

Application

The application for emergency relief proceedings seeking urgent interim measures may be made before the arbitral tribunal is constituted and should be submitted to the Secretariat of the Arbitration Court of the Swiss Arbitration Centre (*article 43(1)*).

The application may be made before the Notice of Arbitration is submitted. However, if it is, then the Notice of Arbitration must be submitted within ten days of the receipt of the application for emergency relief. If it is not, then the court can terminate the emergency relief proceedings, unless it considers that the time limit should be extended (*article 43(3)*).

The application should state what interim measures are sought, and the reasons for seeking the relief (in particular, the reasons for the urgency (*article 43(1)(a)*)). It must contain confirmation of payment of the registration fee and deposits required (*article 43(1)(c)*).

Appointment of emergency arbitrator

The court will appoint an emergency arbitrator as soon as possible after receipt of the application, registration

fee and deposit monies. The court retains the power not to refer to an emergency arbitrator if it finds that there is either "manifestly no agreement to arbitrate under these rules" or "it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the application to it" (*article 43(2)*).

The emergency arbitrator may not serve as an arbitrator in any arbitration relating to the dispute, unless the parties agree otherwise (*article 43(11)*).

Procedure

The emergency arbitrator may conduct the emergency relief proceedings in such a manner as they consider appropriate, taking into account the urgency of the proceedings. The parties should all be given a reasonable opportunity to be heard (*article 43(6)*).

It may be possible to make an *ex parte* application for emergency relief before an emergency arbitrator. However, the responding party must be informed of the order no later than the time it is made and it must then immediately be given an opportunity to be heard (*articles 43(1) and 26(3)*).

Decision

The emergency arbitrator's decision should be made within 15 days from the date on which the Secretariat transmitted the file to them (*article 43(7)*). The decision has the same effect as a decision on interim measures by an arbitral tribunal under article 26 of the Swiss Rules 2012 (*article 43(8)*).

The decision should contain a determination on costs. However, the allocation of costs may be adjusted by the court and the arbitral tribunal, which is required to approve or adjust this part of the decision (*article 43(9)*).

Netherlands Arbitration Institute (NAI) Rules 2015

The NAI Rules 2015 do not provide for emergency arbitral proceedings. Instead, they provide for summary arbitral proceedings for arbitrations "located" in the Netherlands (*section 4, articles 35 and 36*) where "urgent cases ... require immediately enforceable provisional relief in view of the parties' interests, regardless of whether arbitral proceedings on the merits are pending".

The NAI Rules 2015 are substantially different to the emergency arbitrator provisions under the other rules considered in this note. In the other rules, the emergency arbitrator is generally limited to considering the specific request for urgent interim relief and is very likely to reject any request to consider overall merits of the dispute. Under the NAI Rules 2015, the arbitral tribunal in the proceedings for summary arbitral proceedings are expressly empowered to make a decision on the substantive merits of the dispute (*article 35(6)*).

Application

The request for summary arbitral proceedings should be filed, in two copies and with exhibits, with the NAI Administrator (*article 36(2)*). The request should contain the information set out in article 7(a) to (f) as well as the grounds on which the urgent relief is required (*article 36(2)*).

The applicant should notify the respondent of the request and provide a copy of it and any exhibits to all parties to the arbitration, and proof of such notice must be provided by the applicant no later than by the time of the hearing of the application (*article 36(3)*).

Appointment of arbitrator for summary arbitral proceedings

The rules provide for the appointment by the administrator of the NAI of an arbitral tribunal, consisting of a sole arbitrator, to decide the summary arbitral proceedings (*article 36(4)*).

Procedure

The tribunal should immediately determine the day, time and place of the hearing (*article 36(5)*).

Statements must only be filed if the tribunal so determines, unless the respondent wishes to raise a plea of lack of jurisdiction or a counterclaim, for which written memorials are required (*articles 36(5), 36(6) and 36(7)*).

The tribunal may determine "that the case is not sufficiently urgent or is too complicated to be decided in summary arbitral proceedings". If this is the case, the tribunal may deny all or part of the claim and refer the parties to arbitration on the merits (*article 36(9)*).

Costs

In common with the position under many of the other rules, a deposit for the costs of the application must either be deposited or paid before the hearing (*article 36(10)*).

Security

The arbitral tribunal may require the party seeking the summary arbitral proceedings or the party raising a counterclaim in the summary arbitral proceedings to provide security for its claim (*article 35(3)*).

Decision

The NAI Rules 2015 state that the decision on provisional relief of the arbitral tribunal in the summary procedure should not prejudice the decision of the arbitral tribunal in deciding the merits of the case (*article 35(5)*). However, an arbitral tribunal in a summary arbitral proceeding may also, if both parties agree and request the tribunal to do so, issue a final award on the merits instead of granting provisional relief (*article 35(6)*).

PRIME Finance Rules 2022

The first edition of the PRIME Finance Rules, introduced in February 2016, was largely based on the UNCITRAL Arbitration Rules 2010. The PRIME Finance Rules 2022 came into force on 1 January 2022 and are the result of a review designed to ensure that the rules remain suitable for a wide range of financial and banking disputes, including disputes in emerging sectors, such as fintech. The International Bureau of the Permanent Court of Arbitration at The Hague (PCA) will administer any arbitration conducted under the PRIME Finance Rules 2022.

The PRIME Finance Rules 2022 contain emergency arbitrator provisions that may be implemented prior to constitution of the arbitral tribunal (*article 25*).

Application

The request for emergency arbitral proceedings may be made before a Notice of Arbitration has been filed and up until the arbitral tribunal has been constituted (*articles 25.1 and 25.12*).

If the request for emergency arbitral proceedings is made before the Notice of Arbitration has been filed, the Notice of Arbitration must be filed within ten days of the receipt by the PCA of the request for emergency measures, unless the emergency arbitrator determines that a longer period of time is needed (*article 25.5*).

The request must contain the following information:

- Details of the parties, the arbitration agreement and relevant contracts, as well as a brief description of the claim and amount (if any) involved, and the identity of any third party with a significant interest in the outcome of the dispute (see *article 25.1(a) and articles 5.3 (b) to (e) and (g)*).
- A statement of the emergency measures requested (*article 25.1(b)*).
- A statement of the facts and arguments supporting the request for emergency measures, in particular with respect to measures said to be needed prior to constitution of the arbitral tribunal (*article 25.1(c)*).
- Any agreement or proposal as to the legal place of the arbitration (or the emergency arbitration), the applicable rules of law, or the language of the arbitration (or the emergency arbitration) (*article 25.1(d)*).
- Any Notice of Arbitration or any other submissions in connection with the underlying dispute filed prior to the request (*article 25.1 (e)*).

The request should also include proof of payment of the required fee, the administrative costs and the deposit for the emergency arbitrator's fees (*article 25.1(f) and Annex D)*. Currently, these are a registration fee of EUR1,000, administrative costs of EUR10,000 and a deposit for the emergency arbitrator's fees and expenses of EUR20,000.

Appointment of emergency arbitrator

The PCA will appoint an emergency arbitrator "within as short a time as possible, normally within two days of receipt of the request…". (*article 25.3 and article 8*). Articles 12 to 15 of the Prime Finance Rules 2022 (dealing with disclosure, challenge and replacement) apply to an emergency arbitrator as they do to members of the arbitral tribunal, subject to certain adjustments in relation to time periods for making and determining challenges to the appointment (*article 25.4*).

The appointed emergency arbitrator may not act as arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties (*article 25.4*).

The powers of the emergency arbitrator are extinguished on the appointment of the arbitral tribunal. Article 25.12 states that "The arbitral tribunal, once constituted, shall decide upon any party's requests or claims related to the emergency arbitration".

Procedure

The PRIME Finance Rules 2022 specify that emergency arbitrators may conduct emergency arbitrations in such manner as they consider appropriate (*article 25.7*).

The decision on emergency measures should be rendered within 15 days of the emergency arbitrator's appointment (*article 25.8*).

Decision

The decision of the emergency arbitrator may be rendered in the form of an order or an award, depending on which the emergency arbitrator considers most appropriate (*article 25.8*).

The order or award should state the reasons on which it is based and contain a determination on which of the parties should bear the costs of the emergency arbitration, and in what proportions (*article 25.8*). The grant of emergency measures may be subject to such conditions as the emergency arbitrator considers appropriate, including the provision of security (*article 25.10*).

The emergency arbitrator has the power to grant interim relief in the form of a preliminary order prior to rendering the decision on emergency measures (*article 25.8*).

The emergency arbitrator or the arbitral tribunal may modify, suspend or terminate the order (*articles 25.10 and 25.12*).

Australian Centre for International Commercial Arbitration (ACICA) Rules 2021

The ACICA Rules 2021 emergency arbitrator provisions are contained in Schedule 1 to the ACICA Rules, which should be read in conjunction with article 37 on interim measures of protection.

Application

The application to ACICA for emergency interim measures may be made concurrently with or following the filing of the Notice of Arbitration, before the constitution of the arbitral tribunal (*articles 1.1 and 1.2(b), Schedule 1*).

The application should be made in writing (*article 1.2(a)*). It should contain details of the:

- Nature of the relief sought.
- Reasons why this relief is required on an emergency basis.
- Reasons why the party is entitled to this relief.

(*Article 1.3.*)

The applicant should notify the other party or parties at the time they make the application and should provide a copy of the application to the other parties as well as provide a statement certifying that all other parties have been notified or an explanation of the steps it has taken to notify the other parties of the application (*article 1.2(c) and (d), Schedule 1*).

The applicant must pay ACICA the Emergency Arbitrator Fee (currently set at AUS$10,000) and the application fee (currently AUS$2,500) when the application is made (*article 1.4,* ACICA Schedule of Fees).

Appointment of emergency arbitrator

ACICA will appoint an emergency arbitrator within one business day of the receipt of the application (*article 2.1, Schedule 1*).

A challenge by a party to the appointment must be made within one business day of the date on which the party was notified of the appointment (*article 2.1, Schedule 1*).

Unless otherwise agreed, the emergency arbitrator may not act as an arbitrator in the proceedings (*article 2.3, Schedule 1*).

The jurisdiction and powers of the emergency arbitrator cease as soon at the arbitral tribunal is appointed (*article 5.1, Schedule 1*).

Procedure

The emergency arbitrator is required to make a decision on the application for emergency interim measures no later than five business days from the date on which the application was referred to them, although ACICA does have the power to extend this time limit upon request from the emergency arbitrator (*article 3.1, Schedule 1*).

The emergency arbitrator has the power to order or award any interim measure of protection on an emergency basis (the "Emergency Interim Measure") (*article 3.3*).

Decision

The decision must be signed, made in writing, state the date when it was made and contain reasons for the decision (*article 3.2, Schedule 1*). The emergency arbitrator may modify or vacate their decision at any time before the constitution of the arbitral tribunal (*article 3.4*).

It is a unique feature of the ACICA provisions that they specify threshold requirements for the grant of an Emergency Interim Measure by an emergency arbitrator. The party seeking emergency relief must be able to demonstrate:

> "(a) irreparable harm is likely to result if the Emergency Interim Measure is not ordered;
>
> (b) such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if the Emergency Interim Measure is granted; and
>
> (c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of the decision of the Arbitral Tribunal in making any subsequent determination". (*article 3.5*.)

The Emergency Interim Measure is stated to be binding on the parties and the parties undertake to comply with the measure without delay (*article 4.1 and 4.2, Schedule 1*).

The Emergency Interim Measure ceases to be binding if one of the following applies:

- The arbitral tribunal makes a final award.
- The claim is withdrawn.
- The emergency arbitrator or the arbitral tribunal so decide.
- The arbitral tribunal is not appointed within 90 days of the emergency interim measure being made.

(*Article 4.3*, *Schedule 1*.)

The arbitral tribunal is not bound by any decision or the reasons of the emergency arbitrator and it may reconsider, vacate or modify any emergency interim measure (*article 5.2 and 5.3, Schedule 1*).

Security

The emergency arbitrator may require a party to provide security as a condition to granting any Emergency Interim Measure (*article 3.6, Schedule 1*).

Costs

The costs associated with the emergency proceedings may initially be apportioned by the emergency arbitrator, with the tribunal retaining the power to re-apportion them as part of the determination of costs of the arbitration under the ACICA Rules (*article 6.3*).

WIPO Arbitration Rules 2021

The rules on emergency relief proceedings are contained in article 49 of the WIPO Arbitration Rules 2021.

Article 49 applies to arbitrations conducted under arbitration agreements entered into after 1 June 2014 (*article 49(1)*). Emergency relief proceedings are also available under the *WIPO Expedited Arbitration Rules 2021* (*article 43*).

Application

An application for emergency relief may be made before the tribunal is constituted and should be submitted to the WIPO Arbitration and Mediation Center (Centre) (*article 49(b)*). It should contain:

- The names, addresses and telephone, e-mail or other communication references of the parties and of the claimant's representative.
- A copy of the arbitration agreement and, if applicable, any separate choice of law clause.
- A brief description of the nature and circumstances of the dispute, including an indication of the rights and property involved and the nature of any technology involved.
- A statement of the interim measures sought and the reasons why such relief is needed on an emergency basis.

(*Article 49(b) and article 9(ii) to (iv)*.)

The application may be made before a Request for Arbitration is submitted, but the emergency arbitrator will terminate emergency relief proceedings if arbitration is not commenced within 30 days from the date of commencement of the emergency relief proceedings (*article 49(j)*).

The request for emergency relief is subject to proof of payment of the administration fee and of the initial deposit of the emergency arbitrator's fees in accordance with the Schedule of Fees applicable on the date of commencement of the emergency relief proceedings (*article 49(d)*).

Appointment of emergency arbitrator

The Centre will "promptly" (normally within two business days of receiving the request for emergency relief) appoint a sole emergency arbitrator (*article 49(e)*). Any challenge to the appointment must be made within three days of being notified of the appointment (*article 49(e) and articles 22-29*).

Unless otherwise agreed by the parties, the emergency arbitrator may not act as an arbitrator in any arbitration

relating to the dispute (*article 49(l)*). Once the tribunal has been constituted, the emergency arbitrator has no further powers to act (*article 49(m)*).

Procedure

The emergency arbitrator may conduct the proceedings in such manner as they consider appropriate, taking into account the urgency of the request. They must ensure that each party is given a fair opportunity to present its case. The emergency arbitrator may provide for proceedings by telephone, video conference or online tools, or on written submissions as alternatives to a hearing (*article 49(g)*).

Decision

The emergency arbitrator may order any interim measure that they deem necessary (*article 49(i)*). Their decision may take the form of an order or an interim award (*article 49(i)* and *article 48(c)*). The emergency arbitrator may modify or terminate the order at the request of a party (*article 49(i)*).

Once constituted, and at the request of a party, the tribunal may modify or terminate any measure ordered by the emergency arbitrator (*article 49(m)*).

Costs

The emergency arbitrator will fix and apportion the costs of the emergency relief proceedings in consultation with the Center and in accordance with the Schedule of Fees applicable on the date of commencement of the emergency relief proceedings, subject to the tribunal's power to make a final determination of the apportionment of such costs under article 73(c) (*article 49(k)*).

Security

The emergency arbitrator may order the emergency relief to be conditional on security being provided by the requesting party (*article 49(i)*).

Beijing Arbitration Commission (BAC) Rules 2015

The provisions for emergency arbitrators are contained in article 63 of the BAC Rules 2015.

Application

An application for the appointment of an emergency arbitrator and application for interim measures may be made once the BAC has accepted the case and before constitution of the tribunal (*article 63(1)*).

Appointment

If the BAC approves the appointment of the emergency arbitrator and the parties have paid the required fees (as set out in Annex 3), the appointment will be made from the BAC's Panel of Arbitrators within two days of the payment of the fees (*article 63(2)*). Unless otherwise agreed by the parties, the emergency arbitrator shall not act as arbitrator in the proceedings to which the application for interim measures relates (*article 63(7)*).

Procedure

An emergency arbitrator is bound by the same duties of disclosure as set out in article 21 and may be challenged in the same way as an arbitrator appointed under the BAC Rules under article 22 (*article 63(4)*). The emergency arbitrator may consider the application for interim measures "in such manner as he deems appropriate" and is required to "ensure that the parties have a reasonable opportunity to present their cases" (*article 63(4)*).

Decision

The emergency arbitrator's decision, order or award "stating the grounds on which it is based" should be issued within 15 days after their appointment. It must be signed by the emergency arbitrator and affixed with the seal of the BAC (*article 63(5)*). A party may, if it objects to the decision, order or award, apply to the emergency arbitrator for an amendment to or the suspension or revocation of the decision, order or award within three days of the date of the decision, order or award (*article 63(6)*). The decision, order or award of the emergency arbitrator will not be binding on the arbitral tribunal (*article 63(8)*).

Costs and security

No express provision is made in the emergency arbitrator provisions for either costs or security. However, article 63(4) states that the emergency arbitrator "shall consider the

application for interim measures in such a manner as he deems appropriate".

The CIArb Arbitration Rules 2015

Unless otherwise agreed by the parties, the CIArb Rules 2015 apply to arbitrations where the arbitration agreement was entered into on or after 1 December 2015. The emergency arbitrator provisions will also apply automatically. If parties do not wish to be bound by these provisions, they should expressly set this out in the arbitration agreement. The emergency arbitrator provisions will only apply to arbitration agreements entered into before 1 December 2015 if the parties expressly opt into the provisions.

The Emergency Arbitrator and Relief provisions are set out in article 26 and Appendix I of the CIArb Rules 2015.

Application

Any party in need of conservatory or urgent interim measures prior to the constitution of the tribunal can file an application with CIArb seeking such relief (*article 26*). Any such application must be made in accordance with the procedures set out in Appendix I of the CIArb Rules.

The application should be sent to CIArb and all other parties to the arbitration. It must contain the prescribed information, including the following:

- The applicant's position, if any, regarding the place of the emergency proceedings.
- Full statement of the relief sought.
- Statement as to why the applicant's application for emergency relief cannot await the constitution of the arbitral tribunal.
- Statement regarding whether and, if so, why harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and that there is a reasonable possibility that the applicant will succeed on the merits of the claim.

  (*Appendix I, article 1(3).*)

The application must be accompanied by the appropriate fee, currently set at £1,250 plus VAT (see *Appendix III*).

Appointment

The emergency arbitrator is appointed by CIArb (*article 2(1), Appendix I*) unless it finds that the parties have not agreed that the relevant CIArb Rules apply or the applicant has failed to demonstrate that the emergency arbitrator should be appointed. The emergency arbitrator should be appointed within two business days of the application and the fee being received by CIArb (*article 2(2), Appendix I*). Unless the parties have agreed otherwise, the emergency arbitrator may not serve as a member of the arbitral tribunal (*article 2(3), Appendix I*).

Procedure

The emergency arbitrator should establish a schedule for the proceedings within two days of being appointed and is empowered to conduct the proceedings "in any manner the emergency arbitrator determines to be appropriate" (*article 5(1), Appendix I*). The emergency arbitrator should try to issue decisions within 15 days of his appointment (*article 6(1), Appendix I*).

Interim order or award

The emergency arbitrator should issue the award or order in writing and it must also contain details of all of the following:

- The date on which it was issued and the place of the emergency proceedings.
- The basis for the emergency arbitrator's jurisdiction.
- The reasons for the decision.
- The allocation among the parties of the responsibility for the costs associated with the application for emergency relief and the emergency proceedings, subject to the authority of the arbitral tribunal to make a final determination and apportionment of such costs.

  (*Article 6(4), Appendix I.*)

The award or order made by the emergency arbitrator may be modified or confirmed by the arbitral tribunal, and, in the absence of modification or confirmation by the tribunal, will expire 15 days after the tribunal has been constituted (*article 6(9), Appendix 1*).

Costs

The emergency arbitrator has the authority under the rules to determine what the relevant fees, expenses and rates for their time will be for the proceedings (*article 7(1),*

Appendix I). The emergency arbitrator should inform the parties of how this will be determined once they have been appointed and is required to provide the parties with details about how payment should be made. The parties are required to make payment in the time frame set out by the arbitrator, failing which the emergency arbitrator is entitled to dismiss the application. The emergency arbitrator is also under an obligation to render an accounting of the fees and expenses incurred, and to return any expended balance to the applicant (*article 7(2), Appendix I*).

THOMSON REUTERS
PRACTICAL LAW™

Interim, provisional and conservatory measures in international arbitration

by Practical Law Arbitration

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **us.practicallaw.tr.com/1-342-7952**
Request a free trial and demonstration at: **us.practicallaw.tr.com/practical-law**

This practice note outlines the range of interim measures available in the context of international arbitration, and gives practical advice on where, when and how to apply for such measures.

Scope of this note

This note introduces the range of interim measures that are potentially available to parties in international arbitration. It provides an overview of the factors to consider when deciding whether to make an application to an emergency arbitrator, a tribunal or a national court where these are empowered to grant such measures. The provisions of nine institutional rules that give the tribunal powers to grant interim measures are set out in some detail. It highlights those rules where a right to apply to court is excluded and those rules providing for the appointment of emergency arbitrators who could issue orders or awards granting interim measures prior to the formation of the tribunal. For a more detailed discussion of emergency arbitrators' powers to grant interim measures of protection, please see Practice note, Emergency arbitrators in international arbitration.

The note also covers the position in ad hoc arbitrations including those applying the UNCITRAL Rules. The general procedure for making such applications to a tribunal is also discussed including timing, whether the application should be made on notice, and enforcement. There is also a brief section on deciding which national court to apply to for interim measures.

When do you need an interim measure?

What is an interim measure?

The term "interim measure" covers a wide range of orders. Most interim measures are granted at an early stage in the proceedings, with a view to preserving the status quo, or preventing the dissipation of assets or evidence pending the resolution of the arbitral dispute. Interim measures are often requested without notice and usually ordered on a provisional basis, that is, they are subject to later adjustment or setting aside by the tribunal. Interim measures are sometimes referred to as "interim measures of protection" or "provisional relief". An interim measure which aims to preserve evidence or assets is sometimes called a "conservatory" measure. However, not all interim measures are conservatory. For example, in *Merck Sharp & Dohme (IA) C v Republic of Ecuador (PCA Case No 2012-10)*, an UNCITRAL tribunal granted interim measures restraining enforcement of any local court judgment against the claimant (see Legal update, Tribunal grants interim measures preventing enforcement of future local court judgment (UNCITRAL)). Similarly, in *Sergei Viktorovich Pugachev v Russian Federation (UNCITRAL)*, an UNCITRAL tribunal granted interim measures requiring Russia to suspend proceedings to extradite the respondent (on the basis that such extradition would prejudice his ability to take part in the arbitration), but refused to make orders restraining other criminal and civil proceedings (see Legal update, Tribunal restrains extradition of claimant from France to enable participation in arbitration (UNCITRAL)).

Interim measures may be granted by an arbitral tribunal or by a court (*see* Should I apply to the arbitral tribunal, an emergency arbitrator or the court?).

Which measure when?

There are a variety of interim measures, appropriate in different situations.

Risk of party hiding or dissipating assets

You may consider that there is a risk of your opponent hiding or dissipating its assets, thereby rendering any

award in your favour nugatory. The best way of addressing this situation is to obtain interim relief requiring assets to be identified and "frozen" pending the outcome of the arbitration. In England, such orders are known as "freezing injunctions". A variant on this type of order is one attaching assets against which any subsequent award can be enforced. For further discussion of obtaining freezing injunctions under English law, see Practice note, The arbitral tribunal and English court's supportive powers: interim injunctions and receivers.

Risk of party destroying, damaging or hiding relevant evidence

Similarly, if you believe that your opponent possesses evidence which is relevant to the dispute, but that this evidence is likely to be destroyed, damaged or lost, you may apply for an interim measure aimed at protecting that evidence. For example, you may seek an order requiring the evidence to be produced, or delivered up into safe custody, or an order requiring your opponent to identify its whereabouts and to ensure its safekeeping.

Risk of party destroying, damaging or hiding property which is the subject of the dispute

Your dispute may be concerned with title in, or the condition of, property which is in the custody of your opponent. If you are concerned that the property in question may be destroyed, damaged or hidden, then you may consider applying for an interim order. An appropriate order to address this situation would be a conservatory order requiring the property to be produced or delivered up into safe custody, with the aim of preserving it safely until the dispute between the parties has been resolved.

Alternatively, where you will need to adduce evidence concerning the condition, location or nature of property or goods, you may consider applying for an order requiring your opponent to permit inspection, photographing, preservation, sampling or experimentation on the property. The precise order will depend on the particular dispute and the nature of the property in question.

Risk of goods or property perishing

Where a dispute is concerned with the ownership of perishable goods, the goods may well deteriorate before the dispute can be determined. In such a case, consider applying for an order requiring the sale of the goods (with the sale proceeds to be held pending the final award). You may also need to apply for ancillary orders requiring the goods to be sampled, tested or photographed prior to sale.

Unfairness in keeping party out of its money

If one party has a strong claim, it may be unfair to deprive it of its money pending the outcome of the arbitration. In such cases, the tribunal or the court may be able to grant provisional relief (in the nature of an interim payment). For example, under Dutch and French law, a "*juge des referes*" is able to order a debtor to make an advance payment, pending the outcome of an arbitration. The decision of the *juge des referes* is provisional, and subject to adjustment by the arbitral tribunal. Alternatively, the tribunal may have the power to make provisional awards or to order interim payments on account.

Risk of costs being unpaid

It is unfair to a respondent if, having successfully defended a claim, it is unable to recover its costs from the claimant. This potential unfairness can be dealt with by obtaining an order for security for costs, although such orders are relatively rare in the context of international arbitration. For further discussion of security for costs in relation to investment treaty arbitration, see Practice notes, Third-party funding for international arbitration claims: overview and Defending states in investment arbitration.

Risk of party's conduct causing irreparable harm

One party's conduct may be causing harm to the other. For example, in a trademark infringement or "passing off" claim, a claimant's commercial reputation may be irreparably harmed by continued infringement. If the defendant is permitted to continue with its conduct during the arbitration, it may not be possible to compensate the claimant for the harm caused. An interim injunction can remedy this situation.

Who can grant an interim measure?

There are three possible bodies that can grant interim measures:

- The arbitral tribunal.
- A national court.
- An emergency arbitrator, but only where the applicable institutional rules provide that one may be appointed.

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

- The arbitration agreement.
- Any applicable arbitration rules.

- The detailed provisions of national law in force at the seat of the arbitration and (if different) in the court where relief is sought.

The arbitration agreement, any applicable arbitration rules, or the law applicable at the seat of the arbitration, may confer power on the tribunal to grant interim measures. However, the effectiveness of any agreement, or rules to confer such a power on a tribunal, will also depend on whether they are recognised as valid by the law applicable at the seat of the arbitration. For example, Italian law does not recognise the ability of arbitrators to grant interim measures of protection. Any agreement or rules that purport to confer such power on the tribunal would not, therefore, be enforceable in an arbitration whose seat was Italy.

By contrast, countries that have adopted the Model Law will recognise and enforce interim measures granted by the tribunal, because the revisions to article 17 of the Model Law expressly provide for this. For further discussion, see, *Redfern and Hunter: Law and Practice of International Commercial Arbitration* (Oxford University Press. 6th ed., 2015), Chapter 5, paragraphs 5.27-5.34.

Similarly, the power of any national court to grant interim measures depends upon its national law. Most national arbitration laws permit a court to intervene and grant interim measures in support of the arbitral process. Many jurisdictions do also recognise concurrent jurisdiction, entitling both the tribunal and the court to intervene and grant interim measures. Specific local law advice should be sought when considering an application for interim or conservatory measures in support of arbitral proceedings.

Should I apply to the arbitral tribunal, an emergency arbitrator or the court?

If both the court and the arbitral tribunal have the power to grant interim measures, to whom should you apply? If a tribunal has not yet been constituted, can (or should) you apply for the assistance of an emergency arbitrator or should you apply to the court? In some cases, it will be preferable, for practical reasons, to make your application to the court. Consider the following:

- **Is the tribunal constituted?** Interim measures are usually most helpful and effective when sought at a very early stage in the proceedings. Often an arbitral tribunal has not yet been constituted, and therefore is unable (yet) to act. In such cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to court is necessary.
- **Do the applicable arbitral rules provide for the appointment of an emergency arbitrator?** Most of the major arbitral rules provide for the appointment of an emergency arbitrator who will have wide powers to order urgent interim relief. However, any such order or award will be subject to the tribunal's scrutiny and will have to be made on notice to the other party. It will also probably be necessary to provide security for the relief sought. For further discussion, please see, Practice note, Emergency arbitrators in international arbitration.
- **Will the tribunal's order be enforceable?** Where a tribunal grants interim measures, its decision will be contained in either a procedural order or an award. Whether and how it can be enforced will depend on the law of the seat of the arbitration or the law of the country in which you are seeking to enforce the order or award. As a matter of English law, if the decision takes the form of an order, then it cannot be enforced. If the decision takes the form of an award, then it is enforceable in principle, but may be subject to prior scrutiny by the courts or challenge in the court. In either case, enforcement of interim measures granted by a tribunal is likely to be considerably less straightforward than enforcement of a court order. (For further discussion of this distinction, see Practice note, Awards: the English Arbitration Act: what is an award?.)
- **Will it be necessary to enforce the order?** An arbitral tribunal has no power to compel compliance with any interim measures which it orders. This problem is likely to be particularly acute where the order affects third parties (as, for example, in the case of freezing injunctions). By contrast, a court can compel compliance (both by the parties to the arbitration, and non-parties such as banks) by imposing sanctions (for example, for contempt of court).
- **Will the application be made without notice?** An arbitral tribunal is likely to be reluctant to grant interim measures where these are applied for without notice to the other party. This is a significant disadvantage of applying for measures from the arbitral tribunal. In many cases, notice of the application gives the party an opportunity to dissipate the evidence or assets which is the subject of the application: by the time the tribunal makes an order, it is too late. By contrast, most courts will permit an applicant to proceed without notice in urgent cases. This usually happens where an application is made for a freezing injunction.
- **Will the tribunal be willing to grant relief?** More generally, an arbitral tribunal may well be reluctant to grant interim measures which might be seen in some way as prejudging the issues in the arbitration.

Therefore, although the pros and cons of every case must be assessed carefully, in many cases (and in particular, where a freezing injunction is sought) an application to court will represent the best option.

In each case, however, you must take advice on the extent to which the national court in question has power to entertain the application. Some national courts will intervene only if and to the extent that the arbitral tribunal is unable to act and may require proof that you have already taken steps to obtain relief from the tribunal. Furthermore, in some cases, a national court will make an order that will last only until such time as the arbitral tribunal is able to act effectively. For a helpful discussion in the context of the position under the Arbitration Act 1996, see *Russell on Arbitration* (Sweet & Maxwell, 24th ed., 2015), Chapter 5, Section 4, paragraph 5-080.

Interim measures: emergency arbitrator

Power of an emergency arbitrator to grant interim measures

Most leading arbitral institution rules now contain provisions that allow for the appointment of an emergency arbitrator. The emergency arbitrator is appointed by the arbitral institution, at the request of one or both of the parties to the dispute pending the constitution of the arbitral tribunal. The emergency arbitrator is appointed very quickly, usually between one and three business days from the time the application is received by the institution.

The powers of the emergency arbitrator to grant interim measures will depend on the particular institution rules under which the arbitration is conducted. In general, the emergency arbitrator has the power to order whatever interim relief he or she considers necessary but any application for an order or award will usually have to be made on notice to the other party and will normally have to be supported by some form of security for costs.

Emergency arbitrators also do not normally have any power to bind the arbitral tribunal, so any order that is made may be set aside or varied by the tribunal once it has been constituted. In addition, as with any order or award made by an arbitral tribunal, an emergency arbitrator does not have any powers to compel performance of his or her order or award. Whether a court will enforce the order of an emergency arbitrator will depend on the national arbitration laws of the country in which enforcement is sought.

For further discussion, see Practice note, Emergency arbitrators in international arbitration.

Interim measures: arbitral tribunal

Power of the tribunal to grant interim measures

The power of the tribunal to grant interim measures depends primarily on the terms of the arbitration agreement. Sometimes the arbitration agreement will expressly confer power on the tribunal to grant interim measures. Sometimes the arbitration agreement will apply arbitration rules, which themselves confer such power. However, you should also take advice about the effect of the law applicable at the seat of the arbitration: some national arbitration laws also confer powers on the tribunal to grant interim measures; others may refuse to recognise an agreement that purports to confer power on the tribunal (whether made expressly or by incorporation of institutional rules).

For example, revisions to article 17 of the UNCITRAL Model Law expressly empower the tribunal to grant interim measures, and further provide for the recognition and enforcement of such orders. Therefore, if an arbitration takes place in a country that has adopted the Model Law, the tribunal is likely to have power to grant any necessary interim relief.

Position under institutional rules

This section summarises the position, vis-à-vis interim measures, under some of the key arbitration rules.

ICC Rules (1998, 2012, 2017 and 2021)

1998 Rules

Article 23(1) of the ICC Rules (1998) confers on the tribunal power to grant interim measures. It provides as follows:

> "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate."

Note that:

- The power of the tribunal can be excluded by agreement.
- The tribunal may act only after the file has been transmitted to it. This occurs only after the tribunal has been fully constituted and all advances on costs requested by the Secretariat have been paid (see *article 13*). In practice, parties may need to obtain interim measures before this by applying to court (as to which, *see* Interim measures: court).
- The tribunal's power is wide-ranging, and is not limited to measures which affect property or evidence which is the subject of the dispute.
- The tribunal is entitled to make any order conditional on the provision of security. Security is commonly required from the requesting party in order to compensate the other party for loss caused by the interim measures, should they later be set aside.
- The measure can take the form of an award or order. An order is not itself enforceable; an award is enforceable but is subject to scrutiny by the ICC Court (*see* Should I apply to the arbitral tribunal, an emergency arbitrator or the court?).

2012, 2017 and 2021 Rules

Article 28(1) of the ICC Rules 2012, 2017 and 2021 preserves the power to grant interim and conservatory measures in the same terms as article 23(1) of the 1998 Rules.

Emergency arbitrator provisions

The ICC Rules 2012, 2017 and 2021 also include provisions allowing for the appointment of an emergency arbitrator to deal with applications for urgent interim or conservatory measures ("emergency measures") before the constitution of a tribunal (*article 29 and Appendix V*). However, the emergency arbitrator provisions will not apply where:

- The arbitration agreement was concluded before 1 January 2012.
- The parties have agreed to opt out of them.
- The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures (such as the ICC Pre-Arbitral Referee Procedure) (*article 29(6) ICC Rules 2012 and 2017*) or, in the case of the ICC Rules 2021, that the arbitration agreement upon which the application is based, arises from a treaty (article 29(6)).

Furthermore, the emergency arbitrator provisions only apply to parties that are signatories to the arbitration agreement.

Any application for "emergency measures" must be received by the Secretariat before transmission of the file to the tribunal and can be made before the Request for Arbitration is filed (*article 29(1)*). The current fee for an application is USD40,000 (USD10,000 for ICC administrative expenses and USD30,000 for the emergency arbitrator's fees and expenses), subject to increase depending on the circumstances (*article 7 of Appendix V*). The emergency arbitrator may make an order, which the parties agree to comply with (*article 29(2)*). Once an arbitral tribunal has been constituted, it is not bound by the emergency arbitrator's order, which it may modify, terminate or annul (*article 29(3)*).

Can the parties also apply to court?

The parties' ability to approach a national court in limited circumstances is preserved by article 23(2) of the 1998 Rules and article 28(2) of the 2012, 2017 and 2021 Rules, all of which provide:

> "Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

The file is transmitted to the tribunal immediately after the tribunal is constituted. This provision therefore has the effect of plugging the gap which arises before the file is transmitted, by permitting the parties to apply to court. In many cases, where interim measures are required urgently (as in, for example, freezing injunctions), an application will be made to court.

The parties may also apply to court (rather than to the tribunal) in "appropriate circumstances" after the file is transmitted. The meaning of this phrase is not entirely clear. In some jurisdictions, there is support for the principle that it is not appropriate to apply to court until an application has first been made to the tribunal. One situation in which it will often be appropriate to apply to court is where an order is sought urgently and without notice to the other party. In such a situation, many arbitral

tribunals will be most reluctant to act at all. Note that in any case where an application to court is made, both the application and its outcome must be notified without delay to the Secretariat.

LCIA Rules (1998, 2014 and 2020)

1998 Rules

Article 25 of the LCIA Rules (1998) confers various powers on the tribunal to grant interim measures. It provides:

> "25.1 The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:
>
> (a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;
>
> (b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and
>
> (c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties."

The power under article 25.1(a) to order security for the claim is particularly useful, though note that the applicant will usually be required to supply a secured cross-indemnity to cover any losses incurred by the respondent. If you apply for security, you must therefore be prepared to provide counter-security yourself.

The power under article 25.1(b) to make conservatory and other orders in respect of property or any other "thing" is broad enough to encompass conservatory measures in respect of evidence. The power is limited to property which both:

- Relates to the subject matter of the arbitration.
- Is under the control of a party.

In practice, however, these limitations are unlikely to cut down significantly the scope of the tribunal's power. Note, further, that under article 22.1(d), the tribunal has a further power:

> "to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal"

Article 25.1(c) is a potentially wide-ranging power, which entitles the tribunal to make any award on a provisional basis. In practice, this is used most frequently to order provisional payments on account of sums which may later be found due. The parties' ability under English law to agree to confer on the tribunal the power to make provisional awards is expressly recognised in *section 39* of the *Arbitration Act 1996*. Article 25.1(c) of the LCIA Rules (1998) qualifies as such an agreement (by contrast, rule 34.2 of the UNCITRAL Rules has been held obiter to be inconsistent with the power to make provisional awards under section 39). For further discussion of provisional awards, see Practice note, Awards: the English Arbitration Act 1996: provisional awards.

Under article 25.2 of the 1998 Rules the tribunal has the power to make orders for security for costs. Article 25.3 expressly excludes the right of the parties to apply to court for security for the costs of an arbitration: any application must be made to the tribunal.

Expedited formation of the tribunal

If you need to apply for interim measures at an early stage of the proceedings and before the tribunal has been formed, consider applying under article 9 of the LCIA Rules (1998) for expedited formation of the tribunal. Article 9 provides:

> "9.1 In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules.
>
> 9.2 Such an application shall be made in writing to the LCIA Court, copied to all other parties to the arbitration; and it shall set out the specific

> grounds for exceptional urgency in the formation of the Arbitral Tribunal.
>
> 9.3 The LCIA Court may, in its complete discretion, abridge or curtail any time-limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time-limit."

This provision is used relatively frequently for the purpose of enabling a tribunal to grant interim measures (such as orders for the preservation or expert inspection of goods, or for security for the claim) in urgent cases. However, the procedure involves giving notice to your opponent of your proposed application, so it may not be suitable for all cases.

Can the parties apply to court?

The ability of the parties to apply to court for interim measures of protection is expressly preserved, in limited circumstances, by article 25.3. This provides that the parties are able to apply to court for relief both before the tribunal is formed and, in "exceptional" cases, after the formation of the tribunal, except insofar as an application for security for costs is concerned. Such an application can only be made to the arbitral tribunal.

2014 and 2020 Rules

Under the 2014 and 2020 Rules the arbitral tribunal is granted the power to grant interim remedies, whereas the power to grant interim remedies under the 1998 Rules was subject to the parties' agreement in writing.

Article 25.1 states:

> "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 and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:
>
> (i) to order any respondent party to a claim, [counterclaim] or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;
>
> (ii) to order the preservation, storage, sale or other disposal of any [monies] documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and
>
> (iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.
>
> Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration."

Similar considerations to those in respect of the 1998 Rules apply. However, the power to order preservation has been widened to include "documents, goods and samples" in the 2014 Rules and to include "monies" in the 2020 Rules. (The words in square brackets were included in the 2020 Rules).

Can the parties apply to court?

As under the 1998 Rules, the parties ability to apply to court for interim measures is preserved up until the formation of the tribunal, and, once the tribunal has been constituted, such an application may be made "in exceptional circumstances" (*article 25.3, 2014 Rules*) or "in exceptional cases" (*article 25.3, 2020 Rules*). However, any application for security for legal or arbitration costs must be made to the tribunal (*article 25.5, 2014 Rules; article 25.4, 2020 Rules*).

Expedited formation of the tribunal

Article 9A of the 2014 and 2020 Rules provides for urgent formation of the tribunal. Accordingly, if a party needs to apply for interim measures before the tribunal has been constituted, he or she should consider applying under this provision.

Emergency arbitrator provisions

As an alternative to an application for expedited formation, and unless otherwise agreed, prior to the formation of the tribunal, a party may, in the case of emergency, apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator under article 9B. The LCIA will determine the application as soon as possible and if granted, the LCIA Court will appoint an emergency arbitrator within three days of receipt of the application, or as soon as possible thereafter.

The emergency arbitrator will decide the claim for emergency relief as soon as possible, but no later than

14 days following his or her appointment (the deadline can be extended by the LCIA Court in exceptional circumstances or by the parties' written agreement). No hearing is necessary and the decision may take the form of an order or award, but the arbitrator must give reasons for his or her decision.

The order or award of an Emergency Arbitrator (except any order for adjournment to the arbitral tribunal of any part of a claim for interim relief) may be confirmed, discharged, varied, or revoked by the arbitral tribunal when formed. (For further discussion see Practice note, Emergency arbitrators in international arbitration.)

Article 9B only applies to arbitration agreements concluded before 1 October 2014 where the parties have agreed in writing to "opt in" (*article 9.14, 2014 Rules; article 9.16 2020 Rules*). In addition, in the case of arbitration agreements concluded after 1 October 2014, article 9B will not apply if the parties have agreed in writing at any time to "opt out" (*article 9.14, 2014 Rules; article 9.16, 2020 Rules*).

UNCITRAL Rules (1976, 2010, 2013 and 2021)

1976 Rules

The UNCITRAL Arbitration Rules were first promulgated in 1976.

An arbitration governed by the UNCITRAL Rules 1976 will be subject to the broader and less detailed provisions of article 26 of the 2010, 2013 and 2021 Rules. Article 26 of the 1976 Rules provides:

> "1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
>
> 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures."

Note that the power in article 26.1 is unlimited in scope ("any interim measure it deems necessary"), save that it must relate to the subject-matter of the dispute. The tribunal has a discretion as to whether or not to establish its decision in the form of an award: see Should I apply to the arbitral tribunal, an emergency arbitrator or the court? for discussion of the significance of this.

Can the parties apply to court?

Article 26.3 provides that

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

Therefore, the ability of the parties to apply to court for interim measures is preserved in all circumstances.

2010, 2013 and 2021 Rules

The 1976 rules were substantially amended in 2010, and that version of the rules came into force on 15 August 2010. The UNCITRAL Rules 2010 did not undergo major revisions in 2013 and 2021, but rather were updated with a new provision on each occasion and are otherwise the same (see Practice note, Arbitrating under the UNCITRAL Rules 2010, 2013 and 2021: a step-by-step guide).

Article 26 of the 2010, 2013 and 2021 Rules sets out the circumstances in which the tribunal may grant interim measures. An interim measure is defined as:

> "..any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
>
> (a) Maintain or restore the status quo pending determination of the dispute;
>
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
>
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute" (*Article 26.2*).

Note that this definition is not exhaustive.

Article 26.3 sets out the test that the applicant must satisfy when applying for an order falling within categories (a), (b) or (c) above. The applicant:

> "..shall satisfy the arbitral tribunal that:
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially

> outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim".

Note that the tribunal's decision on (b) "shall not affect the discretion of the arbitral tribunal in making any subsequent determination".

Where an application is made for an order falling within article 26.2(d) (preservation of evidence), then the requirements of article 26.3 apply only to the extent the arbitral tribunal considers appropriate (*article 26.4*).

Article 26 confers a number of ancillary powers on the tribunal, including:

- The power to modify, suspend or terminate an interim measure (*article 26.5*).
- The power to require the applicant to pay any costs and damages caused by the interim measure if the tribunal later determines that the measure should not have been granted (*article 26.8*).
- The power to require the applicant to provide cross-security (*article 26.5*).
- The power to require any party to disclose any material change in circumstances on the basis of which the interim measure was requested or granted (*article 26.7*).

Can the parties apply to court?

Article 26.9 provides that

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

Therefore, the ability of the parties to apply to court for interim measures is preserved in all circumstances.

ICDR Rules (2014 and 2021)

Under the ICDR Rules 2009 and 2014:

> "1. 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.
>
> 2. Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures."

(*Article 24, ICDR Rules 2014; article 27, ICDR Rules 2021.*)

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 2014; article 27.4, ICDR Rules 2021*). In many cases it will be preferable for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

Emergency measures of protection

Article 6 of the ICDR Rules 2014 and article 7 of the ICDR Rules 2021 cater for the situation where a party requires emergency relief before the tribunal has been formed. The rules provide for the appointment of an "emergency arbitrator". The emergency arbitrator will have the power to order interim measures for the protection or conservation of property and may grant such measures in the form of an award or an order, giving reasons in either case (*article 6(4), ICDR Rules 2014; article 7(4) ICDR Rules 2021*). The authority of the emergency arbitrator ceases once the tribunal has been constituted (*article 6(5), ICDR Rules 2014; article 7 (5), ICDR Rules 2021*).

Can the parties apply to court?

The rules provide:

> "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 2014; article 27(3), ICDR Rules 2021.*)

This provision preserves, in unlimited terms, the parties' right to apply to court for any interim measure.

CIETAC Rules (2012 and 2015)

Under the PRC Arbitration Law and the PRC Civil Procedure Law, the power to grant conservatory measures is reserved to the competent Chinese court. The CIETAC Rules 2012 and 2015 comply with these mandatory provisions of PRC law, and state explicitly that, where a party applies for conservatory measures (including orders for the preservation of property or the protection of evidence) pursuant to the laws of the PRC, the Secretariat of CIETAC must forward the application to the competent PRC court in accordance with the law (*article 21.1, CIETAC Rules 2012* and *article 23.1, CIETAC Rules 2015*).

On 1 January 2013, a series of amendments to the PRC Civil Procedure Law came into effect. These give parties to arbitral proceedings increased powers to seek relief from the PRC courts in aid of arbitration. In particular, the amended Civil Procedure Law introduces injunctive relief as a new class of "conservatory measures" ("保全措施")

available from the PRC courts, thereby giving additional power to the courts to order a party to conduct a specific action, or prohibit a party from taking a specific action. The amended Civil Procedure Law also provides that a party may apply to a PRC court for "conservatory measures" before commencing litigation or arbitration proceedings, in "urgent" circumstances. The requesting party must prove that it "would suffer irreparable damage if the party fails to petition for conservatory measures". The court will revoke any relief granted under this article if the requesting party does not file litigation or arbitration proceedings within 30 days of the date of the court order. It is not yet clear whether a party can apply directly to the PRC court, or must make its application via the relevant arbitration commission.

Where a procedural law other than PRC law applies in a CIETAC arbitration (for example, where the parties agree a seat outside Mainland China), the arbitral tribunal, at the request of a party, has power to grant interim measures it deems necessary or proper (in the form of a procedural order or an interlocutory award) in accordance with the applicable law (*article 21.2, 2012 Rules* and *article 23.3, 2015 Rules*). In such circumstances, the scope of "interim measures" will depend on the types of interim measures available under the applicable procedural law (either according to agreement of the parties or law of the seat). Articles 21.2 and 23.3 (2012 Rules and 2015 Rules, respectively) shall also be applicable to arbitrations seated in Mainland China, where the interim measures requested are different than the conservatory measures referred to in article 21.1 (2012 Rules) and article 23.1 (2015 Rules). However, such interim orders of the tribunal will not be enforceable by the Chinese courts if parties do not voluntarily comply.

ICSID Rules

Article 47 of the ICSID Convention together with Rule 47 of the ICSID Arbitration Rules 2022 (*Rule 39(1) of the* ICSID Arbitration Rules 2006*)* entitle a party to apply to the tribunal for interim measures. Rule 47(1) is an expanded version of prior Rule 39, providing greater clarity of the circumstances in which provisional measures may be requested and the factors the tribunal will consider. It provides:

> "(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:
>
> (a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;
>
> (b) maintain or restore the status quo pending determination of the dispute; or
>
> (c) preserve evidence that may be relevant to the resolution of the dispute."

The tribunal is also entitled to recommend interim measures of its own initiative and recommend provisional measures different from those requested by a party (*Rule 47(4), ICSID* Arbitration Rules 2022). Under the 2022 Rules, Rule 47 also incorporates the requirements of "urgency" and "necessity" that have been universally recognised by tribunals in cases to date.

Both the ICSID Arbitration Rules 2006 and the 2022 Rules provide for an expedited procedure. Under Rule 47(2) of the 2022 Rules, if a party makes a request for provisional measures before the constitution of the tribunal, the Secretary General will fix time limits for written submissions on the request, so that the tribunal can consider the matter promptly upon its constitution. Rule 47(2)(d) imposes a deadline of 30 days for the tribunal to decide on the request for provisional measures. The deadline runs from the date of constitution of the tribunal or the last submission on the request, whichever is the later.

Article 47 of the ICSID Convention provides:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

Article 47 does not impose any limitation on the rights that can be preserved and does not exclude contingent rights from its ambit. Therefore, tribunals have found in certain circumstances, that they did have the power under article 47 to recommend security for costs.

Article 47 and Rule 47 permit the tribunal to "recommend" provisional measures. Much has been made of whether this means the tribunal can make an "order". In any event, many tribunals treat their recommendations as orders. In *RSM Production Corporation v Saint Lucia (ICSID Case No. ARB/12/10)* an ICSID ad hoc committee noted that the negotiating history of the ICSID Convention indicated that it was understood that consequences could attach to non-compliance with a recommendation, notwithstanding the use of the word "recommend" as opposed to "order" (see Legal update, RSM succeeds in partially annulling award rendered in ICSID arbitration against St Lucia (ICSID)). The ICSID Arbitration Rules 2022 remain consistent with the wording of the ICSID

Convention, in that the tribunal may "recommend" rather than "order" provisional measures

It is also generally accepted that Article 44 of the ICSID Convention, which allows the tribunal to decide any procedural question not covered by the Rules, enables the tribunal to impose sanctions on parties who fail to comply with a recommendation for provisional measures. Such sanctions may include suspension and termination of the proceedings, though not "with prejudice" termination (see *RSM Production Corporation v Saint Lucia (ICSID Case No. ARB/12/10)*).

The ICSID Additional Facility Arbitration Rules 2022 introduce a new section (Chapter XIII) on expedited arbitration, mirroring changes made to the ICSID Arbitration Rules 2022. Requests for provisional measures (Rule 57) "shall run in parallel" with the main calendar (Rule 85(4)), Additional Facility Arbitration Rules 2022).

Can the parties apply to court?

Where arbitration proceeds under the ICSID Arbitration Rules 2006 or 2022, the parties can apply to court provided they have stipulated for this in their agreement (see Rule 39(6) of the 2006 Rules and Rule 47(7) of the 2022 Rules.

Under the Additional Facility Rules 2006, Rule 46 provides for an unlimited right to apply to court for interim or conservatory relief, as do the Additional Facility Rules 2022 (Rule 57(7), which provides:

> "A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration."

In United Utilities (V) and another v Republic of Estonia (ICSID Case no ARB/14/24) an ICSID tribunal made an order restraining the claimant's publication of documents generated in the arbitration, thereby highlighting the wide range of interim relief available to parties under article 47 and Rule 39.

For further discussion of interim relief in ICSID arbitration, please see Practice notes, ICSID arbitration (2006 Rules): a step-by-step guide: Provisional measures for the preservation of rights and ICSID arbitration (2022 Rules): a step-by-step guide Provisional measures for the preservation of rights. For further discussion of security for costs in ICSID arbitration, see Practice note, Defending states in investment arbitration.

HKIAC Rules (2008, 2013 and 2018)

2008 Rules

Article 24 of the 2008 Rules deals with interim measures of protection. Article 24.1 gives the tribunal a wide-ranging power, at the request of a party, to order "any interim measures it deems necessary or appropriate", and it may also order the provision of appropriate security by a party seeking an interim measure (*article 24.2*).

Can the parties apply to court?

The parties have an unfettered right to apply to the court for interim measures.

Article 24.3 of the 2008 Rules provides that requests for interim measures to a court of competent jurisdiction shall not be deemed incompatible with the arbitration agreement or a waiver of the arbitration agreement.

2013 Rules

The HKIAC's Administered Arbitration Rules 2013 came into force on 1 November 2013 and apply to all arbitrations where the Notice of Arbitration is submitted on or after 1 November 2013. Article 23 deals with interim measures of protection. Article 23.2 gives the arbitral tribunal the wide-ranging power to order any interim measures it deems necessary or appropriate, in the same terms as article 24.1 of the 2008 Rules. The tribunal may order the party requesting an interim measure to provide appropriate security (*article 23.6*). The 2013 Rules also provide for emergency relief prior to the constitution of the tribunal, allowing parties to apply for urgent interim or conservatory measures by requesting the appointment of an emergency arbitrator (*article 23.1*).

For further discussion, see Practice note, Arbitrating under the HKIAC Administered Arbitration Rules (2013): a step-by-step guide.

Can the parties apply to court?

Article 23.9 of the 2013 Rules gives parties an unfettered right to apply to the court for interim measures in the same terms as the 2008 Rules. Requests for interim measures to a competent judicial authority will not be deemed incompatible with the arbitration agreement or a waiver of an arbitration agreement.

2018 Rules

The HKIAC's Administered Arbitration Rules 2018 came into force on 1 November 2018 and apply to all arbitrations

where the Notice of Arbitration is submitted on or after 1 November 2018. Article 23 deals with interim measures of protection. Article 23.2 gives the arbitral tribunal the wide-ranging power to order any interim measures it deems necessary or appropriate. The tribunal may order the party requesting an interim measure to provide appropriate security (article 23.6). The 2018 Rules also provide for emergency relief prior to the constitution of the tribunal, allowing parties to apply for urgent interim or conservatory measures by requesting the appointment of an emergency arbitrator (article 23.1).

Can the parties apply to court?

Article 23.9 of the 2018 Rules gives parties an unfettered right to apply to the court for interim measures. Requests for interim measures to a competent judicial authority will not be deemed incompatible with the arbitration agreement or a waiver of an arbitration agreement.

SCC Rules (2010 and 2017)

The SCC Arbitration Rules confer on the tribunal a wide-ranging power to grant "any interim measures it deems appropriate" (*article 32(1), SCC Rules 2010*; *article 37(1), SCC Rules 2017*). The tribunal is entitled to order the applying party to provide security, and its decision may be contained in an award (*articles 32(2) and (3), SCC Rules 2010*; *articles 37(2) and (3), SCC Rules 2017*). These provisions are very similar to the UNCITRAL Rules, though the power is not limited to the subject matter of the dispute.

Emergency arbitrator provisions

The SCC Rules provide for the appointment of an emergency arbitrator, who may make orders for interim measures before the constitution of the tribunal (see article 32(4) and Appendix II of the SCC Rules 2010 and article 37(4) and Appendix II of the SCC Rules 2017).

For an example of a case where an Emergency Arbitrator rejected an application for interim measures, see Legal update, SCC emergency arbitrator dismisses interim measures application against Moldova (*Evrobalt LLC v Republic of Moldova SCC 2016/082 (EA)*).

Can the parties apply to court?

Article 32(5) of the SCC Rules 2010 and article 37(5) of the SCC Rules 2017 preserve the right of the parties to apply to court for interim relief. They provide:

> "A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules".

SIAC Rules (2010, 2013 and 2016)

Article 24 of the SIAC Rules 2010 and 2013 and article 27 of the SIAC Rules 2016, which cover international and domestic arbitrations (subject to certain exceptions which are irrelevant for present purposes set out in Schedule 1 of the 2010 and 2013 Rules), entitles the tribunal to make various orders, including orders for the inspection of property (*article 24(f); 27(d) SIAC Rules 2016*), and the preservation, storage, or sale of property (*article 24(g); 27(e) SIAC Rules 2016*).

In addition, the tribunal may have additional powers conferred by the law of the seat of the arbitration, such as the *Singapore International Arbitration Act* (which is based on the UNCITRAL Model Law).

WIPO Rules 2021

Article 48 of the WIPO Arbitration Rules 2021 confers on the tribunal the power to grant interim measures in the form of an interim award. It provides:

> "(a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.
>
> (b) At the request of a party, the Tribunal may order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counter-claim, as well as for costs referred to in Article 74.
>
> (c) Measures and orders contemplated under this Article may take the form of an interim award."

The WIPO Rules 2021 also provide for emergency relief proceedings, which apply to arbitrations conducted under arbitration agreements entered into on or after 1 June 2014 (*article 49*). These provisions allow parties to seek urgent interim relief before the constitution of the tribunal.

Can the parties apply to court?

Article 48(d) of the WIPO Rules 2021 preserve the right of the parties to apply to court for interim relief. They provide:

> "(d) A request addressed by a party to a judicial authority for interim measures or for security for the claim or counter-claim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement."

Note the recognition here of the possibility of applying to court to enforce any orders made by the tribunal.

Power of tribunal to order interim relief in an ad hoc arbitration

In an ad hoc arbitration, where the arbitration does not take place under the auspices of an arbitral institutional, there are three possibilities:

- Most commonly, the UNCITRAL Rules are applied in an agreement for ad hoc arbitration. If this is the case, then the position vis-à-vis interim measures will be as described UNCITRAL Rules (1976, 2010, 2013 and 2021). Sometimes, the parties may agree to apply institutional rules (even though the arbitration does not take place under the auspices of, and is not administered by, any particular arbitral institution).
- Alternatively, the arbitration agreement may confer power on the tribunal to grant interim relief. If so, the orders available will depend on the scope of the arbitration agreement.
- Finally, the law which applies at the seat of the arbitration may confer powers on the arbitral tribunal to grant interim relief. For example, where the seat of an arbitration is in England and Wales, section 38 of the *Arbitration Act 1996* confers on the tribunal power to make conservatory and other orders in respect of property. (For further discussion, see Practice note, Procedural powers of the arbitral tribunal under the English Arbitration Act 1996: Interim or conservatory orders.)

The question of whether the court also has power to grant supportive interim relief depends on:

- The proper construction of the arbitration agreement. The effect of any provision in the arbitration agreement must also be assessed by reference to the law governing the arbitration agreement and, if different, the law applicable at the seat of the arbitration.
- Whether the national court in question will accept jurisdiction to grant relief in any particular case. Advice from local lawyers will probably be required in order to determine whether, in the light of the arbitration agreement, a national court is entitled to act. For example, where the seat of an arbitration is England and Wales, section 44 of the *Arbitration Act 1996* entitles the court to grant certain types of interim relief to support the arbitral process. (For further discussion, see the following: Practice notes, The arbitral tribunal and English court's supportive powers: interim injunctions and receivers and The English court's supportive powers: preservation or sale of property, assets and evidence).

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, before you have made your application.
- Furthermore, delay in applying may be taken into account by the tribunal or the court when exercising its discretion.

How to apply

The procedure for applying to the tribunal depends in the first instance upon the arbitration agreement or any applicable rules. For example, an application under the LCIA Rules (2020) for expedited formation of a tribunal must be made in writing to the Registrar by electronic means, with a copy of the request or response delivered or notified to all the other parties (*article 9.2*). However, the following points are generally applicable:

- **Apply in writing:** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing and copies sent to the other parties to the arbitration. In the unlikely event that you are proceeding without notice there will be no need to copy the application to the other parties, though you should ensure that all members of the tribunal receive a copy. Some institutional rules provide mechanisms for this, but otherwise you must send copies to all members yourself.
- **Evidence:** You should provide evidence in support of your application. For example, if you are seeking conservatory orders in relation to property, you must identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If you are proceeding without notice to the other parties, most tribunals will expect you to explain why.

- **Specify orders sought:** State very clearly in your application the precise order that you seek. Do not prejudice your chances of success by applying for an order that is too wide in its scope. It is usually best to provide a carefully formulated draft order so that the tribunal can easily see what you are asking for.

What if the tribunal is not yet constituted?

If there is no constituted tribunal, then you will usually have to apply to court for any necessary measures, unless the applicable rules contain emergency arbitrator provisions. For further discussion, see Practice note, Emergency arbitrators in international arbitration.

In ICSID arbitration, article 39(5) of the ICSID Arbitration Rules provides that:

> "If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution."

Can I apply without notice?

Some arbitration rules exclude the possibility of any application for interim relief being made without notice.

In other cases, an application without notice is, in theory, possible. In practice, however, this may not be a good idea:

- Most arbitral tribunals are extremely nervous about proceeding without giving both parties an opportunity to address them. Only the Swiss Rules of International Arbitration expressly permit a request for interim relief to be made without notice, and even then require that all parties have an opportunity to be heard immediately following the granting of a "preliminary order" (*article 26(3)*).
- Any steps taken without notice may affect the enforceability of any ultimate award. One ground for resisting enforcement of an award under the New York Convention is where one party "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case" (*article V.1(b)*). Arguably, the grant of interim relief on a without notice basis would fall within this provision. For further discussion, please see *Redfern and Hunter on International Commercial Arbitration*, Chapter 5, paragraph 5.33.

Enforcing the order

The tribunal cannot compel compliance with any order which it makes. It may be able to impose sanctions for non-compliance. For example, if the English *Arbitration Act 1996* applies to the arbitration, *section 41(5)* of the Act enables the arbitrator to make a peremptory order requiring compliance within a prescribed period of time. If the party is refusing to comply with an order to provide security, then breach of the peremptory order entitles the tribunal to dismiss the claim. Section 41(7) sets out a range of other (limited) sanctions for non-compliance with a peremptory order. See also Russell on Arbitration, Chapter 4, Section 6, paragraph 4-095.

Even though the tribunal cannot enforce compliance itself, it may make adverse inferences where a party refuses to comply with its order. Such conduct may also affect and impact its subsequent deliberations on the merits of the claims referred to arbitration as well as any subsequent costs allocations and decisions. For further discussion, see Practice notes, Procedural powers of the arbitral tribunal under the English Arbitration Act 1996: Breach of procedural orders and The English court's supportive powers: enforcement of peremptory orders.

It may be possible for the tribunal's orders to be enforced by a national court. For example, under *section 42* of the *Arbitration Act 1996*, the court has power to enforce the tribunal's peremptory orders. However, in many cases this will be too slow a process to be effective.

Similarly, if a tribunal's decision is contained in an award, it can be enforced like any other. Again, however, the process of enforcement is likely to be too slow to be of practical benefit.

Interim measures: court

In many cases, it will be preferable to apply to court for easily enforceable interim measures of protection.

Which court?

You will need to decide which national court is best placed to act effectively. This may be, for example:

- The court in the country where the relevant assets or evidence is to be found.
- The court in the country where the defendant is resident or domiciled.
- The court in the country where the arbitration is seated.

This decision will, therefore, require preliminary investigations to identify the potentially relevant national courts. You will then need to take advice from local lawyers about the practical possibility of obtaining relief from the national court in question. Ensure that you obtain advice on the question of how the local courts will interpret the New York Convention, and whether the court will view the application as a breach of the arbitration agreement.

The English Commercial Court has held that parties to an arbitration seated in England were entitled to apply to the Zambian courts for interim or conservatory measures pending the appointment of the tribunal. The court rejected the argument that the English court, as the court of the seat of arbitration, had exclusive jurisdiction to make such orders (see *U&M Mining Zambia Ltd v Konkola Copper Mines plc. [2013] EWHC 260 (Comm)*, discussed in Legal update, Court of seat does not have exclusive jurisdiction to grant interim measures (Commercial Court)).

The English court may entertain applications for interim relief in relation to any arbitration, wherever the seat, but may refuse to exercise its powers if the fact that the seat is overseas makes it inappropriate to do so. The English court cannot make an order for security for costs for an arbitration seated in England and Wales, as that power is reserved for the arbitral tribunal (see section 38(3), *Arbitration Act 1996*; *Russell on Arbitration*, paragraph 7.216 and Practice note, Security for costs in arbitration in England and Wales).

For further discussion of the scope of the powers of the English court in relation to interim and conservatory measures, see the following Practice notes:

- Supportive powers of the English courts: an overview.
- The English court's supportive powers: enforcement of peremptory orders.
- The arbitral tribunal and English court's supportive powers: interim injunctions and receivers.
- The English court's supportive powers: preservation or sale of property, assets and evidence.

See also *Russell on Arbitration*, Chapter 7, Section 10, paragraph 7-185 onwards.

The availability of interim and conservatory measures varies from country to country. To see detailed guidance on interim measures in the US, see Practice note, Interim, Provisional and Conservatory Measures in US Arbitration.

THOMSON REUTERS
PRACTICAL LAW™

Interim, Provisional and Conservatory Measures in US Arbitration

by Practical Law Litigation and Practical Law Arbitration

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **us.practicallaw.tr.com/0-587-9225**
Request a free trial and demonstration at: **us.practicallaw.tr.com/practical-law**

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 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 resulting from the remedy if it is determined that the applicant was not entitled to the remedy or if the respondent prevails on the merits. 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. For more information on interim, provisional and conservatory measures in international arbitration generally, see Practice Note Interim, Provisional and Conservatory Measures in International Arbitration and Interim Relief in Arbitration.

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 cause harm that is not adequately reparable by an award of damages.

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 in court proceedings relating to all international arbitrations and most domestic arbitrations.

The FAA does not cover transportation workers (see Practice Note, Employment Arbitration Agreements (US): Exceptions to FAA Coverage). The FAA's transportation

worker exemption, 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, however, 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, if 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). Courts generally hold that they have subject matter jurisdiction over requests for preliminary relief in aid of international arbitration (*Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906, 909 (5th Cir. 2019); 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 under 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.)

For more information on the scope of the FAA, see Practice Note, Understanding the Federal Arbitration Act.

Seeking Interim Relief before Courts and Arbitrators

Arbitration governed by institutional rules such as the American Arbitration Association (AAA)'s Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013 and September 1, 2022) (AAA Rules) and the International Centre for Dispute Resolution (ICDR)'s International Arbitration Rules as amended and effective June 1, 2014 and March 1, 2021(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 R-37 and R-38 AAA Rules 2013 and R-38 and R-39, AAA Rules 2022;Articles 6 and 24, ICDR Rules 2014, Articles 7 and 27, ICDR Rules 2021).

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)).

The prevailing view, which is supported by the Restatement rejects that position, and holds that permitting courts to order provisional relief promotes the arbitration process (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.3 PFD (2019); 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, if there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

Other courts, however, have declined to grant provisional relief where 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); *Smart Technologies ULC v. Rapt Touch Ireland Ltd*, 197 F. Supp. 3d 1204, 1205 (N.D. Cal. 2016)).

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).

The standard for a federal court injunction pending arbitration is the same as for preliminary injunctions generally (see *Golden Fortune Imp. & Exp. Corp. v. Mei-Xin Ltd.*, 2022 WL 3536494, at *2 (3d Cir. Aug. 5, 2022); *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.

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 *Espíritu Santo Holdings, LP v. L1bero Partners, LP*, 789 F. App'x 288, 289 (2d Cir. 2020); *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; see also *Blue Sphere Corp. v. York Renewable Energy Partners, LLC*, 2020 WL 6273712, at *4-*5 (Sup. Ct. N.Y. Co. Oct. 26, 2020). In effect, restraints issued by courts often serve

the same function as a temporary restraining order (TRO). In *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. Outside of admiralty jurisdiction, state law generally governs attachments (see *Cirrincione v. Pratt Chevrolet, Oldsmobile & Pontiac*, 275 F. Supp. 2d 26 (D. Me. 2003) (federal court applies attachment law of the state in which the federal court sits, "unless federal or constitutional law dictates otherwise")).

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, despite 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*, 2018 WL 513722, at *7 (D. Conn. Jan. 22, 2018)).

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).

Procedure under State Law

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.

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 Revised Uniform Arbitration Act (RUAA) 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); see also *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, 21 states and the District of Columbia have adopted the RUAA. Section 8 of the RUAA expressly authorizes courts and arbitrators to grant provisional remedies. For information on the RUAA and a list of the states that have adopted it, see Practice Note, Revised Uniform Arbitration Act: Overview.

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) and Petition for an Attachment in Aid of Arbitration (NY).

Whether to Apply to the Arbitral Tribunal or the Court

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 and assessing costs if a party does not comply), 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 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.
- The moving party does not yet have 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 R-38(b), AAA Rules 2013 and R-39(b), AAA Rules 2022;Article 6, ICDR Rules 2014; Article 7, ICDR Rules 2021). 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 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 a particular 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); *HPG, LLC v. Kerrigan*, 2019 WL 2515167 (W.D. Wash. June 18, 2019) (holding that only the arbitrator can grant preliminary relief where arbitration agreement makes no reference to courts of competent jurisdiction having power to grant it); *Smart Techs.*, 197 F. Supp. 3d at 1205 (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, the applicable law, or 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); *Sperry Intern. Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 303-06 (2d Cir. 1982) (ordering that the proceeds of the letter of credit be held in an escrow account)).
- In in international case, the arbitrators are likely to consider an international standard, in particular the UNCITRAL Model Law (see G. Born, *International Commercial Arbitration* 2474-81 (2d ed. 2014)). The revisions to Article 17A of the Model Law provide that the applicant show only "reasonable possibility" that the applicant will succeed on the merits of the claim and harm that is "not adequately reparable," which is a lesser showing than what would be required in a US court. In 2021, JAMS amended Article 31.2 of its International Arbitration Rules & Procedures to specify that the Model Law standard applies. Where the Model Law is not the law of the seat, or the arbitral rules do not expressly adopt the Model Law standard for interim relief, it is a best practice for parties and arbitrators discuss, and attempt to agree on, the applicable standard from the outset of the proceedings.
- 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 out 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 Commercial Arbitration 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).

These rules empower the tribunal to grant interim relief but do not supply a standard for arbitrators to follow when deciding whether the requested relief is appropriate.

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 R-37, 2013 Rules, and R-38, 2022 Rules).)

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 R-38(e), 2014 Rules, and R-39(e), 2022 Rules). The authority of the emergency arbitrator ceases once the tribunal has been constituted (AAA Rule R-38(f), 2013 Rules, and R-39(f), 2022 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 this rule, the agreement to arbitrate or a waiver of the right to arbitrate."

(AAA Rule R-38(h), 2013 Rules, R-39(h), 2022 Rules.)

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 2014; Article 27, ICDR Rules 2021.)

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 2014; Article 27(4), ICDR Rules 2021). 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 2014; Article 7(2), ICDR Rules 2021). 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 2014; Article 7(4), ICDR Rules 2021). The authority of the emergency arbitrator ceases once the tribunal has been constituted (Article 6(5), ICDR Rules 2014; Article 7(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 2014; Article 27(3), ICDR Rules 2021.)

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 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.

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. 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.

No 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 Donald 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, an 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

Although courts have held that they do not have the power to review an interlocutory ruling by an arbitral tribunal (see *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980), they have relaxed this rule when parties seek confirmation of provisional remedies awarded by arbitrators (see *Sperry Int'l Trade v. Gov't of Israel*, 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")). In view of this treatment, courts presumptively recognize an interim measure as a partial award (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1(t) PFD (2019)).

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 if 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 *Preble-Rish Haiti, S.A. v. Republic of Haiti*, 2022 WL 229701 (S.D.N.Y. Jan. 26, 2022) (confirming partial award directing respondent to post security for fuel seller's claim under unpaid invoices); *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).

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)).

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)).

Depending on the nature of interim award, courts may specifically enforce it. For example, in *Commodities & Minerals Enter. Ltd. v. CVG Ferrominera Orinoco*, the US District Court for the Southern District of New York granted a- motion to transfer $8 million into escrow to satisfy a federal court judgment in Florida that confirmed a Miami-seated partial final award ordering the defendant to post $63 million in security while the arbitral tribunal considers claims seeking more than $212.3 million in damages (423 F.Supp.3d 45, 50 (S.D.N.Y. 2019)).

Despite the well-developed case law, there are some outliers. In *Al Raha Group for Technical Services v. PKL Services Inc.*, a federal district court in Atlanta held that despite the jurisdictional grant contained 9 U.S.C. § 203, it lacked subject matter jurisdiction to enforce an interim emergency award issued by an ICDR emergency arbitrator to preserve the status quo (2019 WL 4267765, at *3 (N.D. Ga. Sept. 6, 2019)). Especially when appearing before a court that may not have extensive arbitration experience, counsel should be sure to thoroughly brief the court's authority to grant relief as was the case in *Vital Pharms. v. PepsiCo, Inc.*, 528 F. Supp. 3d 1304 (S.D. Fla. 2020).

Where a court is asked to vacate an interim award issued by arbitrators, however, the court will not necessarily entertain the application. At least some US courts refuse a request to vacate an emergency arbitrator's interim order for conservatory measures (*Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, 2011 WL 2135350 (S.D. Cal. May 27, 2011)). In *Chinmax*, the court addressed a challenge to the interim order and 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 *Schatt v. Aventura Limousine & Transportation Serv., Inc.*, 603 F. App'x 881, 888 (11th Cir. 2015) (court lacked jurisdiction to vacate interim award); *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).)

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.

THOMSON REUTERS
PRACTICAL LAW™

Petition for Preliminary Injunction in Aid of Arbitration (Federal)

by Practical Law Litigation and Practical Law Arbitration

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **us.practicallaw.tr.com/w-003-3155**
Request a free trial and demonstration at: **us.practicallaw.tr.com/practical-law**

A sample petition for a preliminary injunction in aid of arbitration in federal district court. This Standard Document contains integrated drafting notes with important explanations and tips for drafting the petition's caption, preliminary statement, jurisdiction and venue sections, facts section, prayer for relief, and signature block.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

A petition for a preliminary injunction in aid of arbitration generally asks a court to preserve the status quo before the arbitrators hear the merits of an arbitration proceeding and render their final award. For example, counsel may seek a court order that:

- Prevents the disclosure of trade secrets.
- Requires goods to be:
  - sold, with the sale proceeds to be held pending the final award; or
  - sampled, tested, or photographed before they are sold.

Filing a petition for a preliminary injunction in aid of arbitration allows a petitioner to request relief from a court without first filing a complaint. When a party commences an action in federal court by filing a petition, the court treats the petition as a motion (9 U.S.C. § 6; *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 372 F. Supp. 2d 83, 87 (D.D.C. 2005)). If an applicant styles the application as a "complaint," the court construes the complaint as a petition if the applicant requests relief in aid of arbitration (see *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, & Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund v. All. Workroom Corp.*, 2013 WL 6498165, at *1 (S.D.N.Y. Dec. 11, 2013)).

This Standard Document contains a template for a petition for a preliminary injunction in aid of arbitration. It complies with the FRCP's formatting requirements and provides general guidance on how to draft a petition. Counsel should tailor this form to comply with applicable court rules and the facts and circumstances of each case.

Review Applicable Rules

Before preparing a petition for a preliminary injunction in aid of arbitration, petitioner's counsel should review:

- The Federal Rules of Civil Procedure (FRCP), including FRCP 65, which governs injunctions in federal court.
- The individual district court's:
  - local rules;
  - standing orders; and
  - case management/electronic case filing (CM/ECF) rules.

If the petition relates to another lawsuit pending in the district court, counsel should also review:

- Case-specific orders in the related case (such as an order of consolidation).
- Individual practice rules for the judge presiding over the related case.

If a lawsuit between the same parties is still pending, then the request is generally made by motion rather than petition.

District courts typically post their local rules, standing orders, CM/ECF rules, and judge's individual rules on their websites. Case-specific orders are typically posted on the electronic docket for a particular case and are accessible using the court's CM/ECF system.

Although the FRCP sets out the basic formatting, substantive, service, and filing requirements for a petition, the court's local rules and any standing orders may supplement the FRCP. For information on the service and filing requirements for case-initiating documents in federal court, see Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Complaint.

Determine Whether to Apply to Court or Arbitral Tribunal

Before seeking preliminary injunctive relief, a petitioner should determine whether to apply to a court or to the arbitral tribunal.

A party should consider applying to the court when:

- The arbitral tribunal has not yet been constituted and therefore cannot yet act. In these cases, the party must apply to the court unless the applicable arbitral rules contain emergency arbitrator provisions.
- 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 little ability to enforce their orders, especially regarding non-parties. 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.
- The party needs ex parte relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties (Rule 38(b), American Arbitration Association (AAA) Commercial Arbitration Rules and Article 6 (2014) and Article 7 (2021), International Centre for Dispute Resolution (ICDR) International Arbitration Rules). Notice of the application gives the party an opportunity to take the action that the preliminary injunction seeks to block. By the time the tribunal, even an emergency arbitrator appointed on short notice, 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.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy (Revised Uniform Arbitration Act (RUAA), section 8). 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 petitioner needs a temporary restraining order (TRO). For more information on the requirements for obtaining a TRO, see Practice Note, Preliminary Injunctive Relief: Drafting the Required Documents (Federal): Drafting the Motion Papers: Order to Show Cause.

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

- The tribunal has been constituted and is available on short notice.
- The institutional rules provide for the prompt appointment of an emergency arbitrator.
- The applicant is satisfied that the other party intends to respect orders issued by the tribunal.
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration.
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than is likely to be available in court.

For more information, see Practice Note, Interim, Provisional, and Conservatory Measures in US Arbitration: Whether to Apply to the Arbitral Tribunal or the Court. This Standard Document should be used once the party seeking a preliminary injunction decides to proceed in court.

For a sample order to show cause, with integrated drafting notes, see Standard Document, Order to Show Cause for Preliminary Injunction and Temporary Restraining Order (Federal).

Required Documents

When commencing an action by filing a petition, the petitioner typically must pay the required filing fee and file:

- A civil cover sheet.
- A summons.
- The petition.
- A Rule 7.1 disclosure statement (if the petitioner is a nongovernmental corporate entity) (see Standard Document, Rule 7.1 Disclosure Statement).
- A memorandum of law.
- Supporting exhibits, affidavits, and declarations (see Drafting Note, Supporting Exhibits, Affidavits, and Declarations).
- Any other documents required by the district court's local rules.

Counsel should submit a separate memorandum of law that presents all the arguments and legal authorities supporting the request. Although some circuits require a hearing on applications for preliminary injunctive relief (see, for example, *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380, 383 (Fed. Cir. 1986); *SEC v. G. Weeks Sec., Inc.*, 678 F.2d 649, 651 (6th Cir. 1982)), not every circuit does, so courts in those circuits may base their decisions solely on the parties' written submissions. For a sample memorandum of law, with integrated drafting notes, see Standard Document, Petition for Preliminary Injunction in Aid of Arbitration: Memorandum of Law (Federal).

Bracketed Language

The drafting party should replace bracketed language below in ALL CAPS with case-specific facts or other information. Bracketed language in sentence case is optional language that the drafting party may include, modify, or delete in its discretion. A forward slash between words or phrases indicates that the drafting party should include one of the words or phrases in the document.

UNITED STATES DISTRICT COURT FOR THE

[__________] DISTRICT OF [___________]

– X

Petitioner(s), : [__ Civ. ___(__)(__)]

[PARTY NAME(S)], :

– X

[PARTY NAME(S)], :

:

:

:

-against- : **PETITION FOR A PRELIMINARY INJUNCTION IN AID OF ARBITRATION**

:

:

Respondent(s). :

DRAFTING NOTE: CAPTION

The caption for a petition for a preliminary injunction in aid of arbitration must include:

- The court name (for example, "United States District Court for the Northern District of Illinois").
- Title of the action, including the parties' names and roles. Although a petition resembles a complaint and commences an action in federal court, the petition should identify the parties' roles as "Petitioner(s)" and "Respondent(s)," rather than "Plaintiff(s)" and "Defendant(s)," regardless of their designations in the underlying arbitration. For cases involving multiple parties, the moving party generally only identifies the first petitioner and respondent in the caption (FRCP 10(a)). The moving party may identify the remaining petitioners and respondents by an et al. designation.
- The document title (for example, "Petition" or "Petition for Injunction in Aid of Arbitration").
- Blank spaces for the docket number. The district court clerk issues a docket number for a newly commenced action after the petitioner files its case-initiating documents and pays the required fee (FRCP 79(a)(1)).

(FRCP 7(b)(2) and 10(a).)

Local rules may impose additional requirements on what to include in the caption (for example, S.D.N.Y. and E.D.N.Y. L. Civ. R. 11.1(a) (judges' initials)).

For more on drafting the caption, see Practice Note, General Formatting Rules in Federal Court: Captions.

[PETITIONER(S)], by and through [its/their] attorneys, [LAW FIRM NAME], for [its/their] Petition allege[s] as follows:

[PRELIMINARY STATEMENT/INTRODUCTION]

1. This is a [BRIEF DESCRIPTION OF NATURE OF ACTION, THE PARTIES, AND CITATION TO RELEVANT LAWS OR STATUTES SUPPORTING PETITIONER'S CLAIM IN THE UNDERLYING ARBITRATION] (the "Arbitration").

2. Petitioner seeks an order pursuant to Rule 65 of the Federal Rules of Civil Procedure [and [STATE STATUTE APPLICABLE TO PROVISIONAL REMEDIES IN SUPPORT OF ARBITRATION]] enjoining the respondent[s] during the pendency of the Arbitration from [SUMMARY OF INJUNCTIVE RELIEF SOUGHT AND THE REASON RELIEF IS NEEDED PRIOR TO THE CONCLUSION OF THE ARBITRATION].

DRAFTING NOTE: PRELIMINARY STATEMENT/INTRODUCTION

A preliminary statement or introduction is optional, but attorneys often include one to identify the parties and describe the nature of the application and the relief sought. When describing the relief sought, counsel should request the longest possible preliminary injunction, which is during the pendency of the arbitration (see Drafting Note, Relief Requested).

Numbered Paragraphs

Like a complaint, a petition generally contains allegations in numbered paragraphs. However, because a petition is treated as a motion by the court, counsel may prefer to draft the preliminary statement or introduction in an unnumbered section, as a party drafts a similar section in a memorandum of law.

PARTIES

DRAFTING NOTE: DESCRIBING THE PARTIES

The "parties" section of the petition should identify the petitioners and respondents, state their addresses, and include facts explaining why they are parties.

In diversity jurisdiction cases, the petitioner must identify the citizenship of each petitioner and each respondent. The test for determining a party's citizenship varies depending on whether that party is a natural person, corporation, or other type of business entity (see Drafting Note, Diversity Jurisdiction). If the petitioner does not rely on the parties' diversity of citizenship as a basis for the court's subject matter jurisdiction, the petition does not need to include the citizenship of the parties unless it is relevant to an issue such as venue.

The petitioner usually knows from the arbitration proceedings the necessary facts for identifying the respondent and its citizenship. When the petitioner does not know this information, the petitioner must allege it on information and belief.

3. [[PETITIONER] is an individual who resides in [CITY AND STATE/FOREIGN COUNTRY]. Petitioner is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE PETITIONER].

DRAFTING NOTE: CITIZENSHIP OF INDIVIDUALS

An individual (except for a resident alien) is a citizen of the state where the individual is domiciled, which may be the state where the individual either:

- Resides.
- Intends to return, if the individual is presently absent from that state.

(*Washington v. Hovensa LLC*, 652 F.3d 340, 344 (3d Cir. 2011); *Johnson v. Smithsonian Inst.*, 4 F. App'x 69, 70 (2d Cir. 2001).)

Although an individual may have more than one residence, for diversity jurisdiction purposes the individual has only one domicile and is a citizen of only one state (see *Reich v. Lopez*, 858 F.3d 55, 63 (2d Cir. 2017); *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1346 (11th Cir. 2011)). Aliens admitted to the US for permanent residence are deemed citizens of the US and of their foreign country for diversity jurisdiction purposes (28 U.S.C. § 1332(a)).

OR

[PETITIONER] is a corporation that is incorporated in [STATE/FOREIGN COUNTRY] and has its principal place of business in [CITY AND STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE PETITIONER].

DRAFTING NOTE: CITIZENSHIP OF CORPORATIONS

For diversity jurisdiction purposes, a corporation is a citizen of:

- Every US state where it is incorporated.
- Every foreign state where it is incorporated.

- The US or foreign state where the corporation has its principal place of business.

(28 U.S.C. § 1332(c)(1).)

A corporation's principal place of business is where a corporation's officers direct, control, and coordinate the corporation's activities. A corporation's principal place of business is normally the place where the corporation maintains its headquarters (see *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010)). Unlike an individual, a corporation may be a citizen of more than one state.

OR

[PETITIONER] is a limited liability company formed under the laws of [STATE/FOREIGN COUNTRY]. Petitioner has [NUMBER] members: [MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT PETITIONER].

DRAFTING NOTE: CITIZENSHIP OF LIMITED LIABILITY COMPANIES

A limited liability company (LLC) is a citizen of all states in its members are citizens (see *Mgmt. Nominees, Inc. v. Alderney Invs.*, LLC, 813 F.3d 1321, 1325 (10th Cir. 2016); *Lindley Contours, LLC v. AABB Fitness Holdings, Inc.*, 414 F. App'x 62, 64 (9th Cir. 2011)). Unlike a corporation, an LLC's state of formation and principal place of business do not determine the LLC's citizenship.

OR

[PETITIONER] is a partnership formed under the laws of [STATE/FOREIGN COUNTRY] and does business in [CITY AND STATE/FOREIGN COUNTRY]. Petitioner has [NUMBER] partners: [PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT PETITIONER].

DRAFTING NOTE: CITIZENSHIP OF PARTNERSHIPS

A partnership is a citizen of all states in which its partners are citizens (see *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015); *Lindley Contours*, 414 F. App'x at 64). Unlike a corporation, a partnership's state of formation and principal place of business do not determine the partnership's citizenship.

OR

[PETITIONER] is a limited liability partnership formed under the laws of [STATE/FOREIGN COUNTRY] and does business in [CITY AND STATE/FOREIGN COUNTRY]. Petitioner has [NUMBER] general and limited partners: [PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT PETITIONER].]

DRAFTING NOTE: CITIZENSHIP OF LIMITED LIABILITY PARTNERSHIPS

A limited liability partnership is a citizen of all states in which its general and limited partners are citizens (see *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990)). Unlike a corporation, a limited liability partnership's state of formation and principal place of business do **not** determine the partnership's citizenship.

4. [[Upon information and belief,] [RESPONDENT] is an individual who resides in [CITY AND STATE/FOREIGN COUNTRY]. Upon information and belief, respondent is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE RESPONDENT].

OR

[Upon information and belief,] [RESPONDENT] is a corporation that is incorporated in [STATE/FOREIGN COUNTRY] and has its principal place of business in [CITY AND STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE RESPONDENT].

OR

[Upon information and belief,] [RESPONDENT] is a limited liability company formed under the laws of [STATE/FOREIGN COUNTRY] and does business in [CITY AND STATE/FOREIGN COUNTRY]. Upon information and belief, respondent has [NUMBER] members: [MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD MEMBER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE RESPONDENT].

OR

[Upon information and belief,] [RESPONDENT] is a partnership formed under the laws of [STATE/FOREIGN COUNTRY] and does business in [CITY AND STATE/FOREIGN COUNTRY]. Respondent has [NUMBER] partners: [PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT RESPONDENT].

OR

[Upon information and belief,] [RESPONDENT] is a limited liability partnership formed under the laws of [STATE/FOREIGN COUNTRY] and does business in [CITY AND STATE/FOREIGN COUNTRY]. Upon information and belief, respondent has [NUMBER] general and limited partners: [PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; [SECOND PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]; and [THIRD PARTNER] is a citizen of [STATE/FOREIGN COUNTRY]. [KEY FACTS ABOUT THE RESPONDENT].]

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this action pursuant to 9 U.S.C. § 203, in that this is a civil action seeking a preliminary injunction in aid of an arbitration falling under the [Convention on the Enforcement and Recognition of Foreign Arbitral Awards/Inter-American Convention on International Commercial Arbitration].

OR

This Court has jurisdiction over this action pursuant to [28 U.S.C. § 1332(a)(1), in that this is a civil action between citizens of [STATE] and citizens of [STATE]/28 U.S.C. § 1332(a)(2), in that this is a civil action between citizens of [STATE] and citizens of [FOREIGN STATE]/28 U.S.C. § 1332(a)(3), in that this is a civil action between citizens of [STATE] and [STATE], citizens of [FOREIGN STATE], a foreign state as defined in 28 U.S.C. § 1603(a), and citizens of [STATE(S)]], and the amount in controversy exceeds $75,000, exclusive of interest and costs.]

DRAFTING NOTE: BASIS FOR SUBJECT MATTER JURISDICTION

The petition must include a short and plain statement of the grounds for the court's subject matter jurisdiction over the case (FRCP 8(a)(1)). The Federal Arbitration Act (FAA) does not independently confer subject matter jurisdiction on a US district court over domestic arbitration cases (see *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) and *Amgen, Inc. v. Kidney Ctr. of Del. Cty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996)). The main types of civil cases over which federal district courts have subject matter jurisdiction are:

- Federal question cases (28 U.S.C. § 1331).
- Diversity cases (28 U.S.C. § 1332).

Federal Question Jurisdiction

A court has federal question jurisdiction over cases arising under federal law, meaning:

- The US Constitution.
- Federal statutes, rules, and regulations.
- International treaties to which the US is a contracting state (for example, the New York Convention or the Panama Convention).

(28 U.S.C. § 1331.)

An action or proceeding falling under the New York Convention is deemed to arise under US laws and treaties (9 U.S.C. § 203). Courts generally hold that they have jurisdiction over requests for preliminary relief in aid of international arbitration (see *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906, 909-11 (5th Cir. 2019) (finding jurisdiction in action for pre-arbitration attachment) and *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990), cert. denied, 500 U.S. 953 (1991) (entertaining applications for a preliminary injunction in aid of arbitration is consistent with a court's powers under section 206 of the FAA)). 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)). In the petition or accompanying memorandum of law, be sure to brief thoroughly the court's subject matter jurisdiction.

The petitioner also may look to any state court having jurisdiction to grant a preliminary injunction. However, Section 205 of the FAA permits the respondent to remove any New York Convention-related proceedings to the federal district court for the district and division embracing the state venue of the proceedings (9 U.S.C. § 205). (See Practice Note, Removal: How to Remove a Case to Federal Court.)

To determine whether it has federal question jurisdiction over a petition for injunctive relief in a domestic arbitration case, US district courts have "looked through" the petition to the underlying dispute to determine if it would have subject matter jurisdiction over the dispute except for the arbitration agreement (*Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009)). This look through approach would permit a petitioner to bring a petition for injunctive relief concerning a dispute arising under federal law without first filing a federal question complaint to determine that federal question jurisdiction exists (*Vaden*, 556 U.S. at 65). A recent Supreme Court decision suggests, however, that this look through approach is limited to applications to compel arbitration under section 4 of the FAA (*Badgerow v. Walters*, 2022 WL 959675 (U.S. Mar. 31, 2022)).

Diversity Jurisdiction

A court has diversity jurisdiction over cases where the amount in controversy is more than $75,000 (see Drafting Note, Amount in Controversy Requirement), exclusive of interest and costs, and is between:

- Citizens of different US states.
- Citizens of a US state and citizens or subjects of a foreign state, except when the citizen or subject of the foreign state is:
  - an alien lawfully admitted for permanent residence in the US; and
  - domiciled in the same US state.
- Citizens of different US states, where citizens or subjects of a foreign state are additional parties.

- A foreign state (as defined in 28 U.S.C. § 1603(a)) as petitioner and citizens of a US state or of different US states.

(28 U.S.C. § 1332(a).)

Federal courts usually do not look through the petition to determine whether complete diversity among the parties exists (see *Richmond Health Facilities-Kenwood, LP v. Nichols*, 2014 WL 4063823, at *3 (E.D. Ky. Aug. 13, 2014)). Federal courts also lack diversity jurisdiction over suits in which a US citizen domiciled abroad is a party (see *Herrick Co. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001)).

For guidance on how to determine the citizenship of a person or entity, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations: Diversity Jurisdiction.

Amount in Controversy Requirement

The standard for establishing the amount in controversy is lenient. A petitioner's allegations may satisfy the requirement unless the respondent shows that the recovery of an amount exceeding the jurisdictional minimum is legally impossible (see *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 160 (2d Cir. 1998)).

Federal courts may perform a limited look through test to the underlying dispute to determine if the amount in controversy requirement has been met (see *Nichols*, 2014 WL 4063823, at *3).

6. Venue is proper in this judicial district under 28 U.S.C. § 1391 because [a majority of the] arbitrator(s) are sitting in this district.

OR

Venue is proper in this judicial district because the parties' arbitration agreement specified [CITY, STATE LOCATED IN JUDICIAL DISTRICT] as the place for judicial proceedings in connection with the arbitration.

DRAFTING NOTE: PROPER VENUE

Determining the proper venue depends on several factors, including:

- Where the arbitration is taking or will take place.
- Who the parties are.
- Where the parties reside.
- Where the events or omissions giving rise to the case occurred.
- Where a substantial part of property that is the subject of the action is situated.

(28 U.S.C. § 1391 and see *Credit Suisse Sec. (USA) LLC v. Ebling*, 2006 WL 3457693, at *2 (S.D.N.Y. Nov. 27, 2006) (a party agreeing to arbitrate in a particular jurisdiction consents not only to personal jurisdiction but also to venue of the courts within that jurisdiction).) (For more information on a court's personal jurisdiction over the respondent, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations: Does the Court Have Personal Jurisdiction Over the Defendant?)

If there is more than one district where venue is proper, the petitioner may file the case in any district that has a substantial connection to the claim (see *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 563 (8th Cir. 2003)).

If the parties signed a contract containing a forum selection clause in which they agreed to have their dispute heard in a particular court, petitioner's counsel should refer to the written agreement and quote the language of the clause. The parties' arbitration

agreement often specifies the venue of any litigation in connection with the arbitration.

For more information on determining the proper venue for a lawsuit, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations: Determine the Proper Venue for the Lawsuit. For more information on forum selection clauses, see Practice Note, Commencing a Federal Lawsuit, Initial Considerations: Review All Relevant Agreements.

FACTS

7. [FACTS SUPPORTING THE PETITIONER'S CLAIMS.] [Attached hereto as Exhibit [NUMBER/LETTER] is a true and correct copy of the arbitration agreement between the parties.]

8. [DETAILS OF ARBITRATION ALREADY COMMENCED OR ABOUT TO BE COMMENCED].

9. [DESCRIPTION OF ANY ADDITIONAL EXHIBITS OR FACTS SUPPORTING THE PETITIONER'S REQUEST.]

10. Absent the requested preliminary injunction, [DESCRIPTION OF IRREPARABLE INJURY]. Granting the requested preliminary injunction will ensure that any arbitration award that Petitioner may be entitled to will not be rendered ineffectual without such provisional relief. The balance of equities here tips decidedly in Petitioner's favor.

DRAFTING NOTE: FACTS

The petition should provide a short, plain statement of the relevant facts in numbered paragraphs (FRCP 8(a)(2) and 10(b)). Each paragraph should be limited as far as practicable to a single allegation (FRCP 10(b)).

The petition should present facts that satisfy the requirements for preliminary injunctive relief. The standard for an injunction in aid of arbitration is the same as for preliminary injunctions generally (see *Golden Fortune Imp. & Exp. Corp. v. Mei-Xin Ltd.*, 2022 WL 3536494, at *2 (3d Cir. Aug. 5, 2022); *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015)).

Federal courts traditionally consider four factors when evaluating a motion for a preliminary injunction or TRO:

- The moving party's likelihood of success on the merits.
- The likelihood that the moving party will suffer irreparable harm absent preliminary injunctive relief.
- The balance of harms between the moving party and the non-moving party.
- The effect of the injunction on the public interest.

The federal circuits vary in how they weigh these factors. 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.

Circuits also have different standards for what is required to meet each factor. For example, in some circuits the likelihood of success on the merits must be substantial, while in others the movant must show only that success is more likely than not. For more information, see Standard for Preliminary Injunctive Relief by Circuit Chart.

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 when

the relief is in aid of arbitration therefore has reduced influence. (*SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 84 (2d Cir. 2000).)

Certain Facts Must Be Redacted

The petitioner must redact certain information from a petition for a preliminary injunction in aid of arbitration and any exhibit or any other litigation document before filing it with the court. The petition and exhibits should disclose only:

- The last four digits of an individual's Social Security number or taxpayer identification number.
- The year (but not the month and date) of an individual's birth.
- The initials of a minor.
- The last four digits of a financial account number.

(FRCP 5.2(a).)

The petitioner may file an unredacted copy of the petition under seal, which the court must retain as part of the record (FRCP 5.2(f)).

For more information on redaction, see Practice Note, Filing Documents in Federal District Court: Redact Personal Identifiers Before Filing.

WHEREFORE, Petitioner respectfully requests that this Court:

1. Issue an injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure [and [APPLICABLE PROVISION OF STATE LAW]] to prevent Respondent from [DESCRIBE RELIEF SOUGHT].

2. Issue an order pursuant to [PROVISION OF PARTIES' AGREEMENT] awarding expenses[, attorneys' fees,] and costs incurred in connection with this application for a preliminary injunction.

3. Award the Petitioner such other and further relief as this Court deems just and proper.

DRAFTING NOTE: RELIEF REQUESTED

Counsel must carefully draft the relief the petitioner seeks. Every order granting an injunction and every TRO must state its terms specifically and describe in reasonable detail the acts restrained or required (FRCP 65(d)(1)).

Counsel should generally ask for the longest possible preliminary injunction, which is "during the pendency of the arbitration." However, many courts issue preliminary injunctions to last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see *Fairfield Cty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 56 (2d Cir. 2014); *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 211, 215 (7th Cir. 1993)). In effect, these restraints often serve the same function as a TRO. Other courts allow provisional remedies to remain in place until the arbitral panel renders an award (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d at 902; *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)).

The court may entertain a request for attorneys' fees and costs in connection with the judicial provisional remedy proceedings, despite 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)). Therefore, petitioner should request attorneys' fees if:

- The arbitration agreement provides for attorneys' fees to the prevailing party.
- The petitioner prefers that the court, not the arbitrator, award fees in connection with the petition for a preliminary injunction.

Dated:[DATE]

[CITY], [STATE]

Respectfully submitted,

[NAME OF LAW FIRM]

_____

[ATTORNEY'S NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[PHONE NUMBER]

[EMAIL ADDRESS]

Attorneys for [PETITIONER]

DRAFTING NOTE: SIGNATURE BLOCK

The petition must be signed by at least one attorney of record and contain the signer's:

- Name.
- Mailing address.
- Email address.
- Telephone number.
- Other identifying information the court's local rules may require, such as the attorney's state bar number.

(FRCP 11(a) and, for example, S.D. Fla. CM/ECF Guidelines § 3J(1); LR, D. Mass. 5.1(a)(1).)

Counsel also should state which party they represent by including the phrase "Attorneys for [PETITIONER(S)]" at the bottom of the signature block.

For more information on formatting signature blocks, see Practice Note, General Formatting Rules in Federal Court: Signatures.

Manual Versus Electronic Signatures

FRCP 5 requires counsel to file most documents electronically through CM/ECF and allows filers to sign CM/ECF documents by typing their name on the signature line (FRCP 5(d)(3)(A) and (C)). However, counsel should check the district court's local rules and CM/ECF rules to determine the applicable filing and signature requirements in a particular case, as these requirements may vary from FRCP 5. For example, some courts may require the filer to type /s/ or s/ and their name on the signature line or require manual signatures on certain documents. For more on electronic signatures and which documents may require manual signatures, see Practice Note, E-Filing in Federal District Court: Basics and Formatting: Signatures.

Verification Generally Not Required

Unless a rule or statute expressly states otherwise, a party filing a petition for a preliminary injunction in aid of arbitration does not need to verify the petition (FRCP 11(a)). Counsel should consult the court's local rules to determine whether verification is necessary (for example, D.N.J. Civ. R. 11.2).

EXHIBIT(S)

EXHIBIT [NUMBER/LETTER]

DRAFTING NOTE: SUPPORT EXHIBITS, AFFIDAVITS, AND DECLARATIONS

The petition should identify and attach the arbitration agreement and any other exhibits, affidavits, or declarations that are essential to the determination of the action. Counsel typically identify exhibits by using:

- Numbers for a petitioner's exhibits.
- Letters for a respondent's exhibits.

If the petitioner attaches a document as an exhibit to the petition, the document becomes part of the petition (FRCP 10(c)).

Because an application for a preliminary injunction requires the submission of proof or facts, it should be accompanied by an affidavit or declaration stating the relevant facts of which the affiant declarant has personal knowledge. An affidavit or declaration made in support of an application for preliminary injunctive relief should:

- Be sworn to by someone with personal knowledge of the facts at issue in the application for preliminary injunctive relief but need not be composed solely of evidence that would be admissible at trial (see *Mullins v. City of N.Y.*, 626 F.3d 47, 52 (2d Cir. 2010); *Corbell v. Norton*, 391 F.3d 251, 260-1 (D.C. Cir. 2004); *Country Fare LLC v. Lucerne Farms*, 2011 WL 2222315 at *9 (D. Conn. June 7, 2011)).
- Contain specific allegations (see *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088-9 (9th Cir. 1972); *Greenfield v. U.S. Marine Corps.*, 2012 WL 1133184 at *6 (S.D. Cal. Apr. 4, 2012)).
- Allege specific facts demonstrating that immediate and irreparable injury, loss, or damage will result to the petitioner before the respondent can be heard in opposition, if the petitioner seeks an ex parte TRO (FRCP 65(b)(1)). A federal court TRO expires after 14 days unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension (*Granny Goose v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 432-3 (1974); FRCP 65(b)(2)).

For more on drafting declarations and affidavits generally in federal court, see Standard Documents, Declaration: General (Federal) and Affidavit: General (Federal).

2022 WL 1002626
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

GOLDEN FORTUNE IMPORT & EXPORT CORPORATION, Plaintiff,

v.

MEI-XIN (HONG KONG) LIMITED and Maxim's Caterers Limited, Defendants.

Civil Action No. 22-01369 (JXN) (JRA)
|
Signed 04/04/2022

Attorneys and Law Firms

David M. Dugan, Chiesa Shahinian & Giantomasi PC, West Orange, NJ, Marisa Rauchway Sverdlov, Rauchway Law LLC, West Caldwell, NJ, for Plaintiff.

Mauro M. Wolfe, Duane Morris LLP, New York, NY, Sarah Fehm Stewart, Duane Morris LLP, Newark, NJ, 3rd Vincent J. Nolan, Duane Morris, LLP, Cherry Hill, NJ, for Defendants.

OPINION

NEALS, District Judge

***1 THIS MATTER** having been brought before the Court by the law firms of Chiesa Shahinian & Giantomasi, P.C., and Rauchway Law, LLC., as co-counsel for Plaintiff, Golden Fortune Import & Export Corporation ("Golden Fortune" or "Plaintiff"), by way of a Verified Complaint (ECF No. 1) and application by Order to Show Cause for a Preliminary Injunction pursuant to Fed. R. Civ. P. 65 (ECF No. 3), Defendants Mei-Xin Limited and Maxim's Caterers Limited, (respectively "Mei-Xin;" "Maxim's;" or collectively "Defendants") having filed opposition to the application (ECF No. 9) and a Cross Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(2) (ECF No. 10), through their counsel Duane Morris, LLP. The Court having heard oral argument and in consideration of the parties' submissions, for the reasons set forth below, Plaintiff's application by Order to Show Cause for a Preliminary Injunction pursuant to Fed. R. Civ. P. 65 (ECF No. 3) is **GRANTED**, and Defendants' Cross Motion to Dismiss (ECF No. 10) is **ADMINISTRATIVELY TERMINATED**.

I. BACKGROUND

This Court has subject matter jurisdiction based upon 28 U.S.C. 1332(a)(2). Venue is proper pursuant to 28 U.S.C. 1391(b)(2).

Golden Fortune Import & Export Corporation (defined above as "Golden Fortune" or "Plaintiff") is a New Jersey corporation having its principal place of business at 55 Hook Road, Bayonne, New Jersey. Compl., at ¶ 9. Golden Fortune imports and distributes Asian groceries in the United States. *See Id.*, at ¶ 14. Defendant Mei-Xin (Hong Kong) Limited is a Hong Kong company with its principal place of business at 18/F, Maxim's Centre, No. 17 Cheung Sun Street, Cheung Sha Wan, Kowloon, Hong Kong. *Id.* at ¶ 10. Defendant Maxim Caterers Limited is a Hong Kong company and parent company of Mei-Xin, with its principal place of business at 18/F, Maxim's Centre, No. 17 Cheung Sun Street, Cheung Sha Wan, Kowloon, Hong Kong.[1] *Id.* at ¶ 11.

Mei-Xin manufactures mooncakes and other pre-packaged bakery products. *See* Declaration of YU Yuet Fun Alice ("Alice Decl."), at ¶ 3. Mei-Xin's products, and, in particular, its mooncakes branded as "Hong Kong MX," enjoy an unparalleled reputation overseas due to their use of high-quality ingredients and innovative flavors (e.g., lava custard mooncake with molten filling). Alice Decl., at ¶ 4. Hong Kong MX-branded mooncakes have been sold to the public for well over thirty-years (Alice Decl., at ¶ 5), and they are frequently referred to by international media as the most "iconic," "high-quality" and "best-selling" mooncakes on the market.[2] Hong Kong MX-branded mooncakes have been distributed internationally since the 1990s, including to Canada, United Kingdom, Taiwan, Singapore, Philippines, New Zealand and South Africa. *Id.*

***2** Prior to 2000, Maxim's Caterer's sold MX Mooncakes only in Hong Kong, and therefore had no overseas presence or market share. Compl. at ¶ 19. Because it lacked goodwill or any United States-based sales team or advertising (in fact, Mei-Xin still has no United States-based sales team or advertising), Mei-Xin engaged two non-exclusive United States-based distributors, one of which was Golden Fortune. Alice Decl., at ¶ 9.[3] In 2000, Maxim's engaged Golden Fortune to establish and develop a market for the MX

Mooncakes brand in the eastern portion of the United States. *Id.* at ¶ 21. In or about 2001, due to its increasing sales in Hong Kong and the international market, Mei-Xin determined to sell its products in the United States. Alice Decl., at ¶ 6. Maxim's engagement of Golden Fortune also gave Maxim's access to Golden Fortune's extensive list of supermarket and wholesale customers, as well as the selling power of Golden Fortune's highly experienced and motivated sales and marketing team. Compl., at ¶ 23. Golden Fortune has been Maxim's exclusive distributor for the eastern half of the United States for over twenty (20) years. *Id.*, at ¶ 32.

Golden Fortune has over "40 years of experience sourcing high quality products" from around the globe, and uses a "dedicated purchasing team [to] constantly plac[e] orders with reputable manufacturers in Asia to import the best Asian food products into the United States." *See* Declaration of Sarah Fehm Stewart ("Stewart Decl."), Exs. 1-2. As a result of this deep experience and broad efforts, Golden Fortune imports and distributes at least 1,599 different products from over 150 brands. Stewart Decl., Exs. 3-4. The products include dried, frozen, refrigerated, seasonal, canned and bottled items such as beverages, snacks, sauces, rice, noodles and more. *See* Stewart Decl., Ex. 1. The brands include large, internationally recognized companies such as Kraft, Nestle, Nissin, Knorr and Spam. *See* Stewart Decl., Ex. 4. Golden Fortune displays the logos from the "150+ brands on its website and LinkedIn page, and represents itself as providing wholesale distribution services for many 'famous' and 'common' brands." *See* Stewart Decl., Ex. 5. Golden Fortune's website does not describe itself as uniquely tied to the Hong Kong MX brand. *See* Stewart Decl., Ex. 6. Rather, Hong Kong MX is listed among the 150+ brands. *See* Stewart Decl., Ex. 6. In addition to selling its own branded products and providing import and distribution services, Golden Fortune also offers full-service logistics, marketing and warehousing services to all of its customers. *See* Stewart Decl., Ex. 1.

Golden Fortune owns and operates a massive 270,000 square foot warehouse with 21 exterior loading docks and 16 interior loading docks in Bayonne, New Jersey. The company also has a custom-built 30,000 square foot walk-in cooler and freezer for refrigerated and frozen goods. *See* Stewart Decl., Ex. 1. Golden Fortune has operated out of its Bayonne, New Jersey warehouse since the inception of the relationship between Golden Fortune and Maxim's. Compl., at ¶ 47. At Golden Fortune's Bayonne warehouse, Golden Fortune's personnel make calls to customers. Golden Fortune's warehouse is also the location from which Golden Fortune's goods – including MX Mooncakes – are delivered to customers. *Id.*, at ¶ 48. Additionally, some customers choose to pick up MX Mooncakes from Golden Fortune's warehouse to be the first to start selling the coveted MX Mooncakes to their customers for the Mid-Autumn Festival. As a result, Golden Fortune also displays MX Mooncakes promotional material in their Bayonne, New Jersey location. *Id.*, at ¶ 49.

In 2021, Golden Fortune and Mei-Xin executed the most recent agreement between the parties (the "Distribution Agreement"). *Id.*, at ¶ 35; Ex. B. The Distribution Agreement names Golden Fortune's Bayonne, New Jersey warehouse address on the front page of the Distribution Agreement. Compl., at ¶ 46. Pursuant to the Agreement, Golden Fortune is required to distribute certain Mei-Xin goods, including Hong Kong MX-branded mooncakes, only in the eastern United States and Panama. Compl., Ex. B at § 4 and Standard Terms ¶ 2. Specifically:

> ***3** Subject to these Terms, the Buyer shall buy and the Company shall sell the Goods at the Price.
>
> *The Company hereby appoints the Buyer as Company's distributor of the Goods (as defined above) only in the Territory during the Term. For avoidance of doubt, the Company is still entitled to grant exclusive or non-exclusive distribution rights to other third party in the Territory and outside the Territory to distribute, sell and market all of or part of the Company's Goods without in (sic) breach of this Agreement.* Without derogating from the generality of this clause 2, the Buyer agrees and undertakes that it will source and purchase all goods (including the Goods) supplied by the Company only and not by any third party.
>
> The Buyer shall not solicit sales of Goods or promote the sale of Goods outside the Territory. The Buyer shall not establish an office or warehouse outside the Territory for the sale of Goods. The Buyer shall be solely responsible for all and any claims, disputes, complaints or otherwise issues directly or indirectly relating to or arising out of the Goods which are sold by the Buyer to purchasers, customers and consumers in the Territory.

Compl., Ex. B at § 4 and Standard Terms ¶ 2 (emphasis added).

The Agreement places restrictions on Golden Fortune's promotion and use of Mei-Xin's name, trademark, service mark, trade dress or logo, and requires Golden Fortune to

obtain Mei-Xin's express prior written consent to use same in any promotional materials. Compl., Ex. B at Standard Terms ¶ 6.1; Alice Decl., at ¶ 14. The Agreement further warns Golden Fortune against "tamper[ing] with any markings or name plates or other indication of the source of origin of the Goods which may be placed by the Company on the Goods or the packaging thereof." Compl., Ex. B at Standard Terms ¶ 6.3. The Agreement restricts Golden Fortune from ever using the name of Mei-Xin's corporate parent, Maxim's: "The Buyer undertakes not to use the English word 'Maxim's' on any promotional or advertising materials or in any manner whatsoever." Compl., Ex. B at Standard Terms ¶ 6.4. Moreover, the Agreement specifies that Mei-Xin and Golden Fortune are "independent parties" and "[n]othing in th[e] Agreement shall be deemed to create any association, partnership, joint venture or agency." Compl., Ex. B at Standard Terms ¶ 16.

The Agreement contains termination provisions and choice of law and arbitration clauses, which provide, in relevant part:

> 7. Termination
>
> 7.1 Except where Clause 7.2 of applies, either the Company or the Buyer shall have right to terminate this Agreement during the Term by giving the other thirty-day (30) day written notice.
>
> 7.2 The Company is entitled to terminate this Agreement immediately without notice in any of the following event:
>
> (a) there is non-compliance with any provision of this Agreement on the part of the Buyer; or
>
> (b) there is major shareholding change of the Buyer or the Buyer becomes insolvent, reorganizes, or liquidates, or a receiver is appointed over the Buyer's property.
>
> * * *
>
> 19. Applicable Law
>
> This Agreement shall be governed by and construed in accordance with the laws of Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong").
>
> ***4** 20. Arbitration
>
> Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in accordance with the Hong Kong International Arbitration Centre ("HKIAC") Procedures for the Administration of International Arbitration. There shall be only one arbitrator. The appointing authority shall be HKIAC. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre.

Compl., Ex. B at Standard Terms ¶¶ 7.1, 7.2, 19, 20.

Over a period of 20 years, Golden Fortune's efforts have resulted in MX Mooncakes going from an unknown brand in the United States to becoming the #1 mooncake brand in the United States eastern region. Compl., at ¶ 56.

According to Defendants, in 2013, the gross sales value received by Mei-Xin for these goods was approximately $1,044,000, up 23% from the previous year. Alice Decl., at ¶ 16. In 2014, the gross sales value received by Mei-Xin for these goods was approximately $1,273,000, up $22% from the previous year. *Id.*, at ¶ 16. In 2015, the gross sales value received by Mei-Xin for these goods was approximately $1,403,000, up 10% from the previous year. *Id.* In 2016, the gross sales value received by Mei-Xin for these goods was approximately $1,589,000, up 13% from the previous year. *Id.* Thus, from 2013 through 2016, Golden Fortune achieved double-digit growth on a yearly basis. *Id.*

Defendants further contend that in 2017 – coinciding with Golden Fortune 50% owner, Frank Ng, leaving the company – growth began to decline. *Id.*, at ¶ 17; Compl., at ¶ 102. For example, in 2017, the gross sales value received by Mei-Xin for these goods was approximately $1,707,000, just up 7% from the previous year. Alice Decl., at ¶ 18. Similarly, in 2019, the gross sales value received by Mei-Xin for these goods was approximately $2,114,000, up only 6% from the previous year. *Id.* In 2020, the gross sales value received by Mei-Xin for these goods was approximately $1,500,000, down some 29% from the previous year. *Id.* In 2020, Mei-Xin warned Golden Fortune that it may move its distribution to Frank Ng's new company, TKS, if sales did not sufficiently improve. *Id.*, at ¶ 19.

Golden Fortune's tax return for its fiscal year, September 1, 2018 and August 31, 2019, reveals annual gross revenue of $45,720,201. Compl., at ¶ 97. Golden Fortune's gross sales of Maxim's products between September 1, 2018 and

August 31, 2019, was approximately $3,959,887. *Id.*, at ¶ 98. Plaintiff alleges the following in its Complaint to calculate the percentage of Golden Fortune's gross sales attributable to Defendants:

> As Maxim's products are the only significant seasonal product that Golden Fortune sells, these numbers provide for an approximate sales volume – removing Maxim's sales – of quarterly sales of $10,440,079 (($45,720,201 minus $3,959,887) divided by 4).

Id., at ¶ 99.

> Adding back in Golden Fortune's Maxim's sales during the period between July 2019 and September 2019 ($3,305,575), the total sales during this period is $13,745,654 ($3,305,575 + $10,440,079), resulting in sales of Maxim's products during this period constituting a percentage of approximately 24% ($3,305,575 divided by $13,745,654).

***5** *Id.*, at ¶ 100.

Golden Fortune learned that Defendants selected the company TKS to replace Golden Fortune as its new distributor. TKS was started by the former fifty percent (50%) owner of Golden Fortune and offers many of the same product offerings to Asian supermarkets as Golden Fortune sells. *Id.*, at ¶ 102. TKS advertised on its website that it is a "partner" of "Hong Kong MX Mooncakes." Compl., at ¶ 103, Ex. X. Plaintiff alleges "[a]s a result, Golden Fortune's supermarket customers who normally purchase MX Mooncakes along with other Asian food products from Golden Fortune will inevitably, absent injunctive relief, move their entire purchase orders to TKS." Compl., at ¶ 105.

Defendants contend that after six years of slowing sales and contractual breaches[4] following the exit of Frank Ng from Golden Fortune, on January 21, 2022, Mei-Xin sent a notice of termination to Golden Fortune by email. Alice Decl., at ¶ 26 and Ex. A. Golden Fortune replied to this email, claiming that the termination was invalid because it did not constitute written notice under Sections 7.1 and 11 of the Agreement. *Id.* In response, Mei-Xin sent a written notice of termination to Golden Fortune on March 3, 2022. *Id.*, at ¶ 27.

On March 7, 2022, Golden Fortune responded to the written notice of termination, claiming that the notice of termination is invalid under the New Jersey Franchise Practices Act ("NJFPA").[5] *Id.*, at ¶ 28. On March 10, 2022, Mei-Xin replied to Golden Fortune, explaining that the NJFPA does not apply, and reiterating its termination of the Agreement. *Id.*, at ¶ 29. Mei-Xin has now engaged TKS to distribute Mei-Xin's goods in the eastern United States. *Id.*, at ¶ 30.

On March 14, 2022, Golden Fortune initiated the instant action in the United States District Court for the District of New Jersey, naming Mei-Xin and its corporate parent, Maxim's, as defendants. *See generally* Compl. In its Complaint, Golden Fortune alleges three causes of action for violation of the NJFPA, breach of the implied covenant of good faith and fair dealing and tortious interference, as well as a cause of action seeking declaratory judgment and an injunction in its favor, namely a "declaration and adjudication that (a) Golden Fortune continues to be Maxim's exclusive distributor ... (b) all previous efforts by Mei-Xin or Maxim's Caterers to terminate ... have no force or effect; and (c) an injunction enjoining Mei-Xin and Maxim's Caterers from terminating Golden Fortune as the exclusive distributor." *See generally* Compl.

***6** Golden Fortune further seeks a preliminary injunction "(a) barring Defendants from terminating or otherwise failing to renew Golden Fortune as Defendants' exclusive distributor of Defendants' products in the eastern portion of the United States referenced in the agreement in the Verified Complaint and (b) barring the distribution of Defendants' products through any person or entity, other than Golden Fortune, in the eastern portion of the United States referenced in the agreement in the Verified Complaint[.]" *See generally* Order to Show Cause ("OSC"). (ECF No. 9, 10).

Defendants oppose the application (ECF No. 9) and filed a Cross Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(2) (ECF No. 10).

II. STANDARD OF REVIEW

A. Jurisdictional Analysis[6]

As a threshold issue, the Court must determine whether it may properly exercise jurisdiction over Defendants. Defendants assert that they are foreign corporations with no presence in the United States. Alice Decl., at ¶ 34. Neither Mei-Xin nor Maxim's maintain a place of business in New Jersey, and neither Mei-Xin nor Maxim's are registered to do business in New Jersey or otherwise invoke New Jersey's laws. *Id.*, at ¶ 34. Mei-Xin and Maxim's do not conduct any real business in New Jersey. *Id.*, at ¶ 35. In fact, Maxim's conducts no business in New Jersey, and Mei-Xin's New Jersey business is limited to the distribution of its products by Golden Fortune

pursuant to the Agreement. *Id.*-Maxim's is not a party to that Agreement. *Id.*, at ¶ 33. Moreover, the Agreement was negotiated and signed by Mei-Xin in Hong Kong. *Id.*, at ¶ 36. Mei-Xin has not visited New Jersey in connection with negotiating or signing the Agreement. *Id.* And, more generally, neither Mei-Xin nor Maxim's own any property in New Jersey, hold any bank accounts in New Jersey, or otherwise have a physical presence in the State. *Id.*, at ¶ 37. Neither Mei-Xin nor Maxim's have ever consented to jurisdiction in New Jersey. *Id.*, at ¶ 38. Golden Fortune's location in New Jersey is incidental, as Mei-Xin, in entering the Agreement, was looking for a distributor to sell products in the entire eastern United States. *Id.*, at ¶ 39. Mei-Xin does not target the New Jersey market specifically. *Id.*, at ¶ 40.

Although plaintiffs bear the ultimate burden of proving personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the preliminary stages of litigation. *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino,* 960 F.2d 1217, 1223 (3d Cir. 1992). Motions to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), like those for failure to state a claim under Rule 12(b)(6), require the court to accept as true the allegations of the pleadings and all reasonable inferences therefrom. *Pinker v. Roche Holdings Ltd.,* 292 F.3d 361, 368 (3d Cir. 2002). When "[b]oth sides offer[ ] evidence on the personal jurisdiction issue," but "there has not been discovery or an evidentiary hearing, the plaintiff receives the benefit of what amounts to a Rule 12(b)(6) standard." *Murphy v. Eisai, Inc.*, 503 F.Supp.3d 207, 214 (D.N.J. 2020). Unlike Rule 12(b)(6), Rule 12(b)(2) does not limit the scope of the court's review to the face of the pleadings. *See id.; Carteret Sav. Bank, F.A. v. Shushan,* 954 F.2d 141, 142 & n. 1 (3d Cir. 1992). Consideration of affidavits submitted by the parties is appropriate and, typically, necessary. *Patterson by Patterson v. FBI,* 893 F.2d 595, 603–04 (3d Cir. 1990). Plaintiffs must merely allege sufficient facts to establish a *prima facie* case of jurisdiction over the person. *Id.* Once these allegations are contradicted by an opposing affidavit, however, plaintiffs must present similar evidence in support of personal jurisdiction. *Metcalfe v. Renaissance Marine, Inc.,* 566 F.3d 324, 330–31 (3d Cir. 2009); *Carteret Sav. Bank,* 954 F.2d at 142 & n. 1, 146; *Patterson,* 893 F.2d at 603–04. When the plaintiff responds with affidavits or other evidence in support of its position, the court is bound to accept these representations and defer final determination as to the merits of the allegations until a pretrial hearing or the time of trial. *Carteret Sav. Bank,* 954 F.2d at 142 n. 1 (stating that the "plaintiff need only plead [a] *prima facie* case to survive the initial [Rule 12(b)(2)] motion, but must eventually establish jurisdiction by a preponderance of the evidence") (citing *Behagen v. Amateur Basketball Ass'n,* 744 F.2d 731, 733 (10th Cir. 1984)).

***7** A federal court may exercise personal jurisdiction over a defendant to the extent authorized by state law. Fed. R. Civ. P. 4(k)(1)(A). New Jersey provides for jurisdiction coextensive with constitutional due process. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004) (citing N.J. CCt. R. 4:4-4). Due process allows for two types of personal jurisdiction, general or specific jurisdiction. *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414–15 & n. 9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

A court exercising general jurisdiction may hear any claim against a defendant that possesses systematic and continuous contacts with the forum regardless of whether the claim resulted from the defendant's forum-related activities. *Id.* at 415, 104 S.Ct. 1868 n. 9. The defendant must maintain perpetual, abiding ties with the forum. *Metcalfe,* 566 F.3d at 334; *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 262 (3d Cir. 2000). In the corporate context, courts have historically applied general jurisdiction to organizations that hire employees, hold real property, maintain bank accounts, apply for business licenses, advertise, and regularly solicit sales within the relevant forum. *Metcalfe,* 566 F.3d at 335. General jurisdiction is usually found where a nonresident defendant makes a substantial number of direct sales in the forum, solicits business regularly and advertises in a way specifically targeted at the forum market. *See id.,* (predicating general jurisdiction upon fewer than twenty sales directly to consumers within the forum).

In contrast, specific jurisdiction enables a court to hear claims that arise from a defendant's contacts with the forum where the court sits. *Helicopteros,* 466 U.S. at 414 n. 8, 104 S.Ct. 1868. The inquiry as to whether specific jurisdiction exists has three parts. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d. Cir. 2007). First, the defendant must have "purposefully directed [its] activities" at the forum. *Id.,* (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)) (quotation marks omitted). Second, the litigation must "arise out of or relate to" at least one of those activities. *Id.,* (citing *Helicopteros,* 466 U.S. at 414, 104 S.Ct. 1868; *Grimes v. Vitalink Commc'ns Corp.,* 17 F.3d 1553, 1559 (3d Cir. 1994)). And third, if the prior two requirements are met, a court may consider whether the

exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.' " *Id.,* (citing *Burger King,* 471 U.S. at 476, 105 S.Ct. 2174) (quoting Int'l Shoe *Co. v. Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

Although Defendants allegedly make substantial sales of their Mooncakes in New Jersey, the Court will review jurisdiction under the specific category due to the apparent lack of a corporate presence in New Jersey based on the facts presented at bar.[7]

i. Purposeful Availment

Preliminarily, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum." *O'Connor*, 496 F.3d at 317, citing *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Physical entrance is not required. *Id., See Burger King,* 471 U.S. at 476, 105 S.Ct. 2174; *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.,* 988 F.2d 476, 482 (3d Cir. 1993) ("Mail and telephone communications sent by the defendant into the forum may count toward the minimum contacts that support jurisdiction."). "[W]hat is necessary is a deliberate targeting of the forum." *O'Connor*, 496 F.3d at 317. "[R]andom, isolated, or fortuitous" contacts with the forum will not do. *Ford Motor Company v. Montana Eighth Judicial District*, —— U.S. ——, 141 S. Ct. 1017, 1024, 209 L.Ed.2d 225 (2021). "Each defendant's contacts with the forum state must be assessed individually." *Nicholas v. Saul Stone & Co.*, 224 F.3d 179, 184 (3d Cir. 2000) (citation omitted); *O'Connor*, 496 F.3d at 317.

***8** Here, Plaintiff set out a series of claim specific contacts in the Complaint, which sufficiently allege that Defendants purposefully availed themselves in New Jersey. Mei-Xin engaged two non-exclusive United States-based distributors, one of which was Golden Fortune. Alice Decl., at ¶ 9. In 2000, Maxim's engaged Golden Fortune to establish and develop a market for the MX Mooncakes brand in the eastern portion of the United States. *Id.* at ¶ 21; Compl., at ¶ 42. Maxim's engagement of Golden Fortune also gave Maxim's access to Golden Fortune's extensive list of supermarket and wholesale customers, as well as the selling power of Golden Fortune's highly experienced and motivated sales and marketing team. Compl., at ¶ 23. Golden Fortune has been Maxim's exclusive distributor for the eastern half of the United States for over twenty (20) years. *Id.,* at ¶ 32. Golden Fortune has operated out of its Bayonne, New Jersey warehouse since the inception of the relationship between Golden Fortune and Maxim's. *Id.*, at ¶ 47. At Golden Fortune's Bayonne warehouse, Golden Fortune's personnel make calls to customers. Golden Fortune's warehouse is also the location from which Golden Fortune's goods – including MX Mooncakes – are delivered to customers. *Id.*, at ¶ 48. Customers pick up MX Mooncakes from Golden Fortune's warehouse so as to be the first to start selling the coveted MX Mooncakes to their customers for the Mid-Autumn Festival. As a result, Golden Fortune also displays MX Mooncakes promotional material in their Bayonne, New Jersey location. *Id.*, at ¶ 49. Over a period of 20 years, Golden Fortune's efforts have resulted in MX Mooncakes going from an unknown brand in the United States to becoming the #1 mooncake brand in the United States eastern region. *Id.*, at ¶ 56.

Defendants have equally set forth facts that demonstrate purposeful availment in this forum. Because it lacked goodwill or any United States-based sales team or advertising (in fact, Mei-Xin still has no United States-based sales team or advertising), Mei-Xin engaged two nonexclusive United States-based distributors, one of which was Golden Fortune. Alice Decl., at ¶ 9. Golden Fortune has over "40 years of experience sourcing high quality products" from around the globe, and utilizes a "dedicated purchasing team [to] constantly plac[e] orders with reputable manufacturers in Asia to import the best Asian food products into the United States." Stewart Decl., Exs. 1-2. Pursuant to the Agreement, Golden Fortune is required to distribute certain Mei-Xin goods, including Hong Kong MX-branded mooncakes, only in the eastern United States and Panama. Compl., Ex. B at § 4 and Standard Terms ¶ 2. According to Defendants, in 2013, the gross sales value received by Mei-Xin for these goods was approximately $1,044,000, up 23% from the previous year. Alice Decl., at ¶ 16. In 2014, the gross sales value received by Mei-Xin for these goods was approximately $1,273,000, up $22% from the previous year. *Id.*, at ¶ 16. In 2015, the gross sales value received by Mei-Xin for these goods was approximately $1,403,000, up 10% from the previous year. *Id*. In 2016, the gross sales value received by Mei-Xin for these goods was approximately $1,589,000, up 13% from the previous year. *Id*. Thus, from 2013 through 2016, Golden Fortune achieved double-digit growth on a yearly basis. *Id.* The Agreement places restrictions on Golden Fortune's promotion and use of Mei-Xin's name, trademark, service mark, trade dress or logo, and requires Golden Fortune to obtain Mei-Xin's express prior written consent to use same in any promotional materials. Compl., Ex. B at Standard Terms ¶ 6.1; Alice Decl., at ¶ 14. Golden Fortune's gross sales of

Maxim's products between September 1, 2018, and August 31, 2019, was approximately $3,959,887. Compl., at ¶ 98.

Consequently, at least for present purposes, if Plaintiff's and Defendants' allegations are taken as true, there is a sufficient showing that Defendants purposefully availed themselves of the privilege of doing business in New Jersey. *See O'Connor*, 496 F.3d at 317*; Miller Yacht Sales,* 384 F.3d at 97.

ii. Claims Arise out of or Relate to Defendant's Activities

After establishing purposeful contacts in the forum, the plaintiff's claims must also "arise out of or relate to" at least one of those contacts. *Helicopteros*, 466 U.S. at 414, 104 S.Ct. 1868; *Grimes*, 17 F.3d at 155. Whether a plaintiff's claims "arise out of or relate to" the defendant's contacts with the forum state depends, in part, on the type of claim brought. *See O'Connor*, 496 F.3d at 317 (quoting *Helicopteros*, 466 U.S. at 414, 104 S.Ct. 1868.) For contract claims, a plaintiff must satisfy a "restrictive standard" by showing proximate causation (also called "substantive relevance"). *O'Connor*, 496 F.3d at 318, 320. But-for causation is not enough: "[T]he defendant's contacts with the forum [must have been] *instrumental* in either the formation of the contract or its breach." *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 130 (3d. Cir. 2020) (citing *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001)) (emphasis added). A plaintiff cannot simply allege that "but for *x*'s occurrence, *y* (which may have been remote and not foreseeable) would not have happened." *Id.*

***9** Here, it is readily apparent that the claims arise out of or relate to the Defendants' activities in New Jersey. The Defendants' contacts were based upon the parties' Distribution Agreement thereby instrumental to not only the formation of the contract but also the allegations that serve as the basis for its breach. The pleadings that both parties have filed in the action indicate that Plaintiff's claims arise out of the Defendants' contacts with New Jersey. Namely, the marketing and sale of its products pursuant to its Distribution Agreement with Plaintiff, through Plaintiff's Bayonne warehouse. This involves extensive distribution activities in New Jersey that serve not only New Jersey but also the eastern portion of the United States. Accordingly, Plaintiff has alleged sufficient facts to establish a prima facie case that the claims arise out of or relate to Defendants' contacts with New Jersey. Consequently, Plaintiff satisfies the second prong of the *O'Connor* test.

iii. Appropriate Exercise of Personal Jurisdiction

Having determined that sufficient minimum contacts exist, the Court must review whether exercising personal jurisdiction offends the "traditional notions of fair play and substantial justice." *O'Connor*, 496 F.3d at 317, citing *Int'l Shoe Co.,* 326 U.S. at 316, 66 S.Ct. 154 (internal quotation omitted). The existence of minimum contacts makes jurisdiction presumptively constitutional, and the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *O'Connor*, 496 F.3d at 324; *see also Burger King,* 471 U.S. at 477, 105 S.Ct. 2174; *see also Pennzoil Prods. Co. v. Colelli & Assocs., Inc.,* 149 F.3d 197, 207 (3d Cir. 1998) (noting that if minimum contacts are present, then jurisdiction will be unreasonable only in "rare cases"); *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.,* 988 F.2d 476, 483 (3d Cir. 1993) ("The burden on a defendant who wishes to show an absence of fairness or lack of substantial justice is heavy.")

The Supreme Court has identified several factors that courts should consider when balancing jurisdictional reasonableness. Among them are "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate [and international] judicial system's interest in obtaining the most efficient resolution of controversies," *O'Connor*, 496 F.3d at 325, citing *Burger King,* 471 U.S. at 477, 105 S.Ct. 2174(quotation marks omitted), and "[t]he procedural and substantive interests of other nations." *O'Connor*, 496 F.3d at 324, citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

Having found that Defendants have minimum contacts with New Jersey under the first two steps of the Court's analysis, Defendants must make a "compelling case" that litigation in New Jersey would be unreasonable and unfair. *See Burger King,* 471 U.S. at 477, 105 S.Ct. 2174. As the Supreme Court has stated, "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *See Asahi,* 480 U.S. at 114, 107 S.Ct. 1026. *Asahi* involved a suit in California between parties from Japan and Taiwan wherein the Court declined to exercise jurisdiction. *See id.* Unlike California's "slight"

interest in that case, *id.,* New Jersey has a "manifest interest in providing effective means of redress" when a foreign corporation reaches into the state and solicits its citizens. *See McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). New Jersey's manifest interest is clearly evidenced by the passage of the NJFPA. The New Jersey Legislature plainly stated the state's "manifest interest" in the Legislative findings and declarations within the NJFPA:

> The Legislature finds and declares that *distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare.* It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements and to protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees. *The Legislature finds that these protections are necessary to protect not only retail businesses, but also wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors in this State. Further, the Legislature declares that the courts have in some cases more narrowly construed the Franchise Practices Act than was intended by the Legislature.*

***10** N.J.S.A. 56:10-2 (emphasis added).

Furthermore, requiring Plaintiff to litigate in China would saddle them with a significant burden compared to Defendants' burden in New Jersey. The very purpose for the parties' Distribution Agreement was to sell Defendants' products in New Jersey and the other parts of the eastern United States, which Plaintiff has done for over twenty years through its Bayonne, New Jersey warehouse. Compl., at ¶¶ 21, 32.

In light of these countervailing interests, the Court concludes that this is not one of those "rare" and "compelling" cases where jurisdiction would be unreasonable despite the presence of minimum contacts. The burdens on Defendants may be substantial, but they "do not dwarf the interests of Plaintiff and the forum state." *O'Connor*, 496 F.3d at 325. When minimum contacts exist, due process demands no more than a reasonable forum. *Id.* Defendants do not present a compelling case of unreasonableness, so the Court finds that jurisdiction in New Jersey "comport[s] with fair play and substantial justice." *Burger King,* 471 U.S. at 476, 105 S.Ct. 2174.

Having found that the Court's exercise of jurisdiction is proper, the Court will review whether Plaintiff is entitled to the protections of the NJFPA and a preliminary injunction.

B. The New Jersey Franchise Practices Act

The NJFPA provides:

> This act applies only:
>
> to a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise;

N.J.S.A. 56:10-4(a).

Pursuant to the NJFPA, in order to take advantage of the Act's protections an entity must first meet the statutory definition of a "franchise," which follows,

> "Franchise" means a *written arrangement* for a definite or indefinite period, in which a person grants to another person a *license* to use a trade name, trade mark, service mark, or related characteristics, and in which there is a *community of interest* in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

N.J.S.A. 56:10-3(a) (emphasis added). The Act has been interpreted to cast a broader net to encompass more diverse business relationships than the prototypical franchise situation such as a car dealership or fast-food restaurant. *Instructional Sys., Inc. v. Computer Curriculum Corp.,* 130 N.J. 324, 350, 614 A.2d 124 (1992) ("*ISI*").

The Court must review each element, namely a written arrangement, a license and a community of interest to determine whether Plaintiff is entitled to the Act's protections. Here, it is undisputed that the parties have a written arrangement between them as evidenced by the Distribution Agreement. *See* Compl., Ex. B. The Court will address the remaining elements in turn.

i. License Requirement

***11** The New Jersey Supreme Court has held that "the Act's 'license to use' requirement does not encompass a definition of license in the word's broadest sense, that is: permission to do something [that] without the license would not be allowable." *ISI*, 130 N.J. 324, 614 A.2d 124. Simply allowing a franchisee to use the franchisor's insignia, an act that would normally "not be allowable" under trademark laws, does not in itself create a license. Otherwise, "any business selling a name brand product would, under New Jersey law, necessarily be considered as holding a license." *Id.* (quoting *Colt Indus. Inc. v. Fidelco Pump & Compressor Corp.*, 844 F.2d 117, 120 (3d Cir. 1988)). Rather, the meaning of "license" is more narrowly defined under the Act. It means "to use as if it is one's own. It implies a proprietary interest...." *Finlay & Assoc., Inc. v. Borg–Warner Corp.,* 146 N.J. Super. 210, 369 A.2d 541, 546 (Law Div. 1976), *aff'd on other grounds,* 155 N.J. Super. 331, 382 A.2d 933 (App.Div.), *certif. denied,* 77 N.J. 467, 391 A.2d 483 (1978). The mere furnishing of advertising materials as contemplated by a distributorship agreement, and allowing a plaintiff to have its name placed on certain items if it so desires as advertising for itself, does not satisfy the Act. "[T]he trademark, trade name reference means and implies use of that name in the very business title of the franchisee and a holding out or perhaps representation to the public of some special relationship or connection." *Id.* Merely selling goods or distributing materials bearing the manufacturer's name or trademark does not "license" use of the "trademark." *Id.*

At a minimum, the term "license" means that the alleged franchisee must use the name of the franchisor "in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the ... licensor and the licensee by which the licensor vouches, as it were, for the activity of the licensee." *Neptune T.V. & Appliance Serv., Inc. v. Litton Microwave Cooking Prods. Div., Litton Systems, Inc.,* 190 N.J. Super. 153, 160-161, 462 A.2d 595 (App. Div. 1983) (noting that hallmark of a license is that the franchisor gives its approval to the franchisee's business enterprise with regard to the franchisor's product such that the public is induced "to expect from [the franchisee] a uniformly acceptable and quality controlled service endorsed by [the franchisor] itself") (cited in *ISI,* 130 N.J. at 354, 614 A.2d 124).The NJFPA license requirement contemplates an "obligation of the franchisee to promote the [franchisor's] [trade]mark itself, as distinct from merely using it to make sales[.]" *Liberty Sales Assocs., Inc. v. Dow Corning Corp.*, 816 F. Supp. 1004, 1011 (D.N.J. 1993) (no NJFPA license if manufacturer merely supplies displays and advertising materials).

In the instant case, the Distribution Agreement contains restrictive language as to Golden Fortune's promotion and use of Mei-Xin's name, trademark, service mark, trade dress or logo, and requires Golden Fortune to obtain Mei-Xin's express prior written consent to use same in any promotional materials. Compl., Ex. B at Standard Terms ¶ 6.1; Alice Decl., at ¶ 14. The Agreement further warns Golden Fortune against "tamper[ing] with any markings or name plates or other indication of the source of origin of the Goods which may be placed by the Company on the Goods or the packaging thereof." Compl., Ex. B at Standard Terms ¶ 6.3. The Agreement restricts Golden Fortune from ever using the name of Mei-Xin's corporate parent, Maxim's: "The Buyer undertakes not to use the English word 'Maxim's' on any promotional or advertising materials or in any manner whatsoever." Compl., Ex. B at Standard Terms at ¶ 6.4.

Plaintiff engaged in extensive marketing activities pursuant to the licensing provisions in the Distribution Agreement. Mei-Xin provided its consent for Golden Fortune to use Mei-Xin's intellectual property to promote Maxim's products by, without limitation, wrapping Golden Fortune's trucks with Maxim's logo and intellectual property and creating billboards and other promotional materials using Maxim's trademarks. Compl., at ¶ 38. Maxim's provided Golden Fortune display guides. While the display guides state that they are suggestions, Maxim's communicated to Golden Fortune that Golden Fortune had to comply with them in order to remain Maxim's distributor for the eastern half of the United States. *Id.,* at ¶ 42. Golden Fortune also ordered voluminous point-of-sale materials from Maxim's to market MX Mooncakes in the eastern half of the United States, including, without limitation, several "Polo shirt[ ]" with MX Mooncakes branding that Golden Fortune's personnel routinely wore when promoting MX Mooncakes to the public. *Id.*, at ¶ 43. For the MX Mooncakes that Golden Fortune sells in the United States, Maxim's stamps these products with both the "MX Mooncakes" branding and Golden Fortune's logo and company information. *Id.*, at ¶ 50.

***12** Additionally, Maxim's has previously created and distributed certain instructional advertisements published in Chinese print media (magazines and newspapers) and social media advising consumers about the existence of counterfeit MX Mooncakes in the market and how to distinguish between genuine and counterfeit products. Among the

identifiers, which include scanning QR codes and checking valid expiration dates, is the Golden Fortune marking that is branded on every box of the MX Mooncake sold in Golden Fortune's eastern United States territory. *Id.*, at ¶ 51. Moreover, Golden Fortune's representatives wear shirts with MX Mooncakes branding during countless demonstrations of MX Mooncakes products, emphasizing to the public that Golden Fortune was an arm of Maxim's. These maroon shirts with the MX Mooncakes branding can be seen in several photographs depicting Golden Fortune's representatives at MX Mooncakes demonstrations throughout Golden Fortune's territory in 2019. *Id.*, at ¶ 55. Golden Fortune also wrapped its trucks with MX Mooncake branding, which displayed the MX Mooncake logo alongside Golden Fortune's logo. A true and correct copy of email correspondence between Golden Fortune and Maxim's demonstrating Maxim's control and direction in the wrapping of Golden Fortune's delivery trucks....*Id.*, at ¶ 67.

These extensive activities in conjunction with the longstanding relationship of the parties establish at this stage of the litigation that the trade name is used "in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the trade name licensor and licensee...." *See Neptune,* 190 N.J. Super. at 160-161, 462 A.2d 595. Moreover, these activities are far beyond "merely furnishing advertising materials to a dealer or authorizing the account to display its name," *See e.g.*, *Liberty Sales Assocs.*, 816 F. Supp. 1004, thereby establishing a probability of success on the merits as to the license requirement.

ii. Community of Interest

Under the Act, a community of interest means more than the mere fact that two parties share in the profits realized when a product makes its way from manufacturer to the ultimate consumer. *Neptune,* 190 N.J. Super. at 163, 462 A.2d 595. Courts analyzing whether an alleged franchisee is part of the class that is protected by the Act have looked for specific proof, focusing on certain indicia of control by the supposed franchisor over the supposed franchisee. *See, e.g.*, *id.* at 163–64, 462 A.2d 595. "To develop goodwill generally for a product cannot be enough to create a community of interest. Otherwise, any licensee distributing a brand-name product could claim it has a community of interest with its supplier. For example, a department store selling Sony name products could claim a community of interest with the manufacturer despite the fact that the department store's goodwill investments are not intimately tied to the manufacturer and therefore lack the economic character of genuine franchise investments." *ISI*, 130 N.J. at 359, 614 A.2d 124. The community-of-interest standard "is based on the complex of mutual and continuing advantages which induced the franchisor to reach his ultimate consumer through entities other than his own which, although legally separate, are nevertheless economically dependent upon him." *Id.* (citing *Neptune T.V.*, 190 N.J. Super at 163, 462 A.2d 595). The concept of community of interest is a "broad, elastic and elusive" concept, reflecting a "symbiotic character of a true franchise arrangement and the consequent vulnerability of the alleged franchisee to an unconscionable loss of his tangible and intangible equities." *Id.* at 165, 462 A.2d 595.

The Third Circuit echoed that reasoning: "[C]ommunity of interest exists when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skill that will be of minimal utility outside the franchise." *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.,* 944 *F.*2d 1131, 1143 (3d Cir. 1991) (declaring whether relationship constitutes a franchise is a mixed question of fact and law). In *ISI*, the New Jersey court addressed the "interdependence" of the parties before it and found joint cooperation in resolving maintenance problems, joint representation at educational conventions, and joint cooperation in sales and marketing activities, as supportive of the concept. *Id.* at 365, 614 A.2d 124. In finding a community of interest, the *ISI* court also found that the franchisee had made intangible franchise-specific investments such as installing a base of clients, which would have been lost in the event of termination, and conducting customer studies assessing the product in question. *ISI*, 130 N.J. at 363–64, 614 A.2d 124.

***13** Likewise, Plaintiff here has developed a client base for Defendants in New Jersey and throughout the eastern United States, which Defendants did not have when it entered its first contract with Plaintiff twenty years ago. Compl., at ¶¶19, 21. Defendants gained access to Plaintiff's supermarket and wholesale customers. *Id.*, at ¶ 23. Golden Fortune has been Maxim's only distributor for the eastern half of the United States for over twenty (20) years. *Id.*, at ¶ 32.

Plaintiff also points to a litany of other intangibles. Plaintiff has operated out of its Bayonne, New Jersey warehouse since the inception of the relationship, where its

personnel make calls to Defendants' customers; from which it delivers Defendants' mooncakes; at which customers pick up Defendants' mooncakes; and at which Plaintiff displays Defendants' MX Mooncakes promotional material. Compl., at ¶¶ 47-49.

As previously set out relative to its licensing activities, with Defendants' consent, Plaintiff wrapped Golden Fortune's trucks with Maxim's logo, created billboards and other promotional materials using Maxim's trademarks. Compl., at ¶ 38. Plaintiff also ordered voluminous point-of-sale materials from Maxim's to market MX Mooncakes in the eastern half of the United States, including, shirts with MX Mooncakes branding that Golden Fortune's personnel routinely wore when promoting MX Mooncakes to the public. *Id.*, at ¶ 43. These franchise-specific investments are not transferable to other manufacturers and cannot benefit other customers.

For purposes of satisfying the preliminary injunction requirement that the movant demonstrate a reasonable probability of success on the merits, the Court concludes that based on the record before it, the above examples of franchise-specific investment, which were required to be made and which were necessary to the conduct of the business, are sufficient for plaintiffs to meet their burden.

iii. New Jersey Place of Business

The NJFPA applies only to an agreement "the performance of which *contemplates* or requires the franchisee to establish or maintain a place of business within the State of New Jersey." N.J.S.A. 56:10–4 (emphasis added). The NJFPA defines "place of business" as:

> a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, warehouse, a place of storage, a residence or a vehicle.

N.J.S.A. 56:10–3(f). The Act requires a sales location in New Jersey; mere distribution through an office or warehouse is insufficient. *ISI,* at 349 (quotation omitted).

In *ISI,* the New Jersey Supreme Court, in finding that plaintiff franchisee's facility was a place of business, noted that plaintiff ISI "ha[d] been giving more than one hundred demonstrations a year" at that facility, *ISI,* 130 N.J. at 350, 614 A.2d 124, and that ISI had used the facility to acquaint prospective purchasers with the functioning of its product. *Id.* ISI's only business location was a 6,000–square–foot facility on the sixth floor of a commercial office building in Hackensack, New Jersey. *Id.* ISI specifically constructed its facility so that its franchisor's products could be demonstrated, and instruction given to customers. *Id.*

In the instant case, it cannot be contested to any significant degree whether Plaintiff maintained a New Jersey place of business in accordance with the Act. As set out previously, the parties at minimum contemplated the establishment and maintenance of a New Jersey place of business. Plaintiff's Bayonne warehouse appears on the face of the Distribution Agreement. Compl., at ¶ 46. Plaintiff has operated out of its Bayonne, New Jersey warehouse since the inception of the relationship. Compl., at ¶ 47. Deliveries, sales and marketing of Defendants' products all take place from Plaintiff's Bayonne warehouse. *Id.*, at 47–49. Accordingly, the Act's place of business requirement is satisfied at this stage of the litigation.

iv. NJFPA Sales Requirement

***14** Having met the Act's definition of a franchise for purposes of Plaintiff's application for a preliminary injunction, the Act further maintains a sales threshold, which provides in relevant part:

> (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise;

N.J.S.A. 56:10-4(a)(2).

By its plain language, the statute does not set forth any particular time period within which to make the determination of whether the franchisee's gross sales satisfy the 20% requirement. The time limit is explicit only to and encapsulated within the Act's prong (2) $35,000 requirement. Additionally, the explicit language of prong (3) appears to allow for circumstances where the 20% requirement is met, but also where the 20% requirement is not met, but merely *intended* by the parties to be met. N.J.S.A. 56:10–4 (emphasis added). This understanding of prong (3) is consistent with the Court's discussion in *Colt Industries, Inc. v. Fidelco Pump & Compressor Corp.,* 700 F.Supp. 1330, 1334, n. 4 (D.N.J.

1987) ("Putting aside the language regarding 'intended' sales, which would presumably recognize situations in which the acts of the franchisor prevent the franchisee from meeting the statutory minimum, ..."), *aff'd,* 844 F.2d 117 (3d Cir. 1998). In the absence of an explicitly provided statutory time frame, a determination of what constitutes a reasonable time frame for meeting the requirement is a determination appropriately left for the trier of fact. *See In re Faber Assocs.*, No. 16-2821, 2016 WL 11714223, at *2 (D.N.J. Dec. 13, 2016) ("Importantly ... the 20% requirement does not feature a time period to determine whether the 20% threshold [is] met"); *see also, Harter Equip., Inc. v. Volvo Const. Equip. N. Am., Inc.*, No. 01-4040, 2003 WL 25889139, at *3 (D.N.J. Sept. 23, 2003).

In the Verified Complaint, Plaintiff contends that sales of Defendants' products did exceed 20%, at least at one time and alleges the following:

> 97. Golden Fortune's tax return for its fiscal year, September 1, 2018 and August 31, 2019, reveals annual gross revenue of $45,720,201....
>
> 98. Golden Fortune's gross sales of Maxim's products *between* September 1, 2018 and August 31, 2019, as Maxim's is aware, was approximately $3,959,887.
>
> 99. As Maxim's products are the only significant seasonal product that Golden Fortune sells, these numbers provide for an approximate sales volume – removing Maxim's sales – of quarterly sales of $10,440,079 (($45,720,201 minus $3,959,887) divided by 4).
>
> 100. Adding back in Golden Fortune's Maxim's sales during the period between July 2019 and September 2019 ($3,305,575), the total sales during this period is $13,745,654 ($3,305,575 + $10,440,079), resulting in sales of Maxim's products during this period constituting a percentage of approximately 24% ($3,305,575 divided by $13,745,654).

Compl., at ¶¶ 97 – 100 (emphasis added).

The Act's monetary requirements "single[ ] out for protection" the franchisees "that are especially vulnerable to the disproportionate power of franchisors." *Boyle v. Vanguard Car Rental USA, Inc.*, No. 08-6276, 2009 WL 3208310, at *5 (D.N.J. Sept. 30, 2009). In reviewing this language, Courts must interpret the provision "consistent with its plain meaning." *Oberhand v. Dir., Div. of Taxation*, 193 N.J. 558, 940, 940 A.2d 1202 (2008) (citation omitted). Here, the plain language proves clear (even if surprisingly broad), and compels, on its face, an inquiry into the scope of *intended* revenues, in addition to *actual* revenues. *See* N.J.S.A. 56:10–4 (emphasis added); *see also Liberty Lincoln–Mercury v. Ford Motor Co.*, 134 F.3d 557, 566 (3d Cir. 1998) (citations omitted) (explaining that remedial statutes, like the NJFPA "must be construed broadly to give effect to their legislative purposes").

***15** Here, there is no evidence in the record that the parties intended that revenue from Defendants' products would yield more than 20% of Plaintiff's gross sales. The inquiry then is limited to actual revenues. The mathematical gymnastics employed by Plaintiff to meet the 20% threshold appears to test the flexibility of the Act to its uppermost limits.[8] The Act contains no controlling time period, however, and uses the disjunctive "or" relative to the parties' intentions as to the 20% threshold ((3) where more than 20% of the franchisee's gross sales are intended to be *or* are derived from such franchise. N.J.S.A. 56:10-4(a)(2) (emphasis added)).

As previously stated herein, the New Jersey Legislature has made clear that the Act's terms are to be interpreted broadly "to protect not only retail businesses, but also wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors in this State." N.J.S.A. 56:10-2. The Legislature further cautioned that "the courts have in some cases more narrowly construed the Franchise Practices Act than was intended by the Legislature." *Id.*

Because the Act has no specified period for the 20% of gross sales requirement, despite any potential weaknesses in Plaintiff's allegations, Plaintiff has arguably sufficiently pled the threshold requirement at this early procedural stage. *See*, e.g., *Harter,* No., 2003 WL 25889139, at *4.

v. NJFPA Good Cause Termination Standard

The NJFPA contains a good cause requirement for termination and states in relevant part that:

> It shall be a violation of this act for a franchisor to terminate, cancel, or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

N.J.S.A. 56:10–5. The courts of New Jersey have consistently given effect to the plain meaning of this provision. *See, e.g., Dunkin' Donuts of America v. Middletown Donut Corp.,* 100 N.J. 166, 178, 495 A.2d 66 (1985) (franchisee's attempt to defraud franchisor amounts to good cause under the plain language of the Act); *Shell Oil Co. v. Marinello,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed.2d 475 (1974).

The New Jersey legislature enacted the NJFPA to protect "the innocent franchisee when the termination occurs at the franchisor's convenience." *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co.,* 86 N.J. 453, 432, 432 A.2d 48 (1981). The Act's concern is that once a business has made substantial franchise-specific investments it loses all or virtually all its original bargaining power regarding the continuation of the franchise. Specifically, the franchisee cannot do anything that risks termination, because that would result in a loss of much or all the value of its franchise-specific investments. Thus, the franchisee has no choice but to accede to the demands of the franchisor, no matter how unreasonable those demands may be. *Id.* at 62-63; *ISI* at 357;141.

As previously indicated, Plaintiff has sufficiently pled that it has made substantial franchise-specific investments in the distribution of Defendants' products thereby entitling it to the Act's protections at this early stage of the litigation. Defendants have alleged termination grounds that on their face may appear reasonable and comport with the terms of the Distribution Agreement. Alice Decl., at ¶ 27. Plaintiff has sufficiently alleged, however, that the grounds provided by defendants to terminate the Distribution Agreement do not meet the good cause standard required under the Act. *See* Compl., at ¶¶ 79–86. Whether Defendants' grounds for termination meet the good cause standard set out in the Act, however, cannot be determined at this stage of the litigation.

vi. The Arbitration Provision within the Distribution Agreement

***16** The parties' Distribution Agreement requires that the parties submit their disputes to arbitration. Compl., Ex. B at Standard Terms at ¶ 20. This does not preclude this Court from granting a preliminary injunction, however, to preserve or restore the status quo, provided that the moving party satisfies the standards for preliminary injunctive relief. *Ortho Pharmaceutical Corp. v. Amgen, Inc.,* 882 F.2d 806, 812 (3d Cir. 1989); *Specialty Bakeries, Inc. v. RobHal, Inc.,* 961 F.Supp. 822, 829 (E.D.Pa.), *aff'd,* 129 F.3d 726 (3d Cir. 1997). An arbitration clause does not operate as an impermissible waiver of a judicial forum in violation of the NJFPA because it does not relieve a person of liability but rather determines the forum in which liability may be adjudicated. *Central Jersey Freightliner, Inc. v. Freightliner Corp.*, 987 F.Supp. 289, 300 (D.N.J. 1997), citing *Alpert v. Alphagraphics Franchising, Inc.,* 731 F.Supp. 685, 688 (D.N.J. 1990). Moreover, a statutory provision that conflicts with the Federal Arbitration Act ("FAA") is invalid under the Supremacy Clause. *Id.*

The Act reflects a state policy of providing special protection for franchisees. *See* N.J.S.A. 10-2. The Supreme Court held that allowing states to protect franchisees by proscribing arbitration would open the door for state legislatures to "wholly eviscerat[e] Congressional intent to place arbitration agreements 'upon the same footing as other contracts' and would permit states to override the FAA's policy favoring enforcement of arbitration agreements." *Id.* Because the FAA was intended to foreclose state legislative attempts to limit the enforceability of arbitration agreements, the NJFPA is preempted by the FAA in that regard. Accordingly, the arbitration clause in the parties' Distribution Agreement is enforceable.

C. **Preliminary Injunction Standard**

"Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (internal quotation marks and citation omitted). The movant must show: (1) a reasonable probability of ultimate success on the merits; (2) that the movant will be irreparably injured (or "harmed") if relief is not granted; (3) that the relative harm that will be visited upon the movant by the denial of injunctive relief is greater than that which will be sustained by the party against whom relief is sought; and (4) the public interest in the grant or denial of the requested relief, if relevant. *S & R Corp. v. Jiffy Lube Int'l, Inc.,* 968 F.2d 371, 374 (3d Cir. 1992); *ECRI v. McGraw–Hill, Inc.,* 809 F.2d 223, 226 (3d Cir. 1987). The first two factors are the "most critical," and the Court considers these "gateway factors" before the third and fourth factors. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Only if a plaintiff meets the threshold for these gateway factors does the Court consider the remaining factors; a plaintiff's failure to establish the gateway factors in its favor renders a preliminary injunction inappropriate. *Id.*

i. Likelihood of Success

The "success on the merits" prong is undoubtedly the injunction element upon which the New Jersey Franchise Practices Act exerts the most influence. As such, to determine whether plaintiffs will likely succeed on the merits, the Court must review the purposes and requirements of the Act and apply them to the facts. At this very early stage of the case, on an application for injunctive relief, the movant need only "make a showing of reasonable probability, not the certainty, of success on the merits." *SK & F Co. v. Premo Pharm. Lab., Inc.,* 625 F.2d 1055, 1066 (3d Cir. 1980); *Central Jersey Freightliner, Inc.,* 987 F.Supp. at 295 (plaintiffs need not "demonstrate that their entitlement to a final decision after trial is free from doubt").

***17** Having determined the legal aspects of this case—whether Plaintiff has made a threshold showing under the Act, the Court turns to the equitable considerations bound up with any prayer for injunctive relief. Whether an injunction will be granted rests, *inter alia,* with plaintiffs' showing that they will be irreparably harmed if injunctive relief is withheld. The availability of adequate monetary damages undermines a claim of irreparable injury. *Frank's GMC Truck Ctr. v. General Motors Corp.,* 847 F.2d 100, 102 (3d Cir. 1988).

ii. Irreparable Harm

Next, to demonstrate irreparable harm, a movant has the burden of establishing a "clear showing of immediate *irreparable* injury." *Louis v. Bledsoe*, 438 F. App'x 129, 131 (3d Cir. 2011) (citation omitted) (emphasis added). "Establishing a risk of irreparable harm is not enough [to warrant a preliminary injunction]." *ECRI,* 809 F.2d at 226. Moreover, "the injury created by a failure to issue the requested injunction must be of a peculiar nature, so that compensation in money cannot atone for it." *Acierno v. New Castle City.*, 40 F.3d 645, 653 (3d Cir. 1994) (internal quotation marks and citation omitted). The Third Circuit has repeatedly stated that "the preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 562 F.3d 553, 557 (3d Cir. 2009) (citing *Adams v. Freedom Forge Corp.,* 204 F.3d 475, 487 (3d Cir. 2000)).

Economic injury, compensable in money, cannot satisfy the irreparable injury requirement. *Id.* (citation omitted). Where a plaintiff fails to adduce proof of actual or imminent harm which otherwise cannot be compensated by money damages, an injunction cannot issue. *Id.* The preliminary injunction must be the only way of protecting the plaintiffs from harm. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797 (3d Cir. 1989) (citations omitted). The United States Supreme Court has clarified irreparable harm as follows:

> [I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.... 'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'

Sampson v. Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (quoting *Virginia Petroleum Jobbers Assn. v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)). More than a risk of irreparable harm must be demonstrated. *Acierno v. New Castle County,* 40 F.3d at 655 (citations omitted). "The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury.' " *Id.*

The termination of a long-standing business relationship can result in irreparable harm. *See Carlo C. Gelardi Corp. v. Miller Brewing Co.,* 421 F.Supp. 233, 236 (D.N.J. 1976) (a preliminary injunction case asserting antitrust violations, breach of a distributorship contract, and violation of the New Jersey Franchise Practices Act by a beer manufacturer against a beer distributor, the court held that "the loss of business and good will, and the threatened loss of the enterprise itself, constitute irreparable injury to the plaintiff sufficient to justify the issuance of preliminary injunction") (citing *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205 (2d Cir. 1970); *Interphoto Corp. v. Minolta Corp.,* 417 F.2d 621, 622 (2d Cir. 1969) (citing *Semmes*); *Brennan Petroleum Prods. Co. v. Pasco Petroleum Co.,* 373 F.Supp. 1312, 1316 (D. Ariz. 1974); *cf.* D. Dobbs, Remedies § 12.18, at 884–85 (1973)). The court in *McCarthy v. Arnold Foods Co., Inc.,* 717 F.Supp. 325, 329 (E.D. Pa. 1989) allowed a plaintiff to successfully argue that there was irreparable harm in the termination of a fourteen-year-old wholesalership. The loss of goodwill may constitute irreparable harm for purposes of preliminary injunctive relief. *See Cooper Distributing v.*

Amana Refrigeration, 1992 U.S. Dist. LEXIS 17918, *9 n. 4, 1992 WL 877091 (D.N.J. Jan. 23, 1992) ("*Amana I*"). To reiterate, the New Jersey Legislature has plainly identified this type of harm in the Act and stated, "... these protections are necessary to protect not only retail businesses, but also *wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors in this State.*" N.J.S.A. 56:10-2 (emphasis added).

***18** Where, as here, a franchisor's decision to terminate a franchise is based on bona fide business reasons, an injunction would not be available *except for temporary relief. Westfield,* 86 N.J. at 467, 432 A.2d 48 (emphasis added). Plaintiff seeks a preliminary injunction to maintain the status quo pending an ultimate resolution of this litigation. The quoted language above from the *Westfield* court explicitly states that an injunction is available for "temporary relief" where the decision to terminate a franchise is based on "bona fide business reasons." As the Court summarized in *Atlantic City Coin & Slot Service Co. v. IGT*, 14 F. Supp. 2d 644, 670 (D.N.J. 1998), the inquiry is not whether " 'Humpty Dumpty' [ ] will be put back together again at a later date. From plaintiffs' prayer for declaratory judgment, it is clear that this case is instead about keeping Humpty Dumpty from falling off the wall, having a great fall, and shattering into a million pieces in the first instance." *Id.*, at 670.

Here, Plaintiff alleges in the Verified Complaint that is set to lose its investment in the promotion of Defendants' products, entire good will and market share for MX Mooncakes and all the sales of its other products that routinely are purchased by Asian supermarkets alongside their MX Mooncakes orders. (Verified Complaint, at ¶¶ 91-105). These allegations are sufficient to support a finding of irreparable harm at this stage of the litigation.

iii. The Balance of the Relative Harms

In analyzing the relative harms, the potential loss of years' worth of investment in the promotion and marketing of Defendants' products has been determined to be the type of harm that the Act was designed to proscribe. *See Neptune T.V.,* 190 N.J.Super. at 163–64, 462 A.2d 595; N.J.S.A. 56:10-2. This must be balanced against the relative harm to Defendants. Defendants stand to potentially earn additional profits from a new distributor were an injunction to be denied and until the final decision of this or another court as weighed against the potential harm to Plaintiff. The Court in *Amana I* found in a similar circumstance that equity favored the plaintiff in this circumstance. *Id.* at *5. The Court similarly finds here.

III. CONCLUSION

For all of the foregoing reasons, the Court grants Plaintiff's motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65. Because the Court concludes that Plaintiff has demonstrated that it has a reasonable likelihood of success on the merits in its cause of action arising under the New Jersey Franchise Practices Act, it need not determine the merits of Plaintiff's other claims for relief.

The Court, in its discretion, will stay litigation pending arbitration. *See* FAA, 9 U.S.C. § 3 (authorizing court to stay proceedings pending arbitration where any issue in suit is referable to arbitration); *Central Jersey,* 987 F.Supp. at 300, citing *Optopics,* 947 F.Supp. at 824; *Allied Fire & Safety Equip. Co. v. Dick Enter., Inc.,* 886 F.Supp. 491, 498 (E.D. Pa. 1995) (holding that court has the discretion to stay proceedings pending arbitration where arbitrable claims predominate or where arbitrable claims will have some effect on non-arbitrable claims); *Mutual Benefit Life Ins. Co. v. Zimmerman,* 783 F.Supp. 853, 876 (D.N.J.) ("The decision to stay litigation of nonarbitrable claims pending the outcome of arbitration is one left to the district court ... as a matter of its discretion to control its docket."), *aff'd,* 970 F.2d 899 (3d Cir. 1992).

The Court concludes that a security bond is appropriate. Accordingly, counsel for Plaintiff and Defendants shall meet and confer and make good-faith efforts to agree on a proposed order setting a security bond under Fed. R. Civ. P. 65(c). By **April 18, 2022**, the parties shall jointly file a proposed order setting a security bond; and, to the extent they cannot agree, the parties shall submit a statement of the amount proposed by each side with supporting documents. Although the submission shall not contain further argument regarding matters already decided, the Court expressly holds that the parties' participation in this process shall be without prejudice to any arguments made, or positions taken, by them at later stages in this litigation (including arbitration).

***19** An appropriate Order accompanies this Opinion.

All Citations

Slip Copy, 2022 WL 1002626

Footnotes

1 Plaintiff alleges that Maxim's Caterers has a majority interest in Mei-Xin and/or effectively controls Mei-Xin. Plaintiff further alleges all or most of numerous employees with whom Golden Fortune has dealt in connection with the parties' relationship (including the purported termination thereof) are employees of Maxim's as shown by their LinkedIn profiles and email domains (which contain the "Maxim" name). *Id.* at ¶ 15.

2 *See* Buenaventura, Marie, "Over The Moon With Mooncakes," Manilla Bulletin, *available at*: https://mb.com.ph/2021/09/02/over-the-moon-with-mooncakes/ (last visited Mar. 20, 2022); Metro Style Team, "UPDATE: Hong Kong's Beloved Mooncake Has Exciting New Flavors," Metro.Style, *available at*: https://metro.style/food/features/hong-kong-s-beloved-mooncake/31085 (last visited Mar. 20, 2022); "Dining In/Out (09/02/21)," BusinessWorld, *available at*: https://www.bworldonline.com/dining-in-out-09-02-21/ (last visited Mar. 20, 2022); Abellon, Bam V., "So Popular It's Peddled In The Black Market, HK's Bestselling Mooncake Is Now In Manila," AncX, *available at*: https://news.abs-cbn.com/ancx/food-drink/features/08/29/19/so-popular-its-peddled-in-the-black-market-hong-kongs-bestselling-mooncake-is-now-in-manila (last visited Mar. 20, 2022); Abrahams, Luke, "A Mooncake Pop-Up Is Bringing Magic To Chinatown," Evening Standard, *available at*: https://www.standard.co.uk/reveller/restaurants/a-mooncake-popup-is-bringing-magic-to-chinatown-a3658476.html (last visited Mar. 20, 2022).

3 Mei-Xin's reputation at the time was largely tied to a festival celebrated in Asian countries, the Mid-Autumn Festival, which is an ancient festival marking the traditional time of harvest. Alice Decl., at ¶ 7. The Mid-Autumn Festival is widely celebrated in Hong Kong, mainland China, Taiwan, Macau and Vietnam. *Id.*, at ¶ 8.

4 Defendants offered the following contentions as to contractual breaches. For example, in September 2017, Mei-Xin learned that Hong Kong MX-branded mooncakes were being sold in Texas supermarkets, and had been distributed by Golden Fortune. Alice Decl., ¶ 26 and n.1. Texas is outside Golden Fortune's territory. *Id.*, ¶ 26 and n. 1. In September 2018, Mei-Xin learned that Hong Kong MX-branded mooncakes were being sold in an Oklahoma supermarket, and had been distributed by Golden Fortune. *Id.* Oklahoma is outside Golden Fortune's territory. *Id.* In September 2019, Mei-Xin learned that Hong Kong MX-branded mooncakes were again being sold in Texas supermarkets, and had been distributed by Golden Fortune. *Id.*

5 New Jersey Franchise Practices Act, N.J.S.A. 53:10-1, *et seq.*

6 Service upon Defendants was effectuated pursuant to Fed. R. Civ. P. 4(f)(3). See Declaration of David M. Dugan (ECF 14).

7 *See* Alice Decl., ¶¶ 34 – 38, *et seq.*

8 Plaintiff asserts that "During the peak sales season for MX Mooncakes (July through August annually), Golden Fortune generates well over twenty (20%) of its sales from sales of Maxim's products." Compl., at ¶ 91.

End of Document

2022 WL 3536494
Only the Westlaw citation is currently available.
NOT PRECEDENTIAL
United States Court of Appeals, Third Circuit.

GOLDEN FORTUNE IMPORT & EXPORT CORPORATION,

v.

MEI-XIN LIMITED; MAXIM CATERERS LIMITED Appellants

No. 22-1710, No. 22-1885
|
Opinion Filed: August 5, 2022

On Appeal from the United States District Court for the District of New Jersey

(Civil No. 2:22-CV-01369)

District Judge: Honorable Julien Xavier Neals

Submitted Under Third Circuit L.A.R. 34.1(a) August 4, 2022

Before: GREENAWAY, JR., MATEY, and NYGAARD, Circuit Judges.

OPINION[*]

GREENAWAY, JR., Circuit Judge.

***1** When evaluating a motion for a preliminary injunction, the gatekeeping issues to resolve are whether the movant is likely to be successful on the merits and is more likely than not to suffer irreparable harm should we deny its request. Here, Golden Fortune Import & Export Corporation ("Golden Fortune") argues that it satisfies every requirement to secure a preliminary injunction against the termination of its Distribution Agreement ("Agreement") with Mei-Xin (Hong Kong) Limited ("Mei-Xin"). We disagree. We will reverse based on Golden Fortune's failure to show a likelihood of success on the merits and irreparable harm.

I. BACKGROUND

Plaintiff-Appellee Golden Fortune is a distributor of Asian groceries—and quite a successful one at that. Boasting over "40 years of experience sourcing high quality products," it imports and distributes 1,599 products from over 150 brands, including its own stand-alone brand, throughout the United States. J.A. 723 ¶¶ 4-5. It also offers service logistics, marketing, and warehousing services to its customers.

Defendant-Appellant Mei-Xin is a Hong Kong company that manufactures internationally renowned mooncakes[1] and other pre-packaged bakery products. When Mei-Xin decided to expand to the United States in 2000, it engaged Golden Fortune along with another company[2] to distribute its products and to develop a market for the brand there. Through their two-decade-long business relationship, Golden Fortune has enabled Mei-Xin to become the number one mooncake brand in the eastern United States. Golden Fortune has benefited as well. In the only fiscal year for which Golden Fortune provided its financial information (September 1, 2018 to August 31, 2019), Mei-Xin products accounted for $3,959,887—or 8.6%—of Golden Fortune's $45,720,201 in gross sales.

In 2021, the parties entered their most recent Distribution Agreement, which is the subject of this appeal. As relevant here, the Agreement provides that Golden Fortune will sell Mei-Xin "Mooncakes and Pre-packaged Bakery Products" in the eastern United States and Panama. J.A. 225 §§ 4-5. It covers the period from May 1, 2021 to April 30, 2022. There are two means for early termination. First, either party has the "right to terminate this Agreement during the Term by giving the other thirty-day (30) day [*sic*] written notice." J.A 229 § 7.1. Second, Mei-Xin has the unilateral right to "terminate ... immediately without notice" if Golden Fortune fails to comply with "any provision." J.A. 229 § 7.2(a). In addition, the Agreement contains an arbitration clause providing for the arbitration of "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof." J.A. 231 § 20.

***2** In 2017, Golden Fortune's annual sales growth of Mei-Xin's products began experiencing a significant decline. In 2020, Mei-Xin warned Golden Fortune that it would exercise its discretion to replace Golden Fortune with another distributor if there was not adequate improvement. When that improvement did not occur, Mei-Xin purported to terminate the Agreement via email on January 21, 2022. Golden Fortune asserted that the termination was insufficient under Sections 7.1 and 11 of the Agreement, prompting Mei-Xin to send another notice of termination on March 3, 2022.

This time, Golden Fortune claimed that the termination was invalid under the New Jersey Franchise Practices Act ("NJFPA"). The NJFPA "define[s] the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements." N.J. Stat. Ann. § 56:10-2 [hereinafter § 56:10-2]. It was enacted "to protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power[.]" *Id.* Consistent with its protective purpose, it prohibits franchisors from terminating a franchise "without good cause." § 56:10-5. In Golden Fortune's view, Mei-Xin failed to satisfy the good cause requirement.

Asserting that the NJFPA is inapplicable, Mei-Xin reiterated its purported termination and engaged a replacement distributor. In response, Golden Fortune commenced this action in the District Court for the District of New Jersey on March 14, 2022 against Mei-Xin and its parent company, Maxim's Caterers Limited ("Maxim's"). Golden Fortune alleged three causes of action: (1) violation of the NJFPA, (2) breach of the implied covenant of good faith and fair dealing, and (3) tortious interference. In addition, Golden Fortune sought a declaratory judgment that it continues to be Mei-Xin's exclusive distributor and that all previous termination efforts were invalid. Lastly, Golden Fortune filed a motion for a preliminary injunction seeking to prohibit Mei-Xin and Maxim's from terminating the Distribution Agreement and from engaging any other distributor in the eastern United States.

Although it found that the dispute was arbitrable, the District Court granted Golden Fortune's motion for a preliminary injunction. The District Court ordered that the parties enter an "alternative security arrangement" under which Golden Fortune would purchase 17% more product annually from Mei-Xin. J.A. 44-45. The preliminary injunction and security agreement are to remain effective until the parties complete arbitration. On April 18, 2022, Mei-Xin and Maxim's filed a timely notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a).

"In reviewing the grant or denial of a preliminary injunction, we employ a tripartite standard of review: findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Osorio-Martinez v. Att'y Gen. U.S.*, 893 F.3d 153, 161 (3d Cir. 2018) (quoting *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015)).

III. DISCUSSION

We disagree with the District Court's grant of a preliminary injunction in favor of Golden Fortune. Golden Fortune has not shown a likelihood of success on the merits or that it will more likely than not suffer irreparable harm in the absence of the grant of a preliminary injunction.

A. Preliminary Injunction

Preliminary injunctive relief is an "extraordinary remedy" that "should be granted only in limited circumstances." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). In determining whether to grant a request for injunctive relief, courts consider four factors. These factors are: (1) whether the movant has shown "a reasonable probability of eventual success in the litigation"; (2) whether the movant "will be irreparably injured ... if relief is not granted"; (3) "the possibility of harm to other interested persons from the grant or denial of the injunction"; and (4) whether granting the preliminary relief will be in "the public interest." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)).

***3** The first two factors are the "most critical." *Id.* at 179. They are "gateway factors," meaning that failure to satisfy them ends the inquiry. *Id.* Once the gateway factors are met, the court, "in its sound discretion," should balance all four factors. *Id.* at 176.

i. Likelihood of Success on the Merits

A likelihood of success "requires a showing significantly better than negligible but not necessarily more likely than not." *Id.* at 179 (citing *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)).

Here, Golden Fortune has alleged that Mei-Xin's termination of the Distribution Agreement violates the good cause standard under the NJFPA. *See* § 56:10-5. This claim turns on whether the NJFPA applies to Golden Fortune. The District

Court concluded it does. We disagree for two primary reasons. First, Golden Fortune and Mei-Xin do not share the requisite community of interest. *See* § 56:10-3(a). Second, 20% of Golden Fortune's annual gross sales are not derived from Mei-Xin. *See* § 56:10-4(a).

1. Community of Interest

The NJFPA defines franchise as "a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a *community of interest* in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." § 56:10-3(a) (emphasis added). Golden Fortune cannot satisfy the "community of interest" element.

The lynchpin of the community of interest element—and the NJFPA more generally—is the vulnerability of the purported franchisee. *See, e.g., N.J. Am., Inc. v. Allied Corp.*, 875 F.2d 58, 65 (3d Cir. 1989) (observing that the New Jersey legislature enacted the NJFPA to protect the "vulnerable position" of franchisees); *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 466 (N.J. 1981) (explaining that "[r]estoration of the loss accords with the legislative desire to protect the innocent franchisee when the termination occurs at the franchisor's convenience"). We consider several factors bearing on the purported franchisee's vulnerability in determining whether this element is satisfied. They include: the "(1) [the] licensor's control over the licensee, (2) the licensee's economic dependence on the licensor; (3) disparity in bargaining power, and (4) the presence of a franchise-specific investment by the licensee." *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.*, 944 F.2d 1131, 1140 (3d Cir. 1991).

The first factor—control—requires that the purported franchisee act at the "whim, direction and control of a more powerful entity whose withdrawal from the relationship would shock a court's sense of equity." *Colt Indus. Inc. v. Fidelco Pump & Compressor Corp.*, 844 F.2d 117, 120–21 (3d Cir. 1988). Indicators of control include sales quotas and whether advertising and promotional materials provided to the purported franchisee are merely suggested as opposed to required. *Id.*

The second factor—economic dependence—refers to "the complex of mutual and continuing advantages which induced the [purported] franchisor to reach his ultimate consumer through entities other than his own which, although legally separate, are nevertheless economically dependent upon him." *Cassidy Podell Lynch, Inc.*, 944 F.2d at 1141 (quoting *Neptune T.V. & Appliance Serv., Inc. v. Litton Microwave Cooking Prods. Div.*, 462 A.2d 595, 600-01 (N.J. Super. Ct. App. Div. 1983)). Relying on a "single supplier" does not "automatically" render a distributor economically dependent on that supplier for purposes of the NJFPA. *Id.* at 1141-42. The parties must intend to create a franchisor-franchisee relationship when entering the business agreement. *Id.*

***4** The third factor—disparity in bargaining power—means that the purported franchisor has "become[ ] dependent as a result of the relation itself." *Id.* at 1142. It does not exist ex ante. Instead, it occurs when the purported franchisee has been "induce[d] or require[d] ... to invest in skills or assets that have no continuing value to" the franchisee if the business relationship is terminated. *Id.* The fourth and final factor refers to "any significant specific investment in capital equipment [by the purported franchisee] that could only be used" for the benefit of the purported franchisor. *Id.*

The District Court concluded that a community of interest existed between Golden Fortune and Mei-Xin. In doing so, it relied primarily on perceived mutual advantages: Golden Fortune developed a client base for Mei-Xin in the eastern United States, and Mei-Xin gained access to Golden Fortune's supermarkets and wholesale customers. In our view, these allegations do not suffice and the above factors weigh against finding a community of interest.

We begin with control. The Distribution Agreement is an ordinary commercial contract, and not "so burdensome as to create the unfettered control typically present in a franchise relationship." *Id.* at 1141. While Mei-Xin did provide some guidance to Golden Fortune as to marketing, these were not requirements. Instead, Golden Fortune kept its promise to "work together with [a] brand's in-house marketing team." J.A. 724 ¶ 13.

As for economic dependence, the District Court correctly identified some mutual advantages stemming from the Distribution Agreement. However, that Golden Fortune came to rely exclusively on Mei-Xin for its mooncakes does not transform the Distributor Agreement into a franchisor-franchisee relationship where that intent did not appear to exist for either party in the first place. *Cassidy Podell Lynch, Inc.*, 944 F.2d at 1141-42. The facts here

indicate a lack of economic dependence: Golden Fortune distributes approximately 1,598 products aside from Mei-Xin's mooncakes, and Mei-Xin products account for only 8.6% of Golden Fortune's annual revenue.

Nor has Golden Fortune become so dependent on Mei-Xin as to create a disparity in bargaining power. Golden Fortune did not invest in skills that have no continuing value beyond the Distribution Agreement. Indeed, the Agreement offered Golden Fortune one of many opportunities to "sourc[e] high quality products"—a practice that Golden Fortune has been engaged in for 40 years. J.A. 723 ¶ 4. Nor did Mei-Xin require Golden Fortune to invest in assets. Lastly, although Golden Fortune has invested in marketing programs specific to Mei-Xin, those alone do not warrant a different result. Taken together, these factors indicate that Golden Fortune and Mei-Xin do not share the community of interest required under the NJFPA. *See* § 56:10-3(a).

2. 20% Gross Sales Requirement

Further, Golden Fortune does not meet the 20% gross sales requirement. The NJFPA applies only "(2) where gross sales of products ... between the franchisor and franchisee ... have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from [the] franchise." § 56:10-4(a)(2)-(3).

We must decide whether the "12 months next preceding the institution of suit" clause applies to both subsections (a)(2) and (a)(3). We interpret the provision "consistent with its plain meaning." *Oberhand v. Dir., Div. of Taxation*, 193 N.J. 558, 568 (N.J. 2008) (citation omitted). We must also construe remedial statutes like the NJFPA "broadly to give effect to their legislative purpose." *Liberty Lincoln–Mercury v. Ford Motor Co.*, 134 F.3d 557, 566 (3d Cir. 1998).

***5** While the District Court concluded no temporal limitation applies, we think the better reading is that "20% of a franchisee's gross sales *over a 12-month period* are intended to be or are derived from the franchise." Unlike § 56:10-4(a)(2), which places a 12-month limitation on the $35,000 gross sales requirement, § 56:10-4(a)(3) contains no temporal limitation. Nonetheless, the canon of consistent usage indicates that we should also apply the 12-month limit to subsection (a)(3). Pursuant to that canon, "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *United States v. Scott*, 14 F.4th 190, 197 (3d Cir. 2021) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)). Both subsections (a)(2) and (a)(3) reference "gross sales" requirements. Because "gross sales" in subsection (a)(2) refers to gross sales over a 12-month period, we should read "gross sales" in subsection (a)(3) as referring to a 12-month period as well.

If there were any ambiguity, the context confirms our interpretation. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (explaining that we "read the words [of a statute] 'in their context' " and do not construe "isolated provisions") (citations omitted). Section 56:10-3(a) defines a "franchise" as "a written arrangement for a definite or indefinite period." Here, the Distribution Agreement is for a term of 12 months. It follows that we should consider "gross sales" over that period for purposes of the 20% requirement.

Lastly, our interpretation is consistent with the purpose of the NJFPA, which is to "protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power[.]" § 56:10-2. Reading a 12-month limitation into the 20% gross sales requirement does just that: it offers security to franchisees that depend on a franchisor for the success of their business. By contrast, distributors who rely on several different supply streams are less likely to need protection if one supplier terminates the business relationship.

Applying the 12-month limitation, Golden Fortune has not satisfied the 20% gross sales requirement. Between September 1, 2018 and August 31, 2019, Golden Fortune derived $3,959,887—or 8.6%—of its $45,720,201 in gross sales from Mei-Xin. Golden Fortune urges us to focus only on the "peak sales season for MX Mooncakes"—namely, the three-month period surrounding the Mid-Autumn Festival during which 24% of Golden Fortune's gross sales were derived from Mei-Xin. J.A. 192 ¶ 91. We decline to do so. That approach poses an inconsistent usage problem. It disregards that the Distribution Agreement covers a 12-month period and contemplates distribution of a myriad of non-seasonal Mei-Xin products apart from the mooncake. Lastly, it does not further the protective purpose of the NJFPA: without the Mei-Xin mooncake, Golden Fortune can still make 91.4% of its gross sales and distribute 1,598 other products.

ii. Irreparable Harm

The District Court held that Golden Fortune's allegations of irreparable harm were sufficient. **J.A. 36.** Specifically, Golden Fortune alleged that it was set to lose (1) its investment in the promotion of Defendants' products, entire good will and market share for MX Mooncakes; and (2) all the sales of its other products that routinely are purchased by Asian supermarkets alongside their mooncake orders. We disagree.

To establish irreparable harm, there must be "a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat.' " *Acierno v. New Castle Cnty.*, 40 F.3d 645, 655 (3d Cir. 1994) (citation omitted). The mere "risk of irreparable harm is not enough." *ECRI v. McGraw–Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). Further, the alleged harm "must be of a peculiar nature, so that compensation in money cannot atone for it." *Acierno*, 40 F.3d at 653 (internal quotation marks and citation omitted).

***6** It follows that economic loss, including a "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also Acierno*, 40 F.3d at 653. For instance, in *Frank's GMC Truck Center, Inc.*, we reversed the grant of a preliminary injunction where a franchisor ceased supplying some of its products, and a franchisee argued that its inability to sell those products would make potential customers "more reluctant" to purchase the remaining products. *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988). We concluded that the loss of "sales and service customers, and therefore profits," was not irreparable harm. *Id.*

Such losses can rise to the level of irreparable harm only where they would "force[ ] [the business] to shut down." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 802 (3d Cir. 1989). As our precedent makes clear, this threshold is a significant one. In *Instant Air Freight Co.*, we concluded that there was no irreparable harm where a company stood to lose 80% of its business from the termination of a business agreement. *Id.* That 20% of the business survived meant that the company would not be "forced into bankruptcy." *Id.* We also noted that the company was "free to secure other business," and the contract at issue would terminate in under two years regardless of our decision. *Id.*

Even where allegations of economic injury are coupled with allegations of non-economic injury, a preliminary injunction is nonetheless inappropriate where money damages are adequate. *Id.* Apart from losing a substantial portion of its business, the plaintiff in *Instant Air Freight Co.* also alleged the loss of "many if not all of its employees, and its goodwill and reputation in the industry." *Id.* at 798-99, 801. In holding that money damages were sufficient in *Instant Air Freight Co.*, we relied on three factors. First, that "[m]oney damages ... should be provable with reasonable certainty given the" two-decades-long business relationship. *Id.* at 802. Second, we considered that the company could "procur[e] suitable substitute performance by means of money awarded as damages," which would "compensate [the business] fully for its lost profits and other injuries it may prove." *Id.* (quoting Rest. (Second) of Contracts § 360 (Am. L. Inst. 1981)). Third, we concluded that the money damages were collectable given the supplier's high annual revenue. *Id.*

At bottom, Golden Fortune argues that it "stand[s] to lose sales and ... customers, and therefore profits," which does not qualify as irreparable harm. *Frank's GMC Truck Ctr., Inc.*, 847 F.2d at 102. Further, this is not a scenario where termination of the Distribution Agreement would "force[ ] [Golden Fortune] to shut down." *Instant Air Freight Co.*, 882 F.2d at 802. Golden Fortune imports and distributes at least 1,599 products and sells over 150 brands as well as its own brand. In all, Mei-Xin products constitute only 8.6% of its $45 million in annual revenue. In light of our prior holding that losing 80% of one's business does not constitute irreparable harm, we are hard pressed to hold that Golden Fortune has made the requisite showing here. *See id.*

To be sure, the "loss of control of reputation, loss of trade, and loss of goodwill" may constitute irreparable harm in some contexts. *See, e.g., Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) (citing *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3d Cir. 1990)). To the extent that a plaintiff alleges these harms, we require it to demonstrate that its business "is different from other types of commerce in such a way that normal breach of contract remedies could not provide a remedy." *Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 179 (3d Cir. 2008); *see also Pappan Enters., Inc.*, 143 F.3d at 807 (holding that the "right of the public not to be deceived or confused" warrants a preliminary injunction where two parties were using the same trademark) (quoting *Opticians Ass'n of Am.*, 920 F.2d at 197); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 589-90, 596 (3d Cir. 2002) (holding that a preliminary injunction is warranted where a false or

misleading ad would produce consumer confusion, resulting in a "loss of market share" "[i]n a competitive industry where consumers are brand-loyal").

***7** Where the alleged harms stem from the termination of a business agreement, we require evidence that the moving party has not been able to perform on contracts with third parties because of the loss, or for it to point to a loss of goodwill or reputation with specific customers. *See Bennington Foods LLC*, 528 F.3d at 179. Indeed, the harm caused must be direct. It is not enough for the claim to be "two-step," meaning (1) because the supplier is not distributing, the distributor cannot distribute, and (2) the lack of the delivery harms the reputation with third parties who do not receive the distribution. *Id.* at 180. That is a standard breach of contract case, and "there is no reason to make the extended causal inferences necessary to find irreparable harm to reputation." *Id.*

Although Golden Fortune has also alleged non-economic harms, such as the loss of good will and market share, the adequacy of monetary damages weighs against a finding of irreparable harm. Money damages are readily ascertainable given the two-decades-long history between Golden Fortune and Mei-Xin. *Id.* Money damages would allow Golden Fortune to seek substitute performance, which will fully compensate it—especially because other companies have mirrored the quality of Mei-Xin mooncakes, "narrowing [ ] the gap between MX Mooncakes and competitor brands" over the years. J.A. 873 ¶ 13. Lastly, there is a high likelihood that money damages will be collectable given the international success of Mei-Xin and Maxim's. *See Instant Air Freight Co.*, 882 F.2d at 802.

Because Golden Fortune has failed to demonstrate that its business "is different from other types of commerce" or cite specific instances of the loss of good will from its inability to distribute Mei-Xin products, we have no reason to depart from our general rule. *Bennington Foods LLC*, 528 F.3d at 179. Any allegations of a loss of good will are exactly the kind of "two-step" claims we have previously rejected. *See id.* at 180.

IV. CONCLUSION

For these reasons, we will reverse the order of the District Court based on Golden Fortune's failure to satisfy the requirements for a preliminary injunction.

All Citations

Not Reported in Fed. Rptr., 2022 WL 3536494

Footnotes

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1 A mooncake "is the quintessential food consumed and/or gifted during one of China's most important holidays—the Mid-Autumn Festival"—which "takes place annually, falling sometime between September and October." J.A. 179 ¶ 17.

2 Chevalier International (USA) Inc. was responsible for the western United States, while Golden Fortune was responsible for the eastern United States.

End of Document

Applying the Model Law's Standard for Interim Measures in International Arbitration

Jose F. Sanchez*

Commentators and practitioners regard Article 17A of the Model Law on International Commercial Arbitration as the international standard for interim measures in international arbitration. Practitioners apply Article 17A often, even when the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, and even in emergency arbitrations and in investment treaty arbitrations.

To apply Article 17A correctly, however, practitioners must look at Article 2A(1) of the Model Law, which orders practitioners applying any Article of the Model Law, including Article 17A, to follow several mandatory principles of construction. Specifically, Article 2A orders practitioners to have 'regard' to the 'international origin' of the Model Law, 'the need to promote uniformity in its application,' and 'the observance of good faith.'

Those principles of construction of Article 2A(1) have four specific and mandatory consequences on the application of the standard set forth in Article 17A, namely, that practitioners (1) must consider Article 17A's travaux préparatoires, and must apply Article 17A in a way that does not contradict those travaux préparatoires; (2) must consider, but are not bound to follow, the publicly-available decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it; (3) cannot construe Article 17A only under the canons of construction that they would apply to a domestic statute in the jurisdiction relevant to the case; and (4) must factor in equitable considerations.

This article helps practitioners with the first two of those four consequences. Specifically, to help practitioners apply the standard for interim measures set forth in Article 17A uniformly and correctly, i.e. in a way that complies with Article 2A's mandatory principles of construction, this article analyses the travaux préparatoires of Article 17A, the scholarly writings that have analysed that article, and the publicly available decisions by courts and arbitrators around the world that have applied it, including decisions issued by arbitrators acting for the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and excerpts of non-publicly available decisions issued by arbitrators acting for the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).

For the reader's convenience, this Article analyses the travaux préparatoires and applicable authorities separately for each of the following elements of Article 17A's standard: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of

* Jose F. Sanchez (FCIArB) is counsel in the New York office of Vinson & Elkins, is recognized by *Chambers and Partners* on international arbitration in the United States and Latin America, has served as arbitrator in cases handled by the International Chamber of Commerce (ICC) and other institutions, and is a fellow of the New York branch of the Chartered Institute of Arbitrators. This article expresses the opinions of the author only, and not of any of the entities with which he is affiliated. The author would like to thank Andrea Cohen and Ezra C. Sutton for their valuable help in proofreading this article. Email: josesanchez@velaw.com.

Sanchez, Jose F. 'Applying the Model Law's Standard for Interim Measures in International Arbitration'. *Journal of International Arbitration* 37, no. 1 (2020): 49–86.

convenience; reasonable possibility of success on the merits; jurisdiction; and other elements and considerations.

That analysis results in several principles of construction relevant to each element of Article 17A's standard. The article ends with a chart – effectively a cheat sheet for practitioners – that lists those principles of construction for each element of the standard, and explains the rationale of those principles. It is the author's hope that this chart will help practitioners apply each element of Article 17A's standard correctly and uniformly.

Keywords: Interim measures, Conservative measures, Model Law, Article 17A, Article 2A, UNCITRAL Rules, Article 26, Emergency arbitration, Preliminary orders, Standard for interim measures, Conditions for interim measures, Standard for emergency arbitration, Standard for preliminary orders, Uniformity

1 INTRODUCTION

In 2006, the United Nations Commission on International Trade Law (UNCITRAL) revised its Model Law on International Commercial Arbitration ('the Model Law') by adding, among others, Article 17A, which sets forth the standard that a party requesting interim measures in international arbitration must meet to obtain those measures.[1]

Commentators and practitioners regard Article 17A of the Model Law as the international standard for interim measures in international arbitration, and practitioners apply it often, even when the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, and even in emergency arbitrations and in investment treaty arbitrations. Given how relevant Article 17A is, it is imperative that practitioners apply it correctly. To do so, they must look at Article 2A(1) of the Model Law, which orders practitioners applying any article of the Model Law, including Article 17A, to follow several mandatory principles of construction. Specifically, Article 2A orders practitioners to have 'regard' to the 'international origin' of the Model Law, 'the need to promote uniformity in its application,' and 'the observance of good faith.'

Those principles of construction of Article 2A(1) have four specific and mandatory consequences for the application of Article 17A. Specifically, practitioners (1) must consider Article 17A's travaux préparatoires and apply Article 17A

---

[1] Specifically, United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments* as adopted in 2006, 10 (2008), www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 18 June 2019) (hereinafter 'Model Law') establishes that an applicant for interim measures 'shall satisfy the arbitral tribunal' that (1) it is 'likely' to suffer '[h]arm not adequately reparable by an award of damages' if the interim measure is not granted; (2) 'such harm substantially outweighs the harm … likely to result to the party against whom the measure is directed if the measure is granted'; and (3) '[t]here is a reasonable possibility that the [applicant] will succeed on the merits of the claim.'

in a way that does not contradict those travaux préparatoires[2]; (2) must consider, but are not bound to follow, the publicly-available decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it[3]; (3) cannot construe Article 17A only under the canons of construction that they would apply to a domestic statute in the jurisdiction relevant to the case; and (4) must factor in equitable considerations.

Practitioners applying Article 17A's standard should have little difficulty following (3) and (4) above. Conversely, (1) and (2) above are harder to follow. That is, due to the time constraints associated with requests for interim measures, practitioners might not confirm if they are applying Article 17A's standard in a way that does not contradict its travaux préparatoires, and might not consider the decisions by courts and arbitrators around the world that have applied it, or the scholarly writings that have addressed it.

To aid with that, this article analyses the travaux préparatoires of Article 17A, the publicly available decisions by courts and arbitrators[4] around the world that have applied it,[5] and the scholarly writings that have analysed it. For the reader's convenience, this article analyses the following elements of Article 17A's standard separately: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of convenience; reasonable possibility of success on the merits; jurisdiction; and other elements and considerations.

That analysis draws, among others; the following conclusions for each element of Article 17A's standard[6]:

---

2 The term travaux préparatoires refers to the documents that reflect the negotiation and drafting history of a statute or convention, in this case the Model Law.

3 The burden of finding and presenting those decisions and scholarly writings lies with counsel, not the arbitrators. Dean Lewis, The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore, International Arbitration Law Library, Volume 36, 43 (Kluwer Law International 2016).

4 Specifically, this Article analyses publicly available decisions issued by arbitrators acting for the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) and excerpts of, or descriptions of, non-publicly available decisions issued by arbitrators acting for the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).

5 This Article seeks to aid practitioners by covering the many scholarly writings and decisions that the author has located. But, it would be impossible for this Article to capture all scholarly writings that have analysed Art. 17A, and all the arbitral and court decisions that have applied it. Instead, practitioners should confirm whether there are additional writings or decisions supporting their case.

6 This should help practitioners spend fewer resources arguing over how to construe Art. 17A's standard; practitioners dealing with interim measures often spend significant resources arguing over how to construe the applicable standard. *See* e.g. Andrea Carlevaris & Jose Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, 25(1) ICC Int'l Court of Arb. Bull. 20 (2014) (providing examples of cases where parties disputed the applicable standard for requests for interim measures by an emergency arbitrator); Johan Lundstedt, *SCC Practice: Emergency Arbitrator Decisions* 17–18 (1 Jan. 2010–31 Dec. 2013), https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf (accessed 20 June 2019) (hereinafter 'SCC Practice Note 2010-2013') (Case No. EA 010/2012) (parties did not 'fully agree' on the applicable standard).

- *Burden of proof*: applicants must meet the standard (arbitrators have no discretion to issue the measures otherwise) but Article 17A does not establish a specific burden of proof.
- *Urgency*: urgency cannot be considered a separate element of the standard, but can be considered implicitly included as part of the element of harm, or satisfied when the relief requested cannot await a final award or the constitution of the tribunal.
- *Harm*: applicants need not prove that their harm is certain, but must prove – not only allege – that it is likely; the harm is not adequately reparable by an award of damages if respondent is unlikely to honour such award; a large harm is unnecessary, but a small harm may be insufficient, to obtain the interim measures; Article 17A covers (1) harm that is truly irreparable monetarily, and (2) harm that can be repaired monetarily through a final award but that would be 'comparatively complicated to compensate' through such award.
- *Balance of convenience*: irrelevant to the balance of convenience is any harm to the applicant that would remain equally likely if the interim measures are ordered or that would be adequately reparable by an award of damages; irrelevant to the balance of convenience is any harm to a party 'affected by the measure' that is not the party 'against whom the measure is directed'; a party is more likely to prove that the balance of convenience tilts in its favour if it presents an undertaking; a respondent's declaration that it will not infringe the rights at issue is relevant to the balance of convenience; the stronger the merits, the less the applicant must show on the balance of convenience; an applicant's refusal to mitigate damages by accepting a unilateral imposition by respondent might not alter the balance of convenience.
- *Reasonable possibility of success and of jurisdiction*: the 'reasonable possibility' of success refers to the merits only of the underlying claim relevant to the application, not to the merits of the application for interim measures or of the entire dispute; implicit in Article 17A is a requirement to show a 'reasonable possibility' of jurisdiction but only over the claim relevant to the application; the 'reasonable possibility of success' is a low threshold that falls below a 50% chance of success and requires the applicant to show only slightly more than that its rights are plausible; an applicant can show a reasonable possibility of success even if its claim is based only on inferences; whether an applicant has shown a reasonable possibility of success depends on the stage of the proceeding and the information available at that time; a determination of reasonable possibility of success or jurisdiction does not preclude a subsequent award or procedural order to the contrary.

This article is structured as follows. It first presents the background and relevant applications of Article 17A (section 2), then the background and relevant applications of Article 2A (section 3), and then the travaux préparatoires of each element of Article 17A's standard, the decisions by courts and arbitrators around the world that have applied those elements, and the scholarly writings that have analysed them (section 4). The article ends with a chart that lists the principles of construction of each element of Article 17A's standard, which stem from Article 17A's travaux préparatoires and the authorities that have applied or analysed that article, and explains the rationale of those principles (section 5). Practitioners should apply those principles to ensure that they apply the standard correctly and uniformly.[7]

2 BACKGROUND AND SIGNIFICANT APPLICATIONS OF ARTICLE 17A OF THE MODEL LAW

The rules of most international arbitration institutions do not set forth the standard that an applicant must meet for obtaining interim measures,[8] and arbitration clauses rarely set forth that standard.[9]

To find the applicable standard, practitioners might look at the domestic laws relevant to their case, usually that of the seat of the arbitration (*lex arbitri*)[10] or, less

---

7 *See* Gary B. Born, *International Commercial Arbitration* 2466 (2d ed. 2014) ('Art. 17A … should be interpreted in light of international authority from other national courts and arbitral tribunals seated elsewhere … to avoid the costs of a purely national approach to this issue and to encourage formation of international principles in this field'); Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 26 (4th ed. 2019) ('The enactment of … the Model Law is … only half the story: the true test … is its application by the users and national courts').

8 *See* e.g. 2017 ICC Rules, Art. 28(1) ('[T]he arbitral tribunal may … order any interim or conservatory measure it deems appropriate'); 2014 ICDR Rules, Art. 24 (1) ('[T]he arbitral tribunal may order or award any interim or conservatory measures it deems necessary'); 2014 LCIA Rules, Art. 25.

9 *See* Christopher Boog, *Chapter 18, Part III: Interim Measures in International Arbitration*, in *Arbitration in Switzerland: The Practitioner's Guide* 2543, 2551 (2d ed., Manuel Arroyo ed. 2018) ('[C]ases in which the parties have agreed on the prerequisites for ordering interim measures or the law determining such standards are outnumbered by cases in which there is no such agreement'); Born, *supra* n. 7, at 2467 (parties 'seldom' agree on a standard).

10 *See* Julian Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Int'l Court Arb. Bull. 6 -7 (2000) (providing examples where arbitrators applied domestic law); John Beechey & Gareth Kenny, *How to Control the Impact of Time Running Between the Occurrence of the Damage and Its Full Compensation: Complementary and Alternative Remedies in Interim Relief Proceedings*, in *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Volume 5 Dossiers of the ICC Institute of World Business Law, 21 (Filip de Ly & Laurent Lévy eds, International Chamber of Commerce 2008); Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice, 1999 -2008, in International Chamber of Commerce, Interim, Conservatory and Emergency Measures in ICC Arbitration*, (Special Supplement 5) ICC ICArb. Bull. 10 (2011) (hereinafter `Yesilirmak 1999 -2008'); Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* 359, ICC Publication No. 729 (Paris 2012).

frequently, the law that governs the parties' underlying contract (*lex causae*).[11] However, domestic laws on international arbitration can be obsolete, unclear, or simply unhelpful, so, rather than applying domestic law, international arbitrators handling requests for interim measures often prefer to apply a standard from an international source.[12]

Up until 2006, however, such an international standard was not codified, and international arbitrators would have to deduce it from arbitral awards and scholarly writings. This lack of a codified, clear standard gave some arbitrators pause. In January 2000, the UNCITRAL Secretariat reported that the lack of a clearly established international standard for interim measures 'may hinder the effective and efficient functioning of international commercial arbitration' because arbitrators might 'refrain from issuing' those measures, which could result in 'unnecessary loss or damage [to a party,] a party avoid[ing] enforcement of [an] award by [hiding] assets' or other 'undesirable consequences.'[13]

UNCITRAL sought to address this problem when, as part of its revisions issued in 2006 to the Model Law, it included Article 17A, which sets forth a standard for granting interim measures in international arbitration.[14] Specifically, Article 17A of the Model Law establishes that:

> *[An applicant for interim measures] shall satisfy the arbitral tribunal that:*
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[15]

---

[11] *See* Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 Croat. Arb. Y.B. 73, 81 (2016); *see also* International Chamber of Commerce, *ICC Commission Report Emergency Arbitrator Proceedings* 16 (2019) (hereinafter 'ICC Report on EA') (providing examples where emergency arbitrators applied the contract law to decide the request for interim measures).

[12] In the words of UNCITRAL's Secretariat, domestic legislation is 'often particularly inappropriate for international' commercial arbitration. Model Law, Part Two, *supra* n. 1, at 24; David W. Rivkin, *Re-evaluating Provisional Measures Through the Lens of Efficiency and Justice*, in *International Arbitration Under Review: Essays in Honour of John Beechey* 4 (2015); Born, *supra* n. 7, at 2465.

[13] *See* Jan. 2000 Secretariat Note Possible Uniform Rules A/CN.9/WG.II/WP.108 (hereinafter 'Jan. 2000 Secretariat Note') in Howard M. Holtzmann, Joseph E. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 208 (2015).

[14] The idea of including a standard for interim measures received support from relevant players in the field of international arbitration. The ICC, e.g. explained that setting forth the standard applicable to requests for interim measures would help parties in formulating their applications and tribunals in deciding them. *See* Feb. 2004 Secretariat Note ICC PROPOSAL A/CN.9/WG.II/WP.129 in Holtzmann & Neuhaus, *supra* n. 13, at 320–321.

[15] *See* Model Law, Art. 17A. If the interim measure seeks to preserve evidence, these conditions apply 'only to the extent the arbitral tribunal considers appropriate.' *Ibid*.

Since it was issued in 2006, Article 17A has become highly relevant in international arbitration practice, with international arbitrators applying it in several scenarios, including the following five.

First, international arbitrators often apply Article 17A when a jurisdiction whose law is relevant to the request for interim measures has adopted it as domestic legislation.[16] Those jurisdictions include Australia, Bhutan, British Virgin Islands, Costa Rica, Florida (United States), Georgia, Hong Kong, Ireland, Kingdom of Bahrain, Mauritius, New Zealand, Rwanda, and Singapore. If the law of one of those jurisdictions is relevant, for example, because the arbitration is seated there, arbitrators may apply Article 17A's standard to decide the request for interim measures.

Second, international arbitrators often apply, or at least consult, Article 17A, even if the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, because they prefer to apply an international standard, rather than a domestic one,[17] and Article 17A is widely regarded as the internationally accepted standard for interim measures in international arbitration.[18] That said, not all arbitrators who choose to apply an international standard apply Article 17A; some prefer to apply standards from previous arbitral decisions.[19]

Third, precisely because it is considered an international standard, Article 17A is often applied, or at least consulted, in 'emergency' arbitrations, i.e. where a party seeks relief that cannot await the constitution of the arbitral tribunal,[20] although

---

[16] Arbitrators are less reluctant to apply domestic laws on request for interim measures when they mirror Art. 17A of the Model Law because such statutes do not suffer from the flaws of domestic statues that take a parochial approach to international arbitration. *See* Fry, *supra* n. 10, at 359–360 (suggesting that arbitrators should look at Art. 17A when the relevant jurisdiction has adopted it as domestic law and explaining that generally interim measures fall under the law of the arbitration seat).

[17] *See* Born, *supra* n. 7, at 2464–2467; Lew, *supra* n. 10, at 7; Beechey & Kenny, *supra* n. 10, at 21.

[18] *See* e.g. Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration Rules, s. III, Art. 26 [Interim Measures]*, in *UNCITRAL Arbitration* 218 (2017) (explaining that Arts 17 and 26 of the Model Law and UNCITRAL Rules, respectively, are 'in practice relied upon as … general principles universally accepted, even in arbitrations under other rules, including in the ICSID system'); Jacob Grierson & Annet Van Hooft, *Arbitrating Under the 2012 ICC Rules* 160–161 (2012) (explaining that Art. 17A 'reflects the standard for the granting of interim relief applied by many national courts and arbitral tribunals'); Frederic Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 1(6) J. Disp. Res. 83, 89 (2012) (hereinafter 'Bachand, Court Intervention') (explaining that the Model Law has gained 'widespread acceptance globally').

[19] *See* e.g. Lew, *supra* n. 10, at 7; Beechey & Kenny, *supra* n. 10, at 21.

[20] *See* Anja Havedal Ipp, *SCC Practice Note Emergency Arbitrator Decisions Rendered 2015–2016* 6, 11, 13, https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf (accessed 27 June 2019) (hereinafter 'SCC Practice Note 2015-2016') (EA 2016/30, EA 2016/31, EA 2016/32, EA 2016/082, EA 2016/095); Lotta Knapp, *Emergency Arbitrator Decisions Rendered in 2014*, https://sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf (accessed 27 June 2019) (hereinafter 'SCC Practice Note 2014') (Case No. EA 2014/171) (analysing Art. 17A); Nathalie Voser & Christopher Boog, *ICC Emergency Arbitrator Proceedings: An Overview* 11, in *Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration*

emergency arbitrators adjust Article 17A's standard to account for the 'urgency' that cannot await the constitution of the tribunal.[21]

Fourth, arbitrators also apply Article 17A when deciding requests for preliminary orders, i.e. *ex parte* orders 'directing a party not to frustrate the purpose of the interim measure requested,'[22] because the Model Law establishes that the standard set forth in Article 17A also applies to preliminary orders.[23]

Fifth, arbitrators apply this same standard when deciding requests for interim measures in arbitrations conducted under rules that have reproduced Article 17A verbatim, like the UNCITRAL Rules,[24] or the rules of the Japan Commercial Arbitration Association[25] or the Hong Kong International Arbitration Centre.[26]

In light of the significant applications of Article 17A's standard, the correct application of that standard is of great importance in international arbitration practice. This, however, requires that practitioners follow Article 2A(1) of the Model Law, as explained next.

3 ARTICLE 2A(1) OF THE MODEL LAW HAS FOUR PRACTICAL CONSEQUENCES ON THE APPLICATION OF ARTICLE 17A

Article 2A(1) sets forth principles of construction that seek to promote uniformity and harmonization in the application of the Model Law. It mandates that when construing the Model Law, 'regard is to be had to' 'its international origin,' 'the

(2011) (arguing that emergency arbitrators 'are likely to turn to Article 17A of the … Model Law'); Sébastien Besson, *Anti-Suit Injunctions by ICC Emergency Arbitrators*, in *International Arbitration Under Review: Essays in Honour of John Beechey* 19 (2015) (arguing that arbitrators and emergency arbitrators should apply the same test for granting interim measures); ICC Report on EA, *supra* n. 11, at 23 ('EAs have shown a preference to avoid the application of domestic law and to have recourse to … "international sources"').

21 *See* SCC Practice Note 2015–2016 at 10 (Case No. EA 2016/067) (combining the standard under Art. 17A with an element of urgency that requires that the interim measure be issued before the arbitral tribunal is constituted); SCC Practice Note 2014 (Case No. EA 2014/171) (concluding that Art. 17A addresses interim measures in general, and that emergency arbitrator would focus on 'the urgency requirement especially').

22 *See* 2006 Model Law, Art. 17B(1).

23 *See ibid.* Art. 17B(3).

24 *See* United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (as revised in 2010), rule 26.3, www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (accessed 28 June 2019) (same standard as Art. 17A of the Model Law).

25 *See* Japan Commercial Arbitration Association, *Commercial Arbitration Rules 2019, Rule 71.2*, www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitoration_Rules.pdf (accessed 28 June 2019) (same standard as Art. 17A of the Model Law).

26 *See* Hong Kong International Arbitration Centre, *2018 Administered Arbitration Rules, Rule 23.4*, www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#23 (accessed 28 June 2019) (arbitrators may consider the same conditions listed in Art. 17A of the Model Law).

need to promote uniformity in its application,' and 'the observance of good faith.'[27]

3.1 Background and purpose of Article 2A(1) of the Model Law

Article 2A(1) is identical to articles in other model laws, including Article 3 of the 1996 Law on Electronic Commerce, Article 8 of the 1997 Law on Cross Border Insolvency, Article 1 of the 2001 Law on Electronic Signatures, and Article 2 of the 2002 Law on International Commercial Conciliation.[28]

UNCITRAL has explained that the purpose of Article 2A(1) of the Model Law and the identical articles in those other model laws is to 'ensure uniformity in the interpretation' of the model laws,[29] i.e. to 'promot[e] a uniform understanding of' those laws[30] and 'limi[t] the extent to which [they are] interpreted only by reference to the concepts of local law.'[31] That is, Article 2A(1) of the Model Law seeks to have practitioners apply the Model Law as uniformly as possible because, as one commentator put it, 'at the end of the day,' 'mere uniformity in wording [in the Model Law] is useless' and 'only the way in which the law is applied is relevant

---

27 While Art. 2(A)(1) establishes principles of construction of the Model Law, Art. 2A(2) deals with how to resolve issues not expressly covered by the Model Law: 'Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.' This article does not address Art. 2A(2).

28 Those articles were inspired by, and are very similar to, Art. 7(1) of the 1980 Convention on Contracts for the International Sale of Goods (CISG). The differences between the articles in those model laws and the one in the CISG are minimal, as shown here: 'In the interpretation of this Convention [Law], regard is to be had to its international character [origin] and to the need to promote uniformity in its application and the observance of good faith in international trade.' Those differences are due to the nature of both instruments. While the CISG is a binding convention (and thus has an international 'character'), model laws are not binding until adopted as domestic law and only have an international 'origin.' *See* Reinmar Wolff, *Chapter I: The Arbitration Agreement and Arbitrability, On the Interpretation of Model-Law-Based Provisions – Is Art. 2a(1) of the UNCITRAL Model Law on International Commercial Arbitration 'Useful and Desirable' or Just Futile?*, in *Austrian Yearbook on International Arbitration 2014* 74–75 (Christian Klausegger et al. eds).

29 *See* UNCITRAL, *Model Law on Electronic Commerce with Guide to Enactment 1996*, www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf (accessed 28 June 2019), para. 42; UNCITRAL, *Model Law on Electronic Signatures with Guide to Enactment 2001*, www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf (accessed 28 June 2019), para. 109; UNCITRAL, *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (accessed 28 June 2019), para. 40 ('Art. 2 … was inspired by Art. 7 of the [CISG], Art. 3 of the UNCITRAL Model Law on Electronic Commerce (1996), Art. 8 of the UNCITRAL Model Law on Cross-Border Insolvency (1997) and Art. 4 of the UNCITRAL Model Law on Electronic Signatures (2001)').

30 *See* Model Law, Part Two, *supra* n. 1, at 24. In fact, UNCITRAL's *raison d'etre* is to 'promote efficiency, consistency and coherence in the unification and harmonization of international trade law.' *See also* Lewis, *supra* n. 3, at 23 (citing United Nations' General Assembly Resolution 40/71).

31 United Nations, *Report of UNCITRAL's Working Group on Electronic Data Interchange (EDI) on the Work of Its Twenty-Sixth Session*, para. 55, https://undocs.org/en/A/CN.9/387 (accessed 28 June 2019).

for harmonization.'[32] Put simply, Article 2A(1) seeks that the Model Law becomes 'not simply … a harmonized *legislative* framework [but] rather … a harmonized *legal* framework.'[33]

3.2 Four practical consequences of Article 2A(1) on the application of Article 17A

The scholarly writings that analyse Article 2A(1) show that beyond its purpose of unification and harmonization, Article 2A(1) has four practical and mandatory consequences for the application of any Article of the Model Law, including Article 17A.[34] Addressed specifically to Article 17A, those four consequences are as follows.

First, to have 'regard' for the 'international origin' of Article 17A, practitioners must apply that article in a way consistent with its travaux préparatoires.[35] The travaux préparatoires show how the delegations that drafted the Model Law, which came from different countries and legal systems around the world, compromised on the language of Article 17A, from its first draft until its final text, and why they did so. The travaux préparatoires, put simply, truly show the 'international origin' of Article 17A,[36] and practitioners applying that Article cannot contradict them, i.e. must have 'regard' for those travaux préparatoires.[37] Indeed, courts around the world often turn to the travaux préparatoires when construing the Model Law.[38]

---

[32] *See* Wolff, *supra* n. 28, at 55.

[33] Frederic Bachand, *Judicial Internationalism and the Interpretation of the Model Law: Reflections on Some Aspects of Article 2A*, in *The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration* 231, 232, 238 (Frederic Bachand & Fabien Gelinas eds 2013) (hereinafter 'Bachand, Judicial Internationalism') (emphasis in original).

[34] Art. 2A's language 'regard is to be had' makes clear that the consequences of Art. 2A, whatever they are, are mandatory. *See* Bachand, *Judicial Internationalism*, *supra* n. 33, at 232 (arguing that the words 'regard is to be had' in Art. 2A of the Revised Model Law 'requir[e] to always take into consideration' Art. 2A's principles of construction).

[35] *See* Bachand, *Court Intervention*, *supra* n. 18, at 98 (arguing that the travaux préparatoires should be treated as more than a 'merely secondary source'); Bachand, *Judicial Internationalism*, *supra* n. 33, at 249 ('there is much to be said for not treating the Model Law's travaux préparatoires as a merely secondary or subsidiary source').

[36] *See* Lewis, *supra* n. 3, at 25 ('The Travaux Preparatoires contain little about the need for uniformity but do contain a very large volume of subjective views of the protagonists in arriving at the words of each Article of the [Model Law]. The clear implication is that with the aid of the Travaux Preparatoires [practitioners] would … arrive at proper or consistent interpretations of the [Model Law]').

[37] The travaux préparatoires are so important that the UN General Assembly recommended that they be sent to the world's governments together with the text of the Model Law. *See* Bachand, *Judicial Internationalism*, *supra* n. 33, at 249. But *see* Holtzmann & Neuhaus, *supra* n. 13, at 25 (arguing that the drafting history of the Model Law should be considered only if the drafting history is a permissible source of guidance of statutes in the jurisdiction that adopts the Model Law).

[38] *See* Bachand, *Court Intervention*, *supra* n. 18, at n. 50 (collecting cases that have done this). *See also* Bachand, *Judicial Internationalism*, *supra* n. 33, at 249.

Second, to have 'regard' for the 'need to promote uniformity in [the] application' of Article 17A, practitioners must consider the decisions by courts and arbitrators around the world that have applied that article,[39] and the scholarly writings on it.[40] These authorities are not binding,[41] but become more persuasive, and practitioners are more likely to follow them, the more repeated and consistent they are.[42]

Third, to have 'regard' for the 'international origin' of Article 17A and the need to 'promote uniformity in its application,' practitioners must avoid construing that article only under the same canons of construction that would apply to a domestic statute in the jurisdiction relevant to the case.[43] For example, if an arbitrator decides that the standard for interim measures in an international arbitration is dictated by the law of Hong Kong, as that is the seat of the arbitration, she would apply the Hong Kong statute that incorporated Article 17A as domestic legislation, but should avoid construing it exclusively as she would any other Hong Kong domestic statute.[44] As explained, she should also analyse the travaux préparatoires of Article 17A, the relevant decisions that have applied that article, and the relevant scholarly writings that have analysed it.

---

[39] *See* Lewis, *supra* n. 3, at 42–43. To aid practitioners with this, UNCITRAL continuously publishes court cases on its CLOUD platform. Unfortunately, this does not capture all cases issued on point, as some jurisdictions are better at reporting their cases than others; Binder, *supra* n. 7, at 27.

[40] *See* Wolff, *supra* n. 28, at 66 ('If uniformity is to be striven for, foreign decisions and legal literature must be taken into consideration'); Holtzmann & Neuhaus, *supra* n. 13, at 25 (Art. 2A(1) 'should be read to encourage [practitioners] to see how courts, commentators and aribtrators [sic] may have interpreted the provisions in question around the world'); Yesilirmak 1999–2008, *supra* n. 10, at 10 (explaining that arbitrators look at scholarly writings when determining the standard for interim measures).

[41] Unlike the travaux préparatoires, which practitioners must follow, these authorities are not binding on practitioners. *See* Binder, *supra* n. 7, at 18 (explaining that the travaux préparatoires are 'of greater importance to the general interpretation of the Model Law than the individual states' court decisions'); Wolff, *supra* n. 28, at 66 (this 'calls for consideration of foreign case law, but no more than that. It is obvious that foreign court decisions cannot serve as binding precedents'); Bachand, *Judicial Internationalism*, *supra* n. 33, at 241; Lewis, *supra* n. 3, at 42.

[42] A commentator analogizes this effect to the civil law doctrine of 'jurisprudence constante' under which 'non-binding precedents become more persuasive if they are consistently applied over time.' *See* Lewis, *supra* n. 3, at 44. *See also* Yesilirmak 1999–2008, *supra* n. 10, at 4 (explaining that previous arbitral decisions are not binding but are 'generally considered persuasive').

[43] *See* Bachand, *Judicial Internationalism*, *supra* n. 33, at 235–236 (explaining that the 'efficiency' of the international arbitration system depends 'to an important extent on that system being subjected as much as possible to international rather than domestic rules'); Wolff, *supra* n. 28, at 74.

[44] *See* Wolff, *supra* n. 28, at 65 ('the model-law-based law is to be treated as a self-contained body of law and to be construed from within itself rather than in the context of the surrounding non-model-law-based legal order'). *See also* UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 15, www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (accessed 3 July 2019) ('Even prior to the adoption of Art. 2A, the international origin of the Model Law had provided a basis for a court in Hong Kong to be more liberal in adopting a broader interpretation of Art. 7 of the Model Law than it would otherwise have been under its domestic law') (citing *Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co. Ltd.*, High Court, Court of First Instance, Hong Kong, Aug. 1994).

Fourth, to have 'regard' for the 'observance of good faith,' practitioners applying Article 17A must factor in equitable considerations and seek to avoid decisions that are 'inequitable'.[45] They must consider, for example, whether a party is acting in bad faith, or deploying tactics to delay the arbitration or subsequent enforcement proceedings.[46]

In sum, pursuant to Article 2A(1) of the Model Law, practitioners applying Article 17A (1) cannot apply it in a way inconsistent with its travaux préparatoires; (2) must consider, but are not bound to follow, the decisions by courts and arbitrators around the world that have applied that article and the scholarly writings on that article; (3) cannot construe that article exclusively under the canons of construction that they would apply to a domestic statute in the relevant jurisdiction; and (4) must factor in equitable considerations.

The following section addresses (1) and (2) above, i.e. the travaux préparatoires of Article 17A, the decisions by courts and arbitrators around the world that have applied it, and the scholarly writings that have addressed it.[47]

4 ANALYSIS OF EACH ELEMENT OF ARTICLE 17A'S STANDARD THROUGH THE LENS OF ITS TRAVAUX PRÉPARATOIRES, DECISIONS BY COURTS AND ARBITRATORS THAT HAVE APPLIED IT, AND SCHOLARLY WRITINGS THAT HAVE ANALYSED IT

The standard for interim measures set forth in Article 17A of the Model Law includes the following elements: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of convenience; reasonable possibility of success on the merits; and jurisdiction.[48] This section describes:

> (1) the travaux préparatoires of each of those elements of Article 17A. That is, the revisions that the different players at UNCITRAL, namely, the Commission, the delegations from

---

45 *See* Lewis, *supra* n. 3, at 48 (explaining that leading commentary on Art. 7(1) of the CISG, on which Art. 2A(1) of the Revised Model Law is based, has concluded that having 'regard' for 'the observance of good faith' 'equates to equitable results'). This is consistent with previous arbitral practice, too. *See* Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Awards* 5, 1(11) ICC Bull. (2000) (hereinafter 'Yesilirmak 2000') (explaining that some arbitrators denied interim measures when applicants lacked 'clean hands').

46 *See* Lewis, *supra* n. 3, at 47–48. This is also consistent with the commentary that when the request for interim measures seeks an anti-suit injunction, arbitrators should consider the 'bad faith' or 'overall unconscionable conduct' of the party that has 'initiated the proceedings in breach of the arbitration agreement.' *See* Besson, *supra* n. 20, at 13.

47 This article does not address further the third and fourth consequences that Art. 2A(1) has on the application of Art. 17A, because those consequences are more case-specific.

48 While neither Art. 17A nor its travaux préparatoires explicitly discuss jurisdiction, commentators largely agree that arbitrators must be satisfied of their jurisdiction before issuing interim measures, as explained at 4.6 *infra*.

the different countries that formed the Working Group on Arbitration ("Working Group"), and the Secretariat, made to each of those elements of Article 17A since the first draft of that article was presented in January 2002[49] until a final text was published in 2006[50];

(2) the decisions by national courts and arbitrators in the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce (SCC) that have applied those elements of Article 17A[51]; and

(3) the scholarly writings that have addressed those elements.

4.1 Burden of proof

Article 17A establishes that the applicant for interim measures 'shall satisfy the arbitral tribunal that' he meets the standard for obtaining such measures.[52] The travaux préparatoires of Article 17A clarify two noteworthy issues regarding the burden of proof on an application for interim measures.

First, applicants for interim measures *must* meet the standard for interim measures, and arbitrators have no discretion to issue the measures otherwise.[53] The first draft of Article 17A stated that applicants 'should furnish proof that' they meet the standard for interim measures,[54] but the Working Group replaced 'should furnish proof' with 'shall' because it wanted a 'stricter formulation' that showed that applicants have the burden of proof.[55] Similarly, the Working Group rejected a suggestion to rephrase Article 17A as 'the arbitral tribunal is satisfied that' – rather than applicants 'shall satisfy the arbitral tribunal that' – because it wanted Article 17A to 'clearly establish that' applicants have 'the *burden* of convincing the arbitra[tors]' that they meet the standard.[56]

---

49 *See* Jan. 2002 Secretariat Note Interim Measures A/CN.9/WG.II/WP.119 (30 Jan. 2002) (hereinafter 'Jan. 2002 Secretariat Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 224.

50 Art. 17A had other numbers throughout the travaux préparatoires but, for the reader's convenience, this article refers to them as previous versions of Art. 17A.

51 Due to the confidential nature of most arbitration proceedings, there is a limited number of publicly available decisions applying Art. 17A. Moreover, in ICC and SCC decisions, all that is available are excerpts of decisions, or descriptions of the same.

52 *See* Model Law, Art. 17A.

53 Arbitrators have discretion only when the interim measure seeks to preserve evidence. *See* Model Law, Art. 17A(2).

54 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 235.

55 *See* Apr. 2002 Working Group Report A/CN.9/508 (12 Apr. 2002) (hereinafter 'Apr. 2002 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 238.

56 *See* Dec. 2003 Working Group Report A/CN.9/545 (8 Dec. 2003) (hereinafter 'Dec. 2003 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 283 (emphasis in original); 29 Jan. 2004 Secretariat Note Interim Measures A/CN.9/WG.II/WP.128 (29 Jan. 2004) (hereinafter 'Jan. 2004 Secretariat Note'), in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this 'establish[es] clearly that the burden of proof lies on the requesting party').

Second, although Article 17A establishes that applicants have the burden of proof, it does not set forth a burden of proof. The burden of proof, instead, remains an issue determined by the law of the relevant jurisdiction.[57] Indeed, the first draft of Article 17A established that applicants 'should furnish proof that' they meet the standard for interim measures,[58] but the Working Group believed that 'requiring "proof" might be excessively cumbersome in the context of interim measures,'[59] and considered replacing 'furnish proof' with 'establish,' 'demonstrate,' or 'show.'[60] The Working Group ultimately decided not to adopt any of those terms, because Article 17A 'should not interfere with the various standards of proof that might be applied in different jurisdictions.'[61] Accordingly, the Working Group chose the more 'neutral formulation' 'shall satisfy the arbitral tribunal.'[62] In some jurisdictions, arbitrators may be 'satisfied' when applicants have 'more likely than not' met the standard, while, in others, arbitrators may require less, or more.

The decisions by courts and arbitrators that have applied Article 17A, and the scholarly writings that have analysed it, do not raise any significant issues with respect to the burden of proof under Article 17A.

4.2 Urgency

Article 17A does not expressly list 'urgency' as an element of the standard for interim measures. The first draft of Article 17A included 'an urgent need for the measure' as a separate element of the standard,[63] but the Working Group deleted that from Article 17A, on the basis that urgency 'should not be a general feature of interim measures … but rather … a specific requirement for granting an interim measure ex parte,' i.e. a preliminary order.[64]

---

57 *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283; Jan. 2004 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this 'reflects the Working Group's decision to provide a neutral formulation of the standard of proof'); Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

58 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

59 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

60 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238. *See also* Nov. 2002 Working Group Report A/CN.9/523 (11 Nov. 2002) (hereinafter 'Nov. 2002 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 257.

61 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

62 *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283; *see* Jan. 2004 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this 'reflects the Working Group's decision to provide a neutral formulation of the standard of proof').

63 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

64 *See* Nov. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 257; *see* Apr. 2003 Secretariat Note Interim Measures A/CN.9/WG.II/WP.123 (3 Apr. 2003), in Holtzmann & Neuhaus, *supra* n. 13, at 271.

Consequently, practitioners applying Article 17A should not consider urgency to be a separate element of the standard for interim measures,[65] even though, traditionally, arbitration authorities have considered that it is.[66]

Some authorities suggest that the need for urgency is implicit in Article 17A's requirement that the applicant show that it is 'likely' to suffer 'harm' 'not adequately reparable by an award of damages,'[67] i.e. that the relief it seeks cannot await a final award[68] or, in emergency arbitrations, the constitution of the tribunal.[69] Nothing in Article 17A's travaux préparatoires contradicts these authorities and, for that reason, practitioners are free to follow them by determining that an applicant proves the urgency required to obtain interim measures under Article 17A when it demonstrates that the relief it seeks cannot await a final award or the constitution of the tribunal.

4.3 'Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered'

Article 17A establishes as an element of the standard for interim measures that 'harm not adequately reparable by an award of damages [be] likely to result' to the applicant 'if the measure is not ordered.'

Four points are clear from the evolution of this element through the travaux préparatoires and the non-binding authorities on point: (1) the Working Group set a threshold for the element of harm lower than it had originally considered, but applicants can still fail to meet that threshold; (2) whether the final award is likely to be enforced is relevant to the element of harm; (3) a large harm is unnecessary but a small harm might be insufficient; and (4) Article 17A covers both harm that

---

65 This is so because, as explained before, pursuant to Art. 2A, practitioners cannot apply Art. 17A in a way inconsistent with its travaux préparatoires. *See* 3.2 *supra*.

66 *See* ICC, *Interim Award in ICC Case 13194 (Extract)* 4, in *Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration* (denying interim measure in light of applicant's failure to prove urgency); Rivkin, *supra* n. 12, at 6–8; Yesilirmak 2000, *supra* n. 45, at 5. But *see* Boog, *supra* n. 9, at 2553 (arguing that urgency 'is not a separate, general requirement for granting interim measures in international arbitration and is not necessarily required in every case').

67 *See* Born, *supra* n. 7, at 2475; Boog, *supra* n. 9, at 2553.

68 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 219 (applicant 'must show that the tribunal's intervention cannot await "the award by which the dispute is finally decided"'); Holtzmann & Neuhaus, *supra* n. 13, at 170; Born, *supra* n. 7, at 2475.

69 *See* SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32) (emergency arbitrator analysed Art. 17A and 'rejected' an independent 'urgency test,' but held that the requirement of '*imminent* risk of (further) harm not adequately reparable by an award of damages should be sufficient to meet the urgency test') (emphasis in original). *See also* ICC Report on EA, *supra* n. 11, at 13, 24 ('some EAs have taken the shortcut of equating "urgency" with not being able to "await the constitution" of the tribunal').

'cannot be repaired' and harm that is 'comparatively complicated to compensate' with an award of damages. An analysis of those four points now follows.

4.3[a] *The Working Group Lowered the Threshold from Its Original Proposal, but Some Applicants Still Fail to Meet It*

The first draft of Article 17A required the applicant to prove that 'harm will result' if the measure is not granted.[70] The Working Group lowered that threshold, by replacing 'harm will result' with harm being 'likely to result,' because 'at the time an interim measure [is] sought, there [are] often insufficient facts to provide proof that, unless a particular action [is] taken or refrained from being taken, harm would inevitably result.'[71]

Even though the Working Group lowered the threshold, some applicants still fail to meet it. It is not enough for applicants simply to allege that harm is likely; they have to show it.[72] For example, a tribunal applying Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) rejected an application for interim measures in the form of security for costs when an applicant argued that (1) the claimant was in a precarious financial situation and would be unable to pay the applicant's legal costs if ordered to do so by the tribunal, and (2) the claimant's third party funders would not be liable for such costs. The tribunal denied the request because it concluded, in essence, that the applicant had not proven that its harm was 'likely,' as (1) the claimant's 'balance sheet [did] not sufficiently demonstrate that [it] will lack the means to pay a costs award'; and (2) the applicant failed to show a 'sufficient causal link' between the existence of third party funding and the claimant's inability to pay a future award.[73]

Similarly, in an emergency arbitration, an applicant requested interim measures 'prohibiting the respondent from transferring' its shares in certain companies or from causing those companies to transfer their assets. The emergency arbitrator applied Article 17A and found the harm to the applicant not 'likely,' as 'the evidence did not [show] that it was likely that the respondent was … removing, or planning to remove, assets.'[74]

In sum, the travaux préparatoires show that the Working Group decided to lower the threshold for this element, by requiring applicants to prove only that

---

70 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

71 *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 284.

72 As explained by a leading commentator, 'harm [that] remains in some way remote, avoidable, or contingent on future events' is not enough. Georgios Petrochilos, *Interim Measures under the Revised UNCITRAL Arbitration Rules*, 28(4) ASA Bull. 878, 882 (2010).

73 *Guaracachi America Inc. & Rurelec plc v. Plurinational State of Bolivia*, PCA Case No. 2011–17, Procedural Order No. 14 (2013), paras 4–8.

74 *See* SCC Practice Note 2014 (Case No. 2014/171).

their harm is 'likely,' but relevant decisions show that some applicants still fail to meet this element. Tribunals expect applicants not simply to allege that harm to them is likely, but also to prove it.

4.3[b] *Practitioners Should Consider Whether a Final Award Is Likely to be Enforced*

To decide whether the harm to the applicant would be 'adequately reparable by an award of damages,' practitioners should consider whether such award is likely to be enforced. Commentators agree that practitioners should consider this when dealing in general with interim measures[75] and at least one arbitrator considered this specifically when applying Article 17A.[76]

This is consistent with the travaux préparatoires, which show that (1) the UNCITRAL Commission decided to establish a standard for interim measures to avoid 'undesirable consequences' such as 'a party avoid[ing] enforcement of [an] award by [hiding] assets'[77]; and (2) the Working Group included the word 'adequately' (i.e. 'not adequately reparable by an award of damages') so that the element of harm in Article 17A is interpreted 'in a flexible manner requiring a balancing of the degree of harm suffered by' both parties.[78]

4.3[c] *Large Harm Is Unnecessary but Small Harm Might Be Insufficient*

The travaux préparatoires of Article 17A show that the term 'harm not adequately reparable by an award of damages' refers in 'qualitative terms to the very nature of the harm' rather than in 'quantitative terms to the magnitude of damages.'[79] Consequently, to prove a 'harm not adequately reparable by an award of damages,' an applicant seeking interim measures need not prove that its harm is quantitatively large. Specifically, the travaux préparatoires show that the Working Group refused to phrase the element as 'substantial harm' because Article 17A does not have a 'quantitative approach' to the element of harm, or put differently it does not require harm that entails 'substantial damages.'[80]

---

[75] *See* Born, *supra* n. 7, at 2471. *See also* Chartered Institute of Arbitrators, *International Arbitrators Practice Guideline, Applications for Interim Measures* 7, www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf (accessed 1 July 2019).

[76] *See* SCC Practice n. 2015–2016 at 11 (Case No. EA 2016/082) (explaining that the emergency arbitrator analysed the risk of unenforceability of an award).

[77] *See* Jan. 2000 Secretariat Note, *supra* n. 13, at 208.

[78] *See* Oct. 2005 Working Group Report A/CN.9/589 (12 Oct. 2005) (hereinafter 'Oct. 2005 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 395.

[79] *See* Apr. 2004 Working Group Report A/CN.9/547 (16 Apr. 2004) (hereinafter 'Apr. 2004 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 329.

[80] *See* Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329. The Working Group also refused to phrase the element as 'significant degree of harm,' because that term 'might

A decision by an emergency arbitrator that applied Article 17A is consistent with this standard. Specifically, (1) a supplier threatened to supply less oil and gas unless the consumer accepted a price increase; (2) the consumer filed an emergency arbitration against the supplier; and (3) the supplier argued that the interim measures should be denied because the importer's sales of oil and gas were only 'a small fraction of [its] total sales.' The emergency arbitrator dismissed the supplier's argument and granted in part the consumer's request for interim measures. That is consistent with the conclusion that, to prove a 'harm not adequately reparable by an award of damages,' the applicant need not prove that its damage is of a large quantity.[81]

However, the quantity of the damages may matter when it is small. At least two decisions that applied Article 17A seem to have held so. First, a New Zealand court held that because the damages to the applicant were of 'a modest figure,' a difficulty in assessing those damages was not 'conclusive' that such damages cannot be 'adequately repairable by an award of damages.'[82] Second, an emergency arbitrator who considered Article 17A denied the interim measures because, among other reasons, the applicant's economic harm would be 'confined and discrete, and there [was] no suggestion that it may economically ruin the' applicant.[83]

At first glance, these decisions' conclusions that applicants will fail if their harm is small in quantity appear inconsistent with the travaux préparatoires' conclusions that applicants need not show that their harm is of a large quantity. However, they are not. They can be reconciled as follows: large harm is unnecessary but small harm might be insufficient.

---

create uncertainties as to' when harm is 'sufficiently significant to justify' interim measures. *See* Jan. 2002 Secretariat Report, *ibid*. at 238.

81 The arbitrator held that 'the balancing of the risk of doing injustice should [not] be done in relative terms or with regards to the relative risk aversion, since this would in principle mean that larger entities were to be treated under a different standard[.]' *See* SCC Practice Note 2015–2016 at 6–7 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

82 *Safe Kids in Daily Supervision Ltd v. McNeill* et al., High Court Auckland, CIV 2010-404-1696, Apr. 2010, Asher J. (hereinafter '*Safe Kids v. McNeill*'), paras 62–63, 68 ('it is often a reason for the grant of an interim injunction that the assessment of damages is difficult. Certainly the assessment of damage to goodwill would not be a precise exercise in this case. But … that assessment is likely to be of a modest figure and I do not consider that difficulty to be in any way conclusive'). Since New Zealand adopted Art. 17A of the Model Law, its courts have decided applications for interim measures related to arbitration applying the same standard as arbitrators. *Ibid.,* para. 36; Terry Sissons, *Interim Measures* 1, www.aminz.org.nz/Attachment?Action=Download&Attachment_id=49 (accessed 1 July 2019) ('the powers of … [c]ourt[s] to grant interim measures are the same as the powers of an arbitral tribunal under Article 17A').

83 *See* SCC Practice Note 2015–2016 at 11–12 (Case No. EA 2016/082).

4.3[d] *Article 17A Covers Both Harm that 'Cannot be Repaired' and Harm that Is 'Comparatively Complicated to Compensate' with an Award of Damages*

The Working Group considered phrasing the element of harm as 'irreparable harm' but phrased it, instead, as 'harm not adequately reparable by an award of damages' because delegations in the Working Group understood irreparable harm to mean different things.[84]

For some delegations, the term 'irreparable harm' meant a 'truly irreparable damage such as the loss of a priceless work of art,'[85] and excluded 'any loss that might be cured by an award of damages.'[86] For them, adopting the term 'irreparable harm' would have reduced the availability of interim measures, and set 'too high a threshold,'[87] because 'most [harm can] be cured with monetary compensation.'[88] For other delegations, the term 'irreparable harm' was broader, and included harm that 'would be comparatively complicated to compensate' with an award of damages, although in theory they could be compensated.[89] Driving a party into insolvency, or causing it to lose a business opportunity or its reputation, are examples of this.[90]

To compromise, the Working Group adopted the term 'harm not adequately reparable by an award of damages,' which covers what both groups of delegations understood by irreparable harm, i.e. truly irreparable harm, as well as harm that would be comparatively complicated to compensate with an award of damages.[91] Thus, as leading commentators explain, the term 'harm not adequately reparable by an award of damages' covers two types of harm: (1) 'harm that is not economic in nature (e.g. pre-emptive parallel proceedings in the courts, or the destruction of records)'; and (2) 'harm which, though economic, is difficult to repair through an eventual award of damages (e.g. further aggravation of the dispute through

---

84 *See* Marc J. Goldstein, *A Glance Into History for the Emergency Arbitrator*, 40 Fordham Int. L.J. 779, 790 (2017) (explaining that the term 'not adequately reparable by an award of damages' was 'a pushback against the common law concept of irreparable injury' and is an 'expansionary replacement for' it). But *see* Peter Sherwin & Douglas Campbell Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20(3) Am. Rev. of Int'l 317, 336–337 (2010) (arguing that under the Model Law's Art. 17A and the UNCITRAL Rules' Art. 26(3), an applicant must show 'irreparable harm').

85 *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283.

86 *See* Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329.

87 *See* Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329–330.

88 *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283.

89 *See* Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 328–329.

90 *See ibid.*, at 329.

91 Model Law, Art. 17A. *See also* 2004 Commission Report A/59/17 (9 July 2004), in Holtzmann & Neuhaus, *supra* n. 13, at 341 (explaining that the term 'harm not adequately reparable by an award of damages' 'addresse[s] the concerns that irreparable harm might present too high a threshold and … more clearly establish[es] the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure').

economic measures that ruin the applicant's entire business, and make calculations of damages disproportionally difficult or even unreliable).'[92]

In practice, arbitrators have correctly concluded that the term 'harm not adequately reparable by an award of damages' covers both types of harm, as demonstrated by the following decisions.

4.3[d][i] Decisions Applying Article 17A to Harm that Could not be Compensated by a Monetary Award

Arbitrators have found that the term 'harm not adequately reparable by an award of damages' covers harm that a monetary award cannot compensate, which is consistent with Article 17A's travaux préparatoires. For example, in an ICSID arbitration, an applicant argued that the respondent state had launched criminal actions, sequestered corporate documents and intimidated witnesses to impair the applicant's access to evidence in the arbitration.[93] The tribunal held, in essence, that 'any harm caused to the integrity of the … proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced' falls under Article 17A, because it 'could not be remedied by an award of damages.'[94]

Similarly, in another ICSID arbitration, the applicants argued that the respondent state had launched criminal and extradition proceedings that would effectively prevent the applicants from participating in the arbitration. The tribunal adopted Article 17A's requirement that the harm must be 'not adequately reparable by an award of damages' and concluded that the inability to participate in the arbitration could not be remedied by an award of damages.[95]

4.3[d][ii] Decisions Applying Article 17A to Harm that Would be 'Comparatively Complicated to Compensate'

Arbitrators have also found that the term 'harm not adequately reparable by an award of damages' also covers harm that, although it could be compensated, would be 'comparatively complicated to compensate' with an award of damages, which is also consistent with Article 17A's travaux préparatoires.

---

92 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 222.

93 *See Quiborax S.A., Non Metallic Minerals S.A., & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 2010), paras 22–48.

94 *Ibid.,* paras 156–157.

95 *See Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 2016), paras 3.31–3.36. Conversely, emergency arbitrators have denied requests for interim measures when the applicant's damages 'could be made good by an award of damages.' *See* SCC Practice n. 2015–2016 at 11–12 (Case No. EA 2016/082); SCC Practice Note 2010–2013 at 6–7 (Case No. EA 139/2010) (analysing Art. 17A and denying interim measures).

For example, an ICSID tribunal and an emergency arbitrator referred to Article 17A's phrasing of harm 'not adequately reparable by an award of damages' as support for their holding that applicants for interim measures need not demonstrate that their harm is 'not remediable by,'[96] i.e. that it 'cannot be compensated through,'[97] an award of damages. Similarly, another emergency arbitrator found that Article 17A protected an applicant against the risk of losing his company shares because 'even if [he was compensated], this compensation may not reflect the shares' real value,'[98] and another ICSID tribunal held that the eventual destruction of the applicant's business would be 'not adequately reparable by an award of damages.'[99]

Leading commentators explain that Article 17A's concept of harm not 'adequately reparable by an award of damages' also captures 'the disruption to business relations and the waste resulting from' it.[100] Applying this logic, an emergency arbitrator analysed Article 17A and granted interim measures when a supplier threatened to supply less oil and gas unless the importer accepted a price increase.[101] These authorities are consistent with the travaux préparatoires' conclusion that Article 17A covers harm that would be comparatively complicated to compensate with an award of damages.

4.4 Balance of convenience (i.e. the 'substantially outweigh' requirement)

Applicants for interim measures must also satisfy arbitrators that the 'balance of convenience' tips in their favour.[102] Two points are clear from the evolution of this element through the Travaux Preparatoires and the non-binding authorities on point: (1) any harm to the applicant that would remain equally likely even if the interim measure is ordered, or that would be adequately reparable by an award of damages, is irrelevant to the balance of convenience, and (2) any harm to other

---

96 *Sergei Paushok, CJSC Golden East Co. & CJSC Vostokneftegaz Co. v. Mongolia*, Order on Interim Measures (Sept. 2008), paras 68–69.

97 *See* ICC Report on EA, *supra* n. 11, at 26.

98 *See* SCC Practice Note 2015–2016 at 13–14 (Case No. EA 2016/095).

99 *See Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 2009) (hereinafter '*Burlington v. Ecuador P.O.1*'), para. 83.

100 *See* e.g. Petrochilos, *supra* n. 72, at 883.

101 *See* SCC Practice Note 2015–2016 at 5–7 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32). Conversely, an arbitrator's denial of interim measures because an award could repair the applicant's damages, '[d]espite the problems' the applicant 'may encounter in quantifying' those damages (*see* SCC Practice n. 2015–2016, at 10 (Case No. EA 2016/067)), may have been inconsistent with Art. 17A's travaux préparatoires that show that it covers harm that would be 'comparatively complicated' to compensate with an award of damages, i.e. harm whose calculation would be 'unreliable.' *See* Paulsson & Petrochilos, *supra* n. 18, at 222.

102 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

parties 'affected by the measure' is irrelevant to the balance of convenience. Those two points, and four practical applications of the balance of convenience, are explained below.

4.4[a] *Any Harm to the Applicant that Would Remain Equally Likely if the Interim Measure Is Granted, or that Would Be Adequately Reparable by an Award of Damages, Is Irrelevant to the Balance of Convenience*

Under Article 17A, applicants must satisfy the arbitrators that 'harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and *such* harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.'[103]

Early drafts of Article 17A used the words '*that* harm,' but the final text uses the words 'such harm.'[104] The addition of the word 'such' clarifies that the harm to the applicant that must outweigh the harm to the other side is the kind of harm specified in the preceding sentence of Article 17A. That is, the words 'such harm' refer to harm to the applicant that is 'not adequately reparable by an award of damages' and 'likely to result if the measure is not ordered.' Any harm other than 'such harm' is irrelevant for purpose of Article 17A's balance of convenience. Put differently, when considering whether the applicant's harm 'substantially outweighs' the harm to the other side, practitioners should not consider any harm that would be adequately reparable by an award of damages or that is likely to result even 'if the measure is … ordered.'[105]

4.4[b] *Harm to Other Parties 'Affected by the Measure' Is Irrelevant to the Balance of Convenience*

The Working Group considered phrasing Article 17A's balance of convenience so that it would refer to the harm to a 'party affected by the measure.' Ultimately, it phrased it as referring, instead, to the harm to 'the party against whom the measure is directed,' because it believed that the term 'party affected by the measure' was 'ambiguous' 'in view of the multiplicity of parties potentially affected by an interim measure.'[106] Consequently, for purposes of the balance

---

[103] *See* Model Law, Art. 17A (emphasis added).

[104] *Compare* Apr. 2002 Working Group Report in Holtzmann & Neuhaus, *supra* n. 13, at 239 with Nov. 2002 Working Group Report, *ibid.,* at 258 (emphasis added).

[105] This is consistent with the arbitral practice of denying interim measures that are not 'capable of preventing the alleged harm.' *See* Yesilirmak 2000, *supra* n. 45, at 5.

[106] *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 290.

of convenience under Article 17A, the harm to any 'party affected by the measure' who is not 'the party against whom the measure is directed,' is irrelevant.

In line with this, a New Zealand court held that arbitrators analysing Article 17A do not consider the effects that the interim measures would have on the 'public interest' or on 'innocent third parties'[107] (i.e. on parties 'affected by the measure' who are not 'the party against whom the measure is directed').

4.4[c] *Four Practical Applications of the Balance of Convenience*

The travaux préparatoires show that there was a suggestion to delete the word 'substantially' so that Article 17A would refer only to 'harm to the applicant that substantially outweighs the harm.' The UNCITRAL Commission rejected this suggestion, however, because the word 'substantially' was 'consistent with existing standards in many judicial systems.'[108]

Some commentators explain this 'substantially outweigh' requirement as a test of 'proportionality.'[109] That is, practitioners must 'weigh the balance of inconvenience in the imposition of interim measures upon the parties'[110] or, as put by a New Zealand court that applied Article 17A, they must 'asses[s] the financial situation of both' parties and 'the practical effects [of] granting the' measure.[111]

Consequently, 'the greater the adverse effect of the requested interim measure on the respondent,' the harder it is to satisfy the balance of convenience.[112] At one end of the spectrum, arbitrators deny interim measures that would cause 'irreparable harm' to respondents.[113] At the other end, they grant interim measures that would cause harm to respondents that is 'limited'[114] or lesser.[115]

In practice, at least four consequences are clear from the decisions and scholarly writings that have analysed the balance of convenience element under Article 17A. These four consequences are consistent with Article 17A's travaux préparatoires, so practitioners are free to follow them.

First, undertakings and declarations are relevant to the balance of convenience. A New Zealand court applying Article 17A held that an applicant is more likely to

---

[107] *See Safe Kids v. McNeill, supra* n. 82, para. 36.
[108] *See* 2006 Commission Report A/61/17 (14 July 2006) (hereinafter '2006 Commission Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 431.
[109] *See* Besson, *supra* n. 20, at 13.
[110] *See* Rivkin, *supra* n. 12, at 8.
[111] *See Safe Kids v. McNeill, supra* n. 82, para. 33.
[112] *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 220.
[113] *See Burlington v. Ecuador P.O.1*, *supra* n. 99, para. 81.
[114] *See* SCC Practice Note 2015–2016 at 14 (Case No. EA 2016/095).
[115] *See City Oriente Ltd. v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures (May 2008) (hereinafter '*City Oriente v. Ecuador*, Provisional Measures'), para. 78.

prove that its harm substantially outweighs the respondent's when it presents an 'adequate undertaking' to cover the damages that the respondent may suffer if the measure is granted now, but the applicant loses on the merits later.[116] The same could be said when the respondent (not the applicant) presents an 'adequate undertaking,' as the New Zealand court denied the interim measures 'on the basis of the undertakings' provided by the respondents.[117]

Similarly, some arbitrators have denied interim measures on the basis that the respondent provided an undertaking or simply a 'declaration' that it would 'not infringe the right' at issue.[118] Such a declaration, however, is effective only for as long as the respondent honours it, and interim measures can be issued as soon as the respondent reneges on it, as demonstrated by a Mauritius court that did so, applying the domestic statute that incorporated Article 17 of the Model Law.[119]

Second, the balance of convenience is harder to satisfy for affirmative injunctions (i.e. when the respondent is ordered to do, rather than to refrain from doing, something). At least one court has held that it is harder for an applicant to prove that Article 17A's balance of convenience tilts in its favour when the interim measure seeks an affirmative injunction.[120]

Third, the stronger the merits, the less the applicant's harm must 'substantially outweigh' the other side's harm. At least one arbitrator that applied Article 17A has held that, as 'a general rule,' 'the greater the chance that [applicants] will prevail on the merits, the less the balance of harm needs to weigh in [their] favor.'[121] Leading commentators seem to agree with this, explaining that 'all the necessary requirements [under Article 17A] operate "in the round" [i.e.] that a tribunal must be satisfied that they are met in the aggregate to a degree which justifies' interim measures.[122]

---

116 *Safe Kids v. McNeill, supra* n. 82, para. 33.

117 *Ibid.,* para. 71.

118 *See* SCC Practice n. 2010–2013 at 18 (Case No. EA 010/2012) (no interim relief because of 'Respondent's express undertaking not to dispose of, or otherwise dissipate, move or diminish the value of the products in its possession or that of its agents until … a final award'), 10 (Case No. EA 144/2010) (interim order was not necessary because respondent agreed to 'let the Claimant use the equipment in question'). *See also* Yesilirmak 2000, *supra* n. 45, at 5 ('an opposite party's "undertaking" or "declaration" not to infringe the right being defended may suffice to deny a request for a measure'). These arbitrators, however, were not applying Art. 17A.

119 *See* Duncan Bagshaw & Iqbal Rajahbalee, *Chapter 9: Attitude of Mauritian Courts Towards Arbitration*, in *Rethinking the Role of African National Courts in Arbitration* 246 (Emilia Onyema ed. 2018) (describing *Barnwell v. ECP Africa* (2013) SCJ 327).

120 *See* Sissons, *supra* n. 82, at 8–10 (summarizing *Solid Energy New Zealand Ltd. v. HWE Mining Pty. Ltd.*, High Court Hamilton, Aug. 2010, Andrews J.).

121 *See* SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

122 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 219.

Fourth, at least one arbitrator has decided, when applying Article 17A, that an applicant's refusal to mitigate damages by accepting a unilateral imposition by respondent does not alter the balance of convenience. In other words, relevant to the balance of convenience is the harm to the applicant caused by respondent's actions, not the applicant's refusal to bend to respondent's will. Specifically, where a supplier threatened to supply less oil and gas unless the importer accepted a higher price, the importer filed an emergency arbitration; the supplier argued that the importer could mitigate its own harm by paying the price increase, but the arbitrator, analysing Article 17A, dismissed that argument.[123]

4.5 'Reasonable possibility that the [applicant] will succeed on the merits of the claim'

Under Article 17A, the applicant must 'satisfy' the arbitrators that '[t]here is a reasonable possibility that [it] will succeed on the merits of the claim,' but the arbitrators' 'determination on this possibility shall not affect the[ir] discretion … in making any subsequent determination.'[124] Three points are clear from the evolution of this element through the travaux préparatoires and the non-binding authorities on point.

4.5[a] *Relevant Merits Are Those of the Claim Related to the Application*

The travaux préparatoires show that the 'reasonable possibility' of success refers to the *underlying* claim, not the 'claim' for interim measures, i.e. the application. The UNCITRAL Secretariat even added the words 'of the claim' after the word 'merit' 'to clarify that the merits to be considered relate to the main claim and not to the interim measure requested.'[125]

What is more, the applicant must have a 'reasonable possibility' of success on the merits of the claim relevant to the application, not the entire 'dispute' or 'underlying case.' While earlier drafts of Article 17A referred to the merits of the 'underlying case'[126] or the 'dispute,'[127] the final text refers to the merits of 'the claim' only. In

---

123 *See* SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32) (dismissing respondent's argument that applicant 'could have mitigated the harm by paying the price requested by respondents').

124 *See* Model Law, Art. 17A.

125 *See* 5 Dec. 2005 Secretariat Note A/CN.9/WG.II/WP.141 (5 Dec. 2005) (hereinafter '5 Dec. 2005 Secretariat Note'), in Holtzmann & Neuhaus, *supra* n. 13, at 409–410 ('clarifying that what is being considered is the main claim of the dispute may limit unnecessary arguments as to whether there exists a reasonable possibility of success in respect of the granting of the interim measure').

126 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

127 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 237.

line with this, a commentator explains that when applicants seek interim measures in the form of an anti-suit injunction, 'the claim' on which they must prove a 'reasonable possibility of success on the merits' is that the other side breached the arbitration agreement by filing or threatening to file proceedings in a forum other than arbitration.[128] That is, those applicants do not need to prove a reasonable possibility of success on the merits of the entire 'dispute' or 'underlying case.'

4.5[b] *Burden of Proof on the Merits Is Low*

While an applicant must prove that its harm is 'likely,' it must prove only that success on the merits is 'reasonabl[y] possib[le].' Commentators, courts, and arbitrators agree that this is a low threshold. It 'fall[s] well below a fifty per cent chance of success'[129] and requires the applicant to show 'only a bit more' than that its rights are 'plausible,'[130] but definitely much less than the 'more likely than not' standard to be applied on the merits.[131] Indeed, the Working Group rejected suggestions to phrase the element as 'likelihood'[132] or 'substantial possibility'[133] of success on the merits, which would have set a higher threshold.[134]

Some commentators argue that this requires applicants to show 'a prima facie' case on the merits, i.e. 'fumus boni iuris,'[135] and an arbitrator applying Article 17A even found that an applicant met this requirement because it presented a 'prima facie case on the merits.'[136] The travaux préparatoires, however, show that the UNCITRAL Commission decided not to phrase this element as a 'prima facie' case on the merits, because 'prima facie' is 'susceptible to differing interpretations.'[137]

---

128 *See* Besson, *supra* n. 20, at 10.

129 *See* Rivkin, *supra* n. 12, at 6.

130 *See Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Order on the Interim Measures Application of Pakistan dated 6 June 2011, para. 135 n. 210 (Sept. 2011) (holding in *dicta* that Art. 17A requires 'the demonstration of something more than a plausible case').

131 *See* Rivkin, *supra* n. 12, at 8. *See also* Goldstein, *supra* n. 84, at 795 (explaining that a 'reasonable possibility of success' is a lower threshold than the 'common law probability of success requirement'). A New Zealand court, in turn, understood this requirement under Art. 17A as requiring the applicant to present a 'serious question to be tried.' *See Safe Kids v. McNeill, supra* n. 82, para. 30.

132 *See* Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

133 *See* Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

134 In fact, the Working Group rejected a proposition to replace 'will succeed' with 'is likely to succeed' because it concluded that this was 'unnecessary,' as the words '"there is a reasonable possibility" provided the required level of flexibility.' *See* Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 284.

135 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 218 (referring to this requirement as a prima facie case on the merits); *Ch. 5. Powers, Duties, and Jurisdiction of an Arbitral Tribunal*, in Nigel Blackaby et al., *Redfern and Hunter On International Arbitration* 315–316 (6th ed. 2015) (same); Besson, *supra* n. 20, at 10 (same); Boog, *supra* n. 9, at 2552 (same).

136 *See* SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

137 *See* 2006 Commission Report, in Holtzmann & Neuhaus, *supra* n. 13, at 431.

To determine whether the applicant has a reasonable possibility of success on its claim, arbitrators should assess whether, considering the stage of the proceeding at which the applicant filed its request, the applicant has presented enough evidence to support that claim. In the UNCITRAL Secretariat's words, the 'reasonable possibility of success on the merits of the claim will be assessed differently in view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings.'[138] For example, a New Zealand court that applied Article 17A held that because discovery had not yet occurred, it was 'understandable' that the applicant based its claim on inferences only, rather than on direct evidence, and found that the applicant had shown a reasonable possibility of success on the merits.[139]

Most applicants show a 'reasonable possibility of success on the merits' by showing 'a reasonable chance' that the respondent breached the applicable agreements.[140] Applicants can prove a reasonable possibility of success on their claims even if the respondents have 'credible' defenses against those claims.[141] However, applicants will fail to prove this element if the respondents' defenses are compelling, rather than just 'credible.'[142]

4.5[c] *A Decision on Interim Measures Does Not Prejudge Any Future Determination*

Article 17A of the Model Law establishes that a decision on whether 'there is a reasonable possibility that the requesting party will succeed on the merits of the claim' 'shall not affect the discretion of the arbitral tribunal in making any subsequent determination.'[143]

The travaux préparatoires show that the purpose of this provision was that arbitrators would make 'a determination regarding the seriousness of the case

---

138 *See* 5 Dec. 2005 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 410.

139 *Safe Kids v. McNeill, supra* n. 82, paras 45–46. It does not follow that applicants who file requests for interim measures early on the case need to present no evidence to support their claim. Indeed, arbitrators have denied interim measures in those circumstances. *See* SCC Practice n. 2014 (Case No. EA 2014/171) (denying interim measures where 'no evidence … suggest[ed] that the [respondent] was in the process of stripping the Companies of assets by illegitimate means').

140 *See* SCC Practice Note 2015–2016 at 13–14 (Case No. EA 2016/095) (arbitrator analysed Art. 17A and held that 'there was a reasonable chance' that the respondent state breached the applicable BIT); SCC Practice Note 2015–2016 at 10 (Case No. EA 2016/067) (arbitrator analysed Art. 17A and held that at least one of applicant's arguments that the respondent breached the applicable contract 'had a reasonable possibility of success'); SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010) (applicant 'prima facie substantiated its objections to the Respondent's termination of the contract').

141 *Safe Kids v. McNeill, supra* n. 82, para. 42.

142 *See* e.g. SCC Practice Note 2015–2016 at 17 (Case No. EA 2016/150) (applicant had no 'reasonable possibility of success' on a claim that respondent had breached the applicable agreement, where the respondent seemed to have had the right to terminate the agreement due to the applicant's failure to pay royalties).

143 *See* Model Law, Art. 17A.

without in any way prejudicing the findings to be made … at a later stage,'[144] and that by 'subsequent determination' Article 17A refers not only to awards but also to procedural orders.[145]

Despite the language of Article 17A, arbitrators may remain reluctant to grant interim measures if they could be seen as prejudging the merits of the claims or other final issues on the case, as demonstrated by a recent decision by a tribunal in the PCA. There, the respondent first filed a jurisdictional objection on the basis that the claimant was a shell company used by the real investor to improperly obtain protection under the applicable investment treaty,[146] and later filed a request for interim measures in the form of security for costs on the same grounds. The tribunal analysed Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) and denied the request, noting its reluctance to prejudge the merits of the outstanding jurisdictional objection.[147]

4.6 'Reasonable possibility of' jurisdiction

Article 17A does not state that arbitrators must be satisfied that they have jurisdiction before issuing interim measures, and the travaux préparatoires show no discussion on this.[148] Most commentators, however, agree that, before issuing interim measures, arbitrators must be satisfied of their jurisdiction, at least on a prima facie basis[149] and, in practice, arbitrators applying Article 17A analyse their jurisdiction.[150] A showing of jurisdiction is required because without jurisdiction, an applicant cannot show a reasonable possibility of success on the merits of its claims.[151] Several conclusions stemming from this are worth mentioning.

---

144 *See* Nov. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 258.

145 *See* Oct. 2005 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 395.

146 *See South American Silver Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2013–15, Procedural Order No. 10 (Jan. 2016) (hereinafter '*Silver v. Bolivia P.O.10*'), paras 53–55.

147 *See ibid.,* paras 53–55.

148 In practice, this is relevant when the party opposing the interim measure asserts that the arbitrator lacks jurisdiction because there is no arbitration agreement, the agreement is invalid, or the claim falls outside the scope of the arbitration clause.

149 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 219–220. *See also* Donald Francis Donovan, David W. Rivkin et al., *Chapter 7: Jurisdictional Findings on Provisional Measures Applications in International Arbitration*, in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 110–112 (Neil Kaplan & Michael J. Moser eds 2018); Rivkin, *supra* n. 12, at 5; Besson, *supra* n. 20, at 10; Beechey & Kenny, *supra* n. 10, at 21.

150 *See* SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010).

151 *See* e.g. Paulsson & Petrochilos, *supra* n. 18, at 218–219 (explaining that the requirement of a 'reasonable possibility of success' 'encompasses "that the tribunal have both a reasonable possibility of possessing jurisdiction over the claim and a reasonable possibility that the substance of the claim is meritorious"').

First, this refers to whether the arbitrator has jurisdiction to decide the merits, not to whether it has the ability to issue interim measures, which Article 17A presupposes.[152]

Second, the requirement is correctly phrased as a 'reasonable possibility' that the arbitrator has jurisdiction, rather than as a 'prima facie' showing of jurisdiction. As explained in section 4.5(b) *supra*, the travaux préparatoires show that the drafters decided to avoid phrasing the element of 'reasonable possibility of success on the merits' as 'prima facie' determination, to avoid confusion.[153]

Third, arbitrators must be satisfied that the applicant has a 'reasonable possibility of success on' its argument that the arbitrator has jurisdiction to decide the merits of the underlying claim relevant to the application, not the merits of the entire 'dispute' or 'underlying case.' As explained in section 4.5(a) *supra*, an applicant's obligation to prove a 'reasonable possibility of success on the merits' is limited only to the claims relevant to the application, so its burden of proof on jurisdiction must be limited to those claims too.

Fourth, the threshold for showing a 'reasonable possibility' of jurisdiction is low.[154] Applicants have proven that there is a reasonable possibility that arbitrators have jurisdiction simply by showing that the arbitration agreement at issue referred disputes to arbitration under the rules of the institution that appointed the arbitrator.[155] In cases that involved Bilateral Investment Treaties (BITs), applicants have simply shown that they 'appeared' to qualify as investors under those BITs and that those BITs' 'cooling-off periods' were inapplicable due to the 'futility' of the applicants' efforts to settle the dispute amicably.[156]

Fifth, a finding of 'reasonable possibility' of jurisdiction does not preclude a tribunal from later conducting a full jurisdictional analysis and concluding that it does not have jurisdiction,[157] because a finding that the applicant has a 'reasonable possibility of success on the merits' does not prejudge any subsequent determinations, as explained in section 4.5(c) *supra*.

---

[152] *See* Donovan & Rivkin, *supra* n. 149, at 108 (explaining that the requirement refers to a showing of jurisdiction 'over the underlying dispute').

[153] *See* 2006 Commission Report, in Holtzmann & Neuhaus, *supra* n. 13, at 431.

[154] Although this is a low threshold, the applicant's allegations on jurisdiction are not 'immune from attack' by the respondent who can show that 'there are key facts or legal principles that can be easily and definitively disproven.' Donovan & Rivkin, *supra* n. 149, at 117.

[155] *See* SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010).

[156] *See* SCC Practice Note 2015–2016 at 11–13 (Case Nos. EA 2016/082, EA 2016/095).

[157] *See* Donovan & Rivkin, *supra* n. 149, at 115.

4.7 Other elements and considerations not expressly stated in Article 17A and not covered by its travaux préparatoires

Practitioners applying Article 17A's standard may encounter additional considerations not expressly covered by that Article and not debated within its travaux préparatoires, for example, whether Article 17A should be applied in a way that prevents aggravating the parties' dispute, or whether it should not be applied to grant the same relief sought in the main case.

Most commentators agree that, in general, interim measures should be granted to prevent aggravating the parties' dispute, [158] and arbitrators have granted interim measures on that basis.[159] Others have clarified that the no aggravation of the dispute theory 'is not available to protect against an increase of the amount in dispute.'[160] Practitioners are free to follow either of these authorities, because nothing in Article 17A's travaux préparatoires is inconsistent with them.

Similarly, commentators explain that the interim measures sought 'should not reflect the relief sought in the main case'[161] and, although Article 17A is silent on this, at least one tribunal that applied Article 17A seems to have followed this logic. As noted before, a tribunal applying Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) denied a respondent's request for interim measures in the form of security for costs which would have, in essence, granted the respondent the jurisdictional objection it had launched in the arbitration.[162]

---

158 *See* Christian Aschauer, *Use of the ICC Emergency Arbitrator to Protect the Arbitral Proceedings* 10, 23(2) ICC Bull. (2012) ('it is beyond doubt that the arbitral tribunal has the power to order measures necessary to avoid an aggravation of the dispute'); Rivkin, *supra* n. 12, at 5 ('the ICJ has routinely made non-aggravation orders when granting provisional measures'); ICC Report on EA, *supra* n. 11, at 26 ('some EAs have acknowledged the "risk of aggravation of the dispute" as a factor to consider when exercising their discretion to grant emergency relief').

159 *See* Carlevaris & Feris, *supra* n. 6, at 21 (providing example of arbitrator who granted the interim measures 'as the dispute would otherwise have worsened'). But *see City Oriente v. Ecuador*, Provisional Measures, *supra* n. 115, para. 60 (parties agree 'that there is no general, autonomous, abstract right to the non-aggravation of the dispute warranting, ipso jure, the passing of provisional measures').

160 *See* Beechey & Kenny, *supra* n. 10, at 23. *See also City Oriente v. Ecuador*, Provisional Measures, *supra* n. 115, para. 60 ('given that Claimant would only be entitled to damages, the aggravation of such damages does not constitute grounds for ordering provisional measures').

161 *See* Fry, *supra* n. 10, at 359. *See also* Final Award in ICC Case 14287, in *ICC Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration* 9 ('an interim measure must not anticipate a ruling in the case per se'); ICC Report on EA, *supra* n. 11, at 15 (explaining that in two cases emergency arbitrators denied interim measures because 'the specific relief requested was not interim or conservatory in nature, as the measure related to the merits'). In practice, however, sometimes 'both forms of relief are closely related,' such as when a shareholder seeks to prevent another shareholder from transferring its shares to a third party and giving that third party control of the company. *See* Fry, *supra* n. 10, at 359–360.

162 *See* 4.5(c) *supra; Silver v. Bolivia P.O.10, supra* n. 146, paras 53–56; *see* also SCC Practice Note 2010–2013 at 8–9 (Case No. EA 144/2010) (dismissing request that the respondent deliver products because that would equate to 'a substitute for a judgment,' although there is no indication that this arbitrator considered Art. 17A).

5 APPLYING ARTICLE 17A'S STANDARD FOR ISSUING INTERIM MEASURES

As shown in this article, pursuant to Article 2A(1), any application of the standard for interim measures set forth in Article 17A of the Model Law must (1) be consistent with Article 17A's travaux préparatoires as described in section 4 *supra*, and (2) consider the decisions by courts and arbitrators around the world that have applied that Article and the scholarly writings that have analysed it, including those decisions and writings described in section 4 *supra*, and any others practitioners can find.

To aid practitioners with this, Table 1 lists the principles of construction applicable to each element of Article 17A's standard that stem from Article 17A's travaux préparatoires, the relevant decisions by courts and arbitrators that have applied it, and the scholarly writings that have analysed it.

Table 1 Applying the Standard for Interim Measures Under Article 17A of the Model Law on International Commercial Arbitration

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	Principles of construction	Reasoning
	1. General principles of construction applicable to Article 17A	
	Principles that cannot be contradicted	
1.1	Article 17A's travaux préparatoires must be considered, and Article 17A cannot be applied in a way that contradicts those travaux préparatoires	Article 2A mandates that when applying Article 17A, 'regard is to be had to its international origin'
1.2	The decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it must be considered, but are not binding	Article 2A mandates that when applying Article 17A, 'regard is to be had' 'to the need to promote uniformity in [its] application'
1.3	Article 17A's standard cannot be construed solely under the canons of construction that would be applied to a domestic statute in the relevant jurisdiction	Article 2A mandates that when applying Article 17A, 'regard is to be had to its "international origin" and "the need to promote uniformity in [its] application"'

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
1.4	Equitable considerations must be factored in, like for example whether granting or denying the interim measures would reward a party that (1) is acting in bad faith, (2) delaying the proceedings, or (3) delaying enforcement of a future award	Article 2A mandates that when applying Article 17A, 'regard is to be had' to 'the observance of good faith,' i.e. equitable considerations
	2. Burden of proof	
	Principles that cannot be contradicted	
2.1	If the applicant does not meet Article 17A's standard, arbitrators have no discretion to issue interim measures, except when the measures seek to preserve evidence	Article 17A's travaux préparatoires show that the Working Group chose the word 'shall' to obligate applicants to meet the standard
2.2	Article 17A's standard does not establish what burden of proof applicants must meet; each jurisdiction determines that burden of proof	Article 17A's travaux préparatoires show that the word 'satisfy' establishes a 'neutral' burden of proof, and that each jurisdiction sets the burden of proof
	3. Urgency	
	Principles that cannot be contradicted	
3.1	Urgency is not a separate element of Article 17A's standard	Article 17A's travaux préparatoires show that urgency was intentionally eliminated as a separate element of the standard
	Principles that must be considered but are not binding	
3.2	The element of urgency is (1) implicitly included in the requirement of 'harm not adequately reparable by an award of damages,' (2) satisfied when the relief requested cannot await a final award, or (3) in emergency arbitrations, satisfied when the relief requested cannot await the constitution of the tribunal	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	4. Harm to the applicant 'not adequately reparable by an award of damages'	
	Principles that cannot be contradicted	
4.1	Applicants need not prove that harm 'will result' if the measure is not granted	Article 17A's travaux préparatoires show that the Working Group decided to lower the burden of proof from harm that 'will result' to harm that is 'likely'
4.2	Article 17A's concept of 'harm not adequately reparable by an award of damages' covers harm that is truly irreparable	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' covers truly irreparable harm, and list as an example the loss of an irreplaceable piece of art. Arbitrators have held, for example, that the loss of evidence or of the ability to participate in the arbitration are truly irreparable harm covered by Article 17A
4.3	Article 17A's concept of 'harm not adequately reparable by an award of damages' also covers harm that can be compensated by an award of damages, but that it would be 'comparatively complicated to compensate' through such award	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' also covers damages that would be 'comparatively complicated to compensate' by an award of damages, and list as an example losing a business opportunity, or forcing a party into insolvency. Arbitrators have found that this covers, for example, cases where the applicant would suffer a significant disruption of business relations or would go out of business altogether
4.4	To prove a harm 'not adequately reparable by an award of damages,' applicants need not prove that their harm is of large quantity	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' refers to the quality of the harm, not to its large quantity

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	Principles that must be considered but are not binding	
4.5	Harm of small quantity might be insufficient. The application might fail if the quantity of the applicant's harm is too low, regardless of its quality	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
4.6	If the respondent is unlikely to honour a final award, the applicant's harm will 'not [be] adequately reparable by an award of damages'	Numerous decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so
	5. Balance of convenience (the 'substantially outweigh' requirement)	
	Principles that cannot be contradicted	
5.1	Irrelevant to the balance of convenience is any harm to the applicant that would not be avoided or mitigated by the interim measures	Article 17A's travaux préparatoires show that the word 'such' captures harm likely to occur if the interim measures are not granted
5.2	Irrelevant to the balance of convenience is any harm to the applicant that can be 'adequately compensated by an award of damages'	Article 17A's travaux préparatoires show that the word 'such' captures harm not 'adequately compensated by an award of damages'
5.3	Harm to parties who are 'affected by the measure,' but are not the party 'against whom the measure is directed,' is irrelevant to the balance of convenience	Article 17A's travaux préparatoires show that the relevant harm is only that caused to the party 'against whom the measure is directed' and not to any other party 'affected by the measure'
	Principles that must be considered but are not binding	
5.4	Parties who present an undertaking that would cover the damages the other side would suffer if the measures are granted/rejected are more likely to show that the balance of convenience tilts in their favour	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.5	A declaration by respondent that it will not infringe the applicant's rights at issue might help respondent show that	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	the balance of convenience does not tilt in the applicant's favour	those authorities but are not bound to follow them
5.6	If arbitrators deny the interim measures based on a declaration by the respondent not to infringe the rights at issue, and the respondent later reneges on that declaration, arbitrators may issue the measures	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.7	If the interim measures would cause the respondent 'limited' damages, the applicant is likely to show that the balance of convenience tilts in its favour	Numerous decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so
5.8	If the interim measures would cause the respondent 'irreparable harm,' respondent is likely to show that the balance of convenience tilts in its favour	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.9	It is harder for applicants to show that the balance of convenience tilts in their favour if they seek an affirmative injunction	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.10	The stronger the merits of the underlying claim relevant to the application for interim measures, the lower the applicant's burden of proof on the balance of convenience	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.11	A refusal by the applicant to accept a unilateral imposition by the respondent, which imposition would arguably mitigate the applicant's harm, is irrelevant to the balance of convenience	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	6. Reasonable possibility of success on the merits of the claim	
	Principles that cannot be contradicted	
6.1	Applicants need not prove a 'reasonable possibility of success on the merits of the' application for interim measures	Article 17A's travaux préparatoires show that applicants must prove a reasonable possibility of success on the merits of the underlying claim, not the application for interim measures
6.2	Applicants need not prove a 'reasonable possibility of success on the merits of the' claims not relevant to the application for interim measures	Article 17A's travaux préparatoires show that applicants must prove a reasonable possibility of success on the merits only of the underlying claim relevant to the application rather than of the entire 'dispute' or 'underlying case'
6.3	A decision on interim measures does not prejudge a future determination on either an award on the merits or procedural orders	Article 17A's travaux préparatoires show that under Article 17A a decision on interim measures does not prejudge future determinations in either awards or procedural orders
6.4	The determination of whether an applicant showed 'a reasonable possibility of success on its claim' will be influenced by (1) how early in the proceedings the applicant seeks the interim measures; and (2) how much information is available then	Article 17A's travaux préparatoires show that the 'reasonable possibility of success on the merits of the claim will be assessed differently in view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings'
	Principles that must be considered but are not binding	
6.5	To show a 'reasonable possibility of success on the merits,' an applicant should show that the merits of its claim fall between 'plausible' and 'more likely than not'	Numerous decisions and scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so
6.6	An applicant might show 'a reasonable possibility of success on its claim' even when the respondent presents 'credible' defenses	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
6.7	An applicant might show 'a reasonable possibility of success on its claim' even if its claim is supported only on inferences, rather than direct evidence	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
	7. Jurisdiction	
	Principles that cannot be contradicted	
7.1	Any jurisdictional requirement that exists under Article 17A does not refer to the ability of the arbitrator to issue interim measures	Article 17A presupposes the arbitrator's ability to issue interim measures
7.2	If, to get the interim measures, the applicant needs to show that the arbitrator has jurisdiction, the applicant likely needs to show only a 'reasonable possibility' of jurisdiction.	Numerous decisions and scholarly writings have concluded that as part of the 'reasonable possibility of success on the merits,' applicants must prove a reasonable possibility of jurisdiction. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so.
	In any event, the applicant would need to show a 'reasonable possibility' of jurisdiction only over the underlying claim relevant to the application rather than over the entire 'dispute or underlying case'	Yet, if practitioners follow those authorities, i.e. conclude that an applicant must make a showing of jurisdiction, they must limit the requirement to jurisdiction over the underlying claim relevant to the application, because Article 17A's travaux préparatoires show that practitioners must prove a reasonable possibility of success on the merits of that claim only
7.3	A finding of a 'reasonable possibility' of jurisdiction over the underlying	Article 17A's travaux préparatoires show that a decision on interim

	Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (*Principles of construction of each element of the standard*)	
	claim does not preclude a subsequent finding to the contrary	measures does not prevent future determinations to the contrary
	Principles that must be considered but are not binding	
7.4	For purposes of interim measures, arbitrators might be satisfied of their jurisdiction simply when (1) the contract, or treaty, refers to arbitration under the rules of the institution that appointed the arbitrators; and (2) any pre-arbitration conditions seem inapplicable	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
	8. Other elements and considerations	
	Principles that can be considered but are not binding	
8.1	In general, interim measures might be granted to prevent aggravating the parties' dispute, but this does not apply 'to protect against an increase of the amount in dispute'	Article 17A is silent on this, and so are its travaux préparatoires. Practitioners are thus free to follow or disregard the authorities that have concluded this
8.2	In general, interim measures might be denied if they seek the same relief sought in the main case. (But this should not apply if both types of relief are closely related and cannot be untangled)	Article 17A is silent on this, and so are its travaux préparatoires. Practitioners are thus free to follow or disregard the authorities that have concluded this

COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

ICC COMMISSION REPORT

EMERGENCY ARBITRATOR PROCEEDINGS

INTERNATIONAL CHAMBER OF COMMERCE

International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75116 Paris, France
www.iccwbo.org

The views and recommendations contained in this publication originate from a Task Force created within ICC's Commission on Arbitration and ADR. They should not be thought to represent views and recommendations of the ICC International Court of Arbitration or the ICC International Centre for ADR, nor are they in any way binding on either body.

Publication date: April 2019

Contents

Emergency Arbitrator Proceedings

Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings

NOTE TO READERS

The views expressed and statements made in this Report are those of their authors, Task Force and Commission members. The Report, including its Annexes, should not be construed as creating any duty, liability or obligation on the part of ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and the ICC Commission on Arbitration and ADR. The material in the table in Annex II was largely provided by ICC National Committees and is meant as a general overview only; ICC and its constituent bodies should not be held responsible for the accuracy of its information. This Report does not endorse any particular approach on how to conduct emergency arbitrations and does not impose any binding obligations on emergency arbitrators.

I. INTRODUCTION

A. Introductory remarks

1. The Task Force on Emergency Arbitrator ("EA") Proceedings (the "Task Force") was set up to study the experience with EA proceedings and to analyse all aspects, including procedural and substantive issues, that may arise in EA proceedings in order to identify and examine any emerging trends.

2. Over the last decade, EA proceedings have rapidly been adopted by several institutions. ICC adopted its own version - Article 29 and Appendix V (together, the "EA Provisions") - as part of the 2012 revision of the ICC Arbitration Rules. However, the 2012 revision was not the ICC's first attempt to address pre-arbitral relief: in 1990, ICC introduced a Pre-Arbitral Referee Procedure still in force today. While the Pre-Arbitral Referee Procedure is one that can be opted into and presumably for that reason was quite rarely applied in practice, following the 2012 revision, the EA Provisions are part of the ICC Rules themselves and apply to arbitration agreements under the Rules concluded after 1 January 2012, unless the parties have affirmatively opted out.[1]

3. Although the procedure and conditions for obtaining emergency interim relief may vary somewhat between different rules, many institutions seem to have determined that EA proceedings fill a perceived void and satisfy a demand from users. This is borne out by the ICC experience. By 30 April 2018, six years after the EA Provisions were implemented, 80 ICC Applications for Emergency Measures ("Application") had been filed.

4. Absent EA Provisions, or agreement on any Pre-Arbitral Referee Procedure, users requiring urgent interim relief had either to turn to state courts with jurisdiction or wait until the arbitral tribunal is constituted. For some forms of urgent interim relief, state courts are the only viable option regardless of the existence of EA Provisions, e.g. where *ex parte* relief is required and available in state courts or where measures sought concern or affect third parties. However, for other more common types of interim relief the state courts have the inherent downsides of loss of confidentiality and dependency on the local procedural rules that the parties had sought to avoid by selecting arbitration. Absent EA Provisions, the remaining option of awaiting constitution of the tribunal may take too much time in urgent cases and thereby undermine the very utility of seeking emergency relief.

5. Institutions, such as ICC, which have adopted the EA mechanism to fill this lacuna, now have sufficient practical exposure to EA proceedings to have developed a body of learning on how to increase predictability of EA proceedings, improve the process to best suit users' needs, protect due process and avoid abuses, stimulate efficiency and facilitate enforcement of – and compliance with – EA Orders. The Task Force Report seeks to contribute to this goal.

6. The Report is intended to be descriptive rather than prescriptive. The Task Force has sought to collate and analyse practical experience with the ICC EA process, to place such experience in the context of EA proceedings under other rules, and to offer possible solutions to some of the problems identified by the Task Force and ICC Commission members. This Report thus seeks to offer guidance to users, counsel and EAs and to facilitate the use of EA proceedings through increased transparency and predictability. Such guidance does not however impose any binding obligations on EAs.

1 Article 29(6) of the ICC Arbitration Rules. The EA Provisions remain unchanged in the ICC Arbitration Rules in force as from 1 March 2017 (hereinafter the "ICC Rules").

B. Summary of key conclusions

7. The Task Force analysis of the first 80 ICC EA cases and 45 National Reports reveals that there is no universal approach to EA proceedings. This variety is apparent with respect to threshold issues, procedural matters, substantive standards and post-emergency arbitration considerations, and is first and foremost the consequence of the choice made in the ICC Rules to leave to the EA a considerable degree of discretion and flexibility. Acknowledging this advantage, the Report intends to contribute to the predictability of EA proceedings while leaving the EA's flexibility intact.

8. A key finding based on the cases analysed in this Report is that relief has been granted only in a minority of ICC EA Applications. But this may not, of itself, be surprising: the nature of interim relief is such that it is only in exceptional cases that urgent relief is justified. Indeed, this appears to have been the experience with EA mechanisms under most other arbitral rules. It appears from the analysed cases that EAs are minded to strictly apply particular threshold requirements set by the EA Provisions, such as the key requirement that relief "cannot await the constitution of an arbitral tribunal" (Article 29(1)). Yet, EAs have in multiple cases been persuaded to grant interim relief and the EA Provisions are thus an important addition to the ICC Rules, filling a previously existing void.

1) Threshold issues

9. Issues of applicability, jurisdiction and/or admissibility have proven important as they were involved in 56 of the first 80 ICC EA cases studied, with 21 EA Applications rejected in whole or in part on these grounds. Of these 21 EA Applications, three were rejected in whole or in part by the President of the ICC International Court of Arbitration (the "President of the ICC Court" or "President") as part of the President's "applicability" test pursuant to Appendix V, Article 1(5) of the ICC Rules.

10. There is no general consensus on the exact definitions of what constitutes "applicability", "jurisdiction" or "admissibility". For example, some EAs have reviewed the criteria set forth in Articles 29(5) and 29(6) as part of their analysis of the "admissibility" of the Application (pursuant to Article 6(2) of Appendix V) along with the criterion of Article 29(1), while others consider "admissibility" an issue of "jurisdiction". Likewise, many of the topics raised as jurisdictional may also be considered as affecting admissibility and applicability.

11. In order to give guidance to parties and EAs on how to address those preliminary and procedural issues, a summary of the Task Force's findings is set out below.

12. **As to the applicability of the ICC Rules.** Under the ICC Rules (Article 1(5) of Appendix V), the President of the ICC Court "considers" on the basis of "the information contained in the Application" whether the EA Provisions apply with reference to Articles 29(5) and 29(6). These criteria have to be understood as an "applicability test" of the EA Provisions. Arguably, this applicability test does not bind the EA if the Application does proceed, as the test is performed only on the basis of the Application as such and without having the benefit of the respondent's views. Thus, jurisdictional and admissibility issues remain to be decided by the EA, after the President's decision on the applicability of the EA Provisions.

13. Importantly, while the President has on very rare occasions used his power to decide that the EA Provisions do not apply and thus rejected the Application, the President has in some cases allowed the EA Application to go forward subject to the EA's final determination on threshold issues under Article 29(5) or 29(6). Even in the absence of a specific request, the EA will have to decide on such threshold issues if – as this has rather frequently been the case – the respondent invokes the EA's lack of jurisdiction based on Article 29(5) or 29(6).

14. **As to the jurisdiction of the EA.** Under the ICC Rules (Appendix V, Article 6(2)) the EA "shall determine … whether the emergency arbitrator has jurisdiction to order Emergency Measures". No explicit test is set forth in the ICC Rules to assess such jurisdiction however. EAs have often considered elements of Articles 29(5) and 29(6) as part of their threshold analysis on jurisdiction or even considered elements of Article 29(1). The Task Force considers the jurisdictional test to be performed by the EA to include whether an arbitration agreement concluded under the 2012 ICC Rules exists and to additionally require an analysis of the elements of Articles 29(5) and 29(6) of the ICC Rules where the respondent raises issues related to these elements. Whether or not the latter is part of a jurisdictional test or to be qualified as a separate threshold issue may depend on the specific national law or laws relevant to the Application. It is arguable that applicability overlaps with jurisdiction issues. As such, the same issues analysed by the President of the ICC Court when determining applicability may fall to the EA to be determined when analysing jurisdiction. The Task Force does not consider the urgency test of Article 29(1) to be a jurisdictional test, since this test focuses on the measure sought in the particular circumstances rather than on the more general question of the existence and scope of the arbitration agreement.

15. Many jurisdiction challenges have been raised in the context of one or more objections based on multi-tiered dispute resolution clauses, date of the agreement, concurrent jurisdiction, non-signatory/ standing, or questions of the scope of relief/authority of the EA. Each of these objections turns on its own particular facts and application of relevant legal principles.

16. While there is no specific deadline in the EA Provisions for making jurisdictional objections, parties and EAs are encouraged to raise jurisdictional issues as early as possible to allow them to be considered to the fullest possible extent despite the time constraints inherent to EA proceedings.

17. **As to the admissibility of the Application.** Under the ICC Rules (Article 29(1)), a party may make an Application for emergency measures when it "needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal", and thus this criterion is to be understood as an admissibility test. After undertaking a *prima facie* assessment of whether the requested measure could await the constitution of the arbitral tribunal at the admissibility stage, EAs would subsequently further consider urgency when ruling on the merits of the Application.

18. The Task Force considered that "urgency", as a test to be met on the merits of the Application, is not to be measured only by reference to the test of whether the measures requested "cannot await the constitution of an arbitral tribunal" as set forth in Article 29(1) of the ICC Rules. Rather, the reference to the relief not being able to await the constitution of the tribunal provides temporal guidance on one aspect of what may constitute the necessary "urgent interim or conservatory measures".

19. The Task Force also supported treating urgency separately, first as part of the admissibility requirement of Article 29(1), and second, as part of the merits. In this way, the parties can consider arguing urgency afresh to the fully constituted arbitral tribunal (the admissibility requirement of Article 29(1) by definition does not apply in that context) and such approach may also limit any potentially preclusive effect an EA finding of urgency (or lack of urgency) may have on any judicial remedy.

20. The EA's determination of threshold issues is not binding upon the arbitral tribunal once constituted pursuant to Article 29(3) of the ICC Rules. Indeed, given the absence of the time constraints inherent in EA proceedings, the tribunal deciding on the merits may decide to re-examine any objections, consider different evidence, or otherwise approach the issue in any way it wants irrespective of the EA's Order.

21. The EA Provisions do not specify the law applicable to threshold issues. Most EAs consider that they are not bound by the *lex contractus*, yet, in a significant number of cases, EAs found that their determination was to be guided by, but not bound by, relevant national law and/or the *lex arbitri*.

2) Procedural matters

22. Subject to any agreement of the parties and any applicable mandatory law, Appendix V provides limited guidelines and encourages flexibility. The EA's wide discretion has been embraced by most EAs who, eschewing any explicit reliance upon national procedural laws, choose instead to adopt procedures that best serve the needs of a particular case and to resolve the practical and procedural challenges created by the nature and urgency of the Application. In that context, prior consultation with the parties on procedural decisions may not be practically feasible, although parties are invited to identify to the EA as early as possible any mandatory provisions of relevant national laws. Soft law norms, albeit less relevant, might inspire EAs in their procedural discretion.

23. Acknowledging that EA proceedings are demanding on EAs and parties alike, the Task Force has included examples of case management techniques that the EA and the parties can use to promote efficiency of the EA proceedings. Parties and emergency arbitrators are encouraged to consult the *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (see Section V on "Emergency Arbitrator") and the *ICC Emergency Arbitrator Order Checklist*.[2] The Order Checklist is a tool that fosters uniformity as to form and hence facilitates the Secretariat's informal review of the Order when time is of the essence. An initial telephone case management conference was also highly recommended, and such conference was held in a substantial number of cases. The case management conference can be used not only to address purely procedural issues but also to identify any temporary orders needed pending the final EA Order, decide how evidence will be presented and discuss the substantive standard to be applied in determining the Application.

24. Although permitted by some other institutional rules, the conclusion of the Task Force is that true *ex parte* Orders - where the Order itself is issued prior to the respondent being notified of the Application - are incompatible with Article 1(5) of Appendix V of the ICC Rules. There was some support for a less onerous form of *ex parte* procedure in which the EA might issue an initial Order to preserve the *status quo* for the duration of the EA proceedings before the responding party has filed its response. Due process concerns have been voiced to which procedural solutions have been proposed including granting the respondent a very short deadline to object to the temporary measure and/or limiting the duration of the temporary measure (unless extended after the respondent has been granted an opportunity to be heard on it).

25. Given the time constraints and limited effect of the EA proceedings, the EA should at a minimum consider adopting some of the typical procedural innovations in arbitrations under the ICC Expedited Procedures Provisions of Appendix VI to the ICC Rules. Consequently, EAs could in appropriate circumstances decide the case on documents only, with no hearing and no examination of witnesses, and limit the number, scope and length of submissions. The only limit to the EA's discretion is to ensure that each party has a reasonable opportunity to present its case.

26. In most cases however, EAs have adopted a more classical approach, with a hearing and without witness evidence.

---

2 All ICC Notes and Checklists are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/ and in the ICC Digital Library (http://library.iccwbo.org/dr-practicenotes.htm).

27. It is the applicant's burden to establish a *prima facie* compelling case that the requested measures are justified and required. Because many Applications have focused on merely preserving the status quo pending appointment of the tribunal deciding on the merits, extensive factual allegations are not always required.

28. As in any other ICC procedure, if a respondent fails to participate, it should still be notified of all communications in the emergency arbitration.

29. The ICC EA proceedings are almost invariably concluded within, or very shortly after, the 15-day deadline foreseen in the ICC Rules.

3) Substantive standards

30. As to the norms governing consideration of EA Applications, and in the absence of prescriptive norms applicable to EAs, most EAs have applied substantive criteria developed in connection with the granting of interim measures by arbitral tribunals and by reference to standards distilled from international arbitration practice rather than in accordance with any specific domestic laws. This is not to say that the *lex contractus* or the *lex arbitri* have not sometimes been considered. An approach based on international practice is consistent with the parties' expectations and will encourage predictability and uniformity of results. Since the criteria governing the granting of interim relief are arguably best qualified as procedural rather than substantive law norms, reliance on any domestic norms might also be considered less appropriate.

31. As mentioned, the requested urgent measures are admissible when they "cannot await the constitution of an arbitral tribunal" (Article 29(1) of the ICC Rules). In practice, the interpretation and scope of said requirement has been far from uniform and EAs have also considered additional criteria stemming from international practice of arbitral tribunals with interim measures.

32. The urgency criterion is a high standard. The lack of sufficient urgency is a very common basis for denial of an emergency measure. In addition to the urgency, in the sense of a relief which "cannot await the constitution of an arbitral tribunal" (Article 29(1)), EAs have also considered other urgency factors such as, inter alia, the applicant's contribution to the urgency or whether the applicant has demonstrated that the relief requested avoids imminent or irreparable harm. The application of the latter criterion as a decisive element in itself arguably increases the standard of urgency required. The Task Force notes that while the criterion of the risk of irreparable harm has regularly been considered, it has not been applied as a relevant factor consistently, let alone as a self-standing condition, whether as part of the urgency test or otherwise as part of the substantive test.

33. In addition to the urgency requirement, EAs routinely consider a mix of substantive criteria applicable in deciding applications for interim measures outside the EA context. These criteria include i) the likelihood of success on the merits (*fumus boni iuris*), ii) the risk of irreparable harm (*periculum in mora*), iii) the risk of aggravation of the dispute, iv) the absence of prejudgment on the merits, and v) proportionality/balance of equities.[3] EAs tend to assess which elements are relevant in light of the particular circumstances of the case, and similarly which weight is to be afforded to each of them.

34. EAs have also taken into account secondary considerations such as the provision of security from the requesting party in accordance with Article 28 of the ICC Rules and whether the relief requested is appropriate. Orders granting security remain rare in EA practice. There is no uniform approach as to the limits of what could be appropriate relief, although it seems understood that the requested measure must be of a preliminary nature independent of the final relief sought. It is unsettled whether or to what extent, declaratory relief is available in EA proceedings.

4) Post-emergency arbitration considerations

35. As EA proceedings have become more prevalent, concerns about the enforceability of EA decisions have given rise to numerous debates. Enforceability concerns have principally arisen from the status of the EA, the interim nature of the EA decision and the specific form of the EA decision. The report considers these hurdles to enforceability based on an analysis of 45 National Reports, keeping in mind that they should not be overstated as the data suggests that, in the vast majority of cases, parties comply voluntarily with EA decisions. In practice, the responding parties may be inclined to comply voluntarily with EA decisions in order to avoid the negative consequences non-compliance may have in the arbitration on the merits.

36. Given the relatively recent nature of EA proceedings, and with the exception of Hong Kong, New Zealand and Singapore, there is at present no provision in national laws expressly providing for enforcement of EA orders and, similarly, there is limited case law. Consequently, the analysis set forth in the Report is only based on the views of National Committees and Task Force members and should be taken with caution.

37. From the analysis of the National Reports, no uniform interpretation but only trends emerge:

(i) Most reports from countries that have incorporated the UNCITRAL Model Law tend to favour enforceability of EA decisions.

(ii) In those countries where the UNCITRAL Model Law has only inspired the local arbitration law, the position as to enforceability varies widely.

(iii) In the USA, where the UNCITRAL Model Law plays little or no role, there is a growing body of case law on EA decisions, in which such decisions are treated just as interim arbitral awards.

(iv) In countries where statutory provisions allow arbitral tribunals to grant interim measures,

3 See infra paras. 151 et seq. of the Report.

national laws and practice often draw distinctions between domestically seated and foreign seated arbitration.

(v) Where arbitral tribunals do not have general powers to grant provisional and conservatory measures either by express provision of the law or because the silence of the law is interpreted as a prohibition, the direct enforceability of EA decisions is unlikely.

38. The characterisation of the EA decision as an "order" or an "award" under the relevant national law is of concern in some jurisdictions when it comes to enforceability, while in most jurisdictions this distinction as such is not decisive. It is clear to most commentators of the New York Convention that interim measures differ from final awards due to the provisional nature of interim measures as opposed to the final nature of an award. Hence, except in few jurisdictions, enforceability of orders is unsettled.

39. Notwithstanding such uncertainty, the increasing use of EA proceedings worldwide suggests that users are not discouraged by enforceability concerns. This is so because EA proceedings benefit from high levels of compliance by the parties, from the support of local courts and from the tribunal on the merits.

40. Compliance issues related to the ordered emergency measures, excluding costs, were encountered in only three cases out of the 23 ICC EA proceedings where an emergency measure was ordered.

41. In the event of non-compliance, the successful applicant can attempt to seek support from local courts in an enforcement action, particularly in UNCITRAL Model Law inspired countries, or potentially in a breach of contract claim. Interestingly, EA decisions, even if not complied with, could influence local courts to support the decision of the EA.

C. Structure of the Report

42. After this Introduction, Section II addresses the work undertaken by the Task Force and, in particular, the sources of information considered in preparing this Report. This includes an explanation of the Task Force's analysis of the ICC EA decisions, which are referred to throughout the Report and summarised in Annexes I and II.

43. Section III provides the Task Force's analysis of selected contentious areas in the practice and procedure associated with EA proceedings, and identifies emerging common practices (or divergences) on a number of key issues. The Report primarily draws on the experience of the Task Force and Commission Members as well as the Secretariat in identifying these conventions. Section II also provides a statistical commentary based on an analysis of the first 80 ICC EA proceedings.

44. Section IV provides commentary on post-EA proceedings considerations such as enforcement of the EA's decision, modification of the EA's decision and the impact of the EA process on settlement. While this last Section draws heavily on the feedback received from the Secretariat, it is not intended to be exhaustive. This is because the Secretariat is not systematically informed of whether the parties have settled or simply withdrawn the case. More often than not, parties do not share such information. Furthermore, Section IV also draws heavily on the input received from ICC National Committees.

45. Annex I provides an overview of the first 80 ICC EA cases conducted under the ICC Rules.[4]

46. Annex II is a summary table of the material predominantly provided by ICC National Committees on the topic of post-EA proceedings enforcement and related issues.[5]

II. THE TASK FORCE WORK UNDERLYING THIS REPORT

A. Scope of the Task Force work

47. In line with its mandate, the Task Force collected and evaluated experience with EA proceedings under the ICC Rules and other major sets of arbitration rules. Further, the Task Force collected information from individual jurisdictions on mandatory rules impacting the EA proceedings and on the enforceability of EA Orders.[6]

48. Emergency arbitration is defined as a procedure through which a party unable to await the constitution of the arbitral tribunal can seek to obtain urgent interim or provisional relief prior to, or independent from, an arbitration procedure on the merits. The Task Force has not independently studied the availability of interim relief within arbitration proceedings on the merits, or considered expedited arbitration on the merits, or the availability of interim relief in state courts prior to or pending an arbitration on the merits. As interim relief in arbitration on the merits or in state courts are alternatives to EA proceedings and thus comparable by nature, the Task Force work has touched upon the practical advantages and disadvantages of EA proceedings over these alternatives.

49. One particular area of contention specific to emergency arbitration under the ICC Rules has been its non-applicability to treaty-based investor-state arbitration. Under Article 29(5) of the ICC Rules, EA proceedings do not apply to non-signatories of the arbitration agreement. The ICC Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, which was issued in light of the 2012 Rules revision, considered that the purpose

4 Where appropriate, the analysis is incorporated into Sections II and III of the Report.

5 See supra "Note to readers" p. 3 of the Report.

6 See Annex II of the Report.

of the signatory requirement under Article 29(5) was, among other things, to exclude investment arbitration from the EA Provisions.[7] Although this view had been criticised, the ICC Court's policy has since the entry into force of the 2012 Rules been not to apply the EA Provisions in treaty-based arbitrations.[8]

B. Sources for the Task Force study

50. This Report is based on evaluation and input from the following main sources:

(i) An empirical study of the first 80 ICC Applications for Emergency Measures; the 80th Application being filed end of April 2018, based on criteria and questions discussed in the Report.[9]

(ii) Questionnaire addressed to the Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC) and the Swiss Chambers' Arbitration Institution (SCAI) regarding those institutions' experiences with their respective EA mechanisms (or purported equivalents).

(iii) Questionnaire addressed to ICC National Committees to determine questions regarding the status of EA proceedings under local laws, addressing in particular, the enforceability of EA decisions, the availability of specific statutory rules or regulations facilitating enforcement of such decisions, any laws impeding the use of EA proceedings, the availability and standard for obtaining interim relief at state courts in the respective jurisdictions, and any other issues that may be of relevance to the Task Force work.[10]

(iv) Input and feedback from the Task Force members (most of whom have been involved in EA actions as counsel, EAs or as representatives of parties) on the separate topics addressed in the Report based on their experience and know-how,[11] as well as on available scholarly writings and precedents in their corresponding jurisdictions.

III. SELECTED TOPICS - PRACTICE ON KEY ISSUES

51. The relatively recent introduction of EA proceedings in most major international arbitration rules, the users' limited experience with this mechanism and the inherent context of urgency around such Applications, all combine to create an increased need for a better understanding of the way EA proceedings have been and can be used.

52. The ultimate objective of the Task Force is to provide international arbitration users with the means to ensure that EA proceedings meet their potential and provide an avenue for urgent interim measures before the constitution of the arbitral tribunal. In addition, the Task Force wishes to assist in creating fair, well-managed and cost-efficient EA procedures. The Task Force believes that the present Report will help achieve this objective. It is intended primarily to illustrate past experience so as to let users know what to expect from the proceedings, how to best prepare for them and how to avoid pitfalls. Given that party autonomy and flexibility are central to international arbitration, there is no universal approach to any aspect of EA proceedings.

53. With this objective in mind, the Task Force considered the following: General Issues (Section III.A), Threshold issues (Section III.B), Procedural matters (Section III.C), Substantive standards (Section III.D).

A. General issues

1) ICC Note and ICC EA Order Checklist

54. Emergency arbitrations are demanding on the EA who, as required by the ICC Rules, must be available during the entire duration of the proceedings - from 15 to 30 days - and able to act promptly in the management of the proceedings. Because EA proceedings are aimed at addressing urgent issues, the ICC Secretariat issued a *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (the "Note"), which addresses EA proceedings in Section V, and an *Emergency*

7 ICC Commission Reports are available at https://iccwbo.org/commission-arbitration-ADR and in the ICC Digital Library (http://library.iccwbo.org/dr-commissionreports.htm).

8 See P. Pinsolle, "A call to Open the ICC Emergency Arbitrator Procedure to Investment Treaty Cases" in *International Arbitration Under Review: Essays in Honour of John Beechey* (2015), p. 307.

9 Some important caveats should be noted with respect to the Task Force analysis of the 80 EA Applications. First, understandably, ICC has been vigilant to ensure that confidentiality has been maintained; and 38 of the 80 Applications were subject to such heightened sensitivity. Second, because many of the cases are in fact on-going in the merits phase, there is considerably less information available on post-EA issues for the most recent EA Applications. Third, while citations have been made to specific EA Applications where appropriate and possible, specific citations to all relevant EA Applications have not appeared feasible or appropriate. Accordingly, while the data points have been vetted as closely as possible, readers should focus on the identified trends rather than specific numbers of cases cited.

10 The following three questions were asked: (1) The Task Force is particularly interested in learning whether the national laws of your jurisdiction prevents or limits an EA from rendering an Order granting interim relief or to the contrary allows an EA to render an Order subject to penalties for non-compliance. (2)The Task Force is also interested in the impact of your national laws on the enforcement of EA decision or decisions by arbitrators granting interim relief, notably the relevant criteria and limitations commonly applied in your jurisdiction, as well as practical issues to be taken into consideration. (3) Finally, since enforcement of EA Orders is not always possible in law or practice in relevant jurisdictions, the Task Force is seeking to understand the experience under your jurisdiction with alternatives available under the law and in practice to address non-compliance with an EA´s Order. Are damages available as a remedy in the arbitration on the merits? Can state courts order penalties for non-compliance with an EA´s Order? Is interim relief available in the arbitration on the merits securing relief? Will non-compliance with an EA´s Order impact the findings of the Arbitral Tribunal on the merits on substance or on costs?

11 The Task Force consists of 139 members and has held five plenary Task Force meetings at ICC headquarters in Paris.

Arbitrator Order Checklist (the "Order Checklist").[12] The Note emphasises some essential elements that the EA should take into account throughout the proceedings. The Secretariat also issued a checklist for Orders to provide the EA with guidance, particularly as the ICC EA Rules do not provide for scrutiny of the ultimate order to be rendered. The Order Checklist does not however constitute an exhaustive, mandatory or otherwise binding document. The Task Force recognised that the original idea for an Order checklist stemmed less from its usefulness than from the ICC Court's existing practice of using checklists for arbitral awards for the sake of uniformity. It also appears that, in practice, although the ICC Court does not scrutinise Orders, the Orders are informally perused by the Secretariat. Respecting such uniformity as to form facilitates the quick and informal review of the Order when time is of the essence.

2) Boilerplate forms for Applications, EA correspondence and Orders

55. Acknowledging that EA proceedings are demanding on EAs and parties alike, the Task Force considered whether boilerplate forms for EA Applications, EA correspondence with the Parties and EA Orders would facilitate the process for users and encourage speed and efficiency. The Task Force concluded, however, that such boilerplate materials would unnecessarily stifle the flexibility of ICC EA proceedings and could have a counterproductive effect.

56. Instead, the Task Force expressly recognised the need to clarify what parties should expect from such proceedings so as to encourage early, adequate and efficient procedural behaviour. The Task Force therefore considered sharing examples of case management techniques that could be used for increasing the efficiency of EA proceedings.

57. Drawing from the Task Force members' experience, the following are examples of case management techniques that can be used by the EA and the parties to promote efficiency:

a) The party who wishes to file an Application for Emergency Measures should inform the ICC Secretariat as soon as possible and preferably before submitting the Application so as to allow the ICC Secretariat and the President of the ICC Court to select the EA candidate as soon as possible.
b) The applicant should consider being as inclusive and precise as possible in its Application so as to limit the delay in the notification of the Application and the number of further submissions during the proceedings.
c) The EA could apply greater procedural rigidity than is typically required in arbitral proceedings on the merits, including imposing relatively fixed procedural timetables, and limiting the number of written submissions. The EA could consider holding a procedural conference by telephone as early as possible in the proceedings so as to (i) identify issues that can be resolved by agreement of the parties; (ii) identify issues that can be decided solely on the basis of documents rather than through oral evidence or legal argument at the hearing; (iii) limit the number of written submissions; (iv) assess the need for a hearing and how it should be held (by teleconference or otherwise).
d) With regard to production of documentary evidence, the EA can i) require that the parties produce with their first submissions the documents on which they rely; ii) avoid requests for document production.
e) Limit the length and scope of the written submissions and oral witness evidence if witnesses will be heard in the first place.
f) Start the drafting of the procedural section of the Order as soon as possible.
g) Call upon the Secretariat for guidance in case of doubt.

3) How do parties strategically use EA proceedings?

58. EA proceedings are aimed at obtaining urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. The ICC Rules have included barriers to avoid abuse of the proceedings such as a USD 40,000 fee per Application and a requirement to file the Request for Arbitration on the merits within ten days of filing the Application. Yet, it appears likely that some parties may use EA proceedings to "test" the merits of their case and then consider whether to settle the case after having exerted some pressure on the responding party.

59. Although the analysed data does not allow for the establishment of a clear link between the strategic use of EA proceedings and the settlement of cases that started with an EA Application, it is a fact that the settlement rate of cases that started with EA proceedings is relatively high. Out of the first 80 ICC EA cases studied, 25 cases settled on the merits before the issuance of a final award.[13] Among those 25 cases, four cases settled *before* the EA's order was issued and 21 cases settled *after* the issuance of the EA's Order. The emergency measures requested by the applicant were ordered (wholly or partially) in only seven of the 21 cases that settled after the issuance of the Order. No relevant link could be established between the measures ordered by the EA and the settlement.

12 All ICC Notes and Checklists are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/ and in the ICC Digital Library (http://library.iccwbo.org/dr-practicenotes.htm).

13 By the time the text of this Report was finalised, the arbitrations on the merits corresponding to the first 80 EA cases had not all been concluded. Consequently, the settlement rate of cases following an EA procedure may turn out to be higher.

60. A closer look at the first 80 ICC EA proceedings invites three considerations. *First*, in situations where the requested measure was closely tied to the object of the arbitration on the merits, the EA procedure appears to have contributed to resolving the controversy. For example, in three ICC EA proceedings where the exclusive measure requested was placement of money in an escrow account, the cases settled within six months following the EA's Order.[14] *Second*, in instances where the EA expressed a view on the merits of the case, settlement seems to have been facilitated. For instance, in one case, in which the applicant sought an anti-suit injunction order barring the respondent from pursuing its action before courts, the EA dismissed the Application, noting in passing that the case was weak on the merits.[15] The parties settled less than a month after the EA's Order was rendered. *Third*, settlements can also relate to the emergency measures themselves. In some instances, notably under the HKIAC Rules[16] but also in at least two ICC EA proceedings, parties have been able to obtain an Order by consent, i.e. an Order agreed to by the parties and the EA on the emergency measures allowing the parties to focus on the merits of the dispute. In another ICC case, the EA recorded the respondent's commitment to fulfil some of the applicant's requests in the Order's dispositive section but dismissed all other requests.

B. Threshold issues

1) Introduction

61. The EA Provisions invite consideration of three threshold issues: *applicability* of the rules to the EA Application pursuant Articles 29(5) and 29(6); *jurisdiction* of the EA to rule on the Application; and *admissibility* of the relief requested that cannot await the constitution of the tribunal under Article 29(1) as part of the EA Application. This Section of the Report considers these threshold issues, with the aim to provide examples of practice that may assist practitioners and EAs in efficiently and effectively navigating the EA process.

62. The significance of these threshold issues is evidenced by the fact that disputed issues of applicability, jurisdiction and/or admissibility were involved in 56 of the 80 EA cases reviewed. Of these 56 disputes involving threshold issues, three EA Applications were rejected (in whole or in part) as part of the applicability determination undertaken by the President of the ICC Court, and another 18 EA Applications were denied (in whole or in part) by the EA as failing to meet jurisdiction and/or admissibility requirements. The frequency with which threshold issues are raised is perhaps unsurprising given the contentious nature of a typical EA Application and the incorporation of a strict urgency requirement within the admissibility criteria (as discussed below).

63. The starting point for a consideration of threshold issues is the ICC EA Provisions themselves. *First*, Articles 29(5) and 29(6) of the ICC Rules provide that the EA Provisions are only applicable to signatories to the arbitration agreement (or successors thereof), where the arbitration agreement was concluded on or after 1 January 2012, where the parties have not explicitly or implicitly opted-out of the EA Provisions, and where the parties have not agreed to another pre-arbitral procedure for interim relief. *Second,* Article 1(5) of Appendix V of the ICC Rules requires that the President consider the applicability of the EA Provisions before allowing the Application to proceed. *Third*, Article 6(2) of Appendix V provides that the EA's Order shall determine admissibility of the Application pursuant to Article 29(1) and the EA's jurisdiction to order relief. *Fourth*, Article 29(1) requires that the applicant demonstrate a need for "urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal". While providing this basic framework for threshold issues, the EA Provisions do not set out the standards to be applied.

64. A review of the first 80 ICC EA cases, reports from other institutions, and the experience of the Task Force reveals that in practice the definitions of the three threshold issues of applicability, jurisdiction and admissibility are not used consistently. Indeed, the Task Force cautions that these concepts may be defined differently and used interchangeably by practitioners from diverse jurisdictions and under different national laws. Subject to this caution, however, it appears to the Task Force that in many cases issues regarding applicability of the EA Provisions are jurisdictional in nature.

65. The paragraphs below discuss each of the concepts of applicability, jurisdiction and admissibility (B.2), followed by a summary of how such threshold issues have been handled by ICC and EAs in the first 80 ICC EA proceedings (B.3). The Report then addresses choice-of-law in determining threshold issues (B.4) and, finally, how the EA's decision on threshold issues may impact subsequent analysis by the arbitral tribunal appointed to determine the merits of the dispute (B.5).

2) Applicability, jurisdiction and admissibility

a) Applicability: The role of the President of the ICC Court in pre-screening EA Applications

66. Articles 29(5) and 29(6) of the ICC Rules state that the EA Provisions shall apply only if: i) the parties are signatories to an arbitration agreement governed by the ICC Rules, or are successors to signatories; ii) the arbitration agreement was concluded on or after 1 January 2012 or where the parties have agreed that the EA Provisions apply; iii) the parties have not expressly opted out of the EA Provisions; and iv) the parties have not opted for another pre-arbitral procedure providing for conservatory or interim relief.

14 ICC EA Cases No. 1, 3 and 20.
15 ICC EA Case No. 7.
16 Two out of HKIAC's first six EA cases ended through an Order by consent.

67. When a party applies for EA proceedings, its Application must provide documentary evidence to show that these four criteria are met, including identification of the arbitration agreement and any agreement about the applicable rules of law.[17]

68. The Application is directed to the President of the ICC Court, who is responsible for considering whether the EA Provisions apply based upon a review of the information submitted with the EA Application.[18] The President's scrutiny is limited to the four conditions in Articles 29(5) and 29(6). In case these conditions are considered by the President not to be met, the Application shall not proceed. In addition, and consistent with Article 29(1), the President will not accept the Application if the file has already been transmitted to the arbitral tribunal pursuant to Article 16 of the ICC Rules.

69. The President´s analysis on applicability is final when the President holds that the Application shall not proceed. Yet, given that it is an *ex parte* test, if the President holds that the Application shall proceed, the EA may be compelled to revisit applicability issues if the respondent raises them. Article 1(5) of Appendix V phrases the President´s task as one to "consider" applicability, and not to decide on it. Such revisiting of the conditions provided in Articles 29(5) and 29(6) by the EA may well take the form of the EA´s *jurisdictional test rather than being framed again as a test of applicability*. Indeed, as requested by Article 6(2) of Appendix V, some EAs have revisited these issues in their Orders.[19] Importantly, the President may also take note of a potential threshold issue arising under Article 29(5) or 29(6) for purposes of applicability but allow the EA to make a final ruling on the issue. For example, in at least two cases, the President allowed EA Applications to go forward where the agreement was in effect prior to 1 January 2012 but where (i) the agreement was amended after 1 January 2012 or (ii) the arbitration agreement included a reference to application of the ICC Rules in effect at the time of commencement of the arbitration.

70. In all first 80 ICC EA cases, the President's decision was made within 24 hours of receipt of the Application.[20] If the President considers that the criteria in Articles 29(5) and 29(6) are met, the Secretariat notifies the Application to the responding party or parties (and if possible, identifying at the same time the EA who has been appointed). However, "[i]f and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the EA proceedings shall not take place with respect to some or all of the parties".[21] The Secretariat is available to give guidance concerning application of the EA Provisions in advance of the actual filing. But, of course, once submitted, the test on applicability falls to the President.

71. The President has used the power to decline an application only rarely. Of the first 80 ICC EA proceedings, only two cases have been rejected in their entirety outright by the President. In two further cases, the President did allow the EA application to proceed but not with respect to all the parties initially addressed.

72. In the first case, the President determined that the application should not proceed pursuant to Article 29(5) because the named party was not a signatory itself. The EA Provisions were designed to reduce the risk of jurisdictional challenges that would delay the proceedings; limiting the EA Provisions to signatories was one way to reduce that risk: "The purpose of this limitation is to reduce the potential for abuse of the procedure and to provide for a *prima facie* jurisdictional test that is straightforward for the President to administer".[22]

73. The second case involved an arbitration agreement dated 2006 and the parties had not agreed to the EA Provisions. *A posteriori,* the President confirmed that the EA Provisions were not applicable.

74. In the third case, the Application named the signatory and a number of non-signatories and the President allowed the EA Application to proceed only with respect to the signatory respondent and not against the respondent's non-signatory subsidiaries.[23]

75. In a fourth case, which involved multiple contracts, the President decided that, without prejudice to the parties' status in the main arbitral proceedings, the EA Provisions were not applicable with respect to one of the two applicants who was only signatory to the contract concluded before 1 January 2012. The President nonetheless allowed the EA Application to proceed with respect to the other applicant leaving the question of the date of conclusion of the arbitration agreement with respect to amendments included in a post-2012 contract for the EA to decide.

17 J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (ICC, 2012), p. 308, § 3-1097 "Note to Parties".

18 Article 1(5) of Appendix V to the ICC Rules.

19 For example, ICC EA Case No. 5 in which the President decided that the EA proceedings will proceed, specifically leaving the EA to decide whether a post-1 January 2012 amendment to a contract had the effect of bringing the EA Application within Article 29. See also "Interim Relief From An Emergency Arbitrator Not Available Under the ICC Rules in Context of a Dispute Arising Out of a FIDIC Contract," *International Arbitration Quarterly Review*, Addleshaw Goddard, June 2017, pp. 6-7; see also E. Kantor, "Emergency Arbitration of Construction Disputes – Choose Wisely or End Up Spoilt for Choice", *Kluwer Arbitration Blog*, 15 February 2017.

20 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 308, § 3-1096.

21 Art. 1(5) of Appendix V to the ICC Rules.

22 ICC EA Case No. 2. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 308, § 3-1098 and A. Carlevaris, J. Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", *ICC International Court of Arbitration Bulletin*, Vol. 25(1) (2014), p. 29: "[T]he intention has been to avoid the delay that would be caused by jurisdictional objections raised on the grounds of a party's failure to sign the arbitration agreement".

23 ICC EA Case No. 23.

76. The President's role in screening EA Applications to determine whether the EA Provisions are applicable is consistent with the approach taken by some other institutions. For example, the SCC Rules state "[a]n Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute".[24] Less overtly, the SIAC Rules state that the SIAC President shall appoint an EA only "if he determines that SIAC should accept the application for emergency interim relief".[25] Likewise, the HKIAC Rules state that "[i]f HKIAC determines that it should accept the Application, HKIAC shall seek to appoint an Emergency Arbitrator".[26] The International Centre for Dispute Resolution (ICDR) Rules make no mention of the pre-screening but, in fact, the ICDR administrator will undertake a "preliminary review" to determine that the application is complete and falls *prima facie* within the EA provision.[27]

77. Finally, a knotty applicability issue is presented by the question of whether the parties' agreement to a dispute board ("DB") procedure should preclude application of the EA Rules. Under the ICC Dispute Board Rules, a DB can be appointed at the outset of a project or in the event of a dispute to i) help the parties informally resolve disputes;[28] ii) issue recommendations on disagreements;[29] or iii) issue binding conclusions on disputes.[30] Further, the ICC DB Rules provide that the DB has the power to "decide upon any provisional relief such as interim or conservatory measures".[31] Pursuant Article 29(6)(c) of the ICC Rules, the EA Provisions are inapplicable where the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory or interim measures. The *Secretariat's Guide to ICC Arbitration* notes that the use of a DB procedure providing for issuance of interim measures is an implied opt-out of the EA Rules.[32] That said, commentators have argued that DB procedures should not preclude the parties from seeking EA relief, even though this may not have been the original intent. Commentators point out that DBs are often composed of engineers, who may be less well-equipped than lawyers to address emergency interim measures. Practice has also shown that DBs are rarely used to address provisional or interim measures. Finally, in some cases the DB may not yet have been constituted so that urgent interim relief is unavailable. Accordingly, it has been suggested that Article 29(6)(c) should be clarified to ensure that the EA Provisions are available even where DBs and similar procedures have been agreed. Task Force members concurred that such a clarification would be helpful, although some noted that the current Article 29(6)(c) does not inevitably preclude application. For example, the EA could still conclude that where no DB is constituted, or when it is disputed whether a DB was constituted or where the DB consists of engineers but the emergency measure is of a legal nature, then the parties' adoption of the DB procedure is not a choice providing for an effective granting of conservatory or interim measures. Ultimately, whether or not the agreed DB procedure provides for an effective "provisional relief such as interim or conservative measures" depends on specific facts of the case, which can only be examined by the EA. Accordingly, the President of the ICC Court may allow the Application to proceed and leave the final determination on whether the requirement of Article 29(6)(c) is met to the EA. In the summary of cases involving threshold issues below, a case is described where the EA suggested that the mere fact of the parties' agreement to a DB would not in and of itself lead to lack of jurisdiction of the EA. In any event, while this issue is debated, commentators suggest that parties should make clear in their contracts whether incorporation of a DB is to be taken as a waiver of the right to invoke the EA procedures.[33]

b) Jurisdiction: The EA's authority to order the relief requested

78. After the determination of applicability by the President of the ICC Court, all jurisdictional and admissibility issues are to be considered by the EA.[34]

79. In the first 80 ICC EA proceedings, the EA's jurisdiction has been contested in approximately 33 cases. As noted, many of the topics raised as "jurisdictional" may also be considered as affecting admissibility and applicability. Specific cases are discussed below ("3) Summary of cases involving threshold issues").

80. As to the procedure for raising a jurisdictional objection, the Task Force noted that many EAs raised jurisdiction *sua sponte* at the preliminary hearing or in early correspondence. In several cases, jurisdiction was agreed even if questions of admissibility were contested. If not agreed, the matter has usually been the subject of written submissions and/or argument. While there is no specific deadline in the EA Rules for making a jurisdictional objection, the timeliness of such an objection was raised and dismissed in at least one case. The procedural approach to resolving jurisdictional questions, including issues such as burden of proof, is within the EA's discretion.

81. The ICC EA Provisions state that "[i]n the Order, the emergency arbitrator shall determine … whether the emergency arbitrator has jurisdiction to order Emergency Measures". The Order is to be in writing

24 Art. 4(2) of Appendix II to the SCC Rules (2017).
25 Para. 3 of Schedule 1 to the SIAC Rules (2016).
26 Para. 5 of Schedule 4 to the HKIAC Rules (2013).
27 See M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, (Oxford University Press, 2009) §37.15, referring to Article 6 of the ICDR International Rules (2014).
28 ICC Dispute Board Rules (2015), Article 16.
29 ICC Dispute Board Rules (2015), Article 17.
30 ICC Dispute Board Rules (2015), Article 18.
31 ICC Dispute Board Rules (2015), Article 15(1).
32 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 309, § 3-1102.
33 See T. Webster and M. Buhler, Handbook of ICC Arbitration, Third Edition, Sweet & Maxwell, 2014.
34 Note that the Secretariat will play an ongoing role for example in ensuring that the Request for Arbitration is timely filed in accordance with Article 29(1) and Article 1(6) of Appendix V. If the Request for Arbitration is not filed within the relevant deadline, the President will terminate the EA proceedings. Among the first 80 EA cases, there has never been a need for such termination.

and is to state the reasons for the decision.[35] The Task Force noted that as a matter of logic, the EA should first consider jurisdiction within the Order. In more than one final EA Order, the EA opted to address jurisdiction and admissibility as threshold issues before proceeding to the merits of the Application. Nothing prohibits an EA from issuing a separate decision on jurisdiction (and admissibility) prior to an Order on the merits, although as a practical matter this may be difficult given the expedited timetable.

c) Admissibility: Is there any impediment to the claim being admissible, including assessing whether the measures cannot await the constitution of an arbitral tribunal

82. As with any arbitration on the merits, questions of the admissibility of a claim or of the specific relief sought may be raised by the responding party in an EA proceeding. Examples of admissibility objections raised in the first 80 ICC EA proceedings are summarised below ("3) Summary of cases involving threshold issues").

83. However, of particular significance in the EA context, is the requirement in Appendix V, Article 6(2) that the EA "shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules". Article 29(1) provides that EA proceedings are only available to parties that need "urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal". Unsurprisingly, many of the ICC EA cases have invoked these provisions and disputed whether the urgency requirement was met.[36] This raises several issues that were discussed by the Task Force:

- *First*, it is clear that the condition under Article 29(1) "cannot await the constitution of an arbitral tribunal" is to be ruled upon by the EA. The decision of the President of the ICC Court to accept the applicability of the EA Provisions does not imply that the President considers there to be sufficient urgency for the purposes of admissibility.
- *Second,* "urgency", as a test often applied to the merits of the Application, may well be a different test and is not to be measured only by whether the measures requested "cannot await the constitution" of the tribunal. Rather, the reference to the relief not being able to await constitution of the tribunal provides temporal guidance on one aspect of what may constitute the necessary "urgent interim or conservatory measures". Despite this distinction, some EAs have taken the shortcut of equating "urgency" with not being able to "await the constitution" of the tribunal.
- *Third*, the Task Force has noted that there are divergent views on whether urgency in the sense that it cannot await the constitution of the tribunal constitutes *only* a threshold issue of admissibility or whether it is also a substantive requirement of the merits of the Application.[37] A review of the first 80 ICC EA cases shows that EAs are not consistent in their approach to, and consideration of, urgency. For instance, nine of the ICC EA proceedings were dismissed specifically on admissibility grounds; some of those cases were dismissed on the basis of a failure to prove sufficient urgency for purposes of Article 29(1) and specifically addressed the "cannot await the constitution of an arbitral tribunal" requirement; and some EAs noted that there was therefore no need to consider the merits of the Application. In another five cases, the EA chose to address the Article 29(1) requirement of urgency *together* with the broader standard to be applied when deciding whether relief was justified on the merits. One EA specifically held that the "cannot await the constitution of an arbitral tribunal" requirement is not intended for admissibility or jurisdiction purposes, but is rather to be considered as a necessary part of the standard to be used when deciding on the merits.[38] Such an approach, however, seems inconsistent with the language of Article 29(1). One EA stated that for the admissibility test it is sufficient for the EA to assess whether the *need* to decide on the relief can or cannot await for the constitution of the tribunal, but that it is not asked to assess whether the requested measures themselves cannot await the constitution of the tribunal, as this would mean that this criterion applies on the merits for granting emergency relief, which the EA considered to not be within the scope of the ICC Rules. Here too, it seems to the Task Force that this approach is inconsistent with the language of Article 29(1).

84. Many Task Force members considered that the "cannot await the constitution of an arbitral tribunal" condition must be assessed *both* as a matter of admissibility and on the merits, but there was no consensus view on whether this requires a separate assessment at two separate stages. Some noted that it is possible that the EA might apply different legal standards and/or scope of evidential review to considering urgency as a matter of admissibility rather than on the merits. One EA, having noted that the Rules do not address this question, opted to undertake a *prima facie* assessment on whether the requested measure could wait the constitution of the arbitral tribunal at the admissibility stage but "subject … to a more detailed further analysis [as part] of the merits of the Application and the emergency measures sought".[39] This two-step approach has been followed by other EAs. While not taking a position on its necessity, several members of the Task Force agreed that such treatment reflects a pragmatic

35 Art. 6(2) of Appendix V to the ICC Rules.

36 A review of the first 80 EA cases indicates that to the extent that EAs consider urgency as a threshold question rather than only on the merits of the Application, some EA Orders discuss urgency as a matter of jurisdiction rather than admissibility. In addition, on occasion Articles 29(5) and 29(6) have been the basis of an admissibility test. The latter, in the view of the Task Force, seems incorrect.

37 See infra Section III.D(3)(a) discussing the standards to be applied in considering urgency.

38 ICC EA Case No. 8.

39 ICC EA Case No. 32.

solution consistent with the language of Article 29(1), international arbitration practice, and the expedited nature of an EA Application.

85. As a practical matter, the issue of whether urgency is to be treated separately within the admissibility requirement of Article 29(1) or together as part of the merits is unlikely to lead to a different conclusion on whether sufficient urgency exists to grant the Application. However, it may have other consequences. For example, where an EA declines to issue the emergency measure sought only on the ground that it can await the constitution of the tribunal deciding on the merits, this may provide the disappointed applicant with more flexibility to argue urgency afresh to the full tribunal.

3) Summary of cases involving threshold issues

86. This Section provides illustrative examples of threshold issues raised in the first 80 EA proceedings reviewed by the Task Force.

87. Challenges on the basis of threshold issues were successful (in whole or in part) in 21 cases.

a) In a first case, the arbitration agreement was included in an agreement that was executed prior to January 2012, but amended after that date.[40] The applicant argued that the prerequisite of Article 29(6)(a) was met because the amendment also applied to the arbitration agreement such that the EA Provisions in the 2012 amendments to the Rules should apply. The President of the ICC Court took note of the issue and set the EA in motion, but decided to allow the EA to rule on the issue. The EA found that under the law of the contract (Brazilian), the amendments did not renew the contractual relationship in its entirety, and that therefore the arbitration agreement was concluded prior to 1 January 2012. The EA relied on Article 6(2) of Appendix V to conclude that he was not competent to rule on the Application.

b) A similar issue arose in a case involving an arbitration agreement embodied in a contract prior to the entry into force of the 2012 Rules and the EA Provisions, but amended several times after 2012. One of the questions was whether such amendments had also reaffirmed the arbitration clause post-2012. The EA considered on the basis of the applicable law whether any post-2012 amendments made to the initial pre-2012 agreement would also apply to the arbitration agreement and decided that it did not. As a consequence, the post-2012 amendments to some clauses in the main contract did not reaffirm the arbitration clause post-2012 and the EA did not accept that the arbitration agreement was concluded after 1 January 2012 for the purpose of the EA proceedings. The other question, in the same case, concerned the situation of multi-contracts with several arbitration agreements made prior to and after 2012, and whether it was possible to read all contracts together and rely on a post-2012 arbitration clause for jurisdictional purposes in order to request EA relief with respect to all contracts. The EA decided it was not and declined jurisdiction to order emergency relief with respect to one of the claims.

c) Another case involved a multi-tier dispute resolution clause with a 90-day negotiation period.[41] The EA held that the negotiation period was a condition precedent to the initiation of the arbitration proceedings and "a limitation on the parties' consent to arbitrate". The EA further held that the "emergency arbitrator proceedings are not a separate and distinct procedure from arbitration, but an optional first or early stage". Therefore, the EA concluded that the negotiation period was a condition precedent to the EA proceedings as well and that the Application was inadmissible. As discussed below, however, in the majority of cases, EAs have found that EA proceedings are not incompatible with, or limited by, multi-tiered dispute resolution clauses.[42]

d) In one case, the EA declared that the claim for emergency relief of a second (previously undisclosed) applicant, raised as part of the reply briefing, was inadmissible.[43] The EA held that such "joinder" was not provided for in the EA Provisions.

e) In one case, the respondent challenged jurisdiction on the basis of Article 29(6)(c) of the ICC Rules, arguing that the parties had opted out of the EA proceedings when choosing the Dispute Adjudication Board ("DAB") rules following the FIDIC contracts. The respondent argued that the FIDIC DABs also have the power to decide upon any provisional relief such as interim or conservatory matters, which is to be understood as a "pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures", under Article 29(6)(c). The EA concluded that it lacked jurisdiction on the basis of Article 29(6)(c), and accepted that the parties effectively had agreed to "another pre-arbitral procedure", which is empowered to provide for "the granting of conservatory, interim or similar measures". The EA supported the decision by referring to the *Secretariat's Guide to ICC Arbitration* which mentions the "use of a dispute board that may issue interim measures" as one of the examples of an "implied opt-out".[44] The EA carefully set out, however, that it is not the simple fact that the contract provided for a DAB procedure, but that this particular DAB was i) already in place when the EA Application was sought, and ii) that it was empowered to grant similar provisional interim relief. It duly noted that parties to FIDIC agreements are free to amend the

40 ICC EA Case No. 5.

41 ICC EA Case No. 26.

42 See infra para. 88(a) of the Report.

43 EA Case No. 32.

44 *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 309, § 3-1102.

clauses and opt out of the DAB or to exclude its power to order interim relief.

f) In two cases, the EA held that the specific relief requested was not interim or conservatory in nature, as the measure related to the merits, and that, therefore, the claims were inadmissible.[45]

g) In five cases, the EA considered whether the applicant had established sufficient urgency to satisfy the requirements of Article 29(1), and decided - specifically as a matter of admissibility - that it had not and that the request can await the constitution of the tribunal.[46] In one of these cases, the failure to prove urgency was cited in addition to another stand-alone ground of non-admissibility.[47]

88. Other jurisdiction challenges from the first 80 EA Applications, can be summarised as falling within the following five buckets:

a) Multi-tiered dispute resolution clauses. This objection has been raised in six EA proceedings with varying results. While, as discussed above, one EA found that a contractual negotiation period was an unfulfilled condition precedent to the EA proceedings, in at least three other cases, the EA found that the contractual negotiation process did not preclude the EA Application.

- The dispute resolution clause at issue in one case mandated a compulsory 60-day mediation process prior to initiating arbitration, but the EA Application was filed at the same time that mediation was initiated. The respondent argued that the 60-day mediation process was a condition precedent to arbitration and, thus, the EA lacked jurisdiction. The EA rejected this argument and noted that to hold otherwise this would deprive the parties of interim relief at the time it was most necessary.
- In a second case the arbitration clause stipulated a "cooling off" period of 30 days in which the parties shall attempt to find an amicable solution. Although not invoked by the respondent as a ground for lack of jurisdiction, the EA, out of its own motion, found that such cooling off period did not stand in the way of starting the EA proceedings given the urgency of the relief sought by a party.
- In a third case, jurisdiction was also contested by the respondent on the basis of the Article 29(5) arguing that a similar cooling off period should be considered a mandatory mediation period as well as a pre-existing arbitral referee mechanism. The EA dismissed the argument providing that i) a cooling off/negotiation period is not to be understood as a mediation phase, and ii) that it did not preclude from starting emergency proceedings.
- A significant portion of the Task Force supported this approach, arguing that the EA's role is merely to preserve the *status quo*. Indeed, it is quite possible that at the conclusion of the EA proceedings, the parties could engage in whatever pre-arbitration dispute resolution is mandated.[48] By analogy, in many jurisdictions, interim relief can be obtained in court in aid of mediation. But others warned that there can be no "one size fits all" approach, rather, the EA should consider each case on its merits and be sensitive to applicable law issues that may come into play.

b) Date of the agreement. In seven EA proceedings, issues were raised concerning whether the agreement met the Article 29(6)(a) requirement of having been entered into on or after 1 January 2012. In one case, for example, the agreement was signed in 2012 but was the result of a call for tenders that pre-dated the ICC EA Provisions. The EA determined that the EA Provisions applied because the agreement itself was formed in 2012. In reaching this conclusion, the EA relied on the applicable national law.

c) Concurrent jurisdiction. In 12 cases, the respondents argued that the EA should decline jurisdiction (or not admit the Application) based on concurrent proceedings in national courts or in some other dispute resolution forum. The objection is typically premised on Article 29(6)(c), which precludes application of the EA Provisions where there is an agreement to another pre-arbitral procedure for obtaining interim relief. So far, EAs have rejected challenges of this sort relying on Article 29(7), which states that the EA's jurisdiction is non-exclusive. In one case, the EA recognised that, under the ICC Rules, interim relief may be sought in parallel both from the arbitral tribunal and a competent court. Article 29(7) was reportedly included because of concerns of members of the ICC Commission that the existence of EA Provisions alone "could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures".[49] This is discussed below in the context of interactions between EA proceedings and national law.[50]

d) Non-signatory/standing. In seven cases, the EA Application involved a named party to the EA proceedings (or a third party affected by the proceedings) that was arguably not a signatory

45 ICC EA Cases Nos. 38, 41.
46 Including ICC EA Cases Nos. 25, 38, and 39.
47 ICC EA Case No. 38.

48 Some commentators have raised questions regarding the relationship between timing obligations imposed by a multi-tiered clause and the Appendix V, Article 1(6) obligation that the Request for Arbitration must be received by the ICC within 10 days of the Secretariat's receipt of the EA Application. This can be addressed in several ways, with commentators noting that the parties could obtain an extension from the EA of the obligation to file the Request for Arbitration pursuant to Appendix V, Article 1(6), or one could file the Request for Arbitration but obtain a stay pending compliance with the pre-arbitration clause.
49 Nathalie Voser, "Overview of the Most Important Changes in the Revised ICC Arbitration Rules", *ASA Bulletin*, Vol. 29, No. 4, 2011, p. 814.
50 See infra Section IV(A) "Enforcement".

(or successor) to the arbitration agreement, thereby falling afoul of Article 29(5).[51] As noted above, in one such instance, the President of the ICC Court, exercising his review powers under Article 1(5) of Appendix V, determined that the Application would not proceed.[52] In a second case, the President concluded that the Application could not proceed with respect to the signatory's subsidiaries. In a third case, the President decided that the Application could not proceed with respect to one of the two applicants but declared the EA Provisions applicable with respect to the other. In four other cases, in quite different circumstances, the matter was left to the EA. In one case, the EA rejected the respondent's challenge to the applicant's standing to bring a claim following an assignment of the contract, finding that the applicant remained a party to the arbitration agreement, and therefore retained standing.[53] In a second case, the EA declined to join a non-signatory to the EA Application[54]. In a third case, the EA found there was no jurisdiction to grant a requested measure that would impact a non-signatory to the agreement and noted that such decision was without prejudice to the possibility that the non-signatory could be found to be bound to the arbitration agreement as part of the arbitration on the merits.[55] In the last case, the *locus standi* of one of the applicants initially seemed to be contested, but the EA's Order eventually resulted in an Order by consent and the parties had not objected to jurisdiction or admissibility for the purpose of the Order by consent.

e) **Scope of relief/authority of EAs.** In a significant number of cases, objections were also made on grounds that the scope of relief sought was inappropriate and/or that the EA lacked authority to order the interim measure. Such objections have been treated as issues of jurisdiction or admissibility. For example, in one such case the respondent alleged that the EA did not have authority to order the reinstatement of an employee who was not a party to the proceedings.[56] Resolution of these objections is highly specific to the law and facts involved. In one case, a jurisdictional objection was raised as to the *ratione materiae* of the requested relief claiming that the relief sought did not fall within the jurisdiction of the EA. The EA decided that the measure requested did relate to the subject matter of the dispute (on the merits) and made reference to Article 17 of the UNICTRAL Model Law. In another case, the EA considered whether it had the power to grant the interim relief on the basis of the *lex arbitri,* and yet another EA merely satisfied itself that the dispute referred to in the Application fell within the scope of the parties' agreement and its arbitration clause.

4) Law applicable to the EA's consideration of threshold issues

89. The EA Provisions do not specify the law applicable to the threshold issues. With respect to choice-of-law issues in interim relief in general, "commentators and emergency arbitrators have, to date, preferred the view that interim relief is procedural in nature, and therefore not bound by the constraints of the law applicable to the contract itself".[57] In a few of the first 80 cases, EAs held that they are subject to the *lex arbitri*, including rules that apply to the issuance of interim relief by arbitrators. In a significant number of cases, EAs found that their determination was to be guided by, but not bound by, relevant national law. G. Born argues that given the number of state laws that could apply to the substance of any dispute, "the better view is that international sources provide the appropriate standards for granting provisional measures in international arbitration".[58] Several EAs in ICC proceedings have followed this approach, including in the context of threshold issues.[59]

90. With respect to jurisdiction determinations, most EAs have considered the law most relevant to the specific issue. For example, in one case where jurisdiction was challenged on the basis that the applicant was not a signatory for purposes of Article 29(5), the EA applied the *lex contractus* to determine that the applicant remained a party to the arbitration agreement.[60] Similarly, where the applicant relied on the effect of a contractual amendment to come within the Article 29(6) requirement of having an agreement concluded on or after 1 January 2012, the EA referred to the law of the contract.[61] In another case, the EA applied the *lex arbitri* to determine i) whether parties were able to consent to use an EA, and ii) whether the relief requested was an available remedy.[62]

91. The Task Force notes that in some legal systems there may be laws that limit an arbitrator's authority to issue interim measures in general, which could impact the EA's jurisdiction. In at least 10 cases, the EA confirmed that the applicable national law was not inconsistent with the EA proceedings or the specific relief sought, typically by analogy to arbitral interim relief in general.[63]

51 Including ICC EA Cases Nos. 2, 4, 23, 32.
52 ICC EA Case No. 2.
53 ICC EA Case No. 4.
54 ICC EA Case No. 32.
55 ICC EA Case No. 46.
56 ICC EA Case No. 32.
57 E. Sussman and A. Dosman, "Evaluating the Advantages and Drawbacks of Emergency Arbitrators", *New York Law Journal*, 30 March 2015.
58 G. Born, *International Commercial Arbitration* §17.02., (2nd ed., Kluwer, 2014): "These sources consist of arbitral awards, where tribunals have considered similar issues, drawing on common principles of law in developed states".
59 Some Task Force members noted, however, that consideration should be given to whether application of international sources or standards could complicate enforcement of an EA order or award.
60 ICC EA Case No. 6.
61 ICC EA Case No. 4.
62 ICC EA Case No. 23.
63 Including ICC EA Cases Nos. 1, 3, 21.

5) Impact of the EA's decision on threshold issues before the arbitral tribunal

92. Article 29(3) of the ICC Rules explicitly provides that an EA's Order does not bind the arbitral tribunal "with respect to any question, issue or dispute" and the tribunal is free to modify, terminate or annul any Order made by the EA. This presumably includes an EA's decision on jurisdiction and/or admissibility with respect to the Application. Theoretically, this might arise for example in the context of a request to terminate or modify any emergency measures in place once the tribunal is constituted.

93. While not binding, an EA's Order on jurisdiction could have some *indirect* impact on the arbitral tribunal to the extent that the tribunal is considering the same questions and evidence. But, as noted, the grounds for jurisdiction in the merits phase may be quite different. Thus, for example, one EA found it had no jurisdiction over a non-signatory party but noted that this was without prejudice to whether the non-signatory could be a proper party to the hearing on the merits.[64]

94. Likewise, with respect to admissibility, an EA's finding that the matter was sufficiently urgent so that it could not await the constitution of the tribunal could impact the tribunal's consideration of urgency, although (as noted) the urgency test is likely to be assessed based on the different timeline of whether relief can await the final award. Similarly, should the EA find the Application inadmissible because it *could* await the constitution of the tribunal, this would be of limited relevance to the consideration of urgency in the context of a request for interim relief made before the tribunal deciding on the merits.

C. Procedural matters

1) Introduction

95. This Section of the Report discusses the EA proceedings from the transmission of the file to the EA until the rendering of the Order, not including the threshold issues and standards for admissibility of an Application pursuant to Article 29 and Appendix V of the ICC Rules. This discussion of procedural issues draws upon the analysis of the first 80 ICC EA cases and feedback from the Task Force, other Commission members, and the Secretariat.

96. It should be noted at the outset that the EA enjoys wide discretion to tailor the procedure employed to the needs of the case. Subject to any agreement of the parties and any applicable mandatory laws of due process, national procedural laws and soft law should not impinge on the EA's discretion in this regard.

97. Indeed, Article 5(2) of Appendix V to the ICC Rules provides that the EA "shall conduct the proceedings in the manner which the [EA] considers to be appropriate, taking into account the nature and the urgency of the Application". It adds that the EA, in all cases, "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". The EA's discretion, on the other hand, is constrained as a practical matter by Article 6(4) of Appendix V to the ICC Rules, requiring that the EA render the Order within 15 days of transmission of the file (unless an extension is granted). At a general level, and as borne out by a review of the 80 first ICC EA cases, the Task Force confirms that EAs use their broad discretion to best serve the needs of a particular case and resolve the practical and procedural challenges created by the expedited timetable. A review of the ICC EA Applications also confirms that no major issues of procedure have surfaced that could not be resolved by the EA.

98. Perhaps even more so than in other parts of this Report, this Section is not intended to be prescriptive or to advocate universally applicable standards of process. The ICC EA cases reviewed concern diverse topics in different regions of the world, triggering diverse challenges with diverging procedural solutions applied by the respective EAs. Procedural flexibility is firmly embedded in Appendix V, and this Report is in no way intended to stifle that flexibility.

99. Notwithstanding the foregoing, the Task Force concludes that it would be useful to describe procedural issues in the EA context, only as a potential source of inspiration and information for future parties and EAs. Thus, this Section points out procedural questions that have arisen in cases, describes how they have been answered by EAs in ICC proceedings, provides guidance on common procedures employed by EAs, and makes specific recommendations where the Task Force is convinced that there is no room for doubt or interpretation.

2) Rules and norms governing the procedure

100. As a starting point, EAs must apply the ICC Rules in as far as the EA proceedings are concerned, which as mentioned, give the EA considerable discretion. Article 5 of Appendix V, in full, reads as follows:

> 1. The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.
>
> 2. The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases the arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

101. As pointed out in *the Secretariat's Guide to ICC Arbitration*, "[Article 5(2) of Appendix V to the ICC Rules] is broader than Articles 19 and 22(2), which require an arbitral tribunal in all circumstances to consult with the parties and generally respect any

64 ICC EA Case No. 46.

agreement they may reach".[65] In as far as respect for the parties' agreement on procedure is concerned; the Task Force did not have the impression that there is any material significance to the differences between Articles 19 and 22(2) of the ICC Rules and Article 5(2) of Appendix V. However, consulting the parties "in all circumstances" before taking decisions on process was considered by many on the Task Force to be incompatible with the strict time constraints of the EA process. It was pointed out that an EA, for example, is expected under Article 5(1) of Appendix V to establish a procedural timetable "within as short a time as possible". Accordingly, while consultation with the parties on a draft of such a timetable was considered highly desirable by the Task Force – and such consultation indeed very frequently took place in the first 80 EA proceedings – circumstances may arise in which prior consultation with the parties on procedural decisions may not be practically feasible.

102. The ICC Rules do not provide EAs with guidance regarding the process to be applied beyond Article 5 of Appendix V. In this respect, the Task Force focused primarily on whether EAs applied either national procedural laws and/or soft law norms (e.g. the *IBA Rules on The Taking of Evidence in International Arbitration* or the *IBA Guidelines on Party Representation in International Arbitration*).

103. *First,* an analysis of the first 80 ICC EA proceedings reveals that EAs did not tend to refer to, or take explicit inspiration from, any national procedural laws. It cannot be ruled out that in exercising their discretion, some EAs did in fact draw inspiration from national procedural laws. Yet, neither the practice in the ICC EA cases nor the views of the Task Force members suggests EAs should consider themselves bound by any (non-mandatory) national procedural norms.

104. Of course, where potentially applicable, EAs have in practice sought to take into account mandatory provisions of relevant national laws (i.e. arising from the law of the seat, of the agreement, of the arbitration agreement or of the possible place(s) of enforcement of the Order). Such caution is unsurprising given that, even though the EA's decision is in the form of an "order" and not an award, an EA's decision might still be the object of *exequatur* in some jurisdictions and thereby subject to scrutiny.[66] Accordingly, EAs have on occasion been confronted with the daunting task of seeking to identify and navigate potentially relevant mandatory provisions of national laws within the very limited time given to them. For this reason, it goes without saying that the parties should identify to the EA as early as possible the process for identifying any such relevant norms.

105. *Second*, a review of the ICC EA Orders provides little evidence that specific soft law norms have been regularly applied to the EA proceedings or used as guidance. This in itself does not mean that such norms have not been applied or provided inspiration in specific cases, whether implicitly or explicitly. Members of the Task Force, however, have observed that soft law norms are generally not designed to govern interim relief requests and may, in whole or in part, be unsuitable for that reason. At the same time, EAs have been guided by soft law where in the exercise of their procedural discretion they take decisions on issues that are addressed by such soft law norms.

3) Temporary measures protecting the status quo

106. Whether an EA could grant emergency measures *ex parte* was a debated topic within the Task Force. Some Task Force members emphasised that *ex parte* measures should be available if arbitral interim measures are to be a complete alternative to going to courts. In this respect, some forms of interim measures can, by their very nature, only be effective if they are implemented without the respondent's knowledge. One commentator noted that the need for *ex parte* relief is driven in part by the fear of a respondent moving assets out of the jurisdiction, and that this may be less concerning in the context of an arbitral award enforceable under the New York Convention in 159 countries. Regardless of whether indeed *ex parte* measures *should* be available as interim measures, the Task Force has limited its consideration only to whether the ICC Rules allow *ex parte* emergency measures. The Task Force concludes that true *ex parte* emergency Orders, where the respondent was not notified, was not given the opportunity to be heard and in which the EA issues a final EA Order are incompatible with the ICC EA Provisions.

107. This conclusion is a consequence of Article 1(5) of Appendix V, which provides that once the President of the ICC Court is satisfied that the EA Provisions apply, "the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party".

108. As such, the fact that the Application may be transmitted to the respondent before the EA's appointment precludes the possibility of an EA issuing truly *ex parte* emergency Orders, i.e. without the respondent even being aware of the Application.[67] In their analysis of the first ten ICC EA Orders, A. Carlevaris and J. Feris confirmed the following:

> There is no provision for *ex parte* proceedings. The Secretariat is required to notify the responding party of the Application. In one case, the applicant requested that the emergency arbitrator be appointed without giving notice to the responding party. Once the President had decided that the proceedings should be set in motion pursuant to Article 1(5) of the Emergency Arbitration Rules, the Secretariat notified the Application to the responding party after first informing

65 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, at p. 298, § 3-1058(d).

66 See infra Section IV, "Post-emergency arbitration considerations".

67 The same conclusion applies in the SCC Emergency Procedure, which requires that notice be given to the responding party. See J. Lundstedt, "SCC Practice: Emergency Arbitrator Decisions: 1 January 2010 – 31 December 2013", available at p. 1, https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf.

> the applicant that it would do so. In accordance with Article 5(2) of the Emergency Arbitrator Rules, the emergency arbitrator made sure that each party had an opportunity to present its case before issuing the order.[68]

109. The ICC Rules thus do not contain a provision similar to the Swiss Rules of International Arbitration, which, at Article 26(3) combined with Article 43, allows *ex parte* relief by an EA. Article 26(3) reads as follows: "In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard".[69]

110. While it is clear that in ICC EA proceedings, the Application must be transmitted to the respondent, the Secretariat has acknowledged that:

> While not expressly mentioned in the Rules, it is conceivable that the emergency arbitrator might issue an initial order (e.g. a freezing order or an order otherwise maintaining the status quo) before the responding party has filed its response. Depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5(2) of Appendix V.[70]

111. In one of the first 80 ICC EA Applications, the applicant sought an immediate order on an *ex parte* basis, to restrain respondents from receiving payment related to bank guarantees and bonds. The EA immediately rejected this request on the basis that the ICC EA Provisions did not allow to do so without hearing the respondent or at least providing it the opportunity to present its case.

112. While it is therefore uncontroversial that true *ex parte* orders are not available under the ICC EA Provisions, the question is open whether the EA could grant a provisional measure for the duration of the EA proceedings aimed at protecting the *status quo*, even before the respondent has had an opportunity to respond to the Application.

113. Indeed, a review of ICC EA cases reveals at least one instance where an EA has specifically granted a request by the applicant to order the respondent to maintain the *status quo* during the EA proceedings - and in this specific case temporarily refrain from calling the bank guarantee - before the respondent filed its response to the Application.[71] In at least four other instances such measures were requested but not granted. In one of those cases, the EA determined he had no jurisdiction to decide on the Application at all. In another case, the request for provisional measures was not explicitly addressed, for other reasons unrelated to the EA's power to order such provisional measures. It has thus been deemed appropriate by at least one EA, without having heard the respondent, to issue such a provisional measure, (in that case enjoining the respondent from drawing under a letter of credit for the duration of the EA proceedings). Such a temporary measure was issued to preserve the *status quo*, during the EA proceedings, without pre-judging the merits of the EA Application but should not be understood as a (final) EA Order in which eventually the respondent will, and should, have the opportunity to be heard.

114. Despite the existence of this single precedent, it must be noted that several members of the Task Force and contributors to the Commission voiced opposition even to this limited form of temporary measure to preserve the *status quo* during the EA proceedings. Critics argue that such measures cannot be reconciled with the respondent's right to be heard, particularly where the ICC Rules do not expressly authorise the EA to grant such temporary measures. Instead, they point to the duty in Article 5(2) of Appendix V to ensure that "each party has a reasonable opportunity to present its case". They suggest that the EA may, for example, not be aware when rendering such a temporary measure that the respondent has a particularly strong and urgent countervailing interest in executing certain measures that could trump the interest of the applicant in maintaining the *status quo*.

115. On the other hand, those in favour of the EA having such authority cite to Article 29(2) of the ICC Rules, by which the parties have agreed to "comply with any order made by the emergency arbitrator", as further support that the EA may issue a temporary measure intended to maintain the *status quo* during the EA proceedings. Similarly, they rely on the parties' general duty to arbitrate in good faith and the wide discretion of the EA under Article 5 of Appendix V to justify the rendering of such temporary measures in appropriate circumstances.

116. Based on the debates in the Task Force and within the Commission, it is fair to conclude that there is no commonly accepted view, nor a clear majority position, on this topic. Practice and the review of the first 80 ICC EA cases also show, however, that it is common that applicants struggle with the question of how to ensure that the relief they seek is not frustrated before an EA can issue an Order. In this respect, the Task Force notes that it is not unusual for some form

---

68 A. Carlevaris, J. Feris, supra note 22, p. 32.

69 In its Answer to the Task Force survey, the SCAI mentions a case where an *ex parte* measure was granted; it consisted in prohibiting the respondent from disposing of its assets and specific goods; according to the SCAI's Answer: "The EA found that the applicant had a legitimate interest in obtaining orders prohibiting the respondent from disposing of its assets and specific goods, and that such interest substantially outweighed the harm that the respondent would likely suffer as a result of these measures". See also Art. 50.2 of the Arbitration Rules of the Arbitrators and Mediators Institute of New Zealand (AMINZ) (allowing a party to file an application for appointment of an EA to issue preliminary orders without notice to the other side "where to give notice would defeat the entire purpose of the application").

70 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 298, at § 3-1058(d).

71 In ICC EA Case No. 21, the applicant requested a temporarily measure to order the respondent to immediately refrain from executing the letter of credit. The request was temporarily granted but later revoked in the final EA Order.

of temporary measure preserving the *status quo* during the EA proceedings to be ordered, or at least considered (and sometimes in agreement with the Respondent) at the outset of the EA proceedings before the respondent has had an opportunity to be heard. The contentious factor is the extent of the EA's power to render such measures prior to the respondent being heard.

117. Based on the Task Force's discussions, it is suggested that the competing views expressed might be able to be reconciled, depending on the circumstances of the case. In practice, procedural solutions might be found in which the respondent's right to be heard is safeguarded and an applicant's urgent interest in a temporary measure preserving the *status quo* for the duration of the EA proceedings is done justice. Various procedural mechanisms have been suggested. For example, in appropriate circumstances, the EA could notify the respondent that the the requested provisional order will be granted absent the respondent's objection within a very short deadline. Alternatively, the EA could issue the requested temporary measure while, at the same time, expressly allowing the respondent the opportunity to object to it within a very short time period. A further alternative envisions the temporary measure being granted for only a very limited duration so that it expires as of right unless extended by way of a full hearing. Any of these scenarios would allow the EA to hold an urgent teleconference to hear both parties before either confirming or withdrawing his or her temporary decision.

4) Case management, written submissions, evidence and hearing

118. The Task Force further examined the way procedures were concretely handled in the first 80 ICC EA cases, to determine whether there are any common practices. Before dealing with several specific issues (b), the following general considerations can be identified (a).

a) General considerations

119. *First*, as already noted, Article 5(2) of Appendix V gives broad discretion to EAs in the conduct of the proceedings; indeed, greater than the powers arbitrators enjoy under Articles 19 and 22 of the ICC Rules, which oblige them to consult with the parties before adopting procedural measures. The practice of the ICC EA cases shows that EAs have embraced this broad power to tailor procedures to suit the specific needs of the broad variety of cases considered and to overcome the practical obstacles faced in an expedited procedure.

120. *Second*, it has been suggested in the Task Force that the EA's powers (subject to mandatory provisions of relevant applicable laws) include as a minimum the powers of arbitrators acting under the Expedited Procedure Provisions introduced in the ICC Rules of 2017. More specifically, reference is made here to Articles 3(4) and 3(5) of Appendix VI of the ICC Rules and to their analysis in the *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*.[72] This would mean, for example, that EAs, like arbitrators in expedited procedures, could in appropriate circumstances i) decide the case on documents only, with no hearing and no examination of witnesses, and ii) limit the number, scope and length of submissions. Although a hearing did take place in the vast majority of ICC EA cases so far, no hearing was held in a few cases.

121. *Third*, even if time is of the essence in EA proceedings, and even if EAs benefit from great discretion in the management of the procedure, due process remains a fundamental requirement. EAs must make sure, and in the cases reviewed they have made sure, that each party has a reasonable opportunity to present its case.

b) Specific issues

122. **Challenge of the EA.** Article 3 of Appendix V of the ICC Rules provides for challenges of EAs. In four of the ICC EA cases, the EA was timely challenged. All four challenges were decided by the ICC Court, after allowing the EA and the non-challenging party the opportunity to submit comments, each within four days from the day the challenge was made. The challenges were not just on the basis of alleged conflicts but also based on the EA's qualifications and even misconduct. All challenges were rejected.

123. **Case management conference.** Holding such a conference is not required. In the ICC EA Applications, there was no such conference in 55 cases. While case management conferences were not common in the early EA proceedings, case management conferences were often held by phone in more recent EA proceedings at the very early stages, after the transmission of the file to the EA. There is widespread support among the members of the Task Force for an early telephone case management conference. Likewise, ICC supports the use of case management conferences and can provide resources on request. EAs have used such conferences for many purposes, such as:

- setting the timetable;
- determining whether, when and how a hearing should be held;
- agreeing how evidence would be presented;
- agreeing, where possible, on the appropriate standard to apply for considering the Application;
- clarifying emergency relief sought;
- addressing any issues regarding the obligation to file a Request for Arbitration within 10 days of the Application; and
- simply allowing for the key players in the case to get acquainted to ensure as smooth as possible a process.

72 Reference is made to the Note dated 1 January 2019, paras. 93 et seq.

124. **Procedural timetable.** According to Article 5(1) of Appendix V quoted above, EAs must establish a procedural timetable "normally within two days from the transmission of the file". This deadline was met in the majority of the first 80 ICC EA cases. Often, due to the short period of time allowed and possible delays in establishing contact with the respondent (especially absent email addresses), EAs wrote to the parties as soon as possible after having received the file to establish – without prior consultation of the parties – a procedural timetable and basic procedural directions. In this initial communication, EAs have also sometimes given the parties a set period to comment on the timetable and directions. In the same initial communication, EAs have sometimes requested that the parties advise whether a hearing will be requested and even proposed the rules that would be applicable to any such hearing (in terms of timing, place, scope, etc.), subject to the parties' comments before a certain date.

125. **Written submissions.** Practice varies with respect to the number and sequence of written submissions. In the ICC EA cases, the most common number of submissions addressing the merits of the relief was four, being the Application, a response, a reply, and a rejoinder. In at least one case, the respondent filed a counter-Application seeking urgent relief.73 Statements of costs were sometimes submitted separately. Typically, apart from the EA submissions, the claimant will also during the EA proceedings file with ICC its Request for Arbitration on the merits. In the minority of cases, written submissions were limited to the EA Application and a response. Given the fact that the Order is to be issued within 15 days of receipt of the file by the EA, and the fact that a hearing was very often held, the deadlines set for the written submissions were invariably very short. The Task Force noted that applicants control the time of submission of their Application and therefore have an advantage over the respondent in terms of preparation time and planning. In addition, respondents have argued that requiring a response prior to submission of the Request for Arbitration could give the applicant an unfair advantage in the arbitration on the merits. In at least one case, the EA delayed the deadline for the response until after the filing of the Request for Arbitration. This could be particularly advantageous if, for example, witness statements or even expert reports are submitted by the applicant. In setting the time table and deadlines for submissions, EAs may wish to take this advantage into consideration in appropriate circumstances in order to safeguard the respondent's right to present its case.

126. **Witnesses.** There was much debate among the members of the Task Force on whether EAs should permit recourse to witness testimony. Some argued that relying on witness evidence could be incompatible with the nature of EA proceedings. Others pointed out that, in practice, there will be very limited opportunity, if any, to hear witnesses and that the EA's reliance on witness statements might – depending on the circumstances – be inappropriate. In this respect, there is some evidence that where witness evidence (including from the respondent) has been permitted, it has led, in a very small number of cases, to the need to extend the 15-day deadline for rendering an Order. Further, some considered that given that only a prima facie analysis of the evidence would be undertaken, contemporaneous documentary evidence should in principle be preferred to witness testimony. However, there is no rule preventing an applicant or a respondent from submitting witness statements or expert reports, and neither is there a rule preventing the EA from relying on such evidence.

127. In the first 80 ICC EA Applications, witness statements were submitted in 18 cases, and expert reports were filed in three cases. In only a few of these cases, witnesses or experts were called for oral testimony. In one exceptional case, the Application came before the EA with several witness statements and the applicant also requested live testimony. Respondent also produced several witness statements in reply. This was taken into consideration at a conference with the parties when discussing the calendar. It was decided that there would be two rounds of submissions, and that no more documents or witness statements would be produced in the second round. Finally, there was a full day hearing with all the witnesses being heard.

128. Practice thus reveals that, in the majority of ICC EA cases, no witness statements and no expert reports were filed and that if such statements or reports are filed, witness hearings and cross-examination are highly unusual. There are however no absolute rules in this regard, and it is ultimately the EA who decides how to exercise the discretion provided for in Article 5 of Appendix V of the Rules with regard to witness and expert evidence. While the parties' right to be heard should be respected, there is no requirement that the EA hear (all) witnesses or experts who submitted statements or reports, nor must the EA rely on these statements or reports in the eventual Order.

129. **Hearing.** Among the ICC EA cases reviewed, a hearing was held in 53 cases (in person in 20 cases and by telephone in 33 cases). In 20 cases, no hearing took place at all. Subject to mandatory provisions of the relevant laws,[74] it is up to EA to determine the appropriate procedure. As discussed, the EA may render the Order by deciding on documents only (including potentially witness statements) or by conducting a hearing (where only counsel could have the floor, or counsel and parties, or counsel and witnesses, etc.) in person or even by videoconference, telephone or similar means of communication. During the case management conference, it is usually determined whether the parties envisage holding a hearing. Even if a party does request a hearing, the EA has no strict obligation under the Rules to hold one. However, particularly if requested by both parties, it

73 ICC EA Case No. 50.

74 Some laws require that a hearing be organised when a party in an arbitration so requires.

may be deemed advisable to hold a hearing to ensure that both parties have an adequate opportunity to present their respective cases. In several EA cases, a transcript or audio recording of hearings was made available to the parties and the EA.

5) Burden of proof

130. It is not completely clear whether the issue of burden of proof is a question of a procedural or substantive nature, or whether this depends on the concrete question at stake.75 In EA proceedings, the EA will not be issuing any binding determination of disputed factual allegations. As such, the EA is not to pre-judge the dispute on the merits. Accordingly, the standard and burden of proving factual allegations have been of less prominence in ICC EA cases than in arbitrations on the merits.

131. The allocation of the burden of proving factual allegations does not appear to have been highly controversial in the first 80 ICC EA cases. Although the standards applied to the question of whether interim relief was justified have differed,[76] EAs have usually held that it is the applicant's burden to establish a *prima facie* compelling case that the requested measures are justified and required. This, in turn, suggests that it is the applicant who bears the burden to prove – at least to a prima facie standard – the facts upon which the Application relies. Many ICC EA cases so far have merely sought to protect or restore the status quo for the duration of the arbitration on the merits or seek to prevent (irreparable) harm from being suffered, and as such have not essentially relied or depended on the veracity of extensive factual allegations.

132. In so far as the burden of proof has been explicitly addressed, the general rule *"actori incumbit probatio"* has often been applied by EAs, meaning that each party bears the burden of proving the facts relied on to support its case. By analogy, reference has been made in this context to Article 27(1) of the UNCITRAL Rules of Arbitration providing that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense".

133. In the Task Force discussions, several members suggested that the degree of intrusiveness of the measures sought could have an impact on the evidence to be required by an EA. The more intrusive a measure would be, the higher the burden (on the applicant) to prove the factual allegations relied on in the context of the EA proceedings. Conversely, when the measure sought is less burdensome on the respondent, an EA may be persuaded to apply a lower evidentiary standard with respect to the factual allegations in dispute.

6) Non-participating respondent

134. In all the 80 ICC EA Applications, except in two cases where the EA Rules were deemed not to be applicable, the respondent participated. The ICC EA Rules do not contain any particular provision on non-participating respondents. During the Task Force discussions, no consideration emerged suggesting that the attitude of an EA should be different than that of a regular arbitrator when the respondent is not participating. In short, the EA proceedings are to be pursued with the non-participating party being notified of all communications.

7) Time limit for the Order

135. Article 6(4) of Appendix V provides that the Order shall be rendered within 15 days from the date the file is transmitted to the EA. The same Article 6(4) provides that this time limit can be extended by the President of the ICC Court either at the request of the EA or on the president's motion. In ten of the first 80 ICC EA Applications, no Order was rendered due to withdrawal or non-applicability of the ICC EA Rules. Out of the 70 remaining cases:

- In 33 cases, the 15-day deadline was complied with. The Order was made in less than 15 days in three cases.
- In 32 cases, the Order was rendered between day 16 and day 19.
- In 5 cases, the Order was rendered more than 19 days after the file was transmitted to the EA, in each case after an extension was approved by the President. In one case (the longest case by far), the total time elapsed between the transmission of the file to the EA and the Order was 30 days. These delays can primarily be attributed to parties agreeing on an extensive hearing schedule affecting the procedural timetables, or a request for temporary suspension of a scheduled hearing resulting from an initial non-compliance of a respondent with a preliminary Order to maintain the *status quo* such as the calling of a letter of credit. Based on these statistics, it can be concluded that the ICC EA proceedings are almost invariably concluded within or very shortly after the very challenging 15-day deadline foreseen in the ICC Rules.

D. Substantive standards

1) Introduction

136. This Section of the Report discusses the substantive criteria for the determination of whether to grant emergency relief, relying on the Task Force analysis of the first 80 ICC EA proceedings, National Reports, the experiences of other institutions, feedback from Task Force members, as well as relevant academic commentary.[77] More specifically, this Section provides a survey of the norms governing

75 G. Born, supra note 58, n° 2312: "There is little authority on the allocation of burdens of proof in arbitral contexts".

76 See infra Section III.D "Substantive Standards".

77 See also Annexes I and II of the Report.

consideration of EA Applications (D.2), the substantive standards applied in determining Applications (D.3), and other considerations for granting emergency relief, including provision of security and the nature of the relief requested (D.4).

2) Norms applicable to EA Applications

137. Article 29 and Appendix V of the Rules do not articulate any specific applicable substantive standards for the EA's consideration of an Application. This is in keeping with the non-prescriptive approach of other institutional rules, which at most indicate that the requested measure must be urgent, necessary, or appropriate in light of the circumstances.[78]

138. The Task Force notes that, in the absence of prescriptive norms applicable to EAs, most EAs have been willing to apply substantive criteria developed in connection with the granting of interim measures by arbitral tribunals.[79] In this respect, an analysis of the first 80 ICC EA Applications shows that, in at least 49 cases, the EAs explicitly applied the substantive requirements for the granting of interim measures in accordance with standards distilled from international arbitration practice, rather than by reference to any specific domestic law. As one EA put it, EAs are not bound by the applicable substantive law governing the dispute "since the grant of provisional relief is not by nature a matter of substantive law".

139. In contrast, in a significant number of ICC EA cases, the EA at least considered the impact of certain provisions of the *lex arbitri* and/or the *lex contractus* in determining the Application. One EA explicitly considered that an EA decision must comply with applicable or mandatory domestic law. In several cases, EAs concluded that the decision to grant emergency relief should be guided by principles of domestic law, but ultimately found that in the absence of any guidance in domestic law, international standards should apply. Further, in a number of cases the EA considered the *lex arbitri* only for the purposes of admissibility of the EA Application, and made reference to the standards established in international arbitration for the substantive assessment of the request.

140. In sum, EAs have shown a preference to avoid the application of domestic law and to have recourse to "the practice generally followed by international arbitrators", "common principles of law", and/or "international sources" instead. Such an approach is supported by commentators who suggest that an approach based on international practice is more likely to be in accordance with the expectations of the parties and to result in broadly uniform and predictable results.[80] Whatever standard is adopted, the Task Force encourages the early discussion of this issue, maybe even at the case management conference, to try to reach consensus.

141. Although not yet specifically addressed by an EA operating under the ICC Rules,[81] an interesting question concerns the relationship between EA proceedings and decisions rendered by state courts concerning interim measures.[82] Commentators have noted that while both may address the same subject matter, the two fora are conceptually distinct and decision-makers need not reach the same result.[83]

3) Substantive criteria for granting emergency relief

142. As stated above, the ICC Rules do not prescribe requirements for relief other than that the requested urgent measures are admissible when they "cannot await the constitution of an arbitral tribunal" (Article 29(1) of the ICC Rules). Consequently, the EA Rules set forth in Appendix V require that the requesting party state in its Application for Emergency Measures "the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal" (Article 1(3)(e), Appendix V to the ICC Rules). The EA Provisions were intended to enable the parties to seek extrajudicial interim or conservatory measures before the arbitral tribunal was in a position to act under Article 28.[84]

78 See, e.g. SCC Rules 2017, Appendix II; LCIA Rules 2014, Art. 9B; SIAC Rules 2016, Schedule I; CIETAC Rules 2014, Art. 23: Rules of Arbitration of the Arbitration Center of Mexico, Art. 30 Bis. In contrast, a few arbitral institutions provide a specific standard. See e.g. ACICA Rules 2016, Schedule 1, Art. 3.5 (requiring (i) irreparable harm; (ii) harm substantially outweighs the other party; and (iii) reasonable possibility that the requesting party will succeed on the merits).

79 See, inter alia, G. Born, supra note 58, p. 2464: "[T]he better view is that international sources provide the appropriate standards for granting provisional measures in international arbitration". See also A. Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008', *ICC International Court of Arbitration Bulletin* (Special Supplement 2011), p. 10; F. Ferrari, S. Kröll, Conflict of Laws in International Arbitration (1st ed., Sellier, 2010), p. 442; P. Sherwin, D. Rennie, "Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis", *American Review of International Arbitration*, 2010, Vol. 20, p. 323; J. Beechey, G. Kenny, "How to Control the Impact of Time Running Between the Occurrence of the Damage and its Full Compensation: Compensatory and Alternative Remedies in Interim Relief Proceedings", *Dossier of the ICC Institute of World Business Law: Interest, Auxiliary and Alternative Remedies in International Arbitration* (ICC, 2008) p. 109; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, (Kluwer, 2003), p. 602. See also Interim Award of September 2003, ICC Case No. 12361 and Procedural Order of March 2006 in ICC Case No. 13856, available at http://library.iccwbo.org/.

80 Ibid.

81 In the only case of which the Task Force is aware, a US federal court issued a temporary restraining order concerning a party's parallel EA Application under the ICC Rules. But the matter was settled before any substantive steps were taken in the EA proceedings. See *Alstom v. Gen. Elec. Co.*, 228 F. Supp. 3d 244 (S.D.N.Y. 2017)

82 A. Carlevaris and J. Feris, supra note 22, p. 36: "An interesting issue related to the impact of national laws on the emergency arbitrator proceedings is the relevance of any decision made by a state court. This question has not yet been squarely addressed by an ICC emergency arbitrator … Given the frequency with which parties seek interim relief in the courts, the question can be expected to arise in the future".

83 See, e.g. M. Goldstein, "A Glance Into the History for the Emergency Arbitrator", *Fordham International Law Journal* (2017), Vol. 40.3, p. 796 (noting the mission of Emergency Arbitration is to "provide only so much temporary relief as is necessary to maintain the effective ability of the full arbitral tribunal to address continued provisional relief once it is constituted").

84 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 294, §§ 3-1051 and 3-1052; see also supra paras. 2 to 4 of the Report.

Accordingly, this narrow definition of urgency contrasts with the broader discretion given under Article 28(1) of the ICC Rules to the arbitral tribunal that may order "any interim or conservatory measure it deems appropriate". The Task Force noted that this distinction is in line with the EA's role as preliminary means for users to obtain urgent relief pending constitution of the tribunal.

143. Despite this apparently strict standard of admissibility, an analysis of the 80 ICC EA proceedings shows that, in practice, EAs have examined the requirement of urgency (a), as well as additional criteria often defined through international practice relating to interim measures ordered by arbitral tribunals (b).

a) Urgency

144. Article 29 of the ICC Rules affords emergency relief to a party that "needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal".[85] The language of Article 29 and Article 1, Appendix V of the ICC Rules emphasises the importance of urgency to a successful Application.

145. ICC EAs have referred to the urgency requirement in most of the decisions rendered to date. However, the interpretation and scope of said requirement is far from uniform.

146. *First*, there are divergent views regarding the characterisation of urgency as an admissibility condition or as a substantive requirement, or both.[86] In one instance, an EA limited the meaning of urgency, as a threshold question, to the fulfilment of the requirement that the emergency relief "cannot await the constitution of an arbitral tribunal".[87] In the same vein, an EA held that, as a question of admissibility, "following the President's initial review, the EA needs to analyse, under Article 29(1) whether the situation presented and allegedly requiring emergency relief "cannot await the constitution of an arbitral tribunal".[88] Yet in another case, the EA specifically held that the "cannot await the constitution of an arbitral tribunal" requirement is not used for admissibility or jurisdiction purposes, but rather is to be considered as a necessary part of the standard to be used on the merits. However, the Task Force cautions that this latter approach seems inconsistent with Article 29(1).

147. Many of the Task Force members advocated reconciling these approaches to assess urgency at two different stages. As a question of admissibility, a party seeking emergency relief should establish *prima facie* that the request cannot await the constitution of the arbitral tribunal. Then, as an issue of the merits of the EA Application, the party applying for emergency relief should provide a more comprehensive analysis of the urgency, as part of establishing that the measures are in fact warranted in light of the particular circumstances of the case. This two-step approach has been applied in some cases and is discussed above.[89]

148. *Second*, whether as a threshold matter or on the merits, the EA's approach to assessing urgency has not always been consistent. Article 29 of the ICC Rules sets a high standard, requiring that the urgency in question "cannot await the constitution of an arbitral tribunal". The majority of EAs considered urgency on this basis. But in at least 12 cases, the EA took into account other urgency factors, including whether the applicant contributed to the urgency, whether there are compelling reasons that ground the urgency of the measure requested, or whether applicant demonstrated the relief requested is urgently required to avoid imminent irreparable harm. For example, one EA referred to the test as the "urgent risk of irreparable harm" test. Applying such a standard, the EA also examined whether potential damages that would occur absent the emergency measures could instead be compensated by monetary means. If so, the urgency requirement was deemed unlikely to be fulfilled.

149. Other factors may also be relevant to considering urgency. Thus, for example, referring to two ICC cases in which interim measures (as opposed to emergency measures) had been rejected by the arbitral tribunals because the remedy sought "alter[ed] the agreement of [the] parties or their contractual obligations",[90] an EA found that urgency cannot be premised on facts or circumstances known to the parties at the time of the conclusion of the contract, overriding the parties' previously negotiated arrangements. In these circumstances, the EA considered that the parties were on notice of their respective needs and already had the opportunity to negotiate the protections they deemed necessary.

150. Urgency is not exclusive to ICC EA proceedings. Indeed, lack of urgency is the most common basis for denial of an emergency measure under the SCC Rules: between 2010 and 2013, five out of seven EA cases were denied because of lack of urgency.[91] As of 31 December 2014, the most common ground for rejection of interim measures has remained urgency.[92]

85 Ibid.

86 See supra Section III.B(2)(c) discussing the urgency requirement in the context of the threshold admissibility issue.

87 ICC EA Case No. 11.

88 ICC EA Case No. 16.

89 See supra para. 87 of the Report; see also ICC EA Cases Nos. 23 and 32.

90 A. Yesilirmak, supra note 83, p. 11. See also ICC Case No. 10648, Partial Award, 2001; ICC Case No. 12361, Interim Award, 2003.

91 Arbitration Institute of the Stockholm Chamber of Commerce, J. Lundstedt, "SCC Practice Note: Emergency Arbitrator Decisions 2010-2013" ("SCC Practice Note 2010-2013"), https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf, Case 1, p.4; A. Havedal, "SCC Practice Note: Emergency Arbitrator 2015-2016" ("SCC Practice Note 2015-2016"), https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf.

92 Arbitration Institute of the Stockholm Chamber of Commerce, L. Knapp, "SCC Practice: Emergency Arbitrator Decisions 2014", https://sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf.

Similarly, EA decisions under the rules of the ICDR, LCIA, SIAC and others all emphasise urgency as a key, indeed often determinative, criterion.[93]

b) Other factors drawn from interim measures practice

151. The Task Force notes that, in addition to urgency, EAs routinely also consider the substantive criteria applicable in deciding applications for interim measures outside of the EA context. These criteria include the likelihood of success on the merits (*fumus boni iuris*) (i), the risk of serious harm (*periculum in mora*) (ii), the risk of aggravation of the dispute (iii), the absence of prejudgment on the merits (iv), and proportionality/balance of equities (v). As discussed below, EAs tend not to apply these elements cumulatively or as a laundry list. Rather, EAs assess which elements are relevant in light of the particular circumstances of the case.[94]

(i) Likelihood of success on the merits (fumus boni iuris)

152. In the context of interim measures applications before arbitral tribunals, the condition of likelihood of success on the merits (*fumus boni iuris*) requires the party requesting interim relief to show a reasonably arguable case or a reasonable probability of prevailing on the merits.[95] This requirement ensures that a party will not be granted interim relief if there appears to be little prospect that it will prevail in the final award.[96] Typically, however, the tribunal's inquiry into the merits of the parties' claims and defenses is only on a *prima facie* basis, without any detailed or definitive assessment of the evidence or the merits of the parties' legal arguments.[97]

153. In the first ICC 80 EA Applications, at least 31 EAs also considered the likelihood of success on the merits. Indeed, after urgency, and along with the risk of irreparable harm, it is the most commonly applied criterion in ICC EA practice.

154. In 25 of the 31 ICC EA cases in which likelihood of success on the merits was considered, the EA required the applicant to establish a *prima facie* case. One EA mentioned that the request is justified on the merits "if there is, on a *prima facie* basis, a reasonable possibility that the requesting party will succeed on the merits of the claim".[98] In another case, the EA showed concern about prejudging the merits stating "some issues at stake depend on a deeper debate, not admissible in an urgent measure proceeding" and that "this leads to the conclusion of absence of *fumus bonis iuris*".[99] In a further case, the EA stated that the "lack of *fumus bonis iuris* is sufficient to reason dismissal of the measure requested".[100]

155. This approach is consistent with practice under other EA rules. In ICDR practice, the "good prospects of success on the merits" requirement has routinely been considered as one of the conditions necessary for emergency relief.[101] Similarly, a survey of SCC EA practice shows that the "chance of success on the merits" is one of the set of factors that have become commonly accepted as prerequisites for granting emergency relief.[102] In this respect, some EAs in SCC proceedings were satisfied if a claimant presented a *prima facie* case on the merits, i.e. a mere showing that the elements of a claim are present. Most EAs operating under the SCC Rules, however, set a higher threshold requiring applicants to demonstrate a "reasonable possibility" of success on the merits.[103] In one EA proceeding, the EA denied the request for emergency measures because the claimant had failed to prove a *prima facie* reasonable chance of success on the merits.[104]

156. The Task Force received feedback suggesting that, where the EA denies relief at least in part based on consideration of likelihood of success on the merits, the EA might consider issuing his or her Order on a without prejudice basis. The commentator suggested that such approach would clarify that the EA's decision is preliminary and provide prospective applicants with some comfort about the negative impression of an unsuccessful Application on the tribunal deciding on the merits.

(ii) Risk of irreparable harm (periculum in mora)

157. The requirement of *periculum in mora*, or "danger of delay" is a key element in seeking interim measures before arbitral tribunals. In short, it requires that relief may be granted only if the applicant demonstrates that it may suffer "irreparable" damage or injury in the absence of such relief.[105] There is some debate, and a general lack of consensus, over the level of harm necessary to satisfy this requirement. In many jurisdictions the term "irreparable harm" typically refers to an injury that cannot be compensated by way of a damages award.[106] However, in international arbitration practice, the *periculum in mora* requirement has often been interpreted to require a showing of serious or grave harm, even if compensable by money. As one EA observed, "the more common view is that the international standard requires a lesser showing, being a likelihood of serious harm that might not be

93 G. Born, supra note 58, p. 2452.
94 For example, one EA specified that "it is impossible to establish in advance an unalterable list of required conditions as some will be applicable and others not applicable, depending on the facts of each case" (ICC EA Case No. 10).
95 G. Born, supra note 58, pp. 2424-2563.
96 Ibid.
97 Ibid.
98 ICC EA Case No. 11.
99 ICC EA Case No. 5.
100 ICC EA Case No. 14.
101 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data", *Dispute Resolution Journal* (2008), p.5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules* (Oxford University Press, 2nd ed. 2019) Ch. 6.
102 SCC Practice Note 2015-2016, supra note 91.
103 Ibid.
104 Ibid.
105 G. Born, supra note 58, pp. 2424-2563.
106 M. Goldstein, supra note 83, pp. 780-797.

capable of being remedied, fully or at all, in a final award". This less stringent reading of the requirement is more appropriate to the fundamental purpose of arbitral provisional relief, which is to preserve the rights of the parties until the final award is rendered,[107] while the EA's objective is rather to preserve those rights until the arbitral tribunal is in place and capable of adjudicating on provisional relief.

158. An analysis of the first 80 ICC EA cases reveals that the EA considered irreparable harm in half of the cases. It should be noted that it was not clear from all Orders which level of harm was deemed to be "irreparable". In at least 21 of those 40 cases, the EA considered that "irreparable harm" should not be interpreted in a literal sense, but should instead refer to serious and substantial harm. For example, one EA decided that "while international arbitration practice normally requires there to be a risk of irreparable harm, the applicant was entitled to relief despite the absence of such a risk, as the dispute would otherwise have worsened and granting the request would not cause irreparable harm to the responding party".[108] Similarly, another EA sought guidance in Article 17(A) of the UNCITRAL Model Law of 2006[109] to hold that the risk of irreparable harm requirement does not require demonstrating that the harm suffered in the absence of protection cannot be compensated through an award on damages. Rather, the harm should be serious and imminent, tipping the balance in favour of the requesting party.

159. Other arbitration rules, such as those of the Australian Centre for International Commercial Arbitration (ACICA), expressly cite the risk of irreparable harm as a precondition for EA relief.[110] An overview of the EA proceedings from the SCAI has also shown irreparable or substantial harm as a criterion consistently applied by EAs.[111] Looking at the data available from the applications filed with the SCC, "irreparable harm" is part of the commonly-accepted factors for granting emergency relief. In addition, the "urgency" and "irreparable harm" requirements are frequently discussed together.[112] Indeed, some EAs in SCC proceedings do not even consider urgency to be a separate factor, but rather inherent to the requirement that the measures requested are necessary to avoid irreparable harm. Subsequently, in measuring urgency or risk of irreparable harm, most EAs in SCC proceedings analysed whether the harm may be compensable by an award of damages and, if so, found that the request for emergency relief should be denied.[113]

(iii) Risk of aggravation of the dispute

160. The principle of non-aggravation of a dispute "seeks to preserve the respective rights of the parties to a dispute until a final decision has been rendered".[114] "Risk of aggravation of the dispute" means that the EA must consider whether the grant or refusal of emergency relief would aggravate the dispute. It is intended to protect the parties from suffering any further damages. This element must not be confused with the "preservation of the *status quo*", which is another type of interim measure that can be requested.[115] The "risk of aggravation of the dispute" element is rarely discussed in academic articles and publications on EA proceedings. However, some EAs have acknowledged the "risk of aggravation of the dispute" as a factor to consider when exercising their discretion to grant emergency relief.

161. An analysis of the first 80 ICC EA cases shows that EAs mentioned this factor for granting emergency relief in 12 cases. In one case, the EA decided that the applicant was entitled to relief despite the absence of the risk of irreparable harm, as the dispute would otherwise have worsened and granting the request would not cause irreparable harm to the responding party.[116] It is the only ICC case known to the Task Force in which the risk of aggravation *in itself* sufficed to grant emergency relief. In the other cases, this element has been assessed in conjunction with others. In some of the cases, the "preservation of the *status quo*" was mentioned in the applied criteria. However, it is not used as a substitute to the term "no aggravation of the dispute" but as a supplement. The EA considered that there is a "need to avoid aggravation and preserve *status quo"* (emphasis added).

---

107 Ibid.

108 See A. Carlevaris and J. Feris, supra note 22. Similarly one EA considered that "irreparable harm" must be understood in an economic and not literal sense and that the damages only need to be substantial: "Standard is not so high as to require harm that cannot be compensated by money but rather the that the harm will alter the *status quo* significantly and compound the damages" (ICC EA Case No. 3). In more recent cases, an EA considered that "to obtain interim measures, it is not necessary to establish that there is a risk of irreparable harm, i.e. of a harm that cannot adequately be compensated by an award of damages. A risk of serious or substantial harm may be sufficient, depending on the circumstances" (ICC EA Case No. 33), whereas other EAs considered themselves empowered to grant relief in an interim stage to avoid harm which would be caused if the relief had not been granted at an interim stage and the determination would be made by the arbitral tribunal, without referring to a specific standard of harm.

109 Article 17(A)(1) of the of the UNCITRAL Model Law 2006: "(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. [...]" See also Article 26(3)-(4) of the UNCITRAL Arbitration Rules 2010 and Article 23.4 of the HKIAC Rules (2013), which set forth similar requirements for obtaining an interim relief.

110 ACICA Arbitration Rules 2016.

111 SCAI, "Emergency Relief under the Swiss Rules: An overview after 4 years of practice" (2017), https://www.swissarbitration.org/files/620/untitled%20folder/Emergency%20Proceedings%20under%20the%20Swiss%20Rules%20(2017).pdf.

112 SCC Practice Note 2015-2016, supra note 91.

113 Ibid.

114 D. Rivkin, "Re-Evaluating Provisional Measures through the Lens of Efficiency and Justice", *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC, 2015), p.4.

115 See A. Carlevaris and J. Feris, supra note 22, p. 34.

116 Ibid, p. 25.

162. Consideration of this factor is also borne out to some extent in EA applications under other rules. In EA practice under the LCIA Rules, for example, the risk of aggravation of the dispute is considered as a component of the urgency requirement.[117] The EA evaluates the risk of aggravation of the dispute, along with the risk of serious and irreparable harm and the risk of compromised procedural integrity of the arbitration, in order to decide whether the urgency requirement is met. In the 30 Applications filed with the SCC from 2010 to 2016, this requirement has only been mentioned twice.[118] In those cases, the EA considered whether granting the interim relief would aggravate the dispute.

(iv) No prejudgment on the merits

163. When deciding applications for emergency relief, the EA should avoid prejudging or predetermining the dispute itself.[119] As discussed earlier, this does not mean that an EA may not consider the likely prospects of a claim.[120] It does however mean that, in doing so, the EA must not "decide" on the merits of the case, and must not overstep the arbitral tribunal's role of assessing the merits in light of the parties' submissions in the arbitration.[121]

164. The analysis of the first 80 ICC EA cases demonstrates that EAs referred to the "no prejudgment on merits" criterion in a total of 19 cases. In all but one case, the criterion was applied cumulatively. In a single case, the request was denied in order to avoid prejudging on the merits; the EA stated that "[h]owever wide may be the latitude that I enjoy to take pragmatic and necessary action, any such action must necessarily be of an interim or conservatory nature, which among other things means that it must be capable of reassessment if appropriate in the course of arbitral proceedings to resolve the parties' dispute". In other words, an EA will not grant an emergency measure if said relief is the same as the one requested on the merits.

165. Similarly, EA cases statistics from the SCC show that, among the EA applications determined between 2014 and 2016, only two EAs cited the "no prejudgment" condition.[122] In one such case, the EA found that the claimants' requested delivery of certain products under a distribution agreement were not interim measures, but instead constituted a judgment on the merits. The EA stated that said deliveries would make a later judgment wholly or partly superfluous.[123] In the second case, the EA held that "[i]t is not the function of an emergency arbitrator … to decide the merits of the parties' respective cases, particularly where such cases are, necessarily, materially incomplete and turn on complicated and potentially difficult issues of law".[124] In ICDR arbitration, the application of the "no prejudgment on the merits" condition was only found in a one case where the EA denied a declaratory judgment request stating that "the purpose of the emergency relief was not to anticipate the decision on the merits, but to preserve the *status quo*".[125]

(v) Balance of equities (proportionality)

166. Finally, EAs have also balanced the interests of the parties, i.e. weighing any harm caused by granting the measure against the likely harm to the applicant if said relief is not granted. Tribunals frequently consider the balance of the interests in addressing requests for interim measures. This may include consideration of the relative financial positions of the parties to ensure that no substantial disadvantage occurs as a result of the interim measure.[126] The "balance of equities" is a common law principle often applied when granting provisional relief.[127] It may be assessed also within the related concepts of balance of hardships, balance of inconvenience, or proportionality.[128]

167. Contrary to the "risk of aggravation to the dispute" or "no prejudgment on the merits", the "balance of equities" or proportionality element is expressly stated in a few EA Provisions. The ACICA Rules provides that parties requesting an emergency interim measure must show, among other things that "such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if it is granted".[129] Further, pursuant to the UNCITRAL Model Law (Article 17(A), para. 1(a)),

117 R. Gerbay, L. Richman, M. Scherer, "Chapter 10: Expedited Formation of the Arbitral Tribunal, Emergency Arbitrators and Expedited Replacement of Arbitrators", *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Kluwer, 2015), pp. 133-166. "Even though there is no universal consensus on the definition of 'urgency', arbitral decisions have held that this requirement is met if there is a risk of (i) serious and irreparable harm to one of the parties; (ii) aggravation of the dispute during the proceedings; or (iii) compromised procedural integrity of the arbitration".

118 SCC Practice Note 2010-2013, Case 1; SCC Practice Note 2015-2016, Case 3.9, supra note 91.

119 Chartered Institute of Arbitrators' International Arbitration Practice Guideline, Applications for Interim Measures (2015). Indeed, Articles 29(3) and 29(4) recognise that the arbitral tribunal is the ultimate decision-making authority and that the EA's Order shall not bind the arbitral tribunal. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 305, § 3-1088.

120 See supra Section III.D(3) "(i) Likelihood of success on the merits (fumus boni iuris)".

121 G. Born, supra note 58, pp. 2424-2563.

122 SCC Practice Note 2010-2013, supra note 91.

123 Ibid. Case 3.

124 Ibid. Case 7.

125 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data", Dispute Resolution Journal (2008), p.5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, supra note 27.

126 *Chartered Institute of Arbitrators' International Arbitration Practice Guideline, Applications for Interim Measures* (2015).

127 See, e.g. *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Roso-Lino Beverage Dist., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH*, 2010 WL 2991390 (C.D. Cal. July 26, 2010) (granting injunctive relief pending arbitration but only as to claims for which plaintiff demonstrated balance of equities that favored plaintiff).

128 *Winter*, supra note 127, at 376-77 (noting that the court must consider the competing claims of injury and effect on each party of granting or withholding the relief requested).

129 ACICA Arbitration Rules 2016, Schedule 1, Art. 3.5(b).

one of the conditions for granting an interim measure is that "[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".

168. The analysis of the first 80 ICC EA cases shows that EAs referred to the "balance of equities" factor for deciding whether to grant emergency relief in at least 16 decisions. In one case, the EA described the notion of balance of equities as "the likelihood that applicant will receive compensation for the potential damage suffered as a result of the requested measures not being granted is greater than the likelihood that the respondent will receive said compensation in the opposite case". In another case, the EA considered "whether the threatened injury outweighs any harm that would result from the grant of the relief sought, whether grant of the relief sought would disserve the public interest, and whether the applicant can compensate the other party in damages if the relief turns out to have been wrongly granted."

169. Looking at the data available from the SCC, the "proportionality" condition has been commonly accepted as a prerequisite for granting emergency relief.[130] Where all other factors are met (jurisdiction, chance of success on the merits, and urgency), the EA will consider the proportionality of the requested measure by weighing the harm avoided against the potential harm inflicted upon the respondent. If granting the relief would cause significant harm to the respondent, the EA is unlikely to grant the applicant's request.[131] An EA in SCC proceedings noted that proportionality "is commonly assessed as a balance of hardships" and "if the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party".[132]

4) Other considerations for granting emergency relief

170. In addition to the substantive considerations outlined above, EAs have also taken into account the provision of security from the requesting party (a) and whether the relief requested is appropriate (b).

a) Provision of security as a condition to the relief granted

171. The ICC Rules expressly provide that EAs can subject their Orders to the posting of security. Appendix V, Article 6(7) provides that "[t]he emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security". Conditioning emergency relief on the posting of security can allow the EA to balance the interests of the parties[133] and to take into account the practical effects of granting a measure that is, by definition, provisional.[134] Through the provision of security, the EA ensures that the adverse party will be able to recover damages if the provisional measure proves to have been wrongfully ordered.

172. Article 28 of the ICC Rules, as well as many national laws, also specifically provide for the possibility that a tribunal may order security to be posted as a condition of any provisional relief granted.[135]

173. Despite this express authorisation, among the first 80 ICC EA Applications, not one case in which the EA granted relief included the provision of security as a condition.

174. In at least nine cases, the requested measure involved security or some form of cross-undertakings. In the majority of these cases, the EAs expressly declined provision of security. In two cases, a form of security was granted in the sense that, as requested, the payment of amounts in escrow was ordered. In one case, the EA presented the possibility of requiring the posting of security as a means to offset the emergency measure's risk of altering the *status quo*, by ensuring that the eventual harm caused by the measure could be compensated. As the EA explained, the posting of security would typically be required for measures that modify the *status quo* between the parties, such as orders to transfer possession or to demolish, and not in cases of orders to "not change course". More generally, the EA appeared to suggest that the commonly applied interim measures requirements can be disregarded if they prove inadequate for the specific measure at hand. In that particular case, the EA decided that those requirements did not necessarily apply to the measure that was requested to merely preserve the *status quo*.

175. In at least three cases, the EA considered that a provision of security would not be justified absent an allegation of misconduct. While neither the EA Provisions (Appendix V, Article 6(7)) nor Article 28 applicable to arbitral tribunals specify the conditions

130 SCC Practice Note 2015-2016, supra note 91.
131 Ibid.
132 Ibid. case 3.3.

133 See supra Section III.D(3) "(v) Balance of equities (proportionality)".
134 See supra Section III.D(3) "(iv) No prejudgment on the merits".
135 See Article 28(1). See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 292, § 3-1042; G. Born, supra note 58, p. 2508; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) p. 608. See also Article 17(E) of the of the UNCITRAL Model Law 2006: "(1) The arbitral tribunal may require any party to provide appropriate security in connection with the measure. (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so"; Article 26(6) of the UNCITRAL Arbitration Rules 2010; Art. 25(2), LCIA Rules 2014. In some cases, national laws may hinder the enforcement of an interim measure in case of non-compliance with the required provision of security, see Section 30 (1) (ii) of the Lagos State Arbitration Law; Article 89.1 (v) of the Colombian Arbitration Statute; see also the jurisprudence of the Vilnius country court on the basis of Article 23 of the Law on Commercial Arbitration of Lithuania.

under which payment of security can be required, similar caution can be found in case law regarding requests of security for costs before arbitra tribunals.[136]

176. The practice of EA proceedings under other rules also shows a similar reluctance to require provision of security in the context of emergency measures. Under the SCC Rules, there is no information regarding any instance, in which EAs considered, accepted or denied requiring the posting of security since 2010.[137] The SCAI has handled at least one case in which the respondent requested security.[138] The EA denied the request after determining that the respondent had not demonstrated that damages would be incurred as a result of the interim relief.[139] Similarly, the Arbitration Center of Mexico handled one case in which the claimant requested security and the EA granted the request.[140] Interestingly, even under the ICDR EA provisions, there is no instance in which an EA has ordered the provision of security.

b) Nature of the emergency relief sought

177. Whether viewed as an admissibility issue or as a matter arising in assessing the merits of the EA Application, EAs have frequently had to consider the nature of the emergency measures sought and whether such relief is appropriate.

178. Under the ICC Rules, EAs have the power to order measures of an "interim or conservatory nature". The Rules do not define interim or conservatory measures.[141] Interim (or provisional) relief has generally been defined as "decisions that are made prior to a final award, where the relief granted is usually, but not necessarily, designed to protect a party during the pendency of the proceedings, and which are potentially subject to alteration or elimination in the final award", while conservatory (or protective) relief refers to "relief that is designed to protect or conserve particular rights, regardless of whether it is granted in an interim or a final award".[142] However, none of the first 80 ICC EA cases have applied this distinction. Whenever faced with an EA Application, EAs have only assessed whether the requested measure constitutes preliminary relief.

179. EAs in ICC proceedings have decided the following types of requests for emergency relief:

- anti-suit / anti-arbitration injunctions;
- application of delay penalties (*astreintes)*;
- measures aiming to maintain the *status quo* and preservation of assets or property;
- measures restraining the sale of certain products allegedly in breach of contractual obligations;
- measures demanding performance of contractual obligations;
- measures demanding the reinstatement of individuals in a company, the removal of individuals from board positions or employment, the organisation of shareholders meetings, the passing of board resolutions and participation in board meetings;
- measures enjoining the enforcement of bank guarantees, and a declaratory order of the abusiveness of a potential enforcement of such guarantees;
- measures ordering security, as well as prohibiting the opposing party from drawing down on the performance bond; and
- measures impacting third parties.

180. An analysis of the first 80 ICC EA cases shows that while several EAs have considered the appropriateness of the specific measures sought, this is not always constrained by a technical analysis of whether such measures sought are permitted by any applicable law. EAs specifically address the question of the nature and type of the relief sought in some 25 cases. There is no clear visible trend on the norms applied in this respect. EAs have referred to availability of the relief as determined by the *lex arbitri*, and have sought guidance in international practice. Others have simply assessed whether the requested measures were "fit", "appropriate", or "possible". In at least one case, the EA equated its powers to order emergency relief to that of arbitral tribunals in general. In short, the decisions show a wide degree of discretion and flexibility.

181. ICC EAs have not had the opportunity to address whether declaratory relief is available in EA proceedings. Although an EA was faced with such a request, the Application was denied on other grounds. In the context of the SCC Rules, an EA granted a request for declaratory relief.[143] Conversely, an EA operating under the ICDR Rules rejected an application for declaratory relief because "the purpose of emergency relief [is] not to anticipate the decision

136 N. Blackaby, J. Hunter, C. Partasides, A. Redfern, *Redfern and Hunter on International Commercial Arbitration* (2015), p. 316: "Tribunals have been cautious about granting security in such a situation: in *Commerce Group v El Salvador,* for example, the annulment committee noted that 'the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced'".

137 See SCC Practice Notes supra notes 91 and 92; see also A. Havedal, "Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings", *Kluwer Arbitration Blog* (29 Jan. 2017).

138 The Swiss Rules of International Arbitration allow EAs to order the provision of appropriate security through reference to Article 26; see Article 43(1) Swiss Rules of International Arbitration.

139 SCAI, Case No. 4 (unpublished).

140 The Rules of Arbitration of the Arbitration Center of Mexico (CAM) allows the EA to order a party to post security: see Art. 30 Bis, Sec. 6: "The urgent measure may grant under the condition that the requesting party provides the security fixed by the urgent arbitrator."

141 *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 289, § 3-1036.

142 G. Born, supra note 58, p. 2427. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 289, §3-1036 (noting that common types of interim and conservatory relief include measures that (i) protect the *status quo*; (ii) preserve evidence; (iii) provide security for costs; (iv) secure the enforcement of the award; or (v) order interim payment).

143 SCC Emergency Arbitration (087/2012), in SCC Practice Note 2010-2013, supra note 91.

on the merits, but to preserve the *status quo*".[144] In the Task Force, there was no commonly accepted view as to whether or not declaratory relief could be available in EA proceedings. Some members argued that such relief cannot by definition qualify as interim or conservatory in nature, while others have countered that the wide discretion of the EA could in certain circumstances warrant the issuance of declaratory relief.

IV. POST-EMERGENCY ARBITRATION CONSIDERATIONS

A. Enforcement

182. As EA proceedings have become more prevalent, concerns about the enforceability of EA decisions have given rise to numerous debates.

183. Enforceability concerns have principally arisen from the status of the EA (i.e. whether arbitrator or simple adjudicator), the interim nature of the EA decision, and the specific form of the EA decision. The Report considers these hurdles to enforceability successively keeping in mind that they should not be overstated as most parties seem to comply voluntarily with EA decisions.

1) The status of the EA under national laws

184. Other than those of Hong Kong, New Zealand and Singapore, none of the national laws surveyed contains any provision expressly referring to the EA or the EA proceedings.[145] Most national laws seem to strictly apply to arbitral tribunals only and not to an EA. Given the relatively recent nature of EA proceedings, there is, at present, only limited case law addressing whether the EA is empowered to act under the national arbitration laws and whether national courts are empowered to enforce any decisions rendered by an EA.

185. From the analysis of 45 National Reports, a wide range of interpretations emerge, from expressing an unequivocal view that the EA is an arbitrator and that provisions applicable to the arbitral tribunal should apply to EAs, to others that consider that EA proceedings cannot be equated to proceedings before an arbitral tribunal.

186. Even where there is yet to be explicit confirmation from local courts, most reports from countries that have incorporated the UNCITRAL Model Law (and in particular its provisions on enforceability of interim measures), tend to favour the enforceability of EA decisions considering that full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and that it is reasonable to assume that the EA has the same powers as an arbitrator.[146]

187. In those countries where the UNCITRAL Model Law has only inspired the local arbitration law, then the position as to enforceability of EA decisions varies widely, even when the arbitration law expressly authorises arbitral tribunals to grant interim measures. In countries such as Belgium, Colombia, Portugal, Brazil, Nigeria, Poland, Spain, Ukraine, Turkey and Venezuela, National Committees tend to consider that arbitral tribunals' power to grant interim measures are consequently extended to EAs, while countries such as India,[147] Macedonia, Malaysia, Serbia and Thailand, are reported to have a restrictive interpretation of EAs' powers.

188. Further, in countries where statutory provisions allow arbitral tribunals to grant interim measures, national laws and practice often draw distinctions between domestic-seated and foreign-seated arbitration. In certain countries, enforcement is easier in domestic-seated arbitration, while in others enforcement is made easier in foreign-seated arbitration where the law of the parties is given prevalence. For example, in Colombia, EA decisions are not enforceable in domestic arbitration while they should be enforceable (due to greater deference to party autonomy) in foreign-seated arbitration. Similarly, in India, enforcement of EA decisions is uncertain in domestic arbitration. The Indian Act does not contain any provision with regard to EAs or emergency awards. However, with respect to emergency awards in domestic-seated international arbitrations, where the relevant institution rules provide for EA proceedings, it is likely that courts would treat the emergency award in the same manner as a regular award, depending on the status ascribed to it under the said rules. In foreign-seated arbitrations, while courts have, on the one hand, held that emergency awards cannot be enforced under the Arbitration and Conciliation Act (1996) and that the only method of enforcing the same would be by filing a suit, courts have, on the other hand, indirectly enforced

144 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action – Part I: A Look at the Empirical Data", *Dispute Resolution Journal*, August/October 2008, p. 5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, supra note 27.

145 For example, national laws of these countries do not expressly refer to EAs: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Cyprus, Finland, France, Germany, Greece, India, Ireland, Italy, Lebanon, Lithuania, Macedonia, Malaysia, Mexico, Nigeria, Pakistan, Panama, Peru, Poland, Portugal, Qatar, Russia, Serbia, Spain, Thailand, Turkey, UAE, Ukraine, United Kingdom, US and Venezuela.

146 For example, 1985 UNCITRAL Model Law countries: Austria, Canada, Cyprus, Greece and Mexico; 2006 UNCITRAL Model Law countries: Ireland and New Zealand (now provided for in legislation). Australia and Russia seem to consider to the contrary that an EA shall not be equated with an arbitral tribunal. This tendency is based on the opinion expressed by the National Committees and should be confirmed on a case-by-case basis. At the time this Report was drafted there was no case law to confirm the National Committees' reading of their national law.

147 The 246th Law Commission of India Report 2014 had suggested widening the definition of 'arbitral tribunal' under Section 2 (d) of the Arbitration Act, 1996 to include "emergency arbitrator". However, this definition was not included in the Arbitration (Amendment) Act, 2015. Therefore, the concept of "emergency arbitrator" is not yet recognised under Indian law.

the Orders of a foreign-seated EA under Section 9 of the Amendment Act by ordering the same relief based on the same cause of action that was brought before the EA.[148] Panamanian courts enforce domestic interim relief orders upon simple production of the decision, while they scrutinise foreign interim relief decisions through the exequatur process. Illustratively, in Croatia, it is reported that only domestic interim relief orders are considered enforceable.

189. In other countries, arbitral tribunals do not have general powers to grant provisional and conservatory measures either by express provision of the law (e.g. in Italy), or because the silence of the law is interpreted as a prohibition (e.g. in Pakistan). Consequently, in those countries, the direct enforceability of EA decisions is uncertain.

190. As illustrated, national laws differ greatly as to the potential enforceability of an EA Order. Some National Committees have reported that the potential enforceability of EA Orders might be increased if the parties specifically refer to EA proceedings in their arbitration agreement and do not limit themselves to referring to institutional rules containing EA Provisions.[149]

191. A handful of countries have actively addressed the uncertainties surrounding the enforceability of EA decisions by amending their arbitration law. Singapore amended its Arbitration Acts in 2012 providing that an EA constituted an arbitral tribunal and that the EA's decision, whether an "order" or an "award", shall be enforceable in Singapore. Similarly, the Legislative Council of Hong Kong passed the Arbitration (Amendment) Bill 2013 which empowers Hong Kong courts to enforce provisional and conservatory measures granted by an EA. With effect from 1 March 2017, New Zealand has also adopted reforms very similar to the Singapore amendments.[150]

2) Form and interim nature of the EA's decision and impact on enforceability

192. The doubts that have been expressed regarding the purported lack of enforceability of an EA's decision also stem from the fact that i) the EA's decision may be given as an order rather than an award, and ii) the decision of an EA may be viewed as lacking the finality requirement under the New York Convention.

193. Although under Article 28(1) of the ICC Rules the arbitral tribunal is free to determine the form of the measure it adopts,[151] Article 29(2) expressly states that "the emergency arbitrator's decision shall take the form of an order". Other institutions have expressly chosen to characterise decisions on equivalent pre-arbitral interim relief as awards,[152] or more often, have given the EA discretion to characterise the decision as an award or an order.[153]

194. The characterisation of the EA's decision as an "order" or an "award" may be of some concern in some jurisdictions when it comes to enforceability, such as Australia, Lebanon, the UAE, Thailand and Russia. But in most jurisdictions, in application of the principle of "substance over form", the form in which any type of interim measure has been rendered will be of little practical relevance.[154] Mexico has for example recently adopted provisions on court intervention in arbitration proceedings which, among other issues, provides that any interim measure shall be enforced upon request.[155] Mexican legislators also included a procedure for the enforcement of interim measures adopted in a procedural order, or otherwise.

195. According to most commentators of the New York Convention, such decision, irrespective of its characterisation, may not be recognised and enforced in most jurisdictions because interim measures would differ radically from final awards due essentially to the provisional nature of interim measures as opposed to the final nature of an award.[156] That said, it was noted

148 The Delhi and the Bombay High Courts have recently extended the application of Section 9 of the Amendment Act beyond court orders. They indirectly enforced the orders of a foreign seated EA by ordering the same relief based on the same cause of action that was brought before the EA. See *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.* (2016) 234 DLT 349; *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, (2017) 4 AIR Bom R 440.

149 For instance, to enforce an EA decision, Panama requires that the parties expressly agree on the principle of enforcement of an EA's decision and set the conditions for such performance. It is reported that Italian courts are likely to enforce EA decisions if such mechanism is considered as a contractual remedy under the doctrine of "*arbitrato irrituale*". Italian courts would consider that the order is of a contractual nature and enforce it accordingly. In the USA, courts have compelled parties to participate in EA proceedings where specifically required by the arbitration agreement. Finally, it is reported that Cypriot courts might interpret the wording of Article 29(3) of the ICC Rules to mean that orders are deprived of finality and therefore not enforceable. Parties may therefore want to consider specifying the nature of EA Orders if they wish to enforce such order in Cyprus.

150 See Arbitration Act, s. 2(1) (enlarging the scope of what constitutes an "arbitration" to specifically include EA proceedings).

151 ICC Rules, Art. 28: "Any [conservatory or interim] measures shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate".

152 SIAC Rules (2016), Art. 1(3), 30; See also LCIA Rules (2014), Arts. 9(8), 9(9); ICDR Rules (2014), Art. 6(4); HKIAC Rules (2013), Art. 3(9) and Schedule 4(12); United Nations Commission on International Trade, *UNCITRAL Model Law on International Commercial Arbitration*, Art. 17(2) (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

153 NAI Arbitration Rules, AFA Rules of Arbitration, ICDR, SIAC and SCC EA Rules.

154 N. Voser, C. Boog, "ICC Emergency Arbitrator Proceedings: An Overview", *ICC International Court of Arbitration Bulletin* (Special Supplement) Vol. 22 (2011) at p. 86.

155 Art. 1479 of the Mexican Code of Commerce: "Any interim measure ordered by an arbitral tribunal shall be recognised as binding and, except that the arbitral tribunal provides for otherwise, it shall be enforced upon request of the above by the competent court, regardless of the state where it has been ordered, and subject to the provisions of article 1480"

156 D. Di Pietro, "What Constitutes an Arbitral Award Under the New York Convention?", *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), at pp. 155-156. Some prominent authors do not share this view and consider that an arbitral award providing for interim relief may be enforced under the New York

that in countries that have adopted the full version of the 2006 UNCITRAL Model Law, including the optional Article 17 (broadly applicable to interim measures), there is a stronger argument that the EA "order" or "award" will be enforceable.

196. Although Singapore, New Zealand and Hong Kong have enacted legislation providing that EA decisions may be enforced by the courts, and there is case law to the same effect in the USA and in Ukraine, the enforceability of orders in most jurisdictions is unsettled.[157] In most jurisdictions, in the absence of case law on the issue, it is not possible to draw conclusions as to the main lines of interpretation on the enforceability of EA decisions under the New York Convention.

197. In 2003, the Paris Court of Appeal refused enforcement of an order rendered pursuant to the then applicable ICC Pre-Arbitral Referee mechanism, declaring that the Referee was a third-party adjudicator as opposed to an arbitrator. The Paris Court of Appeal considered that the Referee's power was contractual in nature and not jurisdictional. It further considered that the Referee's decision could not be considered as an award under French law as it was not final.[158] The reasoning of the Court of Appeal in relation to the non-jurisdictional nature of the Pre-Arbitral Referee was highly criticised and would unlikely be relied upon today for EA proceedings where, contrary to the ICC Pre-Arbitral Referee Rules, the EA Provisions are incorporated in the ICC Rules. Yet, the *Cour de Cassation* held on 12 October 2011 that an award is "a decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute either on the merits, on jurisdiction or on any procedural issue which terminates the arbitral proceedings".[159] As all interim measures are subject to modification, termination or annulment until a final decision is made by the arbitral tribunal, it is unlikely that French courts will enforce EA decisions as long as such definition of award stands.

198. On the other hand, US case law has developed a more favourable interpretation of the finality of interim orders by focusing on whether the order disposes of a separate, self-contained issue. The 6th Circuit Court held that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings. This issue is a separate, discrete, independent, severable issue".[160] Similarly it was held by the Southern District of New York that "an award is final if it resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration",[161] and by the Northern District of California that "this Court has authority under the FAA to review and vacate an arbitration panel's interim order … [a]s noted above, such an order is sufficiently 'final' to permit judicial review".[162] While few courts have directly addressed EA proceedings, as opposed to interim orders issued by an arbitral tribunal, those that have considered an EA's decision have treated it for all purposes as if it were an award made by a fully constituted arbitral tribunal.[163]

199. Notwithstanding the above, the increasing use of EA proceedings worldwide suggests that users are not dismayed by questions around enforceability of the EA's decision. The EA proceedings seem to work as a self-contained efficient and binding tool that already benefits from high levels of compliance by the parties and from the support of some courts.[164]

a) Compliance with EA decisions

200. EA proceedings seem to draw their efficiency, first, from the binding nature of their decisions;[165] and second, from the fact that the party who seeks

---

Convention provided that the arbitral decision granting interim relief constitutes an arbitral award at the place of arbitration. See e.g. Albert Jan van den Berg, "The Application of the New York Convention by the Courts", "Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention", *ICCA Congress Series* No. 9 (1999), at pp. 25-35. F. Santacroce, "The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?", *Arbitration International*, Vol.31(2) 2015, 302 ff. The interpretation of the term award under the New York Convention is still evolving as demonstrated by Jan Paulsson's recent analysis of the Convention in "The 1958 New York Convention" (Kluwer, 2016), at pp. 97-136. N. Voser, C. Boog, supra note 155, at p. 86: "Whether an emergency arbitrator's Order is enforceable in a state court is a question governed not by the ICC Rules but by the law at the place of enforcement. Generally speaking, Emergency Measures are not enforceable under the New York Convention because they do not qualify as an « award » within the meaning of Article I(1) of the Convention".

157 B. Beigel, "The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis" (2014) 31(1) *Journal of International Arbitration* 1-18; L. Parkin and S. Wade, "Emergency arbitrators and the state courts: will they work together?" 80(1) *Arbitration* 48-54 (Chartered Institute of Arbitrators, 2014); The Higher specialised Court of Ukraine in Civil and Criminal Matters confirmed the enforceability of an EA's order which required Ukraine to refrain from levying a tax which amounted, according to the Kyiv Court of Appeal, to amend Ukrainian legislation.

158 *Société Nationale des Pétroles du Congo and Republic of Congo v. TEP Congo*, Paris Court of Appeal, 29 April 2003.

159 French *Cour de Cassation*, 12 October 2011, No 09-72.439.

160 *Island Creek Coal Sales v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984).

161 *Ecopetrol S.A. v. Offshore Expl. & Prod. LLC,* 46 F. Supp. 3d 327 (S.D.N.Y. 2014).

162 *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003).

163 See, e.g. *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (confirming an EA award issued pursuant to the AAA Rules ordering specific performance to restore the *status quo*); *Blue Cross Blue Shield of Mich. v. Medimpact Healthcare Sys.*, Inc., No. 09-14260, 2010 WL 2595340 (E.D. Mich. June 24, 2010) (same).

164 D. Paraguacuto-Mahéo, C. Lecuyer-Thieffry, "Emergency Arbitrator: A new player in the field – the French perspective", *Fordham International Law Review,* Vol 40, Issue 3 (2017); At least in one known instance, the preliminary relief judge of the Amsterdam District Court in the Netherlands provided indirect support to the enforceability of an ICC EA Order (ECLI:NL:RBAMS:2017:282); In *Pre-Paid Legal Services, Inc. v. Kidd,* No. CIV-11-357-FHS, 2011 WL 5079538 (E.D. Okla. Oct. 26, 2011), the Court directed the parties to submit to the EA proceedings and extended the emergency Temporary Restraining Order sought by the applicant "to allow the parties to properly present, and the emergency arbitrator to properly consider, a request for emergency measures".

165 See ICC Rules (2012), Art. 29(2); SCC Rules (2010), Appendix II, Arts. 9(1), 9(3)); SIAC Rules (2016), Schedule 1(12); ICDR Rules (2014), Art. 6(4); HKIAC Rules (2013), Schedule 4(16).

compliance with the EA's decision can obtain support both from local courts and from the arbitral tribunal on the merits.[166]

201. There remains a risk that the party against whom the decision is directed fails to abide by it. Such risk may be perceived as greater in the context of EA proceedings where the EA who decided the urgent relief will not decide on the merits of the case[167] and where the arbitral tribunal hearing the merits of the case could be asked to reassess the decision of the EA.[168]

202. Yet, there are reasons to believe that parties voluntarily comply with EA decisions. To assess whether parties voluntarily comply with EA's decisions, different factors have to be taken into account including the number of emergency decisions effectively ordering an emergency measure, the number of emergency decisions exclusively deciding on allocation of costs, the orders obtained by consent and the number of settlements on the merits.

- Of the first 80 ICC EA Applications, only 23 have ended with the EA ordering all or some of the requested interim or conservatory measure. Out of the first six emergency cases managed by the SCAI, four requests were partially or fully granted, one dismissed and one withdrawn. Before the SCC Arbitration Institute, ten requests out of the first 14 requests were denied. Before the HKIAC, two out of the six Applications ended with a consent Order; one with a dismissal of the request, one Application was withdrawn, and one was rejected at the outset by the Centre.
- Among the successful applications, some were obtained through a consent Order, thereby limiting the issue of enforcement.[169] Preliminary feedback also indicates that EA proceedings are a potential early settlement tool on the merits. As a matter of fact, out of the first 80 ICC EA cases, 25 cases settled on the merits before the issuance of any final award, among which four settled before any Order was ever issued. For those cases, there are rarely enforcement issues given the high level of compliance with commitments undertaken in settlement settings.
- Of the 80 ICC EA Applications, there were approximately five occurrences where one of the parties did not comply with the EA's Order. In two instances, compliance issues were limited to the payment of the costs of the emergency proceedings.

203. Compliance issues related to the ordered emergency measures, excluding costs, were therefore encountered in only three cases out of the 23 ICC EA proceedings where an emergency measure was ordered. For those cases where the responding party fails to comply with the Order, applicants can seek support from local courts or raise a claim against the non-complying party before the arbitral tribunal.

b) Applicants can seek support from local courts

204. In the event of non-compliance, the successful applicant can attempt to seek support from local courts either in an enforcement action, particularly in UNCITRAL Model Law inspired countries, or in a breach of contract claim.

205. In certain jurisdictions, like in France, courts could be seized through a summary judgment to order specific performance of an EA's Order. Filing for a summary judgment would only be possible during the limited period of time between the issuance of the EA's Order and the constitution of the arbitral tribunal. Once the arbitral tribunal is in place it may be argued that, pursuant to Article 29(4) of the ICC Rules, the arbitral tribunal has sole jurisdiction on claims arising out of or in connection with the compliance or non-compliance of the Order and a claim before the arbitral tribunal to have the Order reconsidered pursuant to Article 29(3) of the ICC Rules may bar any application before state courts. At that time, however, it would be possible for the arbitral tribunal to confirm the Order in the form of an award or otherwise if it deems it is appropriate.

206. In countries where courts can sanction non-compliance with an EA's Order, most of the time through fines for contempt of court or *astreintes*, it is often requested that the Order envisions these potential sanctions. This is the case in Austria, Belgium, and the United Kingdom.[170]

207. Finally and drawing from experience, it appears that EA decisions, even if not complied with by the party against which the order is made, could influence local courts to support the decision of the EA. A Task Force member mentioned a case where the order not to draw on performance bonds was not respected by the responding party, who called the bonds. Despite the EA's decision, the first ranking bank, which was not a party to the EA proceedings, paid the responding party. The applicant then successfully seized the courts of the counter-guarantor bank, asking for an order that the counter-guarantor be ordered not to pay the first rank guarantor bank. Such a local court decision would have been very difficult to obtain had the applicant not first obtained the Order from the EA.

166 Although most national law provisions provide for local courts' assistance to arbitral tribunals and not specifically to EAs, most jurisdictions seem to admit court assistance to arbitration proceedings in general.

167 See N. Voser, C. Boog, supra note 154, pp. 81, 86.

168 See Art. 29(4) ICC Rules (2012); app. II Article 9(2) SCC Rules (2010); Schedule 1(10) SIAC Rules (2016); Art. 9(11) LCIA Rules (2014); Schedule 4(18) HKIAC Rules (2013); and Art. 6(5) ICDR Rules (2014).

169 Two out of the first six cases of HKIAC ended through a consent Order.

170 Out of the 45 National Reports that have examined the question of the courts' power to adopt sanctions in case of non-compliance with an EA's Order, 22 considered that sanctions were possible especially if the Order provided for such sanction. For instance: Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Finland, Greece, Lebanon, Lithuania, Mexico, Pakistan, Portugal, Singapore, Spain, Ukraine, United Kingdom, USA, Venezuela.

In other words, the EA eventually proved to be useful, even though it had been disregarded by the party to whom it had been directed.

c) Applicants can seek support from the arbitral tribunal

208. Under most arbitration laws, there is no statutory or case law limitation on the ability of an arbitral tribunal to take into account the non-compliance with an EA's order or award when considering the merits of the case or deciding on costs,[171] although the ability to impose penalties is generally more debated.

209. This is consistent with those institutional arbitration rules which expressly provide for the EA's decision to be binding upon the parties, and for the parties to undertake to comply with it.[172]

210. Further, Article 29(4) of the ICC Rules provides that "[t]he arbitral tribunal shall decide upon any party's requests or claims related to the EA proceedings including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order".[173] This provision gives the arbitral tribunal the power to i) reallocate the costs of the EA proceedings in light of a party's failure to carry out the Order; or ii) deal with the issue of compensation for costs and damages if the party who has been granted the Emergency Measures does not ultimately prevail on the merits.

211. Therefore, in the event that a party fails to comply with the EA's Order, the aggrieved party may request that a constituted arbitral tribunal deciding on the merits determine whether such failure caused an injury and whether it should be compensated. This provision provides for the possibility of the arbitral tribunal reallocating the costs of the EA proceedings in light of a party's failure to carry out the order or to deal with the issue of compensation for costs and damages if the party who has obtained the emergency measures does not prevail in the arbitration.

212. Damages can only be awarded to the non-defaulting party when a direct causal link is established between the party's non-compliance with the Order and the damage that has allegedly been suffered.[174]

213. Interestingly, among the first 80 ICC EA proceedings, there is only one known case where an arbitral tribunal granted damages for failure to comply with an EA's Order. In that case, the EA issued an anti-suit injunction Order. Breaching both the Order and the arbitration agreement, the respondent maintained its claims before the national courts and attempted to enforce the national court decision. Considering that such breaches were sufficiently serious, the arbitral tribunal ordered the respondent to pay i) all fees and costs expended by the claimant in resisting the respondent's legal actions, ii) all sums that the claimant might be ordered to pay in the future in those pending proceedings and iii) all fees and costs that the claimant might incur if the respondent succeeded in its parallel proceedings.

214. Post-EA arbitral tribunals could also be inclined to order additional relief, including drawing adverse inferences in situations in which the interim measure ordered aims at preserving documents or other evidence that is potentially relevant and material to the outcome of the case.[175] However, such measures should be exceptional and are not admitted in all jurisdictions.[176] The data analysed to date does not provide evidence of any tribunal drawing an adverse inference as described.

215. Finally, arbitral tribunals will also take responsibility for any unexecuted part of the EA's Order, notably as to costs, and reflect it in their final award. For example, in one ICC EA case, although the EA dismissed the Application for Emergency Measures, the Respondent was still ordered to pay the costs of the EA proceedings, including the applicant's legal fees. As the respondent did not comply with the EA's Order, the arbitral tribunal in its final award, ordered the respondent to pay all costs and legal fees including those incurred during the EA proceedings. Yet, the arbitral tribunal refused to grant claimant damages and lost profits for respondent's failure to comply with the EA's Order considering a lack of sufficient evidence.

3) Complicating compliance factors

216. The Task Force is aware of certain complications that have arisen in the compliance phase. Some are due to insufficient details in the EA's decision (timeframe, modalities of execution of the measure, etc.) and, in one instance, the tribunal deciding on the merits was simply too slow in assisting the party with encouraging compliance with the EA Order. The parties are therefore encouraged to specify in the merits proceeding whatever requests they have

171 In certain jurisdictions however, such as Poland, Nigeria and UAE, arbitral tribunals will only be allowed to order damages as a remedy on the merits in case of non-compliance with the EA's Order if it was provided in the arbitration agreement. In Germany, arbitral tribunals could order penalties payable to the aggrieved party if a penalty clause conforming to the requirement of the German Civil Code was included in the contract.

172 Appendix II Article 9(1)(3) SCC Rules (2010); Schedule 1(12) SIAC Rules (2016); Article 6(4) ICDR Rules (2014); and Schedule 4(16) HKIAC Rules (2013).

173 See also Appendix II Article 10(5) SCC Rules (2010); Schedule 1(13) SIAC Rules (2016); Article 9(10) LCIA Rules (2014); Article 6(8) ICDR Rules (2014); Schedule 4(15) HKIAC Rules (2013).

174 D. Paraguacuto-Mahéo, C. Lecuyer-Thieffry, supra note 165.

175 Pursuant to Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration, if a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer such evidence would be adverse to the interests of that party.

176 Based on the National Reports provided to the Task Force, 22 countries out of 45 admit the drawing of adverse inference by arbitral tribunals in case of non-compliance.

for interim or conservatory measure so as to facilitate enforcement of the EA decision. The institutions are also encouraged to ensure that the newly-appointed members of the tribunal deciding on the merits are made aware that compliance with EA decisions may require their immediate attention.

B. Modification of the EA's decision by the EA or the arbitral tribunal

217. The EA has the ability to modify the EA's Order prior to the constitution of the arbitral tribunal.[177] Article 6(8), Appendix V of the ICC Rules provides that "[u]pon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order".

218. In at least one ICC case, the applicant sought a modification of the EA's Order and issuance of further emergency relief a few weeks after the initial EA Order was made. As the arbitral tribunal was not yet constituted, the EA addressed the emergency request (which was partially granted). The data does not, however, allow for any broad conclusion as to the extent to which EAs or arbitral tribunals on the merits have in practice modified or confirmed the EA's original decision. The Task Force members suggest that arbitral institutions establish formal follow-up procedures for further analysis.

219. It is most likely that Orders are not modified unless the objecting party can show that circumstances have changed to such an extent since the rendering of the Order that a modification of the Order is warranted.

220. Based on available data from the first 80 ICC EA proceedings, modification of an EA Order was requested only eight times. Such requests were filed five times before the EA pursuant to Article 6(8) of Appendix V of the ICC Rules, and three times before the arbitral tribunal or sole arbitrator constituted to determine the merits pursuant to Article 29(3) of the ICC Rules. The requests for modifications were dismissed in seven cases and granted in one case.

221. For instance, in one case, as the applicant did not comply with the EA's Order to pay the costs of the EA proceedings, the respondent filed a request with the EA to modify the Order to i) set a time limit for payment, ii) order the applicant to pay interest, and iii) pay for the respondent's costs in seeking enforcement of the Order. The EA dismissed the request for modification considering that i) urgency was missing, ii) the requested measure was unnecessary, and iii) it should have been sought before the Order was even issued.

222. In another case, the respondent filed a request for modification of the EA's Order arguing that the order to place money in an escrow account should be revised in light of changes of circumstances and lack of urgency. Considering the respondent's failure to comply with the original Order, the claimant also requested a modification of the Order, including, inter alia, a request for *astreinte*. The EA was not persuaded that the circumstances upon which the order was granted were materially different and did not find sufficient justification for modifying the Order. While neither party had succeeded in its request for modification of the Order, the EA considered that the respondent had first brought the request for modification and had yet to comply fully with the Order. Accordingly, the EA ordered the respondent to pay claimants the costs for responding to the request for modification.

223. In a third case, the respondent had asked the EA to modify its order to include legal costs which had not been awarded to any party in the initial Order. The EA rejected such request and held that it was not within its mandate to decide on the merits. While insisting that it was not asking to overturn the EA's Order, the respondent requested the arbitral tribunal to complete the Order as to the legal costs incurred in the EA proceedings. The arbitral tribunal agreed to do so and specified that "[w]hen the emergency arbitrator's order has been made, only the subsequent arbitral tribunal is competent to decide on requests of the parties to award costs, as in the case at hand".

224. In three other cases, the requests to modify the Order were exclusively made before the arbitral tribunal or sole arbitrator. For example, in one ICC EA case, the EA ordered the respondent to ensure that the applicant's affiliate (the project company) would obtain the renewal of a permit. As the permit was not renewed, the sole arbitrator accepted the applicant's request to modify the EA's Order considering that it was not bound by it and that circumstances had changed since the Order had been issued. It thus ordered the respondent to inform the applicant of its steps taken to ensure renewal of the permit.

C. Settlement of the dispute

225. As already mentioned, the settlement rate among the first 80 ICC EA cases is relatively high, with 25 cases having settled on the merits before the issuance of any final award. No definitive conclusion can be drawn from these figures as the analysed data does not allow one to establish a direct link between emergency proceedings having taken place and the reasons behind a settlement. The Task Force believes, however, that EA proceedings can give the parties a better understanding of the case and of their chances of success. This is especially true where the EA expressed views as to the strength or weakness of any of the parties' positions.

177 The ICC Rules provide that the EA "shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application". ICC Rules (2017), Appendix V, Art. 2(6). Contrary to the ICC Rules, some other institutions allow for an EA to be appointed to the Arbitral Tribunal upon agreement by the parties. See, e.g. ICDR Rules (2014), Art 6(5); SCC Rules, Appendix II, Art. 4(4); SIAC Rules, Schedule 1, No. 6; Swiss Rules of International Arbitration, Art. 43(11).

226. Indeed, a party will take the EA's *prima facie* analysis of the case very seriously. Such analysis can act as a reality check on the strength of the party's case and lead to early settlement. In at least 11 cases, it is likely that the Order had an influence on the settlement, either by admission of the parties or as a result of the EA's *prima facie* findings on the merits.

227. This side effect of EA proceedings ought to be only that; a side effect. Parties should not confuse EA proceedings with other dispute resolution tools, which may be more appropriate depending on the objectives they are seeking. It is not excluded that Orders may be partially rendered by consent following the parties' joint request that the EA decide on certain disputed issues, or that the EA provide views to facilitate settlement. It is not recommended however that the EA include *obiter dicta* or preliminary views (except upon request of the parties) on disputed issues with relevance to the merits of the dispute beyond what is necessary to the decision as to whether the measure requested should be awarded. Indeed, the jurisdiction of the EA is limited to determining whether an urgent interim or a conservatory measure is warranted. Further, the EA has limited time and limited evidence to issue a decision, which is temporary in nature and not binding upon the arbitral tribunal.

Annex I

Overview of the First 80 ICC EA Applications

A. GENERAL INFORMATION

(i) Numbers and origins. Introduced by the 2012 ICC Rules of Arbitration and in force since 1 January 2012, the Emergency Arbitrator Provisions ("EA Provisions") consisting of Article 29 and the Emergency Arbitrator Rules (Appendix V), have so far enabled parties to apply 95 times for EA proceedings.[178] This overview will limit itself to the first 80 ICC EA cases, including the 80th EA Application filed on 30 April 2018.

The first 80 ICC Applications for Emergency Measures under the EA Provisions involved a total of 247 parties, 121 applicants and 126 respondents, of 51 different nationalities and from all continents.[179] Among the 80 EA Applications filed, approximately 30% of the applicants came from Latin America and the Caribbean; this high demand shows the particular relevance of making emergency relief available to parties from that continent. It may be worth noting that parties in these cases have in the majority chosen a seat of arbitration outside Latin America. Over 25% of the applicants came from North and West Europe, and 10% from North America. There is a relatively lower demand for emergency relief from parties in Asia, Africa, and Central and East Europe.

Thirty cases involved at least two parties with the same nationality, out of which 15 involved parties exclusively with the same nationality and could therefore be considered as "domestic" even if the dispute contained international elements.

Regardless of whether parties had recourse to state courts for interim relief in parallel to these EA Applications, these figures show that parties have widely accepted and used the services of an EA offered by ICC in different corners of the world.

(ii) Multiple parties. Twenty-two out of the 80 EA Applications involved more than two parties and were as such considered as multiparty cases with as many as four applicants and ten respondents.

(iii) Multiple contracts. Twenty-seven of the 80 EA Applications involved multi-contracts with at its maximum six related contracts containing different but compatible arbitration agreements.

(iv) Sectors. The transactions underlying the first 80 EA Applications covered diverse sectors. Half of the applications related to the construction, engineering and energy sectors; ten cases related to share purchase agreements; and fewer cases related to the metals and raw materials industry; the transportation sector; the telecommunications sector; leisure, entertainment and media; the sale of agricultural and chemical products in the agribusiness, real estate transactions; equity interest purchase agreements, and the pharmaceutical business.

The EA proceedings have not only been used in the private but also in the public sector. Of the 80 EA cases, eight cases involved states or state entities and in all cases but one, the state or state entity was the responding party.

(v) Amount in dispute. The amount in dispute in these cases ranged from approximately USD 250,000 to USD 20 billion, with an average amount of USD 190 million. These figures confirm the initial thought that EA proceedings are not limited to high-value cases and suggest that the additional costs incurred by the proceedings have not been a deterrent to their use even in lower value cases.[180]

B. PLACE AND LANGUAGE OF THE EA PROCEEDINGS

(i) Seat. Article 4(1), Appendix V provides that if the parties have agreed on the place of the arbitration, this place should also be the place of the EA proceedings. Otherwise, the President of the ICC Court will fix the place of the EA proceedings.

Forty-three EA proceedings were seated in Europe: in Paris (17 cases), Geneva (nine cases), London (eight cases), Amsterdam (two cases), Zurich (two cases), Madrid (two cases), Vienna, Basel, and in Istanbul. Twelve EA proceedings were seated in North America: in New York (seven cases), Houston (three cases), Miami, and in Dallas. Ten EA proceedings were seated in Latin America: São Paulo (four cases), Mexico City (three cases) Bogota, Medellin, and in Santiago de Chile. Finally, ten EA proceedings were seated in East and West Asia: in Singapore (five cases), Hong Kong, Doha, Manama, Tel Aviv and in Maui.

In 73 of the 78 EA proceedings that eventually took place, the place was provided for by the arbitration agreement. As already explained by A. Carlevaris and J. Feris:

178 Number of ICC EA Applications as of 1 March 2019.

179 Algeria, Austria, Australia, Bahrain, Benin, Bolivia, Bosnia and Herzegovina, British Virgin Islands, Brazil, Bolivia, Cayman Islands, Chile, China, Colombia, Dem. Rep Congo, Cyprus, Ecuador, France, Germany, Hong Kong, Hungary, Ireland, Israel, Italy, Lebanon, Luxemburg, Senegal, South Korea, , Marshall Islands, Lebanon, Mauritius, Mexico, Morocco, The Netherlands, Oman, Panama, Peru, Poland, Philippines, Qatar, Romania, Saudi Arabia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, UAE, United Kingdom, Ukraine, USA.

180 A. Carlevaris and J. Feris, supra note 22, at p. 28.

> In one of the cases, the place fixed by the President for the emergency arbitrator proceedings was subsequently chosen as the place of the arbitration by the parties. In another case relating to four different contracts, only two of the contracts (including the main contract) contained an arbitration clause in which the place of arbitration was specified. The two contracts that contained no reference to the place of arbitration mentioned that in the event of a conflict between their provisions and those of the main contract the latter should prevail. Hence, the place fixed by the President for the emergency arbitrator proceedings was the place indicated in the arbitration agreement in the main contract.[181]

The five cases where a decision from the President of the ICC Court was needed to fix the place of EA proceedings included the following situations: [182]

- The arbitration agreement provided that "[t]he seat of arbitration shall be New York". As New York is a state and the place of arbitration must be a city, the President fixed the seat as New York [City], New York. In the related arbitration proceeding, the claimant had also specified the seat to be New York, New York (USA).
- The arbitration agreement provided for the seat to be "the State of New York, Country of New York"; the latter was understood to refer to the borough of Manhattan, New York City.
- The arbitration agreement did not provide for a seat. Claimant proposed Amsterdam as the seat and the President of the ICC Court fixed the seat as proposed. In making the decision, the President considered that neither party was from the Netherlands but that the applicable law of the contract was Dutch law. The Netherlands' favourable approach to enforcement of EA decisions was also taken into consideration. [183]

(ii) Language. The language of the proceedings may have an impact on other aspects of the proceedings, such as the choice of available candidates to act as EAs. According to the ICC Rules, Applications must be drafted in the language of the arbitration if this has been specified in the arbitration agreement or subsequently agreed by the parties (Article 1(4), Appendix V). If not, it is to be drafted in the language of the arbitration agreement.

In 74 out of 78 EA proceedings, the language of the arbitration was determined in the arbitration agreement; in the other cases, the issue was not controversial and subsequently agreed on by the parties. EA proceedings were generally held in English, but French was the second most used language in ten cases. Spanish was the language of the proceedings in eight cases and Portuguese in two cases.

181 Ibid. p. 30.

182 When fixing the place of EA proceedings, the President followed criteria similar to those applied by the Court, i.e. the neutrality and accessibility of the place, the reliability of its legal and judicial system, and relevant language(s), the aim being to avoid any surprises for the parties.

183 See supra Section III. D(2) "Norms applicable to EA Applications".

C. THE EMERGENCY ARBITRATORS

(i) Appointment of the EA and nationality. As explained below, out of the first 80 Applications, the President of the ICC Court declared the EA Provisions applicable 78 times and allowed the EA proceedings to proceed. Naturally, no appointments were made for the two Applications for which the President had declared the EA Provisions to be inapplicable. Out of these 78 EA cases, a total of 80 EAs were appointed by the President pursuant to Article 2, Appendix V. [184] This can be explained by the fact that two EAs had to resign and were subsequently replaced. These EAs resigned due to potential issues of impartiality and independence pursuant to the disclosure of new facts.

The nationalities of these 80 appointed EAs, 60 men and 20 women, demonstrate significant diversity. They originated from: Argentina, Australia (three EAs), Brazil (seven EAs), Belgium (four EAs), Canada (seven EAs), Chile, Costa Rica, Colombia (two EAs), Denmark, Egypt, France (15 EAs), Germany (six EAs), Greece, the Netherlands (two EAs), Iran, Italy (two EAs), Ireland, Lebanon (two EAs), Malaysia, Mexico (two EAs), New Zealand, Peru (two EAs), Portugal, Spain (three EAs), Switzerland (four EAs), Sweden (four EAs), United Kingdom (six EAs), USA (13 EAs) and Venezuela.[185]

Two EAs were appointed on the same day of the Secretariat's receipt of the Application, 49 EAs were appointed on the day following the Secretariat's receipt of the Application, and 27 EAs were appointed within two days pursuant to Article 2(1) of Appendix V.[186]

(ii) Challenge. Pursuant to Article 3(2) Appendix V, the ICC Rules allow for the possibility of challenging an EA. Of the first 80 appointments, four challenges were made before the expiry of the time limit for rendering the Order, but in each of these cases the

184 A. Carlevaris and J. Feris, supra note 22: "The appointments were made by the President following discussions with the Secretariat's management and the relevant case management team on the qualities required for the matter. Immediately upon receipt of the Application a shortlist of potential candidates was drawn up by the President in collaboration with the Secretariat. At the same time the candidates were contacted to check their availability and interest in the appointment. Those that were available and interested were then considered for appointment after completing a statement of acceptance, availability, impartiality and independence as required by Article 2(5) of the Emergency Arbitrator Rules and confirming that they had no conflicts of interest. The Rules do not provide for a list-based procedure. The President is free to appoint whomever he regards as suitable to act as emergency arbitrator. In doing so, he considers above all the candidates' experience of international arbitration and the potentially applicable laws and fields of law, their proximity to the place of arbitration and their ability to conduct the proceedings in the required language".

185 Unlike sole arbitrators and presidents of arbitral tribunals acting under the ICC Rules, EAs can be nationals of the same country as any of the parties, even without the parties' consent. If the case has its centre of gravity in a country from which one, some or all of the parties originate, the President may consider it appropriate to appoint an EA who is a national of that country.

186 Of the two remaining EAs, it seems that finding the suitable and available EA for a case is one of the reasons that may cause delay.

challenges were dismissed.[187] In each of these cases, the EA and the other party were heard. One challenge was filed one day before the expiry of the time limit for rendering the Order; the Order was rendered within the deadline and the challenge was decided by the Court later, after granting the EA and the other party a short time to submit comments.

D. THE APPLICATION AND THE FILING OF THE REQUEST FOR ARBITRATION

(i) Filing the Application. When parties wish to have recourse to ICC EA proceedings, they shall submit an Application pursuant to Article 1 of Appendix V. Five EA Applications were filed by email directly to the teams already in charge of an on-going arbitration on the merits, two EA Applications were filed through the regular email address for filing a Request for Arbitration (arb@iccwbo.org), another five hard copy EA Applications were hand delivered to the ICC Secretariat. The remaining EA Applications were filed through the specifically dedicated email of emergencyarbitrator@iccwbo.org, which is the correct address to use for submitting an EA Application prior to the Request for Arbitration.

(ii) Applicability of the EA Provisions. Pursuant to the Rules, when the Application is filed, the President of the ICC Court is required to decide whether the EA Provisions apply on the basis of Articles 29(5) and 29(6), which set out four separate requirements.

Among the first 80 ICC EA Applications filed since 1 January 2012, 78 EA cases were set in motion by the President. Hence, in only two cases the President considered that the EA Provisions did not apply.

In one case, the Application did not fulfil the Article 29(5) requirement that the parties must be signatories to the arbitration agreement.[188] The Application was filed after 1 January 2012 but brought under an arbitration agreement that was included in a bilateral investment treaty ("BIT") dated 2001 which entered into force in 2003 and the BIT as such was not signed by the responding party. The President considered the applicability of the EA provisions in light of (i) the requirement that all parties be signatories of the arbitration agreement (or successors to such signatories) and (ii) the requirement of Article 29(6) that the arbitration agreement be concluded before 1 January 2012. The President decided that the EA Provisions did not apply to this Application as the first requirement of "signatories" to the arbitration agreement was not met. In reaching this decision, reference was made to the ICC Commission Report on *States, State Entities and ICC Arbitration*,[189] which explains that (i) the purpose of the signatory requirements under Article 29(5) was, among others, to exclude investment arbitration from the EA Provisions, and (ii) that parties to an arbitration agreement that is formed by the offer contained in the BIT and the investor's acceptance by a Request for Arbitration cannot be considered signatories for the purposes of Article 29(5).[190]

The second EA Application that was not set in motion by the President involved an arbitration agreement dated 2006, thus prior to date of entry into force of the EA Provisions, and the parties did not agree that the provisions could apply a posteriori.

(iii) Notification and participating parties. When the President of the ICC Court decides that the EA Provisions apply, it triggers the notification of the Application to the responding party by the Secretariat. (Article 1(5), Appendix V). The respondents participated actively in all of the 70 cases in which an Order was issued, and in no case was due process a subject of contention.

(iv) Filing of the Request for Arbitration within 10 days. A particularity of ICC emergency relief is that an Application can be filed before the submission of the Request for Arbitration, upon the condition that the Request for Arbitration must be filed within 10 days of the Secretariat's receipt of the Application, unless the EA determines that a longer period of time is necessary. If no Request for Arbitration is submitted within the deadline set by the Rules or within any new time limit determined by the EA, the EA proceedings shall be terminated by the President of the ICC Court (Article 1(6), Appendix V).

Among the 78 Applications set in motion by the President of the ICC Court, the Request for Arbitration had been filed prior to the EA Application in 18 cases. In one case, the EA Application was filed approximately one month after the submission of the Request for Arbitration but still before the filing of the answer to the Request and the constitution of the arbitral tribunal. In another case, the applicant for emergency relief was also the respondent to the Request for Arbitration on the merits filed. It was considered that the requirement embodied in Article 1(6) was fulfilled as the applicant had filed a counterclaim in the

187 If a party wishes to challenge the appointment of an EA, the challenge must be filed within three days of the challenging party's receiving notification of the appointment (or becoming informed of the facts and circumstances on which the challenge is based, if that date is later). Article 3(1) Appendix V. There is no provision suspending the EA proceedings while a challenge is pending, and the challenge can be decided even after the EA's Order has been made.

188 ICC EA Case No. 13.

189 ICC Commission Reports are available at **https://iccwbo.org/commission-arbitration-ADR** and in the ICC Digital Library (**http://library.iccwbo.org/dr-commissionreports.htm**).

190 ICC Commission Report *States, State Entities and ICC Arbitration* at paras. 51 - 52. With respect to the second question on whether the arbitration agreement was concluded after 1 January 2012, the applicants relied on the fact that the offer to arbitrate in the BIT does not limit the reference to the Rules to the version applicable at the time of the BIT's entry into force. The applicants argued that a generic reference to the ICC Rules means that the State made an offer to arbitrate under the ICC Rules in force at the time the offer is accepted and that it is universally accepted in investment treaty arbitration that the date of the arbitration agreement is the date of the filing of the Request for Arbitration. Since the offer was accepted when the investor, i.e. applicants, filed the Request for Arbitration after 1 January 2012, the EA Provisions of the 2012 Rules applied.

arbitration on the merits, which was thus considered equivalent to the Request for Arbitration for the purpose of Article 1(6) Appendix V.[191] In a third case, the Application was not filed by the claimant in a newly commenced or imminent arbitration, but rather by the respondent in an on-going arbitration.[192] Although the EA Provisions did not expressly contemplate such a situation, the Application was considered admissible and EA proceedings were set in motion in the already existing arbitration.

In three cases, the respondent submitted a counterclaim which was addressed by the EA with the initial Application; no separate Application needed to be filed.

Out of the 78 EA cases that proceeded after green light was given by the President, the Request for Arbitration and the EA Application were submitted simultaneously in 12 EA cases. In 47 EA cases, the application was submitted before the Request for Arbitration. In accordance with Article 1(6) of Appendix V, among those 47 cases, 35 Requests for Arbitration were filed within the 10-day period, without the need to request an extension. (In three cases, the Sunday was excluded in the counting of those 10 days, effectively resulting in 11 days). In five cases, parties did need to request the EA to extend beyond the 10-day timeline varying from two extra days to 30 days and for different reasons. All requests for a time extension were granted by the EA and in each of these cases the Request for Arbitration was filed within this extended time limit. In one case, the EA was withdrawn before the Request for Arbitration was filed and due. In another case, the Application was withdrawn as the emergency relief was no longer needed. As a consequence, there was no need for the President of the ICC Court to terminate any EA proceedings among the first 80 Applications on the basis that the Secretariat had not received the Request within 10 days or within an extended time limit of the Secretariat's receipt of the Application pursuant Article 1(6) of Appendix V.

Commentators have noted that the requirement that the Request for Arbitration be filed within 10 days of the Application could conflict with the parties' obligations under a multi-tiered dispute resolution clause. This issue can be addressed by the parties in a number of ways, for example by filing a Request for Arbitration and then seeking a stay pending compliance with the escalation clause, or by obtaining an extension of the filing requirement from the EA.

E. THE PROCEEDINGS

(i) Timetable and conducting the procedure. Article 5(1) of Appendix V requires the EA to establish a procedural timetable for the EA proceedings within as short a time as possible, normally within two days from the transmission of the file. In the majority of the 80 ICC EA cases, the procedural timetable was issued between one and two days.[193] In some cases, the procedural timetable was issued later, generally due to the issuance of a new calendar after an extension request.[194]

The EA Provisions do not propose or recommend the holding of a case management conference, but among the 78 EA Applications that proceeded, a case management conference was held in 25 cases, in one case it was even held twice, and in 53 cases a case management conference was not held.

With respect to the number of submissions, the majority of the EA cases included an Application, a response, a reply and a rejoinder. In six cases, there were only two submissions (Application and response), and in four cases, only one submission. In two exceptional cases, 10 and 16 submissions had been filed. Occasionally, an EA would ask for a separate submission of costs.

(ii) Evidence and burden of proof. Hearings were held in 53 cases, in person (in 20 cases) and by telephone (in 33 cases). Witness statements were issued in 18 cases (between one and ten in each of these cases). Expert reports were issued in three EA cases (between two and four reports).

As explained below, the 80 Applications studied eventually resulted in 69 Orders. Out of those 69 Orders, the EA explicitly considered that the burden of proof lies with the party wishing to have recourse to an emergency arbitrator and thus with the applicant. In 30 Orders, there was no express consideration from the EA regarding which party bears the burden of proof. In none of the cases did the EA consider or order a shift of the burden of proof to the responding party.

F. THE REQUESTED EMERGENCY MEASURES

The first 80 EA Applications concerned requested measures which can be classified in six main categories:

- preserving the *status quo* (in 51 cases): applicants sought maintaining the *status quo* to guarantee enforcement. For instance in one case the applicant requested an order from the EA for a preliminary injunction to preserve the *status quo* and to maintain the distribution agreement in effect;
- specific performance (in 23 cases): applicants sought obtaining specific performance under the contract;
- declaratory relief (in ten cases);
- transfer of money into an escrow account (in seven cases);

191 ICC EA Case No. 7.
192 ICC EA Case No. 47.

193 On the same day in 5 EA cases, after one day in 27 cases and within two days in 19 cases.
194 Within three days in 10 EA cases, within four days in 8 cases, within five days in 1 case, within six days in 1 case, within seven days in 1 case. In one particular circumstance, the timetable was issued after 14 days.

- interim payment (in eight cases); and
- anti-suit injunctions (in six cases): applicants for instance sought an injunction preventing the respondents from bringing any legal actions in state courts until the merits of the dispute had been decided.

In some cases, the requests fell under more than one category. For instance, in one case, the applicant requested a declaration that he did not have to provide payment of the last instalment in addition to requesting the preservation of the *status quo*.[195]

G. THE ORDERS

As explained above, among the first 80 ICC EA Applications filed, the President of the ICC Court considered that the EA Provisions did not apply in only two cases. Out of the 78 cases set in motion, eight cases were withdrawn, of which three cases settled during the EA proceedings (prior to an Order) and five cases where the EA issued a termination Order. In one case, the parties came to an agreement which led to a consent Order.

As a result, the 80 Applications resulted in 69 EA Orders: 19 Orders rejected the Application for Emergency Measures in whole or in part on grounds of jurisdiction and/or admissibility. Out of the 59 Orders addressing the merits, the EA entirely rejected the requested relief in 36 cases, and partially or fully granted the requested Emergency Measures in 23 cases (the EA fully granted the requested emergency relief in only 8 of those cases).

H. THE COSTS

Article 7(1) of Appendix V requires an applicant to pay USD 40,000 (USD 10,000 for ICC administrative expenses and USD 30,000 for the EA's fees and expenses) when filing its Application.

Of the first 80 EA Applications, nine were withdrawn or the EA Provisions were declared not to apply and therefore no Order was rendered. Consequently, these Applications are not taken into account with respect to (the allocation of) costs. Nonetheless, it is worth noting that in one case in which parties withdrew prior to the issuance of the Order, the President of the ICC Court fixed the costs exercising the right thereto pursuant to Article 7(5) of Appendix V and determined the amount to be reimbursed to the applicant.[196]

Among the 69 Orders issued, EAs allocated the costs according to the "costs follow the event" principle in 56 Orders. However, some distinctions need to be made in the application of such principle:

- In 39 Orders, the "costs follow the event" principle was applied without taking into consideration any other elements. The non-prevailing party was ordered to pay the costs of the arbitration.
- In 11 Orders, even though the EA followed the same the behaviour of the parties such as compliance with intermediary orders, level of diligence, practice of good faith and timely submissions was taken into consideration by the EA applying the "costs follow the event" principle and impacted the allocation of costs.
- In 6 Orders, the EA followed the "costs follow the event" principle for the legal costs which were not awarded. The various reasons which led to these decisions included: i) the responding party reserved its rights to claim damages and reimbursement of costs including legal costs against applicant; ii) the parties did not make any submissions as to reasonable legal and other costs, and iii) the EA reserved the decision on legal costs to be determined by the arbitral tribunal.
- In 13 Orders, the EA did not follow the principle "costs follow the event" but instead based the decision on costs on other considerations such as: i) the EA allocated, following the parties' requests, costs based on the reasons to seek the Order and their behaviour; ii) parties' agreement during their oral submissions that applicants should bear 100% of the ICC administrative fees and EA's fees and that each party would bear their own (legal) costs; iii) notwithstanding the fact that applicant did not prevail, it was justified in making its claims and therefore each party should bear its own costs; and iv) parties' agreement to defer the decision on costs to the arbitral tribunal. Introductory Note

195 ICC EA Case No. 4.
196 ICC EA Case No. 9.

Annex II

ICC National Committees' Answers to Questionnaire on the Status of EA Proceedings under Local Law

INTRODUCTORY NOTE

The Questionnaire addressed to ICC National Committees was one of the main sources for the Task Force study.[197]

This Annex II consists of 45 National Reports largely provided by the ICC National Committees and is meant as a general overview only. It should not be understood as exhaustively reflecting the current provisions of local laws or status of case law at the date of publication. ICC and its constituent bodies should not be held responsible for the accuracy of the information provided below and collected from the ICC National Committees' Answers received between May 2016 and March 2019.[198]

THE QUESTIONNAIRE

The Task Force call for National Reports raised the following issues:

1. Whether the national laws of each jurisdiction prevents or limits an EA from rendering an order granting interim relief or to the contrary allows an EA to render an order subject to penalties for non-compliance (**'Status of the emergency arbitrator'**).

2. The impact of national laws on the enforcement of an EA decision or decisions by arbitrators granting interim relief, notably the relevant criterion and limitations commonly applied in each jurisdiction, as well as practical issues to be taken into consideration (**'Enforcement of interim/conservatory measures'**).

3. Since enforcement of an EA's order is not always possible in law or practice in relevant jurisdictions, the Task Force sought to understand the experience under each jurisdiction with alternatives available under the law and in practice to address non-compliance with an EA´s order (**'Alternative remedies for non-compliance with the EA's order'**) and more specifically:

- Are damages available as a remedy in the arbitration on the merits?
- Can state courts order penalties for non-compliance with an EA´s order?
- Is interim relief available in the arbitration on the merits securing relief?
- Will non-compliance with an EA´s order impact the findings of the Arbitral Tribunal on the merits on substance or on costs?

The following ICC National Committees submitted their Answers to the Questionnaire:

1- Australia, 2- Austria, 3- Belgium, 4- Brazil, 5- Canada, 6- Chile, 7- China, 8- Colombia, 9- Croatia, 10- Cyprus 11- Finland, 12- France, 13- Germany, 14- Greece, 15- Hong Kong, 16- India, 17- Ireland, 18- Italy, 19- Lebanon, 20- Lithuania, 21- Macedonia, 22- Malaysia, 23- Mexico, 24- Netherlands, 25- New Zealand, 26- Nigeria, 27- Pakistan, 28- Panama, 29- Peru, 30- Poland, 31- Portugal, 32- Qatar, 33- Russia, 34- Serbia, 35- Singapore, 36- Spain, 37- Sweden 38- Switzerland, 39- Thailand, 40- Turkey, 41- Ukraine, 42- United Arab Emirates, 43- United Kingdom, 44- United States of America, 45- Venezuela.

197 See para. 50 of the Report.
198 See "Note to Readers", p. 3 of the Report.

1- AUSTRALIA Arbitration Statute(s) International Arbitration Act 1974 ('IAA'). UNCITRAL Model Law (1985) incorporated in IAA in 1989. 2006 amendments to the UNCITRAL Model Law incorporated in IAA amended in 2010. State and Territory Commercial Arbitration Acts incorporating 2006 version of UNCITRAL Model Law.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> Nothing in IAA regarding EA, i.e. neither prohibited nor recognised. > Term 'arbitral tribunal' as used in IAA does not cover/include the EA. > ATs and courts can order interim measures. > It appears possible to extend this principle to the EA's decisions, but no authority to date.	Enforceable	Uncertain	Penalties / Sanctions for non-compliance with EA's decision	NO Unless in the final award	YES
Form of the order	> An interim measure may be ordered in the form of an award.			Power to award damages in case of non-compliance with EA's order	YES	No information
Limits	> Risk that Australian courts do not consider the EA as an AT under the terms of Art. 2(b) of the UNCITRAL Model Law, or that the EA has the powers to order interim decisions as defined under Arts 17(1) and 17(H) of the UNCITRAL Model Law. > No interim order on *ex parte* basis. > Orders from AT, hence EA, cannot affect third parties.			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">2- AUSTRIA

Arbitration Statute(s)
UNCITRAL Model Law (1985) incorporated in the Austrian Civil Code of Procedure.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed under Austrian law.
> But as Austrian law expressly authorises an AT to order interim measures (except where parties agree otherwise), an EA must be equated with an AT.
> EA therefore allowed to issue interim measures.</td><td rowspan="4">Enforceable</td><td rowspan="4">Enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO

Unless included within interim orders which shall then be subject to enforcement before state courts.</td><td>No information

State courts shall apply/ enforce the penalties which may be included within interim orders to deal with situations of non-compliance.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Order granting interim relief may be subject to coercive action which cannot however be enforced by the AT, and consequently by the EA (only by state courts).
> No interim order on ex parte basis.
> Interim orders from AT, hence EA, cannot affect third parties.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unlikely</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

3- BELGIUM Arbitration Statute(s) Belgian Law on Arbitration ('BLA') is set out in Book VI of the Belgian Judicial Code ('BJC'). Belgium adopted the UNCITRAL Model Law (1985) and 2006 amendments,with additions.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> EA not addressed expressly in BLA, but subject to general limits on interim relief applicable to ATs. > Pending constitution of an AT, interim/conservatory measures may be concurrently ordered either by state courts or the EA. > Wide margin of appreciation given to EA with respect to the type of interim measures that may be adopted. > At the request of a party, EA may set penalty in case of non-compliance with order (not) to do something. > EA is able to order interim/conservatory measures affecting parties abroad.	Enforceable	Enforceable	**Penalties/ Sanctions for non-compliance with EA's decision**	YES Also from EA	YES If penalty ordered by EA. Moreover, President of the Court of First Instance may order all necessary measures for the taking of evidence (Art. 1708 BJC), which may include assistance in case of non-compliance with EA decision relating to evidence
Form of the order	> The form (award or order) does not matter.			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> Scope of measures an EA may adopt: wide discretion, limited only by mandatory provisions of the applicable arbitration law and by the arbitration agreement itself. > AT/EA may not order conservatory attachments. > Interim orders from AT/EA cannot bind third parties. > Possibility to opt out/exclude recourse to EA in the arbitration agreement. > No interim order from AT/EA on *ex parte* basis.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">4- BRAZIL

Arbitration Statute(s)
Brazilian Arbitration Act of 1996 (‘BAA’) as amended in 2015.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA’s order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator (‘EA’)</td><td>From the Arbitral Tribunal (‘AT’)</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No express provision on admissibility of EA.
> No distinction between regular AT and EA.
> No legal limitation and no doubt as to the power of an EA in Brazil to grant interim relief.</td><td rowspan="4">Enforceable</td><td rowspan="4">Enforceable</td><td>Penalties / Sanctions for non-compliance with EA’s decision</td><td>YES

But AT/EA orders containing penalties are subject to enforcement by state courts.</td><td>YES</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA’s order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> BAA provides that prior to initiating arbitration, parties may seek provisional measures from a judicial court (Art. 22-A), no exclusive jurisdiction though.
> Parties still prefer to resort to state courts before the AT is constituted in order to obtain interim relief.</td><td>Possibility to draw adverse inference from non-compliance with EA’s order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">5- CANADA

Arbitration Statute(s)
UNCITRAL Model Law (1985) is incorporated in international arbitration laws of all provinces and territories other than Quebec.
The Quebec Civil Code and Code of Civil Procedure are consistent with the UNCITRAL Model Law.
International arbitration laws of Ontario and British Columbia were recently updated to incorporate the UNCITRAL Model Law 2006 amendments, other provinces and territories will likely follow.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No specific provisions regarding EA.
> No authority regarding EAs to date, but it seems likely Canadian courts would regard an EA procedure as a form of arbitration, and an EA as an AT.</td><td rowspan="3">Enforceable

Enforcement is expressly provided for under Ontario, British Columbia and Quebec statutes.

Enforcement is likely in other jurisdictions, even though not aware of any court decisions confirming same.</td><td rowspan="3">Not aware of any court decisions regarding the enforcement of EA decisions to date, but likely that Canadian courts would enforce them.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information, but likely

YES, to the extent an AT has powers to impose penalties/sanctions.</td><td>YES

After order recognising and enforcing the EA decision.</td></tr>
<tr><td>Form of the order</td><td>> Not expressly addressed in statutes incorporating the UNCITRAL Model Law (1985)
> In Ontario and British Columbia, decision may be an order or in another form (see 2006 UNCITRAL Model Law, Art. 17(2)).</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES

Not prevented.</td><td>NO</td></tr>
<tr><td>Limits</td><td>> No limitation as to the type of interim measures ATs can grant.
> Interim orders from ATs cannot affect third parties.
> No interim measure from ATs on ex parte basis, except in Ontario and British Columbia (see UNCITRAL Model Law 2006, Art. 17 B(1)) and Quebec.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES

Not prevented.</td><td>YES

If doing so is relevant to an issue properly before the court.</td></tr>
<tr><td colspan="2"></td><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES

Where non-compliance relevant to the exercise of the AT's discretion on costs.</td><td>YES

Where non-compliance relevant to the exercise of the court's discretion on costs.</td></tr>
</table>

6- CHILE Arbitration Statute(s) Law 19.971 on International Commercial Arbitration Law based on the UNCITRAL Model Law (1985) (Off. Gaz. 29 Sept. 2004).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not addressed under national law. > To date, no precedent regarding non-compliance with EA's orders.	Not enforceable Except if seat is in Chile.	Not enforceable Except if seat is in Chile.	Penalties / Sanctions for non-compliance with EA's decision	YES	YES As enforcement mechanism of penalties and conditions.
Form of the order	> Not considered as awards.			Power to award damages in case of non-compliance with EA's order	YES	No information
Limits	> AT only allowed to grant interim relief in international arbitration proceedings based in Chile (Art. 17 of the International Commercial Arbitration law).			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

7- CHINA Arbitration Statute(s) Arbitration Law of the People's Republic of China, effective as of 1 Sept. 1995.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Not provided in any national law but certain arbitration institutions of Mainland China provide for EA proceedings in specific situations (Free Trade Zone (FTZ), CIETAC, Beijing Arbitration Commission (BAC), Shenzhen Court of International Arbitration (SCIA)).	Not enforceable Even where the award was rendered by a foreign AT.	Not enforceable Even where the award was rendered by a foreign EA.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	No information
Form of the order	> Only courts may adopt interim measures in China.			**Power to award damages in case of non-compliance with EA's order**	No information	No information
Limits	> Only courts may adopt interim measures in China.			**Possibility to draw adverse inference from non-compliance with EA's order**	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

<table>
<tr><td colspan="2">8- COLOMBIA

Arbitration Statute(s)
Law 1563 of 2012.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>Not addressed by the law on arbitration or by Colombian arbitration institutions.

Domestic arbitration
> Quasi-judicial procedure.
> Interim measures issued by ATs considered with same legal value as interim measures from Colombian courts.

International arbitration
> No restrictions regarding EA proceedings.
> Not settled whether EA shall be considered as an AT.</td><td rowspan="4">Enforceable</td><td rowspan="4">Unsettled

Enforcement if EA orders are considered interim measures.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>YES</td></tr>
<tr><td>Form of the order</td><td>> EA orders are neither "awards" nor "interim measure decisions" because not issued by authority appointed by parties to render final award on the merits.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">Domestic arbitration
> Quasi-judicial nature implies significant public order limitations to possibility of contracting out of the arbitration statute.
> Issues decided by EA can be reviewed de novo by AT.
> EA procedures are considered as potentially leading to due process issues.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Colombian law is silent</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Colombian law is silent</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">9- CROATIA

Arbitration Statute(s)
Croatian Arbitration Act (the 'Act') largely based on the UNCITRAL Model Law (1985) (Off. Gaz. No. 88/2001).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed in the Act.
> The Act expressly provides for the possibility of interim measures by the AT. The reporters consider that it also applies to measures ordered by the EA.</td><td rowspan="4">Enforceable</td><td rowspan="4">> If seat in Croatia

According to the reporters, interim measure from EA may be enforced by Croatian courts.

> If seat outside Croatia

According to the reporters, no legal basis under which EA order may be enforced by Croatian courts.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>Unsettled</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> Procedural order or, if the measure finally determines an issue of substance, arbitral award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES

In the proceedings on the merits</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> The Act only applies if place of arbitration is in Croatia.
> Nothing said regarding EA sitting outside Croatia.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">10- CYPRUS

Arbitration Statute(s)
International Commercial Arbitration Law 101/1987.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing under Cyprus law prevents or limits an EA from rendering an order for interim relief in respect of domestic and/or foreign ICC arbitral proceedings.</td><td rowspan="4">Enforceable</td><td rowspan="4">Not enforceable

Questionable whether an EA decision would qualify as an arbitral award at all (even an interim one).

Issue
Art. 29(3) of the ICC Rules which stipulates that the AT may modify, terminate or annul the order made by the EA.

The reporters are of the opinion that EA orders are deprived of finality and thus not enforceable.

Even if not enforceable, parties tend to comply with such orders.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

Same as for those ordered by state courts.</td><td>NO

Only for interim orders by state courts (a fine up to € 128.15 and/or imprisonment up to a month).</td></tr>
<tr><td>Form of the order</td><td>> The law is silent as to what constitutes an award. However, state courts do not refuse to recognise and enforce interim awards in the same way as final awards.
> Questionable whether an EA decision would qualify as an arbitral award at all (even an interim one).</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Parties may apply to state courts to obtain interim measures on an ex parte basis at any time prior or during initiation of the arbitration proceedings.
> Art. 29(3) of the ICC Rules which stipulates that the AT may modify, terminate or annul the order made by the EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">11- FINLAND

Arbitration Statute(s)
Arbitration Law 967/1992 (as amended), inspired from UNCITRAL Model Law with 2006 amendments.
Arbitration Rules of the Finland Chamber of Commerce ('FAI Rules').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> FAI Rules incorporated separate EA Rules which mirror the ICC EA Rules.
> However, no statutory provision or local case law, i.e. EA proceedings remain purely contract-based.
> National law silent on power of AT/EA to grant interim measures, but opinion that ATs sitting in Finland may order interim measures.</td><td rowspan="4">Not enforceable

There are no statutory provisions which would provide for such enforcement through the judicial system.

Only court ordered interim measures may be enforced in Finland.</td><td rowspan="4">Not enforceable

Same regime as for ATs applies for EA: interim measures cannot be enforced by Finnish state courts.

But does not mean that interim measures would be completely ineffective.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>NO

However, under certain circumstances, not excluded that a court might decide to entertain a request for penalties.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Only court ordered interim measures may be enforced in Finland.
> Uncertain whether AT/EA may order interim measures if parties have not agreed on such power. Reporters believe that they do, especially in international arbitration.
> No provision in Finnish law regarding EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">

12- FRANCE

Arbitration Statute(s)

Decree No. 2011-48 of 13 January 2011 incorporated in Book IV of the French Code of Civil Procedure ('CCP').

Articles 2059 to 2061 of the French Civil Code as amended by the 2016 reform.

</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No provision under French law referring to EA proceedings, i.e. no prohibition or limitation.
> ATs have the power to order interim measures (Art. 1468 CCP).
> If the EA were to be considered an arbitrator, then Art. 1468 would apply to the EA.
> Arguable that Art. 1468 applies to EA by analogy as a result of the parties' intent to vest the EA with the same powers as an AT.
> Based on the above, an EA acting in France may grant interim reliefs which are not of the kind provided for by the French rules of civil procedure specifically for state courts.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely

Yet, there might be a way to go before French Courts and request the enforcement of the interim order as a decision of contractual nature.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> Decisions/orders are not proper awards and failure to comply with them would only be considered as a contractual breach.
> Under French law, only decisions taken in the form of an award may be recognised and enforced in France. In this regard, French law does not specify the form of an AT's decision on interim measures.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Limits</td><td>> As case law stands, arguable that an EA may only be seen as an expert or a third-party adjudicator.
> Unlikely that an EA seating in France could issue an ex parte order. This is consistent with the ICC Rules on EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

13- GERMANY Arbitration Statute(s) German Code of Civil Procedure ('GCCP') incorporating UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> An AT has jurisdiction to order interim measures (Sect. 1041 GCCP). However, German arbitration law on ATs are not deemed to be applicable to EAs. > A draft bill explicitly extending sec. 1041 GCCP to EAs is expected to be published in the course of 2018. > AT hearing the merits also has the power to grant interim measures securing compliance with any EA decision.	Enforceable	Not enforceable pending an extension of Sect. 1041 GCCP	**Penalties / Sanctions for non-compliance with EA's decision**	YES In order for them to be payable to the aggrieved party, there must be a substantive law claim to penalties which may only arise out of a penalty clause in the contract which must comply with the German Civil Code.	YES
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	YES	YES
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

14- GREECE Arbitration Statute(s) Greek arbitration law 2735/1999. UNCITRAL Model Law (1985) – without amendments of 2006, except Art. 17.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> AT may grant interim measures, unless provided otherwise. > Nothing prevents EA from granting interim relief. > Reporters are of the view that EA = AT.	Enforceable	Unlikely	**Penalties / Sanctions for non-compliance with EA's decision**	No information	YES But only if deemed enforceable which is unlikely.
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	Not prohibited	No information
Limits	> In principle, AT cannot make *ex parte* decisions. > But certain authors argue that *ex parte* decision from an AT does not necessarily violate Greek public policy.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in decision as to costs	YES	NO

15- HONG KONG Arbitration Statute(s) Hong Kong Arbitration Ordinance (HKAO) (Cap. 609).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Powers of AT to grant interim measures as set out in Part 6 of the HKAO do not apply to the EA. > Unclear whether the EA has the same general powers as the AT (including power to grant security for costs). > EA proceedings expressly provided for in the HKAO, including enforceability of EA's orders (Sect. 22A and 22B) (since 2013). > However silent on whether definition of an 'arbitral Tribunal' includes the EA.	Enforceable	Enforceable	**Penalties / Sanctions for non-compliance with EA's decision**	YES AT can make peremptory orders but not certain whether it applies to EA orders. No power to impose financial penalty for non-compliance with peremptory order.	No information
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	No information	NO
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">16- INDIA

Arbitration Statute(s)
Arbitration and Conciliation Act, 1996 (the 'Act') as amended by the Arbitration and Conciliation Act (2015).
UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed. Courts can grant interim measures under Sect. 9 of the Act even in a foreign-seated arbitration.
> The 246th Law Commission Report recommended the recognition of EA proceedings by changing the definition of a 'tribunal' to include an 'emergency arbitrator'. Said recommendation however was not incorporated in the 2015 amendment.</td><td rowspan="3">Not enforceable

- There is no direct enforcement of AT's interim award in an Indian seated Arbitration. In case a party does not comply with the award, the court can under Sect. 27(5) of the Act proceed for contempt. This will only apply to domestic arbitrations.

- In all foreign-seated arbitrations parties can file for injunction under Sect. 9 of the Act.</td><td rowspan="3">> Seat in India

Enforceable under Sect. 17 of the Act.

> Seat outside India

Not directly enforceable, but the same may be enforced indirectly through either:

- approaching Indian Courts under Sect. 9 of the Act, which provides for Court's power in granting interim measures; or

- approaching the Courts to initiate contempt proceedings against the defaulting party under Sect. 27(5) of the Act.

This works only with respect to interim measures/orders by the Tribunal not in the form of an interim award, considering the latter is expressly included in the definition of the 'award' under the Arbitration Act.</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>NO</td><td>YES

In the form of contempt proceedings under Sect. 27(5) of the Act by virtue of the decision by the Supreme Court in Alka Chandewar vs. Shamshul Ishrar Khan.</td></tr>
<tr><td>Form of the order</td><td>> The Act is silent, however a High-Level Committee Report submitted after the 2015 amendments reiterated the suggestion given by the 246th Law Commission Report and suggested the insertion of the term 'emergency award' within the definition of award under the Act. The Committee also recommended the insertion of a definition of an 'emergency award'.
> Dealing with a SIAC EA, the Bombay High Court in HSBC vs. Avitel seems to have characterised the EA decision as an 'award'.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>Unlikely</td><td>NO</td></tr>
<tr><td>Limits</td><td>> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td></td><td></td><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Unlikely</td><td>NO</td></tr>
</table>

17- IRELAND Arbitration Statute(s) Arbitration Act 2010 ('AA') governs both domestic and international arbitrations seated in Ireland. Based upon the UNCITRAL Model Law, as amended in 2006.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Unclear whether EA = AT. > An AT seated in Ireland is permitted to grant interim relief pursuant to Art. 17(1) of the UNCITRAL Model Law. > EA not specifically addressed under Irish law. Nothing prevents or limits it. > Hence, EA presumably has the same power as the AT: - with a broad reading of Art. 17(1); or - if provided by applicable procedural rules; or - if expressly included within arbitration agreement.	Enforceable	It depends. If considered as an AT, would be subject to same provisions regarding enforcement of arbitral awards. i.e. generally enforceable.	**Penalties / Sanctions for non-compliance with EA's decision**	Unlikely Nothing in AA allowing EA to render an order subject to penalties for non-compliance. Presumably permissible where agreed by parties. Penalty clause generally excluded in common law.	No information
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	No information	No information
Limits	> Sect. 10 of the AA provides that a party may seek interim measures from State courts before or during the arbitral proceedings. > But application to Irish state courts does not serve as a waiver of the arbitration agreement nor does it constitute a breach of the agreement to arbitrate.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">18- ITALY

Arbitration Statute(s)
Italian Code of Civil Procedure ('CCP').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No provisions regulating EA or similar emergency proceedings.</td><td rowspan="4">No information

However, according to some scholars, interim measures granted by ATs seated outside Italy are enforceable in Italy, provided that the decision is issued in the form of an award, as defined by the New York Convention.</td><td rowspan="4">No information

However, according to some scholars, interim measures granted by ATs seated outside Italy are enforceable in Italy, provided that the decision is issued in the form of an award, as defined by the New York Convention.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>Unlikely</td></tr>
<tr><td>Form of the order</td><td>> No information
> However, from the combined reading of Art. 818 CCP (see below) and Art. 824 bis CCP it might be inferred that an EA's decision in an arbitration seated in Italy cannot have the form of an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>It depends.

Damages may be granted if the breach of the EA's decision were considered a breach of contract under the applicable law.

Nothing in Italian law would in principle prevent an AT from awarding damages.</td><td>NO

Absent specific provision in the Italian CCP allowing for a potential claim for damages for non-compliance with the EA's decision to be brought before a court, such claim would fall under the arbitration agreement and outside courts' jurisdiction.</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Art. 818 CCP expressly provides that arbitrators do not have the power to grant interim measures, unless otherwise provided by the law.
> Only state courts are entitled to grant and enforce interim measures. The interpretation of this provision is highly controversial.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

19- LEBANON Arbitration Statute(s) Lebanese Arbitration Act incorporated in the Code of Civil Procedure ('CCP').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not governed by any specific provision of the Lebanese Arbitration Act. > EA can be deemed to enjoy the same legal status as an AT under Lebanese law. > An AT may order interim and conservatory measures deemed necessary in light of the nature of the dispute (Arts. 789(2) and 589 CCP), therefore the EA too. > Lebanese provisions on international arbitration are silent with regard to matters of interim relief. However, domestic arbitration regime may be extended to international arbitration. Domestic arbitration (Art. 789(2) CCP) provides that an arbitrator may, pending arbitration proceeding, order interim and conservatory measures deemed necessary.	Unlikely	Unlikely	Penalties / Sanctions for non-compliance with EA's decision	YES The arbitrator may also have recourse to the state judge to order such penalties.	YES Judge and emergency judge.
Form of the order	> Interim measures are not considered and treated as final decisions. Can still be reversed or abrogated by the AT who had issued them.			Power to award damages in case of non-compliance with EA's order	YES See Art. 123 of the Lebanese Civil Code for Contracts.	YES
Limits	> Lebanese courts' jurisdiction with respect to such measures is not considered waived by the mere agreement to arbitrate, unless expressly mentioned in the arbitration agreement. > Parties may exclude interim relief from arbitrators by agreeing to the contrary either in an ad hoc arbitration or by reference to specific arbitration rules that do not recognise such jurisdiction to the arbitrators.			Possibility to draw adverse inference from non-compliance with EA's order	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

<table>
<tr><td colspan="2">20- LITHUANIA

Arbitration Statute(s)
Civil Procedure Code, No. IX-743, 28 Feb. 2002 and subsequent amendments.
Law on Commercial Arbitration, No. I-1274, 2 Apr. 1996 and subsequent amendments.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> National law allows EA to make order for interim measures.</td><td rowspan="4">Enforceable</td><td rowspan="4">Unsettled</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>YES

Non-compliance may lead to a fine up to € 289 for each day of non-compliance.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Interim measures prior to constitution of the AT are not available if:
- the arbitration agreement was signed prior the coming into effect of the arbitration rules;
- parties have opted out of such procedure;
- parties have agreed upon another pre-arbitral procedure</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

<table>
<tr><td colspan="2">21- MACEDONIA

Arbitration Statute(s)
Law on international trade arbitration (Off. Gaz. No.39, 30 Mar. 2006).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing in the Law regarding EA.
> ATs may order interim relief at the request of a party.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> It is not incompatible with the arbitration agreement for the state court to grant interim relief before and during the arbitration proceeding (Art. 9).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
<tr><td>Power to award damages in case of non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
</table>

22- MALAYSIA Arbitration Statute(s) Arbitration Act (2005) (the 'Act') based on UNCITRAL Model Law (1985) with modifications. Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), 2013 Arbitration Rules.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No specific reference to EA but nothing preventing it. > Under the KLRCA Rules, EA has power to order or award any interim relief that he deems necessary. Reasons have to be put into writing. > EA order is binding on the parties. > Under the KLRCA Rules, parties undertake to comply with the order/award.	Enforceable	Not enforceable EA award/order will not be enforced by High Court as it does not come within meaning of definition of an award under the Act.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	NO
Form of the order	> EA order is not an award.			**Power to award damages in case of non-compliance with EA's order**	NO	NO
Limits	> EA order may be reconsidered, modified of vacated by AT. > Unclear whether EA fall within scope of definition of AT.			**Possibility to draw adverse inference from non-compliance with EA's order**	NO	NO
				Power to take into account non-compliance with EA orders in deciding the costs	NO	NO

<table>
<tr><td colspan="2">23- MEXICO

Arbitration Statute(s)
Federal Code of Civil Procedure.
Commercial Code.
UNCITRAL Model Law (1985) adopted as federal legislation.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Neither prevents nor limits EA from awarding interim relief or otherwise.
> Art. 17 of UNCITRAL Model Law has been incorporated into Art. 1433 of the Mexican Commercial Code. Therefore ATs (and EA by extension) have the power to adopt interim measures.
> Although no specific provisions allowing for ex parte enforcement of an order, there is a Federal Court precedent which authorised a state court to enforce such order from the AT/EA.</td><td rowspan="4">Enforceable</td><td rowspan="4">Likely enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

However controversial as penalties are seen as part of the imperium. No case law approving or limiting such power.</td><td>YES

But only when enforcement is sought by the relevant party and the party ordered to comply with the EA's order fails to do so.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES

But better if expressly provided for in the arbitration agreement or in the applicable Rules.</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

24- NETHERLANDS Arbitration Statute(s) Arbitration Act (2015). UNCITRAL Model Law has inspired the Arbitration Act. In the Caribbean parts of the Netherlands Kingdom, the UNCITRAL Model Law applies.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> Permits EA and AT to award interim relief or otherwise. > However, the state courts remain competent to do so if the agreement to arbitrate is not invoked or if the requested measures cannot (notably for want of arbitrability), or not timely, be obtained in arbitration (through the EA).	Enforceable	Enforceable	Penalties / Sanctions for non-compliance with EA's decision.	YES	YES
Form of the order	> May be in the form of an order or an award, the latter if indeed compatible with the ICC Arbitration Rules.			Power to award damages in case of non-compliance with EA's order	YES	YES
Limits	> The limits set by the Dutch Code of Civil Procedure (Art. 254) apply or will be applicable by analogy. These limits pertain to, notably, urgency and an assessment of the interests of the parties with respect to granting or rejecting the requested measure. Reversibility of the requested measure is also a consideration that will have to be balanced by a tribunal in deciding upon requested relief.			Possibility to draw adverse inference from non-compliance with EA's order	YES	YES
				Power to take into account non-compliance with EA orders in deciding the costs	YES	YES But in state courts, costs are assessed on the basis of standard rates and not full costs.

25- NEW ZEALAND Arbitration Statute(s) Arbitration Act (1996) (the 'Act') which incorporates the UNCITRAL Model Law with 2006 amendments.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From The EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> ATs and EA can grant interim measures or issue preliminary orders, even on an *ex parte* basis. With effect from 1 March 2017, s. 2(1) of the Act provides that emergency arbitrations are 'arbitrations' for purposes of the Act.	Enforceable	Likely enforceable	**Penalties / Sanctions for non-compliance with EA's decision**	No information	No information
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	No information	No information
Limits	> More practical to apply directly to courts if urgent interim measures are required prior to initiating arbitration.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

26- NIGERIA Arbitration Statute(s) Arbitration and Conciliation Act 1988 (the 'Act') (Cap. A18, Laws of the Federation of Nigeria 2004) modelled on the UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> No specific reference to EA. > At the request of either party, the AT may grant interim measures in the form of an interim award before or during the proceedings (Sect. 13 of the Act). > The Arbitration Rules of the Lagos State Court of Arbitration provides for a Special Measure Arbitrator (SMA) which is similar to the concept of EA (Art. 11). > An interim measure is binding unless otherwise provided by the AT.	Enforceable	Likely enforceable	Penalties / Sanctions for non-compliance with EA's decision	No information	No information
Form of the order	> Can be in the form of an interim award.			Power to award damages in case of non-compliance with EA's order	Not provided in the Act. But parties are free to agree on such powers.	No information
Limits	> The SMA shall not act where the parties have agreed to another pre-arbitral procedure or where the parties have opted out of this provision. > Arbitrators cannot enforce compliance with interim orders since they have no coercive powers.			Possibility to draw adverse inference from non-compliance with EA's order	No information	NO
				Power to take into account non-compliance with EA orders in deciding the costs	No information	NO

27- PAKISTAN Arbitration Statute(s) Arbitration Act 1940 (domestic arbitration). Recognition and Enforcement Act 2011 (incorporating the New York Convention). Arbitration Act, 2011 (implements the ICSID Convention).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> In principle, ATs do not have the power to deal with a request for interim relief. Only state courts have such powers.	Not enforceable Only way is to obtain an interim award as recognised and enforceable as an award by virtue of Sect. 27 of the Arbitration Act.	Not enforceable	Penalties / Sanctions for non-compliance with EA's decision	NO	YES Non-compliance may lead to prison sanctions for a term not exceeding six months. State Court may also order attachment of property.
Form of the order	> Cannot be issued in the form of an award.			Power to award damages in case of non-compliance with EA's order	YES	YES
Limits	> Possible to seek interim relief from state courts at any time.			Possibility to draw adverse inference from non-compliance with EA's order	No information	NO
				Power to take into account non-compliance with EA orders in deciding the costs	No information	NO

<table>
<tr><td colspan="2">28- PANAMA

Arbitration Statute(s)
Law 131 of 2013, which governs domestic and international arbitration.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Arbitration law does not provide for specific rules on EA. Not prohibited.
> ATs have the power to order interim relief, including preliminary orders and ex parte decisions.
> Unsettled whether it extends to EAs.</td><td rowspan="4">Enforceable

> Seat in Panama

Interim relief is recognised as binding by operation of law without any control from State courts which must enforce it within 10 days. The laws give imperium to the arbitrators.

> Seat outside Panama

ATs may not enforce interim measures without exequatur by the Supreme Court of justice.</td><td rowspan="4">Unsettled

Considering that no provision prohibits the EA, the reporters are of the opinion that nothing would prevent performance / enforcement of an EA order if the parties have expressly agreed and set the conditions for such performance.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> State courts remain competent to issue interim measures in support of the arbitration.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">29- PERU

Arbitration Statute(s)
Peruvian Arbitration law, enacted by Legislative Decree No. 1071 of 27 June 2008 (monist system).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA is not regulated nor prohibited.</td><td rowspan="4">Enforceable

ATs could enforce their own measures under certain limits.

In case of non-compliance the courts must enforce them at the request of any party.

Measures adopted by ATs out of Peruvian territory could be recognised and executed by Peruvian courts under Legislative Decree 1071.</td><td rowspan="4">Likely enforceable under the same rules relating to awards and interim measures.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

<table>
<tr><td colspan="2">30- POLAND

<u>Arbitration Statute(s)</u>
Civil Procedure Code ('CPC') which provisions on interim relief are based on the UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Polish law does not address EA proceedings.
> No application for interim or conservatory measures from an EA has ever been submitted to them, i.e. status is still unclear.
> Parties may request an AT to grant interim relief, unless agreed otherwise by parties.
> The reporters are of the opinion that provisions pertaining to arbitrators should apply to EAs – not settled in doctrine.
> Polish law expected to develop further on the issue of EA and adopt a position that enables state courts to enforce EA orders. EA orders would consequently no longer be undermined by uncertain enforceability.
> EA may order any type of interim or conservatory measures he or she deems appropriate.</td><td rowspan="4">Enforceable</td><td rowspan="4">Likely enforceable

With foreseeable reform of the law to make it clear.</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>No information</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO

Unless otherwise agreed by the parties.</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

31- PORTUGAL Arbitration Statute(s) Law no. 63/2011 based upon the UNCITRAL Model Law as amended in 2006.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not specifically addressed. No reported case law and no relevant published doctrine. > Portuguese Arbitration law provides that an AT may order/grant interim measures and preliminary orders. > Nothing preventing an EA from granting interim measures. However, arbitration agreement may exclude this possibility. > Provisions of Portuguese law applicable to AT shall in principle also apply to EA.	Enforceable	Likely enforceable	Penalties / Sanctions for non-compliance with EA's decision	No information But recent decision of Lisbon Court of Appeal affirmed arbitrator's power to order penalties for non-compliance.	YES Arguably
Form of the order	> No specific information with respect to EA. Interim measures may adopt the form of an award or a procedural order			Power to award damages in case of non-compliance with EA's order	No information	No information
Limits	> No specific limits			Possibility to draw adverse inference from non-compliance with EA's order	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

<table>
<tr><td colspan="2">32- QATAR

Arbitration Statute(s)
Law No. (2) of 2017 promulgating the Civil and Commercial Arbitration Law.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Unless the parties agree otherwise, the AT may, at the request of a party, order provisional measures or interim awards that are required by the nature of the dispute or to avoid irreparable damage.
> No specific law addresses the EA</td><td rowspan="4">Enforceable

But:

- the party in whose favor an interim measure is issued must first obtain written permission from the AT before requesting the competent judge to enforce the interim order or award;

- courts will refuse enforcement if the interim order or award contradicts the law or public policy.</td><td rowspan="4">Enforceable

Under the same regime applicable to AT's interim measures.</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> Interim order or decision.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Limits</td><td rowspan="2">> In some instances, a party may seek interim relief from the courts. Such request shall not be deemed a waiver of the arbitration agreement.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

33- RUSSIA Arbitration Statute(s) Federal Law on international commercial arbitration No. 5338-1 (7 July 1993), with subsequent amendments, which is a verbatim adoption of the UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No legal basis for measures ordered by EA. > Russian law does not prevent EA interim orders. > However, relevant provisions of the applicable law suggest that only the AT has such powers.	Not enforceable Unless in the form of a final award.	Not enforceable	**Penalties / Sanctions for non-compliance with EA's decision**	NO	NO
Form of the order	> Not in the form of an award.			**Power to award damages in case of non-compliance with EA's order**	NO	NO
Limits	> If a party to a Russian or foreign seated arbitration needs interim relief, the usual course of action would be to apply to a competent Russian state court. > Only final awards from an AT are enforceable.			**Possibility to draw adverse inference from non-compliance with EA's order**	No information	NO
				Power to take into account non-compliance with EA orders in deciding the costs	No information	NO

<table>
<tr><td colspan="2">34- SERBIA

Arbitration Statute(s)
2006 Arbitration Law.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing in the law regarding EA.
> ATs may order interim relief at request of a party – unless otherwise agreed by the parties.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely

But interim relief from an EA seated outside Serbia could potentially be enforced if it is in the form of an award as defined under the New York Convention.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Interim relief by an AT and an EA are inefficient towards third parties.
> State courts have the power to grant interim relief before and during the arbitration proceedings.
> No alternative mechanism that would address or sanction non-compliance with interim measures ordered by ATs and EAs.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Unclear</td><td>NO</td></tr>
</table>

35- SINGAPORE Arbitration Statute(s) International Arbitration Act ('IAA'), Cap. 143A, as amended in 2002 (international). Arbitration Act ('AA') (domestic).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Expressly provided for in Sect. 2(1) of the IAA and Sect. 2(1) of the AA. > Both acts include a specific provision on EA within the definition of AT (since 2012). > EA decisions may be enforceable in the same manner as if it were made by a court.	Enforceable Expressly provided for in the law.	Enforceable Expressly provided for in the law.	**Penalties / Sanctions for non-compliance with EA's decision**	Singapore law is silent. But penalties for non-compliance mirror the penalties for non-compliance with an order of court.	YES
Form of the order	> Can take the form of an award.			**Power to award damages in case of non-compliance with EA's order**	Singapore law is silent.	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">36- SPAIN

Arbitration Statute(s)
Arbitration Act 60/2003 (the 'Act').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No express reference to EA but no obstacle to its application.
> Arbitrators include EA. i.e. EA can order interim measures.
> Quasi-jurisdictional function performed by AT.
> EA decisions shall be subject to the rules on annulment (arts 40 et seq. of the Act), regardless of their form (award, order…).</td><td rowspan="4">Enforceable

> Seat in Spain

Same regime as for EA

> Seat outside Spain

Same regime as for EA</td><td rowspan="4">Enforceable

> Seat in Spain

Enforcement requires judicial assistance in accordance with terms for enforcement provided by the Civil Procedure Act.

> Seat outside Spain

Enforceability as a general principle, regardless of the form in which they are adopted.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

According to the reporters, the EA may also order penalties/sanction in case of non-compliance)</td><td>YES

As long as the conduct to be performed by the rebellious party falls within the scope of articles 709, 710, and 711 of the Spanish Civil Procedure Act.</td></tr>
<tr><td>Form of the order</td><td>> Can take the form of an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO

Unless such issue is formally petitioned in the main proceedings by the party in whose favor the order was placed.</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Parties may go either to the AT or the relevant court to request interim measures.
> Judicial interim measures may be granted inaudita parte.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">37- SWEDEN

Arbitration Statute(s)
The new Swedish Arbitration Act became effective as of 1 March 2019 ('SAA').
Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC Rules').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> The request for interim measure may only be filed prior to the commencement of the arbitration (according to SCC Rules)
> SCC Rules incorporate a separate appendix dealing with EA Rules. There is no statutory provision in the SAA dealing expressly with EA, but it is held that ATs seated in Sweden may order interim measures.</td><td rowspan="4">Not enforceable.
No statutory provision providing for enforcement
Only court-ordered interim measures may be enforced in Sweden.</td><td rowspan="4">Not enforceable.
Same regime as applies for EA interim measures; they cannot be enforced by Swedish state courts.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>Although EA decisions are binding on the parties who must comply, there are no specific sanctions for non-compliance according to SCC Rules.</td><td>No</td></tr>
<tr><td>Form of the order</td><td>> An order or an award?
> 'Emergency decision' – is the term used in the SCC Rules.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No</td><td>No</td></tr>
<tr><td>Limits</td><td>> No provision in SAA providing for EA.
> The AT is not bound by the decision of an EA under the SCC Rules.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Yes</td><td>No</td></tr>
<tr><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Yes</td><td>Yes</td></tr>
</table>

38- SWITZERLAND Arbitration Statute(s) Private International Law Act (1987, with amendments).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> No express regulation of EA or emergency arbitration proceedings in PILA, but subject to general limits on interim relief applicable to ATs. > EA qualifies as an arbitrator. > Prerequisite for emergency arbitration proceedings is that the parties have agreed on emergency arbitration, be it by express agreement or by reference to institutional rules that provide for EA relief.	Not enforceable If the party concerned does not voluntarily comply with ordered interim measures, the AT/EA may request the assistance of the competent state court. Whether a Swiss court can provide the above-mentioned state court assistance to an AT/EA seated abroad is presently still controversial.		Penalties / Sanctions for non-compliance with EA's decision	Controversial whether EA can impose penalties or private sanctions for non-compliance. EA cannot combine decision on interim measures with threat of public law or criminal law sanctions in case of non-compliance.	EA may seek assistance of the competent state court to ensure compliance of the interim measure. State court can supplement the order with threat of criminal sanctions.
Form of the order	> Orders regarding interim relief of EA are considered not to be 'awards'.			Power to award damages in case of non-compliance with EA's order	YES	NO
				Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
Limits	> EA has authority to grant interim relief only if the parties have agreed on this mechanism (by express agreement or reference to institutional rules that provide for EA relief). > Parties are free to limit or otherwise restrict the EA's powers. > EA can only order an interim relief with regards to a party bound by the arbitration agreement. > EA has wide discretion as to the contents of provisional measure, but EA cannot grant the interim measure 'attachment' foreseen in the Swiss Debt Enforcement Act (so-called 'Arrest' or '*Sequestre*').			Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">39- THAILAND

Arbitration Statute(s)
Arbitration Act 2002 (the 'Act') based on the UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing preventing EA appointed pursuant to ICC Rules from rendering an order granting interim relief.</td><td rowspan="4">Unlikely to be considered an 'arbitral award' for the purposes of Sect. 41 of the Act, the consequence is that interim / conservatory measures would not be enforceable in Thailand without a separate court order.</td><td rowspan="4">Unlikely</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>Uncertain</td><td>Unlikely</td></tr>
<tr><td>Form of the order</td><td>> Unlikely to be considered as an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> There are no specific provisions in the Act prohibiting the AT from issuing interim measures. However in practice any such order by the AT is unlikely to be enforceable in Thailand without a separate court order.
> Only Thai courts can grant such relief for arbitrations seated in Thailand (Sect. 16 of the Act).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">40- TURKEY

Arbitration Statute(s)
International Arbitration Law 4686, effective as of 5 July 2001 ('IAL').
Civil Procedure Code ('CPC').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No clear provision relating to interim relief granted by EA.
> Express power of AT to grant interim relief (Art. 6 IAL; Art. 414 CPC), unless otherwise agreed.
> If agreement between parties allows EA rules to be used and an EA is appointed, the EA is then able to grant interim relief and interim attachment.
> The AT on the merits can always grant interim relief.</td><td rowspan="4">Enforceable

With assistance of courts.</td><td rowspan="4">No information</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Interim relief may also be directly requested from state courts.
> ATs shall not grant interim measures which are required to be enforced through execution offices or to be executed through other official authorities or that bind third parties (Art. 6 IAL).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

41- UKRAINE Arbitration Statute(s) Law on international commercial arbitration (1994), based on the UNCITRAL Model Law (1985). International Commercial Arbitration Court ('ICAC') Rules.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> No reference to EA proceedings. > The ICAC has an equivalent of the EA proceedings (Art. 4.1 ICAC Rules): interim relief can be granted prior to constitution of the AT by the President of the ICAC. > ICAC recently showed interest in developing EA proceedings into Ukrainian practice. > EA awards are subject to the same enforcement rules as arbitral awards on the merits.	Likely enforceable	Likely enforceable But only one case to date. Although it is premature to argue conclusively, EA awards appear to be generally considered to fall within the scope of the New York Convention.	Penalties / Sanctions for non-compliance with EA's decision	No information	YES Includes fines, imprisonment, etc.
Form of the order	> EA decisions regarded as 'foreign arbitral awards'.			Power to award damages in case of non-compliance with EA's order	NO	No information
Limits	> No information			Possibility to draw adverse inference from non-compliance with EA's order	NO	NO
				Power to take into account non-compliance with EA orders in deciding the costs	NO	NO

42- UNITED ARAB EMIRATES Arbitration Statute(s) 2018 UAE Federal Arbitration Law ('UAE FAL'); 2008 Dubai International Financial Centre (DIFC) ('DIFC AL'); 2015 Abu Dhabi Global Market (ADGM) Arbitration Regulations ('ADGM AR').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> **Onshore:** Subject to the inherent powers of the court (Art. 18, UAE FAL), and unless otherwise agreed by the parties, the AT may, at the request of a party or of its own motion, order interim or conservatory measures as it may consider necessary taking account of the nature of the dispute (Art. 21, UAE FAL). > The UAE Federal Arbitration Law does not contain any specific provisions on EA (nor any express restrictions). > **Offshore:** Unless the parties have agreed otherwise, the AT may, upon the request of a party, order interim measures (of protection) necessary in the circumstances (Art. 24(1), DIFC AL; and similar, Art. 24, ADGM AR). > There is no specific provision on EA in any of the offshore arbitration legislation (nor any express restrictions).	Interim measures and partial awards are likely enforceable, both on- and offshore. (See express wording to that effect at Art. 39(2), UAE FAL, despite wording limited to 'interim awards'; and Art. 30, ADGM AR). Also note Art. 21(4), UAE FAL, which empowers a party to apply to the competent court for the enforcement of any interim order issued by AT (following permission from AT to do so).	Same regime is likely to apply as for AT, subject to confirmation by court practice in further course. For the avoidance of doubt, both the DIFC and ADGM courts are very pro-arbitration. Following the adoption of the UAE FAL, the onshore UAE courts are likely to follow suit (especially if the EA were to be considered as an AT in future court practice).	**Penalties / Sanctions for non-compliance with EA's decision**	**Onshore**: No information, but nothing prohibits it. **Offshore:** Likely to follow UK approach.	**Onshore:** No information, but nothing prohibits it. **Offshore:** Likely to follow UK approach.
Form of the order	> **Onshore:** Order, decision or possibly an award (subject to confirmation by the local courts), but likely to be in the form of an order only in the strict terms of Art. 21, UAE FAL. See express power on part of AT to issue interim and partial awards (Art. 39(1), UAE FAL). > **Offshore:** In any form, including awards (Art. 24(1)(b), DIFC AL).			**Power to award damages in case of non-compliance with EA's order**	**Onshore:** No information (but see Art. 21(2), UAE FAL, providing for general damages arising in connection with enforcement of interim measures). **Offshore:** Likely to follow UK approach. (See also Art. 24(1)(e), DIFC Arbitration Law; Art. 29, ADGM AR).	**Onshore:** No information **Offshore:** Likely to follow UK approach.
Limits	> Parties may reach out to the state courts for purposes of requesting interim relief prior, during and after conduct of the arbitration proceedings (both on- and offshore). > Interim measures may be subject to security ordered by AT or competent court. > Under offshore legislation, AT can only grant interim measures upon party request. > Under Art. 21(1), UAE FAL, AT is empowered to adopt such interim measures of its own motion. > In exceptional circumstances, both on- and offshore legislation empower AT to modify, suspend or terminate interim measures of their own motion, but upon prior notice to the parties.			**Possibility to draw adverse inference from non-compliance with EA's order**	**Onshore:** No information **Offshore:** Likely to follow UK approach.	**Onshore:** No information **Offshore:** Likely to follow UK approach.
				Power to take into account non-compliance with EA orders in deciding the costs	**Onshore:** No information (but possibly covered under Art. 46, UAE FAL). **Offshore:** Likely to follow UK approach.	**Onshore:** No information **Offshore:** Likely to follow UK approach.

43- UNITED KINGDOM Arbitration Statute(s) For England, Wales and Nothern Ireland, Arbitration Act (1996) (the 'Act'); For Scotland, Arbitration Act (2010).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No provisions in the Act as to the EA. Nothing prevents it. > For purposes of the National Report, EA qualifies as arbitrator, but room for arguing that an EA is not an arbitrator. > Role of English Courts is to support arbitration process so where AT is competent, the Court's powers to grant interim relief are circumscribed. They may only act in case of urgency if necessary for purpose of preserving evidence and where the AT has no power or is unable to act effectively. > Similarly, the Commercial Court held it is only where powers of EAs are inadequate, or where the practical ability is lacking to exercise those powers, that English Courts may intervene and grant interim measures; otherwise it is for the arbitral process to deal with the matter. > Seized with a request for EA proceedings, the LCIA Court considered that the application lacked urgency and declined the said application. Unsatisfied with this outcome, the Applicant initiated proceedings under Sect. 44 of the Act before the Commercial Court in view of obtaining interim relief. The application was rejected on the ground that the role of the Court is to support the arbitral process where necessary, not to serve as an additional forum.	Enforceable But doubts due to fact that UK law considers that interim measure cannot be enforced under the New York Convention.	Enforceable But same reserve as for AT. **Specific issue of peremptory orders:** EA may render peremptory orders which are enforceable by state courts (s. 42 of the Act).	**Penalties/ Sanctions for non-compliance with EA's decision**	YES ICC UK is of the opinion that an EA is allowed under the Act to penalise parties for non-compliance with arbitral orders.	YES As regard EA orders, contempt would only apply if the EA order had been converted into an order of the English Court.
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	YES Unless agreed otherwise.	No information
Limits	> English Courts already possess established, well-understood and widely-used powers to make interim and conservatory orders in aid of the arbitral proceedings (Sect. 44 of the Act). They are able to do so with much greater speed than under the EA procedure. > As opposed to AT/EA orders, court order can bind a third party (which EA cannot), may be rendered *ex parte*, and may be enforced directly by sanctions without necessity to invoke the peremptory order procedure. > In the many cases where one or more of these features is necessary for the party requiring interim relief, they can apply to the English Courts. > However, the role of the Courts is to support and not replace or provide an alternative to the role of the AT or EA where the powers of the AT or EA are adequate.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

44- UNITED STATES OF AMERICA Arbitration Statute(s) Federal Arbitration Act ('FAA'), 9 U.S.C.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No specific restrictions on the use of EA proceedings. > EA proceedings are treated the same way as any arbitration for purposes of application of the FAA. > EA decision to be treated as an award made by a constituted AT. > AT/EA have broad authority to grant interim or conservatory measures.	Enforceable Very supportive.	Enforceable Very supportive.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	YES
Form of the order	> Can be issued in the form of an award, which is considered as final. > But the 'final' character of interim awards is still subject to further confirmation from US case law.			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES Not prevented	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES Not prevented	NO

45- VENEZUELA Arbitration Statute(s) Commercial Arbitration Law (1998) ('CAL').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> EA is deemed to have the same force and effect as a court decision > AT may itself enforce interim measures if they do not require the use of 'public force'. Alternatively, the AT may request the assistance of a competent state court. > If interim relief is granted by EA in form of an arbitral award, compliance will be mandatory > EA is often granted and even enforced *ex parte*, without prejudice to the rights of the affected party to seek subsequent remedies.	Enforceable Very supportive.	Enforceable Generally, enforcement of an EA interim relief is subject to the same judicial procedure as any other decision rendered by an AT or a court of law, i.e. a party may request ordinary courts to enforce an interim order from an EA.	**Penalties / Sanctions for non-compliance with EA's decision**	NO	NO However, if compulsory enforcement is mandated by a court of law (upon the request of a party), the non-compliant party may be held in contempt.
Form of the order	> EA order may be issued in the form of an award.			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	Unlikely The non-compliance with an emergency arbitration order and the non-compliance with an order will not impact the findings of the AT on the merits or on costs.	NO
				Power to take into account non-compliance with EA orders in deciding the costs	Unlikely The non-compliance with an EA order and the non-compliance with an order will not impact the findings of the AT on the merits or on costs.	NO

ICC COMMISSION ON ARBITRATION AND ADR

The Commission on Arbitration and ADR brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. In its research capacity, the Commission produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. The Commission also discusses and contributes to the drafting of proposed revisions to the ICC Rules of Arbitration and other arbitration rules and drafts and approves the ICC Mediation Rules, Expert Rules and Dispute Board Rules.

The Commission currently has over 850 members from some 100 countries. It holds two plenary sessions each year, at which proposed Reports and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces. The Commission's products are made available at www.iccwbo.org and http://library.iccwbo.org/.

The Commission aims to:

- Provide guidance on a range of topics of current relevance to the world of international dispute resolution.
- Propose tools for efficient and cost-effective settlement of international disputes by means of arbitration, mediation, expertise and dispute boards to enable ICC dispute resolution to respond effectively to users' needs.
- Create a link among arbitrators, mediators, experts, academics, practitioners, counsel and users of dispute resolution services and provide them with a forum to exchange ideas and experiences with a view to improve dispute resolution services.

ICC Commission on Arbitration and ADR
www.iccwbo.org/commission-arbitration-ADR
arbitration.commissionADR@iccwbo.org
T +33 (0)1 49 53 30 43

Emergency Arbitrator Proceedings is a Report of the ICC Commission on Arbitration and ADR.

The Task Force Emergency Arbitrator Proceedings was co-chaired by James Hosking, Marnix Leijten and Diana Paraguacuto-Mahéo, with significant drafting contributions from Cecilia Carrara, Olivier Caprasse and Fernando Mantilla-Serrano. The analysis of the first 80 ICC Emergency Arbitrator cases has largely been conducted by Dr. Hélène van Lith, Secretary to the ICC Commission on Arbitration and ADR.

Members of the Task Force:

Jean-Michael Ahrens, Josephine Akinwunmi, Essam Al Tamimi, David Arias, Ignacio Arteaga, Christian Aschauer, Hans Bagner, León Barriola, Niuscha Bassiri, Fred G. Bennett, Laura Bergamini, George A. Bermann, Sébastien Besson, Michael Black, Christopher Boog, Alexander Brabant, Stavros Brekoulakis, David Brynmor-Thomas, José J. Caicedo, Olivier Caprasse, Juan Pablo Cardenas Mejia, Cecilia Carrara, Philippe Cavalieros, Stephanie Cohen, Juan Pablo Correa Delcasso, Shane Daly, Coralie Darrigade, Nadia De Araujo, Andrew De Lotbinière Mcdougall, Aimery De Schoutheete, Hernando Diaz Candia, Gediminas Dominas, Stephen Drymer, Caroline Duclercq, Philip Dunham, Stuart Dutson, Nelson Eizirik, Jalal El Ahdab, Nils Eliasson, Marcelo Roberto Ferro, Miriam Giselle Figueroa, Alejandro Flores Patiño, Costas Frangeskides, Valeria Galíndez, Manuel García Cobaleda, Barry H. Garfinkel, Fabien Gélinas, Eduardo Damião Gonçalves , Francisco González De Cossío, Mariana França Gouveia, Sarah Grenfell, Sergiy Gryshko, Jean-Pierre Harb, Wulf Gordian Hauser, Clifford Hendel, Marko Hentunen, Axel Benjamin Herzberg, Denys Hickey, Peter Hirst, Lothar Hofmann, Pascal Hollander, Jean-Christophe Honlet, James Hosking, Hermes Marcelo Huck, Benjamin Hughes, Julianne Hughes-Jennett, José Luis Iriarte, Sigvard Jarvin, Dyala Jimenez, Jean E. Kalicki, Mark A. Kantor, Charles Kaplan, Minas Khatchadourian, Rania Khoury, Brian King, Jennifer Kirby, Jan Kleinheisterkamp, Christian Konrad, Benoît Le Bars, Christian Leathley, Christine Lecuyer-Thieffry, Marnix A. Leijten, William K.W. Leung, Maximiliano Londoño, Esteban López Moreno, Irene Loreto González, Fernando Mantilla Serrano, Giacomo Marchisio, Nathalie Meyer Fabre, Albert Monichino, Mark Morril, Anne Marie Mürrle Rojas, Karim J. Nassif, Lawrence W. Newman, Christopher Newmark, Carmen Nuñez-Lagos, Oladipo Okpeseyi, Felipe Ossa, Dan M. Öwerström, Diana Paraguacuto-Maheo, Patricia Peterson, Vivian Ramsey, James Rogers, Victor Manuel Ruiz, John Rundell, Aníbal M. Sabater, Pedro Saghy, Mika Savola, Erik Schäfer, Jan K. Schäfer, Lawrence S. Schaner, Rogier Schellaars, Maxi Scherer, Sven Schilf, Andreas Schregenberger, Anthony Shanil Fernando, Daniel H. Sharma, Shai Sharvit, Hrvoje Sikiric, Gordon Smith, Victor James Smith, Gabriel Stefanescu, Erica Stein, Christoph Stippl, Franz X. Stirnimann, Hansjörg Stutzer, Edna Sussman, Stamatios Tsetos, Willem H. Van Baren, Melanie Van Leeuwen, Filipe Vaz Pinto, Marc Veit, Ricardo Velez, Gaetan Verhoosel, Deva Villanúa, Fabian Von Schlabrendorff, Andrew Wilson, Fan Yang, Sebastian Yanine, Rabab Yasseen, Ariel Ye, Galina Zukova

ICC Publication 895-0 ENG
ISBN 978-92-842-0540-0

Legal Standards Applicable to Deciding Applications for Interim Relief

by Grant Hanessian*

In international arbitration -- as in all disputes -- it is sometimes critical for a party to obtain relief prior to the final disposition of the case. Such relief – in international arbitration variously termed "interim measures of protection," "conservatory measures" or "provisional", "preliminary" or "temporary" relief -- may be necessary to preserve the *status quo* (e.g., by ordering continued performance of a contract during the arbitral proceedings), to facilitate conduct of arbitral proceedings (e.g., by ordering the preservation of evidence or inspection of goods, property or documents) or to ensure enforcement of a future award (e.g., by freezing assets).[1]

In national courts, the substantive and procedural law applicable to deciding requests for interim relief is well-developed. In international arbitration, however, the matter is more complicated.

First, there is usually no arbitration tribunal in place at the commencement of the dispute to which a party may direct a request for provisional relief. Prior to the recent development of emergency arbitrator provisions by many arbitration institutions, parties to arbitration agreements had no choice but to resort to national courts prior to the formation of the arbitral tribunal, and this of course remains the case with respect to *ad hoc* arbitration. Where a request for interim relief involves a third party -- such as a financial institution holding disputed assets or a witness outside the control of the parties -- recourse to national court may be necessary because the arbitral tribunal has no jurisdiction to order or enforce the requested relief. In some jurisdictions, the law of the place of arbitration may significantly circumscribe the power of arbitrators to grant interim relief.

Also, and now coming to the subject of this essay, historically there has been little authority to guide arbitral tribunals and parties with respect to the legal standards applicable to requests for interim relief. Arbitration rules and *lex arbitri* typically provide little, if any, direction. In recent years, however, the subject has received more attention and it has become increasingly possible to identify international

---

*The author thanks Justin Marlles, an associate in the Houston office of Baker & McKenzie LLP, for his assistance in the drafting of this chapter.

[1] *See, e.g.*, Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 5th ed. 2009), para. 5.24-36 ("*Redfern & Hunter*").

standards applicable to applications for interim relief. This paper considers these emerging standards, with particular emphasis on contributions made by the decisions of investor-state tribunals[2] and emergency arbitrators.[3]

Arbitral Rules and *Lex Arbitri*

Virtually all international arbitration rules now provide arbitral tribunals with power to order interim relief.[4] Most rules provide a broad grant of power to arbitral tribunals to order interim relief without restriction or qualification as to the nature or types of interim relief, subject only to a finding that the relief is "appropriate"[5] and/or "necessary."[6] Emergency arbitrators are usually provided with broad

---

[2] The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), unusually among international arbitration conventions, explicitly provides for interim relief. The ICSID Convention, at art. 47, states: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." Consistent with most institutional rules, the ICSID Arbitration Rules, Rule 39(1), states that "a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures." Notwithstanding the word 'recommend' instead of 'prescribe' ICSID tribunals "increasingly have ordered binding measures (finding creative ways to enforce them) in order to preserve critical rights at stake in their proceedings." Mouawad & Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 Arbitration Int'l. 381, 383 (2013). This remedy is particularly important in ICSID cases since the ICSID Convention, at art. 26, provides that parties that consent to arbitration before ICSID do so to the exclusion of any other remedy. This provision, intended to eliminate or stay parallel national court proceedings, is generally thought to exclude applications for interim relief before national tribunals in ICSID cases. *See* Georgios Petrochilos *et al.*, *ICSID Arbitration Rules,* Rule 39, *in* Concise International Arbitration (Loukas A. Mistelis, ed.) (Kluwer Law International 2010), pp. 275-278; Lucy Reed *et al.*, *Guide to ICSID Arbitration* (Kluwer Law International 2010), pp. 123-157, 145-146

[3] The following institutional rules provide for appointment of an emergency arbitrator prior to the constitution of the arbitration tribunal: International Chamber of Commerce ("ICC" 2012 Rules, art. 29(1) and Appendix V), London Court of International Arbitration ("LCIA" 2014 Rules, art. 9B), International Centre for Dispute Resolution of the American Arbitration Association ("ICDR" 2013 Rules, art. 37.1), Singapore International Arbitration Centre ("SIAC" 2013 Rules , Rule 26(2) and Schedule 1), Arbitration Institute of the Stockholm Chamber of Commerce ("SCC" SCC Rules (2010), Appendix II), Hong Kong International Arbitration Centre ("HKIAC" HKIAC Rules (2013), art. 23.1 and Schedule 4), Kuala Lumpur Regional Centre for Arbitration ("KLRCA" KLRCA Rules (2013), Rule 7(2) and Schedule 2), Swiss Chambers of Commerce ("Swiss" Swiss Rules (2012), arts. 42-43), Mexico City National Chamber of Commerce ("CANACO") CANACO Rules (2008), arts. 36 and 50., and Netherlands Arbitration Institute ("NAI" NAI Rules (2010), arts. 42a and 42b). Through the end of 2013, the ICDR appointed 37 emergency arbitrators, SIAC 30, the SCC nine, and the ICC seven; the average time to resolve these requests appears to be about two weeks from the date of application to award or order. For a discussion of the various rules and their implementation, see G. Hanessian, 'Emergency Arbitrators' in L. Newman & R. Hill, eds., *The Leading Arbitrators' Guide to International Arbitration* (Juris, 2014).

[4] Some commentators consider the ability to grant interim relief an inherent part of arbitrators' adjudicatory powers *See, e.g.,* Gary Born, *International Commercial Arbitration* (2d edition, 2014), pp. 2453-2455.

[5] Among rules permitting a tribunal to order "appropriate" relief are those of the ICC (art. 28(1)), the Korean Commercial Arbitration Board ("KCAB", art. 28(1)), the SCC (art. 32(1)), the Arbitration Center of Mexico (CAM,

authority to grant interim measures, but none of the rules speak to the appropriate standard to be applied to determine when such authority should be exercised.

Unusually, the rules of the Chartered Institute of Arbitrators ("CIArb") and the London Court of International Arbitration specify certain types of interim relief as within the power of a tribunal to grant. The LCIA Rules (art. 25(1)) provide that a tribunal may order: (i) a party to provide security for all or part of the amount in dispute; (ii) the preservation, storage, sale or other disposal of any property or thing under the control of a party and relating to the subject-matter of the arbitration; and (iii) any relief, on a provisional basis and subject to final determination in an award, that the Arbitral Tribunal would have the power to grant in an award. Similarly, the CIArb rules (art. 7.8) provide that the tribunal has the power to grant provisional orders (i) for the payment of money or the disposition of property as between the parties; (ii) for interim payment on account of the costs of the arbitration; and (iii) for the grant of any relief in the arbitration.[7]

An arbitral tribunal's authority to grant interim relief of course is also subject to restrictions imposed by the law at the place of arbitration *(lex arbitri*),[8] since the courts of the place of arbitration will have supervisory jurisdiction over the conduct of the arbitration.[9] Thus, even where the parties have expressly

---

art. 30(1)) and the SIAC (art. 26(1)).

[6] The rules of the American Arbitration Association ("AAA", art. 34(a)) and its international entity, the ICDR (art. 21(1)), JAMS (art. 26.1), the Dubai International Arbitration Centre ("DIAC", art. 31.1) and the World Intellectual Property Organization ("WIPO", art. 46(a)), require a determination that the interim relief requested be "necessary".

[7] It has been suggested that these provisions of the LCIA and CIArb rules may be influenced by the fact that Section 38 of the English Arbitration Act grants an arbitral tribunal certain specific powers to order interim relief, such as the power to order a claimant to provide security for costs for the arbitration and to issue orders for the preservation of property and evidence that is the subject matter of the proceedings. Simon Nesbitt, "LCIA Arbitration Rules, Article 25 [Interim and conservatory measures]", in *Concise International Arbitration* (Loukas A. Mistelis, ed.) (Kluwer Law International 2010), pp. 447-450. However the English Arbitration Act also provides that parties are "free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award," English Arbitration Act of 1996, sec. 39, (*e.g.*, by selecting rules of arbitration that provide for such powers).

[8] *See*, *e.g.* Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2d. ed. 2007), para. 606; Blackaby et al., *Redfern and Hunter*, para. 5.08; Julian Lew et al., *Comparative International Commercial Arbitration* (Kluwer Law 2003) para. 23-8 to 23-9. Presumably if no place of arbitration is specified in the parties arbitration agreement, in the typical case the institution, arbitral tribunal or emergency arbitrator will determine the legal situs, in accordance with the institutional rules (and applicable law, as the case may be), prior to issuing an interim award or order.

[9] *See* Blackaby *et al*, *Redfern and Hunter* 167-88 (2009).

agreed to grant the arbitrators power to grant interim relief by agreeing to arbitration rules that provide for such relief, such authority may be circumscribed where the arbitration has its legal seat in a jurisdiction that does not permit arbitrators to issue injunctions-- such as Argentina, Greece, Italy, Thailand or the Province of Quebec, Canada[10] -- or certain types of interim relief, such as China.[11] In addition, certain procedural requirements may be considered applicable to applications for interim relief, *e.g.,* art. 24(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), which requires an arbitrator to hold an oral hearing upon the request of either party prior to granting any requested relief.

With respect to the standards to be applied by a tribunal in deciding a request for interim relief, of the major arbitration rules only the ad hoc UNCITRAL Arbitration Rules – and the identical provisions of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") and the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") – set forth such standards. These rules provide as follows:

> [T]he party requesting an interim measure…shall satisfy the arbitral tribunal that:
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted, and
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[12]

---

[10] *See* J. Brian Casey, "Emergency Interim Relief Under the ICDR Rules: Practical and Legal Considerations," New York Dispute Resolution Lawyer I Spring 2013 I Vol. 6 I No. 1 (hereafter "Casey, 'Emergency Interim Relief Under the ICDR Rules'"), p. 17; Born, *International Commercial Arbitration*, p. 2439.

[11] Chinese arbitration law permits conservatory measures regarding assets and evidence to be ordered only by the Chinese courts and thus not by arbitral tribunals. Song Lu, *The New CIETAC Arbitration Rules of 2012*, Journal of International Arbitration 2012, Vol. 29(3), p. 306; Landolt & Reeves Neal, *Competition Law*, para. 19-012 (p. 670); Christopher Boog, *The Laws Governing Interim Measures in International Arbitration*, *in* Conflict of Laws in International Arbitration (Franco Ferrari and Stefan Kröll, eds.) (Sellier European Law Publishers 2011), pp. 414-16.

As Gary Born has observed, where parties have chosen in their arbitration agreement international arbitration rules that broadly permit the arbitrators to grant interim relief and a situs that regulates, or prohibits, interim relief, it may be appropriate for arbitrators to consider that the parties' specific choice (the rules) supersedes the general (the situs *lex arbitri*). In practice, of course, few arbitrators will grant interim or other relief prohibited by the *lex arbitri*, whether or not such *lex arbitri* would violate the New York Convention and such orders may be enforceable in jurisdictions other than the situs. *See* Born, *International Commercial Arbitration*, pp. 2558-60.

[12] Art. 26(3) UNCITRAL, CRCICA and KLRCA rules. The UNCITRAL Model Law is almost identical, providing at Art. 17A that the party requesting an interim measure "shall satisfy the arbitral tribunal that:"

Additional, these rules provide that the above requirements apply "to the extent the arbitral tribunal considers appropriate" where the interim relief sought relates to the preservation of evidence that may be relevant and material to the resolution of the dispute.[13]

The *lex arbitri* is usually thought not to include the legal standards applied by national courts in deciding applications for interim relief,[14] although such national judicial standards are sometimes agreed by the parties and applied by arbitrators, presumably because such standards are relatively accessible and familiar to parties and arbitrators. In their recent survey of ICC emergency arbitrator cases, ICC Secretary General Andrea Carlevaris and Deputy Secretary General José Ricardo Feris[15] report that ICC emergency arbitrators have taken other approaches:

> In . . . other cases, the emergency arbitrators relied more heavily on international arbitral practice. In one case, the emergency arbitrator held that the law governing the contract did not apply, and turned instead for guidance to practice generally followed by international arbitrators, mentioning also the procedural law at the place of arbitration. Another emergency arbitrator found that neither the law governing the contract nor the law governing court procedure at the place of the emergency arbitrator proceedings was applicable and, after finding that the law governing arbitral proceedings at the place of the emergency arbitrator proceedings was silent on standards applicable to the granting of interim relief, he ultimately found guidance in international sources such as arbitral awards grounded in common principles of law in developed states. In another case, the emergency arbitrator similarly disregarded the law governing the contract, noted that the parties had not chosen a law applicable to the arbitral procedure, and concluded that the law of the seat did not require him to take into account any national law; he consequently turned to scholarship and arbitral precedents and emphasized the importance of the factual

---

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

[13] Article 26(4) UNCITRAL, CRCICA and KLRCA rules.

[14] *See* Born, *International Commercial Arbitration*, pp. 2558-60. In the U.S., the traditional test for an interim injunction requires the applicant to establish that it is likely to succeed on the merits and likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in its favor, and that an injunction is in the public interest. *See* Tod Gamlen & Christina Wong, "Emergency Relief in International Arbitrations," The Recorder (Calif.), Jan. 15, 2013. In the U.K. and Canada, the applicant needs only to establish there is a serious issue to be tried, damages would not be an adequate remedy and the balance of convenience lies in granting an injunction. *See* Casey, "Emergency Interim Relief Under the ICDR Rules," pp. 17-18.

[15] Andrea Carlevaris and José Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases" ICC International Court of Arbitration Bulletin 25 Vol. 25, No. 1 (2014), p. 25.

circumstances of the case. [footnotes omitted][16]

Further to the notion that international arbitral procedure is not bound by national judicial standards of interim relief, two recent U.S. court decisions held that arbitrators are not required to adhere to interim relief standards applicable in U.S. courts. In *CE International Resources Holdings LLC v. S.A. Mineral Ltd. Partnership et al.,*[17] a New York federal court was asked to enforce an arbitrator's order freezing respondents' assets *pendente lite*. Respondent sought to set aside the New York's arbitrator's order on grounds that the arbitrator had acted in manifest disregard of the law, as New York's procedural law does not permit a plaintiff in an action for a money judgment to obtain pre-judgment security. The court enforced the arbitrator's order, holding that the parties had agreed to arbitrate under the ICDR Rules, and the ICDR Rules gave the arbitrator jurisdiction to order interim relief that might not be available from a court under New York law. Similarly, in *Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc.* a federal court in Montana refused an application by a non-party to the arbitration to set aside the order of an ICDR emergency arbitrator in New York,[18] on grounds that under New York procedural law applicable to applications for interim relief the applicant third party was a necessary party to the emergency arbitrator proceeding.

Harm, Urgency . . . and other factors

In the absence of direction from arbitral rules and/or *lex arbitri*, it is of course for the arbitral tribunal to determine the standards applicable to a request for interim relief.[19] It is generally said that an applicant for interim relief in international arbitration must establish: (i) a risk of serious or irreparable harm to the party seeking interim relief that outweighs any risk of harm to the party against which the interim relief will be granted; (ii) the risk of such harm is imminent; (iii) granting the interim relief will not amount to a prejudgment on the merits of the case; and that the applicant has established a *prima facie* case or

[16] *Id*., p. 36.

[17] 2012 U.S. Dist. LEXIS 176158, Case No 12 Civ. 8087(CM) (S.D.N.Y. 2012).

[18] *Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc. 2*013 U.S. Dist. LEXIS, Case No. CV 13-73-M-DLC (D. Mont., Oct. 30, 2013). The emergency arbitrator's order was annexed to Rocky Mountain's moving papers and is publicly available on PACER, the U.S. judiciary's electronic filing system. The author served as emergency arbitrator in this case.

[19] *See, e.g.*, Peter Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press 2009), para. 6.110; Fry et al., *The Secretariat's Guide*, paras. 3-1037 to 3-1038.

likelihood of success on (iv) the merits of the dispute and (v) the tribunal's jurisdiction.[20]

These requirements are of course not applicable in all circumstances, nor are they necessarily exhaustive. In considering the public decisions on interim relief it seems that two factors dominate: harm and urgency, with the other factors playing important but subsidiary roles depending on the relief requested and the circumstances of the application. The standards for granting relief and the applicant's burden of proof and persuasion with respect to such standards are of obvious importance in considering whether evidentiary hearings are required to fairly adjudicate a request for interim relief. If the applicant need only establish a *prima facie* showing of urgency and likelihood of success on jurisdiction and the merits, the need for evidentiary hearings and cross-examination is reduced. If, on the other hand, the applicant must show "irreparable injury" and that it is "likely to succeed on the merits," this may require a more rigorous determination of the facts underlying the request.

Harm and Urgency. The precise definition of the "serious or irreparable harm" factor varies somewhat from case to case, although it usually "does not require mechanical application of particular levels of probability."[21] Some investment treaty tribunals, such as the *Chevron v. Ecuador* panel, have adopted a U.S.-style approach by interpreting this factor to require a showing of "a sufficient likelihood that such harm…may be irreparable in the form of monetary compensation[.]"[22] Increasingly, however, arbitral tribunals, as in *Paushok v. Mongolia,* consider the irreparable harm factor to have a "flexible meaning"[23]: referencing the decision of the Iran-U.S. Claims Tribunal in the *Behring* case, the *Paushok* panel stated that "the concept of "irreparable prejudice" does not necessarily require that the injury complained of be not remediable by an award of damages."[24] There is some evidence that commercial tribunals may utilize an even more relaxed approach, with one ICC tribunal opining that "any non marginal risk of

[20] *See, e.g.*, Born, *International Commercial Arbitration*, pp. 2467-2482.

[21] *Id.*, p. 2472.

[22] *Chevron Corp. and Texaco Petroleum Co. v. Rep. of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures, Feb. 16, 2012, para. 2.

[23] *Sergei Paushok, CJSC Golden East Co., and CJSC Vostokneftegaz Co.*, UNCITRAL, Order on Interim Measures, Sept. 2, 2008, para. 69. *See* Mouawad & Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 Arbitration Int'l, p. 392 (citing cases).

[24] *Id*., para. 68 (*citing Behring Int'l Inc. v. Islamic Rep. Iranian Air Force, Iran Aircraft Indus., and Gov't of Iran*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238 p. 276).

aggravation of the dispute is sufficient to warrant an order for interim relief."[25]

An ICC emergency arbitrator determined that while international arbitration practice normally requires a risk of irreparable harm, the applicant was entitled to relief despite the absence of such a risk, as the dispute would otherwise have become more aggravated and granting the request would not cause irreparable harm to the responding party.[26]

This reasoning is consistent with one of the principal purposes of interim relief: protection of the *status quo* pending the tribunal's resolution of the dispute. The focus by investor-state tribunals on preserving the *status quo* even in the absence of "irreparable harm" may be traced to the International Court of Justice's jurisprudence on interim measures. In the *Pulp Mills on the River Uruguay*, the ICJ, quoting Article 41(1) of the ICJ Statute, stated that "the power of the Court to indicate provisional measures has as its object to permit the Court to preserve the respective rights of the parties."[27] This criteria has now been adopted by a number of investment disputes panels (which are of course not governed by the ICJ Statute). In their survey of interim measures in investor-state cases, Caline Mouawad and Elizabeth Silbert explain that "[s]everal investor-State tribunals have ordered interim measures on the basis of these well-accepted principles of preserving the *status quo*, preventing the aggravation of the dispute, and preserving the integrity of the arbitral proceedings."[28]

The concept of balancing the harm between the parties has been increasingly seen as part of the international standard since the 2006 revisions to the UNCITRAL Rules and 2010 revisions to the UNCITRAL Rules, both of which require that a party requesting interim relief satisfy the tribunal that the

---

[25] *Distrib. A (nationality not indicated) v. Mfg. B. (nationality not indicated)*, ICC Case No. 1596, Interlocutory Award, 2000, in Yearbook Commercial Arbitration 2005 – Vol. XXX 66, 71 (Albert J. van den Berg. ed., Kluwer L. Int'l 2005).

[26] Carlevaris and Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", p. 36.

[27] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures*, 2006 I.C.J. 113, 159 (Order of July 13, 2006).

[28] Mouawad & Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 Arbitration Int'l, pp. 395–96 (emphasis original) (these include *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003; *City Oriente Ltd. v. Republic of Ecuador and Petroecuador,* ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007; *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009; *Burlington Resources Inc. and others v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Procedural Order No. 1; and *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006.

harm it faces "substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted."[29] Investor-state tribunals applying the UNCITRAL Rules have begun to take this factor into consideration[30], although it remains to be seen whether this will influence cases decided under other rules.

As to urgency, in investor-state cases this consideration "appears to have evolved and relaxed somewhat over the years, morphing from a requirement that the harm be immediately likely and imminent to the seemingly more widespread standard today that the harm occur prior to the tribunal's issuance of the final award."[31] This approach also is based significantly on ICJ jurisprudence. Referencing Article 41(2) of the ICJ Statute,[32] the ICJ stated in the 1991 *Great Belt* case that interim measures are "only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before [a] final decision is given[.]"[33] The ICJ further observed in the 2006 *Pulp Mills on the River Uruguay* case, "the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are subject of the dispute before the Court has had an opportunity to render its decision."[34] The tribunal in the *Chevron v. Ecuador* arbitration used language almost identical to that of the ICJ statute in granting Chevron's second request for interim relief, stating that Chevron had established "a sufficient urgency given the risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties' dispute by any final award[.]"[35]

---

[29] UNCITRAL Model Law, art. 17A(a) (2006) and UNCITRAL Arbitration Rules, Art. 26(3)(a) (2010).

[30] *See Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, para. 9.

[31] Mouawad & Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 Arbitration Int'l, p. 386.

[32] Statute of the International Court of Justice, June 26, 1945, art. 41, 59 Stat. 1055, 33 U.N.T.S. 933:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

[33] *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures*, 1991 I.C.J. 12, 17 (Order of July 29, 1991).

[34] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures*, 2006 I.C.J. 113, 160 (Order of July 13, 2006).

[35] *Chevron Corp. and Texaco Petroleum Co. v. Rep. of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures, Feb. 16, 2012 , para 2.

Emergency arbitrators -- by the necessity of their limited office -- have been rigorous in requiring that the applicant demonstrate urgency.[36] ICC Rules regarding emergency arbitration particularly stress urgency, stating that the emergency arbitrator provision is available only to parties "that cannot await the constitution of an arbitral tribunal."[37] Carlevaris and Feris report that ICC emergency arbitrators "have generally avoided defining what is meant by this requirement and referred instead to the particular circumstances of the case."[38] One ICC emergency arbitrator considered whether applications for emergency measures required a greater showing of urgency than applications for ordinary interim relief, but did not decide the question, denying the application on grounds of failure to show the necessary harm.[39] Of the seven SCC emergency applications denied through 2013, the arbitrator stated in five cases that there was insufficient urgency.[40]

Other Factors. Following considerations of harm and urgency, other considerations include some showing that the applicant is likely to succeed on the merits of the case and that the tribunal has jurisdiction (if this has not been previously established).

An analysis of the likelihood of success on the merits, as this subject is known in common law jurisdictions, is noticeably absent from many of the ICJ cases on interim relief,[41] although this criteria appears increasingly present in investor-state decisions. In the recent *Tethyan v. Pakistan* case, an ICSID tribunal observed, '[t]he question of whether the right to be preserved exists goes to the merits of the case which will not be decided at this preliminary stage of the proceedings. It therefore suffices that the party

---

[36] *See* Johan Lundstedt, "SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013," available at http://www.sccinstitute.com (hereafter "Lundstedt, 'SCC Practice'").

[37] ICC Rules, art. 29.1.

[38] Carlevaris and Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", p. 35.

[39] *Id.*

[40] *See* Lundstedt, "SCC Practice."

[41] *See Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures*, 1991 I.C.J. 12, 16–17 (Order of July 29, 1991); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures*, 2006 I.C.J. 113, 159–60 (Order of July 13, 2006). This is generally thought attributable to a reluctance by the court to appear to prejudge the case. *See, e.g.,* Jerrod Wong, *The Issuance of Interim Measures in Int'l Disputes: A Proposal Requiring a Reasonable Possibility of Success on the Underlying Merits*, 22 Ga. J. Int'l & Comp. L. p. 606 (2005).

requesting the provisional measure establishes a prima facie case that it owns a legally protected interest." [42] Similar sentiments were expressed by tribunals in two widely-circulated ICC commercial decisions on interim relief.[43] There is evidence that emergency arbitrators also consider likelihood of success. In four out of the seven SCC cases in which the applications were denied, the emergency arbitrator found that the applicant had demonstrated a *prima facie* case, or reasonable possibility of success, on the merits.[44] Similarly, ICC emergency arbitrators have usually considered whether there was a prima facie case for the measures requested and failure to meet this requirement has generally been considered sufficient to reject the application.[45]

As to a *prima facie* case on jurisdiction, in its decision in the *Great Belt* case, the ICJ explained that "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded."[46] Investment treaty tribunals seem to have adopted this rather low bar set by the ICJ, and considered whether claimants had *prima facie* demonstrated the right to claim as investors under the ICSID Convention and relevant treaty.[47]

---

[42] *Tethyan Copper Co. v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Provisional Measures, 13 December 2012, ¶¶ 145, 154; *see also Sergei Paushok, CJSC Golden East Co., and CJSC Vostokneftegaz Co.*, UNCITRAL, Order on Interim Measures, Sept. 2, 2008 paras 55-56. *See also* Mouawad & Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 Arbitration Int'l, p. 398.

[43] *See Trust C (Isle of Sark), US Corporation (US) and others v. Latvian Group (Latvia), Latvian Finance Co. (Latvia) and others*, ICC Case No. 10973, Interim Award, 2001 in Yearbook Commercial Arbitration 2005 – Vol. XXX, p. 82 ("It is a general rule in international arbitration that a claimant must prove the *fumis boni juris*, i.e., that there exists a probability that his claims, regarding the question(s) as to the merits of the case, will be successful."); *Distrib. A (nationality not indicated) v. Mfg. B. (nationality not indicated)*, ICC Case No. 1596, Interlocutory Award, 2000, in Yearbook Commercial Arbitration 2005 – Vol. XXX, p. 68 ("The first requirement for interim relief is that the applicant render plausible that it has a prima facie contractual or legal right to obtain the relief it seeks").

[44] *See* Lundstedt, "SCC Practice."

[45] Carlevaris and Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", p. 36.

[46] *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures*, 1991 I.C.J. 12, 15 (Order of July 29, 1991). Notably, identical language appears to have ben used in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Provisional Measures, 1984 I.C.J. 169, para. 24 (Order of May 10, 1984).

[47] *See Sergei Paushok, CJSC Golden East Co., and CJSC Vostokneftegaz Co.*, UNCITRAL, Order on Interim Measures, Sept. 2, 2008, para. 47-48 (quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Provisional Measures, 1984 I.C.J. 169, para. 24 (Order of May 10, 1984)); *Tethyan Copper Co. v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Provisional Measures, 13 December 2012, ¶ 122 (finding *prima facie* jurisdiction under Article 25(1) of the ICSID Convention and the applicable BIT); *Churchill Mining*

In international commercial arbitration, the practical application of this factor may simply require a high-level assessment of (a) whether there is a valid arbitration clause that binds the parties, and (b) whether the rules of arbitration chosen by the parties allow the arbitral tribunal to provide interim relief.[48]

* * * *

Standards applicable to requests for interim relief are continuing to evolve and, it would appear, are increasingly becoming more uniform and predicable. Whether or not investment treaty awards and publically available decisions by international commercial and emergency arbitrators serve as "precedent"[49] in any technical sense, this developing consensus is the inevitable result of the increasing use and importance of international arbitration, and the fundamental role of interim relief in any successful dispute resolution system.

PLC v. Republic of Indonesia, ICSID Case No. ARB/12/14, Procedural Order No. 3, 4 March 2013, ¶¶ 36 *et seq*. (finding *prima facie* jurisdiction on the basis of several jurisdictional tests).

[48] *See Trust C (Isle of Sark), US Corporation (US) and others v. Latvian Group (Latvia), Latvian Finance Co. (Latvia) and others*, ICC Case No. 10973, Interim Award, 2001 in Yearbook Commercial Arbitration 2005 – Vol. XXX 77,79–80 (Albert J. van den Berg. ed., Kluwer L. Int'l 2005).

[49] Most commercial awards remain confidential and, unlike decisions by the highest court in a particular judicial system, arbitral tribunals can not know whether a particular award or reasoning has, or should have, widespread acceptance . *See, e.g.*,Gaillard and Banifatemi, eds., *Precedent in International Arbitration*. For advocacy of a system of *stare decisis* in international commercial arbitration, *see* Thomas E. Carbonneau, *The Law and Practice of Arbitration* (3rd ed. Juris Publishing, 2002) 427 and Klaus Berger, *The International Arbitrator's Application of Precedent*, 9 J. Int'l Arb. 4, 19 (1992). An opposing view is offered in Tom Ginsburg, *The Culture of Arbitration*, 36 Vand. J. Transnt'l Law 1335, 1340 (2003).

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Applications for Interim Measures

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Charles Brown, ex officio
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Wolf Von Kumberg, ex officio

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

Last revised 29 November 2016

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).

INTERNATIONAL LAW INSTITUTE
SERIES ON INTERNATIONAL LAW, ARBITRATION AND PRACTICE
VOLUME 1

INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION

EDITOR
DIORA ZIYAEVA

GENERAL EDITORS
IAN A. LAIRD
BORZU SABAHI
ANNE MARIE WHITESELL

Chapter 3

The Impact of the UNCITRAL Arbitration Rules

Louis B. Kimmelman[1] *and Sonia Marquez*[2]

I. INTRODUCTION

Obtaining interim measures can be essential in an international arbitration. Such measures may be needed to maintain the status quo during the course of the proceeding or to ensure that the purpose of the arbitration is not frustrated. They may also be needed to prevent a party from taking an action that will aggravate the dispute and change the relationship between the parties.

Unlike most aspects of international arbitration, parties have a choice as to whether they will seek interim measures from a court or an arbitral tribunal. As a result, practitioners often have to make an important strategic decision as to whether to seek remedies from a tribunal (if one is in place), from an emergency arbitrator (if a tribunal is not in place and such a procedure exists), or from a national court.

When weighing these options it is important to understand the rules that govern the availability of interim measures in international arbitration. Specifically: (1) what kinds of interim relief are available, (2) what are the requirements for obtaining such relief, and (3) how will the party against whom the measure is granted be protected from an improper order (and conversely what liability may be incurred by seeking interim relief). The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), as revised in 2010, provide answers to these questions in cases where these rules have been adopted.[3] However, the UNCITRAL Arbitration Rules may also serve as a resource for practitioners and arbitrators when the international arbitration rules that apply in a case do not address these questions.

---

[1] Louis B. Kimmelman is a Partner in the New York office of Sidley Austin LLP and is co-chair of the firm's global International Arbitration practice.

[2] Sonia Marquez is an Associate in the New York office of Sidley Austin LLP and practices in the firm's Complex Commercial Litigation group.

[3] For instance, the Hong Kong International Arbitration Centre recently adopted the UNCITRAL Arbitration Rules of 2010. *See* HKIAC Administered Arbitration Rules, art. 23 (2013).

A. Survey of Major International Arbitration Rules

In national courts, the requirements a party must establish to obtain interim measures are generally defined by rules and/or case law.[4] While the arbitration rules of the major international arbitration organizations expressly empower arbitral tribunals to grant interim measures, most do not specify what measures are available and what requirements must be established to obtain such measures. This lack of specificity in most international arbitration rules as to the requirements for interim measures leaves a party without certainty as to what elements it must establish and a tribunal without guidance as to the standard that should inform its determination.

1. ICC, LCIA, and AAA Rules on Interim Measures

The International Chamber of Commerce ("ICC") Rules of Arbitration, in force since January 1, 2012, address Conservatory and Interim Measures in Article 28 as follows:

> Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.[5]

While ICC arbitral tribunals have the power to grant interim and conservatory measures, the ICC Rules do not define what kinds of interim measures are available and what the requirements are for obtaining relief. In addition, there is only a brief description of protections available for the party against whom the measures may be granted.

The London Court of International Arbitration ("LCIA") Arbitration Rules, effective October 1, 2014, contain Article 25 on Interim and Conservatory Measures. That provision provides greater specificity as to the interim measures available and the protections possible for the party against whom the measure is granted. However, the LCIA Rules do not

---

[4] *See, e.g.,* Fed. R. Civ. P. 65 (Federal Rule of Civil Procedure governing injunctions and restraining orders that applies in federal courts in the United States); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (setting forth standard for preliminary injunctions as: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief").

[5] ICC Rules of Arbitration, art. 28 (2012).

explicitly describe the requirements that must be satisfied to obtain relief. Article 25 states:

> 25.1 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 and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:
>
> (i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;
>
> (ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and
>
> (iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.
>
> Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.[6]

The International Arbitration Rules of the American Arbitration Association ("AAA"), effective June 1, 2014, contain Article 24 on Interim Measures. That provision also provides a brief and general description of the relief available and the protective measures allowed, but is silent as to the requirements a party must establish:

> 1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
>
> 2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.

---

[6] LCIA Arbitration Rules, art. 25.1 (2014).

3. 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.

4. The arbitral tribunal may in its discretion allocate costs associated with applications for interim relief in any interim order or award or in the final award.

5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 6.[7]

2. UNCITRAL Arbitration Rules, Article 26

In contrast, Article 26 of the UNCITRAL Arbitration Rules sets forth the types of interim measures available, the requirements that must be established when seeking an interim measure, and the protections available for the party against whom the measure is sought.

First, Article 26 contains a list of categories of interim measures available, which is neither exhaustive nor restrictive:

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

   a) Maintain or restore the status quo pending determination of the dispute;

   b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

   c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

   d) Preserve evidence that may be relevant and material to the resolution of the dispute.[8]

Compared to the other major international arbitration rules, Article 26 provides greater specificity as to the types of interim measures by

---

[7] AAA International Arbitration Rules, art. 24 (2014). The AAA updated its International Arbitration Rules effective June 1, 2014 and in doing so added paragraphs 3-5 to its rule on interim measures.

[8] UNCITRAL Arbitration Rules, art. 26, ¶¶ 1-2 (2010).

defining categories of interim measures based on the purposes that they serve.

Second, Article 26 sets forth the requirements for obtaining an interim measure:

> 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
>
> a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
>
> 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.[9]

Article 26 adopts a test that requires establishing: (i) harm not adequately reparable by an award of damages, (ii) that the hardship of the party seeking the interim measure outweighs that of the party against whom it will be granted, and (iii) a reasonable likelihood of success on the merits. None of the other international arbitration rules provide such a test.

Third, Article 26 sets forth the tribunal's powers with respect to interim measures (¶¶ 5, 7) and, significantly, provides protection to the party against whom the interim measure is granted in the form of security (¶ 6), as well as liability (¶ 8):

> 4. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
>
> 5. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

---

[9] *Id.* ¶¶ 3-4.

> 6. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
>
> 7. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.[10]

Thus, Article 26 of the UNCITRAL Arbitration Rules provides useful guidance to practitioners on how to structure and present their requests for interim measures, as well as to arbitrators who must resolve such requests. In fact, one arbitral institution—the Hong Kong International Arbitration Centre ("HKIAC")—revised its rule on interim measures and emergency relief in 2013 by largely adopting the UNCITRAL language on interim measures.[11] However, Article 26 of the UNCITRAL Arbitration Rules may be useful even when these rules do not apply in a particular case.

II. UNCITRAL

The United Nations General Assembly created UNCITRAL in 1966[12] to further its goal that the "harmonization and unification of the law of international trade should be substantially coordinated, systematized and accelerated."[13] UNCITRAL's mandate includes: "Preparing or promoting the adoption of new international conventions, model laws and uniform laws."[14] UNCITRAL's international arbitration initiatives have included, *inter alia*, the 1976 Arbitration Rules—revised in 2010—and the 1985 Model Law on International Commercial Arbitration—revised in 2006.[15]

> [A]s UNCITRAL works on any project, it necessarily has a constant concern for the impact changes in one document may

---

[10] *Id.* ¶¶ 5-8 (2010).

[11] HKIAC Administered Arbitration Rules, art. 23 (2013).

[12] David D. Caron & Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 2 (2d ed. 2012).

[13] G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., 1497th plen. mtg., preamble (Dec. 17, 1966) (recognizing the importance of international trade co-operation among States and that divergencies arising from the laws of different States pose obstacles to the development of world trade).

[14] *Id.*; *see also* David D. Caron & Lee M. Caplan, *supra* note 12, at 2.

[15] David D. Caron & Lee M. Caplan, *supra* note 12, at 3. Other UNCITRAL international arbitration initiatives include: the 1958 New York Convention, which predated UNCITRAL, but was concluded under the auspices of the United Nations and falls under UNCITRAL's purview; the 1980 Conciliation Rules; the 1996 Note on Organizing Arbitral Proceedings; and the 2002 Model Law on International Commercial Conciliation. *Id.*

> have for all of the other UNCITRAL instruments. A private institution that promulgates only procedural rules does not, when revising those rules, have the same level of concern for the interpretive effect their revision may have on national statutes or treaties that use the same terms.[16]

In 2006, after revising the UNCITRAL Model Law (the "Model Law"), the Commission gave priority to the revision of the UNCITRAL Arbitration Rules (the "Rules").[17] The Commission noted that the Rules had not been amended since their adoption in 1976 and this review should seek to modernize the Rules and promote greater efficiency in arbitral proceedings.[18] The Commission sought to base the revision of the Rules on the most recently adopted international standards on interim measures, including the 2006 revision of the UNCITRAL Model Law.

A. 2006 Revision of the UNCITRAL Model Law

At the thirty-second session (May 17-June 4, 1999), the Commission entrusted the Working Group on Arbitration (later renamed Working Group II (the "Working Group")) to evaluate and consider the improvement of arbitration laws, rules, and practices.[19] The Commission decided that a priority item would include interim measures of protection.[20] In beginning its work, the Working Group noted the increasing importance of interim measures:

> Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases. This trend and the lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration. To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party

---

[16] *Id*.

[17] U.N. Doc. A/61/17, ¶ 184 (2006).

[18] UNCITRAL Working Group on Arbitration and Conciliation, Rep. on its 47th Sess., Sept. 10-14, 2007, ¶ 7, U.N. Doc. A/CN.9/641 (Sept. 25, 2007).

[19] UNCITRAL, Rep. on its 32d Sess., May 17-June 4, 1999, ¶ 337, U.N. Doc. A/54/17 (1999); UNCITRAL Working Group on Arbitration, Rep. on its 40th Sess., Feb. 23-27 2004, ¶ 1, U.N. Doc. A/CN.9/547 (Apr. 16, 2004).

[20] U.N. Doc. A/54/17, ¶¶ 371-73 (1999); U.N. Secretary-General, *Settlement of Commercial Disputes: Rep. of the Secretary General*, UNCITRAL Working Group on Arbitration, 32d Sess., March 20-31, 2000, ¶¶ 6(l), 9, U.N. Doc. A/CN.9/WGII/WP.108 (Jan. 14, 2000); U.N. Doc. A/CN.9/547, ¶ 1 (Apr. 16, 2004).

> may avoid enforcement of the award by deliberately making assets inaccessible to the claimant.[21]

The 1985 Model Law contained a sparse and general provision on interim measures:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.[22]

The Working Group's deliberations on interim measures of protection began at its thirty-second session (March 21-30, 2000), where the Working Group expressed support for a legal regime governing enforcement of interim measures of protection ordered by the arbitral tribunal.[23] The Working Group was composed of all State members and sessions were attended by members, other observer States, intergovernmental organizations, and non-governmental organizations, such as the AAA and the International Council for Commercial Arbitration ("ICCA").

The ICC—whose rules expressly allow parties to seek interim measures—participated as an observer in the Working Group discussions on revisions to the Model Law and noted that in light of its experience:

> [W]e can identify no worldwide consensus with respect to the standards and practices concerning the granting of interim measures by arbitral tribunals. . . . [W]e believe that the articulation of standards for the issuance of interim measures [ ] will help parties in formulating their applications and help arbitral tribunals in evaluating the applications they receive.[24]

The ICC also expressed concern with expanding the existing power of arbitral tribunals to grant interim measures in such a way that the Model Law would become materially different from the arbitration laws in major centers of international arbitration and conflict with well-established

---

[21] U.N. Doc. A/CN.9/WG.II/WP.108, ¶ 104 (Jan. 14, 2000).

[22] UNCITRAL Model Law on International Commercial Arbitration, art. 17: Power of arbitral tribunal to order interim measures (1985). In addition, recognizing that parties could choose between requesting an interim measure from either the arbitral tribunal (should one be constituted) or from a court, the 1985 Model Law provided: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measures." *Id.* at art. 9: Arbitration agreement and interim measure by court. *See also* U.N. Doc. A/CN.9/WG.II/WP.108, ¶ 72 (Jan. 14, 2000).

[23] U.N. Doc. A/CN.9/547, ¶ 1 (Apr. 16, 2004).

[24] Note by the Secretariat, *Interim Measures of Protection: Proposal by the ICC*, UNCITRAL, 40th Sess., Feb. 23-27, 2004, at 2-3, U.N. Doc. A/CN.9/WG.II/WP.129 (Feb. 3, 2004).

arbitration rules. The ICC noted, "[t]his could undermine the Model Law's serving as an international standard reflecting a worldwide consensus."[25]

Moreover, during the drafting process, the Working Group sought to avoid the implication that court recognition and enforcement of an interim measure ordered by an arbitral tribunal would be available only where the interim measures had been issued by an arbitral tribunal operating under the Model Law.[26]

In the UNCITRAL thirty-ninth session (June 19-July 7, 2006), the Commission finalized and adopted, *inter alia*, the legislative provision on interim measures.[27] In doing so, the Commission recognized not only that interim measures were increasingly found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures.[28] The Commission noted the need for a harmonized and widely acceptable model legislative regime governing interim measures granted by arbitral tribunals, as well as interim measures ordered by courts in support of arbitration.[29]

B. 2010 Revision of the UNCITRAL Arbitration Rules

In prioritizing the revision of the Arbitration Rules, the Commission recognized the success of the original 1976 version of the UNCITRAL Arbitration Rules, which had been adopted by many arbitration centers and used in many different proceedings. [30] In recognition of the success and status of the Rules, the Commission gave the Working Group the mandate that "any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex." [31] Moreover, "[t]he delegates who worked on the 2010 revision of the UNCITRAL Arbitration Rules [were] informed by, educated by, and indeed limited by, the work done earlier on the Model Law."[32]

The Working Group agreed that the Rules had been one of UNCITRAL's most successful instruments and cautioned against any unnecessary amendments or statements being included in the *travaux préparatoires* that would call into question the legitimacy of prior

---

[25] *Id.*
[26] U.N. Doc. A/CN.9/547, ¶ 127 (Apr. 16, 2004).
[27] UNCITRAL, Rep. on its 39th Sess., June 19-July 7, 2006, § IV, U.N. Doc. A/61/17 (2006).
[28] *Id.* ¶ 88.
[29] *Id.* ¶ 88.
[30] *Id.* ¶ 184.
[31] UNCITRAL Working Group on Arbitration and Conciliation, Rep. on its 45th Sess., Sept. 11-15, 2006, ¶¶ 3, 15, U.N. Doc. A/CN.9/614 (Oct. 5, 2006).
[32] David D. Caron & Lee M. Caplan, *supra* note 12, at 3.

application of the Rules in specific cases.[33] The Working Group sought to update the Rules to meet the changes that had taken place over the last thirty years.[34] Moreover, the *ad hoc* Rules had been originally intended and easily adopted for use in a wide variety of circumstances covering a broad range of disputes, and the Working Group wanted to retain this quality so the Rules could apply in the future to other situations or types of disputes not yet identified.[35] The Working Group, therefore, agreed it would take a "generic approach" to drafting the Rules that identified common denominators applicable to all types of arbitration regardless of the subject matter of the dispute. Instead of dealing with specific situations, the Working Group aimed to ensure the Rules maintained their existing flexibility and simplicity.[36]

The starting point for the draft revision of the Rules with respect to interim measures was Article 17 (Chapter IV A) of the UNCITRAL Model Law, revised in 2006.[37] This was in keeping with the goal of updating Article 26 based on the most recently adopted international standards on interim measures.[38] In amending Article 26 of the Rules, the Working Group aimed to "clarify the circumstances, conditions and procedure for the granting of interim measures, consistent with Chapter IV A of the Model Law" and "give effect to the party autonomy provided by Chapter IV A."[39] Thus, the Working Group sought to ensure the revised article on interim measures in the Rules promoted the strength of and remained consistent with the Model Law.[40]

Indeed, the Working Group rejected a proposal for a concise article on interim measures based on the original text of the Rules—instead of the more detailed article based on the Model Law—because "it was considered desirable to avoid unnecessary departure from the provisions

---

[33] U.N. Doc. A/CN.9/614, ¶ 16 (Oct. 5, 2006).
[34] *Id.* ¶ 16.
[35] *Id.* ¶¶ 17-18.
[36] *Id.* ¶¶ 18-19; *see, e.g.,* UNCITRAL, Rep. on its 43d Sess., June 21-July 9, 2010, ¶ 118, U.N. Doc. A/65/17 (2010).
[37] U.N. Doc. A/CN.9/641, ¶¶ 46, 51 (Sept. 25, 2007); *see also* Note by the Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, UNCITRAL Working Group II, 48th Sess., Feb. 4-8, 2008, ¶ 27, U.N. Doc. A/CN.9/WG.II/WP.149 (Nov. 30, 2007).
[38] U.N. Doc. A/CN.9/641, ¶¶ 46-47, 51 (Sept. 25, 2007); *see also id.* ¶¶ 50-51 (considering whether to base the revision of the provision on interim measures on the original text of Art. 26 of the UNCITRAL Rules instead of on the revised Model Law, and ultimately deciding it desirable to avoid unnecessary departure from the Model Law).
[39] Note by the Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, UNCITRAL Working Group II, 46th Sess., Feb. 5-7, 2007, ¶ 25, U.N. Doc. A/CN.9/WG.II/WP.145/Add.1 (Dec. 6, 2006).
[40] U.N. Doc. A/CN.9/641, ¶ 48 (Sept. 25, 2007).

on interim measures as contained" in the Model Law.[41] The Working Group also rejected an alternative proposal by the Government of Switzerland (the "Swiss proposal") that similarly advanced a simpler and shorter article on interim measures.[42] The Swiss proposal omitted, *inter alia*, paragraph (2) (on types of interim measures) and paragraph (3) (on the requirements for interim measures) and left the definition and requirements for interim measures to applicable domestic law.[43] It also softened the language of the liability provision.[44] The Swiss proposal received some support because: (i) it represented a "simplified approach" whereas draft Article 26 was longer; (ii) its drafting style corresponded to the style of the Rules; and (iii) the Model Law's recent adoption meant that issues with its provisions were not yet known.[45] Proponents argued that Article 26 of the Rules should not be "overloaded" with provisions "designed initially for use in a legislative context and aimed at establishing in detail the power for an arbitral tribunal to grant interim measures, so that such measures could be recognized and enforced by State courts," because it served a different purpose than Chapter IV A of the Model Law.[46] The Working Group ultimately rejected the Swiss proposal, in large part because it "constituted an unnecessary departure from the provisions on interim measures" of the Model Law and "a better approach would be to duplicate the provisions of the [Model Law] so as to encourage development of practice in that area, in accordance with the standards developed by UNCITRAL."[47]

Harmonizing the provisions of the Rules with the corresponding provisions of the Model Law, however, would not be automatic and would be considered only where appropriate.[48] Specifically, the nature of the Rules and the Model Law were different: the Rules were directed to parties, whereas the Model Law was directed to legislatures. Thus, certain provisions on interim measures would not be included in the Rules, such as the provisions on the enforcement of interim measures.[49] Furthermore, provisions of the Model Law on interim measures that were new and had

---

41 *Id.* ¶¶ 50-51.

42 Note by the Secretariat, *Revision of the UNCITRAL Arbitration Rules: Proposal by the Government of Switzerland*, UNCITRAL Working Group II, 49th Sess., Sept. 15-19, 2008, U.N. Doc. A/CN.9/WG.II/WP.152 (Sept. 9, 2008).

43 UNCITRAL Working Group II, Rep. on its 50th Sess., Feb. 9-13, 2009, ¶¶ 86-87, U.N. Doc. A/CN.9/669 (Mar. 9, 2009).

44 U.N. Doc. A/CN.9/WG.II/WP.152 (Sept. 9, 2008) (Proposed art. 26, ¶ 5 ("The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order."); *see also* U.N. Doc. A/CN.9/669, ¶ 117 (Mar. 9, 2009).

45 U.N. Doc. A/CN.9/669, ¶¶ 86-87 (Mar. 9, 2009).

46 *Id.* ¶ 87.

47 *Id.* ¶¶ 88-89.

48 U.N. Doc. A/CN.9/614, ¶ 21 (Oct. 5, 2006).

49 *Id.* ¶ 105.

given rise to diverging views within the Working Group would not be included in the Rules so as not to endanger the Rules' wide acceptability.[50] Lastly, the Working Group acknowledged the importance of looking to other national laws and international organizations when considering the proposed revisions.[51] For example, several States and international organizations commented on the draft article on interim measures.[52] The Commission finalized and adopted the revised version of Article 26 on interim measures of protection in its forty-third session (June 21-July 9, 2010).[53]

C. Sources of Key Provisions in Article 26 of the UNCITRAL Arbitration Rules

As explained above, the 2010 revision of the Rules was based on the 2006 revision of the Model Law. The key provisions on interim measures in the revised Rules regarding (1) the types of interim measures, (2) the requirements to obtain interim measures, and (3) the protections for the opposing party, are similar or nearly identical to those in the revised Model Law. Thus, to identify the source of these key provisions of Article 26, one must turn to the *travaux préparatoires* of the Model Law.

---

[50] *Id.* For example, the inclusion of preliminary orders (*i.e., ex parte* measures) in the Model Law had been controversial and there remained division among members on the acceptability of such orders despite the safeguards included in the Model Law. Opponents of including preliminary orders in the Rules did not necessarily reject the corresponding provisions in the Model Law; instead, they acknowledged the difference in nature and function between the two instruments. U.N. Doc. A/CN.9/641, ¶ 54 (Sept. 26, 2007). Including such provisions could undermine the Rules' acceptability, particularly by States, and went against the mandate of the Working Group that the structure, spirit, and drafting style of the Rules should not be altered. *Id.* ¶ 55. The Commission ultimately excluded preliminary orders from the final text of Article 26 of the Rules. U.N. Doc. A/65/17, ¶¶ 121-25 (2010).

[51] U.N. Doc. A/CN.9/641, ¶ 49 (Sept. 25, 2007).

[52] *Compilation of Comments by Governments and International Organizations*, UNCITRAL, 43d Sess., June 21-July 9, 2010, at 14, U.N. Doc. A/CN.9/704.Add.1 (May 10, 2010) (Council of Bars and Law Societies of Europe ("CCBE")); *id.*, U.N. Doc. A/CN.9/704.Add.3, at 6-7 (May 12, 2010) (Forum for International Conciliation and Arbitration ("FICACIC")); *id.*, U.N. Doc. A/CN.9/704.Add.4, at 8 (May 17, 2010) (Milan Club of Arbitrators); *id.,* U.N. Doc. A/CN.9/704.Add.5, at 4, 7 (June 1, 2010) (Senegal and Comité Français de l'Arbitrage ("CFA")).

[53] U.N. Doc. A/65/17, § III, ¶¶ 115-26 (2010).

1. Types of Interim Measures

Arbitration Rule, Article 26 ¶ 2	**Model Law, Chap. IV A, § 1, Art. 17 ¶ 2**
An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, ***for example and without limitation***,[54] to: a) Maintain or restore the status quo pending determination of the dispute; b) Take action that would prevent, or refrain from taking action that is likely to cause, ***(i)*** current or imminent harm or ***(ii)*** prejudice to the arbitral process itself; c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or d) Preserve evidence that may be relevant and material to the resolution of the dispute.	An interim measure is any temporary measure, ***whether in the form of an award or in another form***, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: a) Maintain or restore the status quo pending determination of the dispute; b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or d) Preserve evidence that may be relevant and material to the resolution of the dispute.

The Working Group noted the following concerns when discussing the provision on types of interim measures: (a) a desire not to interfere with the autonomy of the arbitral tribunal, and also (b) a desire to leave a broad scope for the autonomy of the parties.[55] The proposed provision on types of interim measures submitted by the United States became the final text in the Model Law, with minor revisions.[56] The United States' proposal

---

[54] Underscoring indicates the differences in language between the text of the Rules and the Model Law.

[55] UNCITRAL Working Group on Arbitration, Rep. on its 34th Sess., May 21-June 1, 2001, ¶ 68, U.N. Doc. A/CN.9/487 (June 15, 2001).

[56] Note by the Secretariat, *Arbitration: Interim Measures of Protection, Proposal by the United States of America*, UNCITRAL Working Group II, 37th Sess., Oct. 7-11, 2002, at 2, U.N. Doc. A/CN.9/WG.II/WP.121 (Sept. 24, 2002); Note by the Secretariat, *Settlement of Commercial Dispute: Interim Measures of Protection*, UNCITRAL Working Group II, 38th Sess., May 12-16, 2003, ¶¶ 6-8, U.N. Doc. A/CN.9/WG.II/WP.123 (Apr. 3, 2003) (One of the minor revisions made to the United States' proposal was to eliminate the use of the

constituted the product of the Working Group's discussion at its thirty-sixth session at the ICCA Congress in May 2002.[57]

The Working Group also looked to the Principles on Provisional and Protective Measures in International Litigation, adopted in 1996 by the Committee on International Civil and Commercial Litigation of the International Law Association ("ILA"), noting that although these Principles were limited to provisional and protective measures issued by courts, the ideas serving as the basis for the Principles were relevant to interim measures ordered by arbitral tribunals.[58]

The Working Group also sought guidance from the approach taken in other international instruments. It aimed to avoid the risk that an illustrative list of interim measures could be read as limiting the autonomy of an arbitral tribunal to determine what interim measure is appropriate. Thus, the Working Group followed the approach taken in the Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968; Lugano, 1988) to list general categories of interim measures.[59] Moreover, while the Working Group reiterated during the course of the discussions that the list of measures should not read as exhaustive, it ultimately decided not to include language explicitly stating the list was non-exhaustive or to add a subparagraph providing that an arbitral tribunal in exceptional circumstances could order an interim measure not otherwise listed.[60] The Working Group reasoned thusly:

> [T]he current draft [which ultimately became the final provision] provided generic broadly cast categories describing the functions or purposes of various interim measures without focusing on specific measures. The current draft thus provided a flexible approach covering all possible circumstances in which an interim measure might be sought. . . . [A]n exhaustive generic list was preferable because it provided clarity in respect of the powers of the arbitral tribunal and might reassure courts at the point of

---

term "eventual award" to avoid the difficulty of defining the term and, where necessary, replace it with "subsequent award," which was considered more neutral language.).

[57] U.N. Doc. A/CN.9/WG.II/WP.121, at 2 (Sept. 24, 2002); U.N. Doc. A/CN.9/WG.II/WP.123, ¶¶ 6-8 (Apr. 3, 2003).

[58] U.N. Doc. A/CN.9/WG.II/WP.108, ¶¶ 106, 108 (Jan. 14, 2000) (citing International Law Association, *Report of the 67th Conference*, Aug. 12-17, 1996, at 202-04).

[59] U.N. Doc. A/CN.9/WG.II/WP.123, ¶ 5 (Apr. 3, 2003); U.N. Doc. A/CN.9/487, ¶ 67 (June 15, 2001).

[60] UNCITRAL Working Group on Arbitration, Rep. on its 39th Sess., Nov. 10-14, 2003, ¶ 21, U.N. Doc. A/CN.9/545 (Dec. 8, 2003) ("The Working Group recalled that, at [a previous] session, it had agreed that it should be made abundantly clear that the list of provisional measures provided in the various subparagraphs [of Paragraph (2)] was intended to be non-exhaustive." (citing UNCITRAL Working Group on Arbitration, Rep. on its 36th Sess., March 4-8, 2002, ¶ 71, U.N. Doc. A/CN.9/508 (Apr. 12, 2002)).

> recognition or enforcement of an interim measure. After discussion, the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), it was no longer necessary to make that list non-exhaustive.[61]

Notably, one of the revisions made for Article 26 of the Rules was to explicitly make the same list in paragraph (2) non-exhaustive to allow for other types of interim measures not identified in the list.[62] Another revision made for paragraph (2) of Article 26 of the Rules was to remove the phrase "whether in the form of an award or another form." The Working Group reasoned that the specific reference to interim measures in the form of an award could be omitted, because the Model Law permitted enforcement of interim measures regardless of their form.[63] The final revision made for Article 26 was to clarify in paragraph (2)(b) the drafters' intention that the provision empower a tribunal to grant an interim measure both where doing so would prevent "current or imminent harm," and where doing so would prevent "prejudice to the arbitral process itself."[64]

In addition, in revising Article 26 of the Rules, the Working Group considered a proposal to amend paragraph (2) by expressly referring to security for costs in subparagraph (2)(c). The proposal ultimately failed due to concerns that such a change in the Rules and not in the Model Law would connote that the corresponding provision in the Model Law was insufficient to provide security for costs.[65]

Another failed proposal for revising Article 26 of the Rules, the Swiss proposal previously discussed above, would have deleted paragraph (2) on types of interim measures entirely.[66] Proponents argued that defining interim measures in the Rules was unnecessary, because a definition would normally be found in applicable domestic law.[67] Moreover, defining interim measures could limit the power of arbitral tribunals in jurisdictions that adopted a more liberal approach to the granting of

---

[61] U.N. Doc. A/CN.9/545, ¶ 21 (Dec. 8, 2003).

[62] Note by the Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, UNCITRAL Working Group II, 51st Sess., Sept. 14-18, 2009, ¶ 25, U.N. Doc. A/CN.9/WG.II/WP.154/Add.1 (July 23, 2009); U.N. Doc. A/CN.9/669, ¶¶ 92-94 (Mar. 9, 2009).

[63] U.N. Doc. A/CN.9/641, ¶ 51 (Sept. 25, 2007) (the Working Group also noted that allowing an interim measure in the form of an award under the Rules could create confusion).

[64] U.N. Doc. A/CN.9/669, ¶ 95 (Mar. 9, 2009); U.N. Doc. A/CN.9/WG.II/WP.154/Add.1, ¶ 26 (July 23, 2009).

[65] U.N. Doc. A/CN.9/641, ¶ 48 (Sept. 25, 2007).

[66] U.N. Doc. A/CN.9/669, ¶¶ 86-87 (Mar. 9, 2009); *see also* U.N. Doc. A/CN.9/WG.II/WP.152 (Sept. 9, 2008) (containing full text of the Swiss proposal).

[67] U.N. Doc. A/CN.9/669, ¶ 86 (Mar. 9, 2009).

interim measures than the Model Law.[68] The Swiss proposal was rejected as the Working Group found that defining interim measures was necessary: "[T]he details included in article 26 did not serve only an educational purpose, but were intended to provide necessary guidance and legal certainty to the arbitrators and the parties."[69] Such guidance was particularly important, because many legal systems were unfamiliar with the use of interim measures in international arbitrations.[70]

2. *Requirements*

Arbitration Rules, Article 26 ¶ 3	**Model Law, Chap. IV A, § 1, Art. 17A ¶ 1**
The party requesting an interim measure under ***paragraphs 2 (a) to (c)*** shall satisfy the arbitral tribunal that: a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.	The party requesting an interim measure under ***article 17(2)(a), (b) and (c)*** shall satisfy the arbitral tribunal that: a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

[68] *Id.* ¶ 87. This concern was ultimately resolved by making the list defining interim measures non-exhaustive, as noted above.
[69] *Id.* ¶ 88.
[70] *Id.*

The requirements provision in the Model Law was inspired, in part, by the draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters, interim text 2001 of the Hague Conference on Private International Law and the Principles on Provisional and Protective Measures in International Litigation, adopted in 1996 by the Committee on International Civil and Commercial Litigation of the ILA.[71]

The Working Group replaced the words "irreparable harm" with "harm not adequately reparable by an award of damages" as there was concern that "irreparable harm" might present too high a threshold.[72] This change would also better serve the purpose of subparagraph (a), which was to establish a "balance of convenience" between the degrees of harm suffered by the applicant if the measure was not granted with the evaluation of harm suffered by the opposing party if the measure was granted.[73] The Working Group was further concerned that subparagraph (a) should be "narrowly interpreted" as excluding from the field of interim measures any loss that might be cured by an award of damages.[74] As to subparagraph (b), the Working Group noted the danger that an arbitral tribunal might prejudge, or be perceived to have prejudged, the merits of the dispute in granting an interim measure, but ultimately decided the final clause of subparagraph (b) was sufficient to avoid this risk.[75]

In revising the requirements provision of Article 26 of the Rules, proponents of the Swiss proposal to omit paragraph (3) argued that the requirements for granting interim measures should be left to the applicable domestic law.[76] They maintained that the conditions under which an arbitral tribunal could grant interim measures were sufficiently covered by the clause stating: "The arbitral tribunal may, at the request of a party, grant interim measures that it considers necessary for a fair and

---

[71] U.N. Doc. A/CN.9/WG.II/WP.123, ¶ 5 (Apr. 3, 2003); U.N. Doc. A/CN.9/WG.II/WP.108, ¶¶ 106, 108 (Jan. 14, 2000); *see also* Note by the Secretariat, *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection*, UNCITRAL Working Group II, 36th Sess., March 4-8, 2002, ¶ 71, U.N. Doc. A/CN.9/WG.II/WP.119 (Jan. 30, 2002) (reproducing the text of Jurisdiction and Foreign Judgements in Civil and Commercial Matters, interim text 2001 of the Hague Conference on Private International Law).

[72] Note by Secretariat, *Settlement of Commercial Disputes: Interim Measures of Protection*, UNCITRAL Working Group II, 43d Sess., Oct. 3-7, 2005, ¶ 16, U.N. Doc. A/CN.9/WG.II/WP.138 (Aug. 8, 2005); *see also* U.N. Doc. A/CN.9/545, ¶ 29 (Dec. 8, 2003).

[73] Working Group on Arbitration, Rep. on its 36th Sess., March 4-8, 2002, ¶ 56, U.N. Doc. A/CN.9/508 (Apr. 12, 2002); *see also* Working Group on Arbitration, Rep. on its 43d Sess., Oct. 3-7, 2005, ¶ 37, U.N. Doc. A/CN.9/589, (Oct. 12, 2005) (the Working Group agreed that in explanatory material accompanying paragraph (3) it would include that the paragraph should be "interpreted in a flexible manner" requiring this balancing test).

[74] U.N. Doc. A/CN.9/589, ¶ 36 (Oct. 12, 2005).

[75] *Id.* ¶¶ 39, 42.

[76] U.N. Doc. A/CN.9/669, ¶ 87 (Mar. 9, 2009); *see also* U.N. Doc. A/CN.9/WG.II/WP.152 (Sept. 9, 2008).

efficient resolution of the dispute."[77] The Working Group rejected the Swiss proposal to delete paragraph (3), because omitting a provision on requirements for granting interim measures could lead to problems in the interpretation and application of Article 26.[78]

Another proposal to delete the requirements provision was based on a concern that it would conflict with applicable domestic law, particularly in jurisdictions that already had specific criteria for granting measures that preserved assets out of which a subsequent award might be satisfied.[79] Opponents of this proposal maintained that the requirements provision was "helpful" both to arbitral tribunals and practitioners.[80] As to arbitral tribunals, the provision "provided guidance to the arbitral tribunals on the conditions under which they could order interim measures."[81] As to practitioners, the subparagraphs were "useful for resolving issues which arose in practice."[82] Furthermore, it was important to specifically set forth the balancing of harm provision under paragraph (3)(a), because it was intended to be less rigid than the irreparable harm criteria.[83] Ultimately, the requirements provision and all subparagraphs remained in the revised Article 26 of the Rules.

3. Protection

(a) Security

Arbitration Rules Article 26 ¶ 6	**Model Law, Chap. IV A, § 1, Art. 17E ¶ 1**
The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.	The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

The original Article 17 of the 1985 UNCITRAL Model Law contained a clause on security: "The arbitral tribunal may require any party to provide appropriate security in connection with such measure."[84] In revising the Model Law, the Working Group stressed "that the

---

[77] U.N. Doc. A/CN.9/669, ¶ 86-87 (Mar. 9, 2009); U.N. Doc. A/CN.9/WG.II/WP.152 (Sept. 9, 2008) (Proposed art. 26, ¶ 1).
[78] U.N. Doc. A/CN.9/669, ¶ 88 (Mar. 9, 2009).
[79] *Id.* ¶¶ 96-97.
[80] *Id.* ¶ 97.
[81] *Id.* ¶¶ 96-97.
[82] *Id.*
[83] *Id.* ¶ 97.
[84] UNCITRAL International Commercial Arbitration Model Law, art. 17 (1985).

requirement for appropriate security to be given by the party seeking interim measures was crucial for the acceptability of the provision."[85] The Working Group wanted to ensure that (i) the security provision gave a tribunal power to order security *only* in connection with an interim order, while (ii) allowing the tribunal to order security at any time during the proceeding.[86] In addition, the prevailing view was that provision of security in connection with interim measures should not be made mandatory and instead should be at the discretion of the arbitral tribunal.[87]

In revising Article 26 of the Rules, the Working Group mirrored the text of the security provision in the Model Law with little discussion and without making any changes.

(b) Liability

Arbitration Rules Article 26 ¶ 8	**Model Law, Chap. IV A, § 1, Art. 17G**
The party requesting an interim measure ***may be*** liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances ***then prevailing***, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.	The party requesting an interim measure ***or applying for a preliminary order shall be*** liable for any costs and damages caused by the measure ***or the order*** to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

The purpose of including the liability provision in the revised Model Law was to offer adequate protection to the party against whom such interim measures might be obtained and to reduce the risk of abusing interim measures. To assist in the discussion of the liability provision, the Secretariat sought information from States on the liability regimes related to interim measures that applied under their national laws, as well as texts drafted by other international organizations on the issue.[88]

---

[85] U.N. Doc. A/CN.9/487, ¶ 68 (June 15, 2001).
[86] U.N. Doc. A/CN.9/547, ¶¶ 92-94 (Apr. 16, 2004).
[87] U.N. Doc. A/CN.9/508, ¶ 60 (Apr. 12, 2002).
[88] U.N. Doc. A/CN.9/545, ¶ 61 (Dec. 8, 2003); Note by the Secretariat, *Settlement of Commercial Disputes: Interim Measures of Protection-Liability Regime*, UNCITRAL Working Group II, 40th Sess., Feb. 23-27, 2004, U.N. Doc. A/CN.9/WG.II/WP.127 (Jan. 27, 2004). National laws reviewed were from Austria, Canada (Province of Quebec), Czech

While security is only paid when the party attaining relief loses the case, the liability provision arises when a measure should not have been granted regardless of the final disposition of the case.[89] Thus, in formulating the Model Law, the Working Group agreed that "the final decision on the merits would not be an essential element in determining whether the interim measure was justified or not."[90]

In basing the liability provision of the Rules on that of the Model Law, the Working Group noted that similar liability provisions existed in national laws and arbitration rules.[91] The Working Group also noted that the party requesting the measure took the risk of causing damage to the other party and the liability provision would ensure that the requesting party would repair the damage if the measure was later not deemed justified.[92] The liability provision would "serve[ ] a useful purpose of indicating to the parties the risks associated with a request for an interim measure."[93]

As it had when drafting the Model Law, the Working Group expressed concern that the liability provision in the Rules would allow a party that had met the conditions of Article 26 but had lost the arbitration to be liable for costs and damages.[94] However, the Working Group noted that the liability provision in the Rules mirrored the Model Law and that in drafting the Model Law it had resolved similar concerns: "[T]he provision of article 17 G [of the Model Law], by leaving all determination to the arbitral tribunal, without including any reference to the merits of the case, avoided any requirement that could make liability dependent on the final disposition of the claims on the merits."[95]

Republic, Finland, France, Germany, Singapore, Spain, Switzerland, and the United States. The work of international organizations was from the International Law Association Principles and the American Law Institute/UNIDROIT: Draft Principles and Rules of Transnational Civil Procedure.

[89] David D. Caron & Lee M. Caplan, *supra* note 12, at 528.

[90] U.N. Doc. A/CN.9/547, ¶ 106 (Apr. 16, 2004); U.N. Doc. A/CN.9/WG.II/WP.138, ¶ 27 (Aug. 8, 2005).

[91] Indeed, the Working Group again considered the Secretariat's note on national liability regimes prepared during the drafting of the Model Law. U.N. Doc. A/CN.9/669, ¶ 116 (Mar. 9, 2009); U.N. Doc. A/CN.9/WG.II/WP.154/Add.1, ¶ 33 (July 23, 2009); Note by the Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, UNCITRAL Working Group II, 52d Sess., Feb. 1-5, 2010, ¶ 28, U.N. Doc A/CN.9/WG.II/WP.157.Add.1 (Dec. 10, 2009).

[92] U.N. Doc. A/CN.9/641, ¶ 49 (Sept. 25, 2007).

[93] *Id.*; *see also* U.N. Doc. A/CN.9/669, ¶ 118 (Mar. 9, 2009) (the Working Group requested the Secretariat prepare a note "on how the different leges arbitri dealt with the matters of liability for damages that might result from the granting of interim measures.").

[94] U.N. Doc. A/CN.9/669, ¶ 116 (Mar. 9, 2009).

[95] U.N. Doc. A/CN.9/WG.II/WP.154/Add.1, ¶ 32 (July 23, 2009) (citing U.N. Docs. A/CN.9/545, ¶ 6 (Dec. 8, 2003), A/CN.9/547, ¶ 106 (Apr. 16, 2004)).

II. CONCLUSION

Institutional arbitration rules often provide limited answers to key considerations in obtaining interim measures in international arbitration: (1) What kinds of interim relief are available? (2) What are the requirements for obtaining such relief? and (3) How will the other party be protected from an order granting such measures? Article 26 of the 2010 UNCITRAL Arbitration Rules answers these questions directly. It provides a framework that practitioners and arbitrators may utilize in determining in what circumstances interim measures may be sought and whether they should be granted. This framework is instructive to practitioners and arbitrators alike, even when the UNCITRAL Arbitration Rules do not apply in a particular case. This is because Article 26 is based on UNCITRAL's efforts to update and modernize international arbitration laws and rules so that tribunals can better address the need for interim measures. It is based on input from participants in the UNCITRAL process from around the world and on the experience of arbitral institutions. Article 26 is a resource that can be—and should be—used to make the process for obtaining interim measures easier to understand and to apply in all cases, regardless of which international arbitration rules are chosen by the parties.