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INTERIMMEASURESININTERNATIONAL COMMERCIAL ARBITR ATION:

PAST, PRESENTANDFUTURE

by

SANDEEPADHIPATHI

(Under the Direction of Professor Gabriel M. Wilner)

ABSTRACT

Thisworkisacomparativestudyoftheavailabilityan dhandlingofinterim measuresininternationalcommercialarbitrationin differentlegalsystems. Itstudiesthe differenceinhandlingofinterimmeasuresandtheneedf oraharmonizedstructure. It alsocontainsareviewoftheproposeddraftamendmentt othe UNCITRAL Model Law and further suggests a different version for the amendment .

INDEXWORDS: InterimMeasures, InternationalCommerc ialArbitration,
ProvisionalMeasures, InterimRelief, UNCITRALModel Law

INTERIMMEASURESININTERNATIONALCOMMERCIALARBITR ATION: PAST,PRESENTANDFUTURE

by

SANDEEPADHIPATHI

B.A.,B.L.,UniversityofMadras,India,2000

 $A The sis Submitted to the Graduate Faculty of The Univer \\ sity of Georgia in Partial \\ Fulfillment of the Requirements for the Degree$

MASTEROFLAWS

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by

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CHAPTERI

INTRODUCTION

A. InternationalCommercialArbitrationandTrade

1. Arbitration as an alternative dispute resolution method $% \mathbf{r}_{1}$

Evolutionofarbitrationasamethodofdisputeresoluti oncanbecountedbacktothe

earlydaysofbusiness, whentraderslookedtoathir dpartytosolvedisputesbetweenthem ¹. The

processhasundergonealotofchangesfromthen, butt hebasicnatureofarbitrationremainsthe

same². Itdependsonacontractual agreement between parties to resolve their dispute before a

select group of non-government albody and accepting its decision as binding. ³ But the process

has undergonealotofchanges and as in case of evo lution has adapted to the changing times ⁴.

Enterprisesallovertheworldhavestartedconductin gbusinessonaninternationalscale.

Producersandsuppliersfromdifferentcontinentscontr actproduceandsellproductsintheglobal marketthroughbranchesandagents. Firmshavebegunto increasinglylookabroadformerger partners, distribution, franchiseetc. Allthesetrans actions are based on contracts between the parties and therefore there are bound to be questions on interpretation of clauses and other such issues to be settled among the parties. Arbitration has frequently be enthechoice of these

¹RobertB.vonMehren, FromVynior'sCaseToMitsubishi:TheFutureofArbitrationandPublic Law,12 BrooklynJ.Int'lL583(1986);BretFulkerson, AComparisonofCommercialArbitration:UnitedStates& LatinAmerica, 23Hous.J.Int'lL.537,539(2001);WilliamM.Howard, EvolutionofConstitutionally MandatedArbitration, 48SepARBJ27(1993);A LAN REDFERN &M ARTIN HUNTER,I NTERNATIONAL COMMERCIAL ARBITRATION2(1996)

² SeeR EDFERN supranote1

³G ARY B.B ORN, I NTERNATIONAL COMMERCIAL ARBITRATIONINTHE UNITED STATES COMMENTARY & MATERIALS 1(1994)

⁴J.Schaefer, NewSolutionsforInterimMeasuresofProtectioninInternationalCommer cialArbitration: English, GermanandHongKongLawCompared, vol2.2ElectronicJournalofComparativeLaw,(August 1998), availableat http://www.ejcl.org/ejcl/22/art22-2.html

enterprisesindealingwiththeircounterparts.Ithas be of of international traded is put es and hence its importan highly efficient alternative means of disputeres olutions on the trade of the sound in the sound in the sound is a sound in the sound in the

 $become the dominant methods of settlement \\ ce has increased \ ^5. Arbitration can provide a \\ on for banks and financial institutions and is \\$

2. Developments in the Infrastructure for International Arbitration

Thedebateaboutarbitrationasaviablealternativeto litigationisstillcontinuing.But, nowinthetimesavvyworldofentrepreneurs, arbitrat ionwithitstimesavingfeatureandthejust andfairresultshasmadeitlookappealingtothebusin essworld ⁷. Combined with this, the need skillinaspecificareaandthefreedomtoset foraneutraldecisionmakerwiththeknowledgeand thestagehasstrengthenedthepopularityforarbitrati on⁸. Asthebusiness community embraces arbitrationandotheralternatedisputeresolutionmeth ods.therehasbeenalotofconcentrationon theprocedural aspects of arbitration. It has set offt hedevelopmentofaninternationallegal systemforcommerce ⁹. Thougharbitration is a process outside the court struc ture, it needs strong functioning 10. Thenationstates have to come legislationsandcourtassistanceforitseffective forwardtoestablishanetworkandprovidemeanstot hewillingpartiestooptoutofthejudicial system and adopt their own disputer esolution for um¹¹.Specificallyintheinternationalarena,

-

⁵ThomasE.Carbonneau, *TheBalladofTransborderLitigation* ,56U.MiamiL.Rev.773,778(July2002) ⁶P REAMBLETO CONVENTIONONTHE SETTLEMENTOF INVESTMENT DISPUTES BETWEEN STATESAND NATIONALSOF OTHER STATES,ICSID(W.Bank) *availableat* http://www.worldbank.org/icsid/basicdocarchive/11.htm

⁷RichardW.Naimark&StephanieE.Keer , *WhatDoPartiesReallyWantFromInternationalCommercial Arbitration?*,57-JANDisp.Resol.J.78,80,81(2002–2003)

⁸2002AnnualReport4,ICSID(W.Bank) availableat

http://www.worldbank.org/icsid/pubs/1998ar/2002_ICSID_ar_en.pdf;Peter K.Yu, , CharlesH.BrowerII, WhatITellYouThreeTimesisTrue:U.S.CourtsandPre-AwardInt erimMeasureUnderTheNewYork Convention,35Va.J.Int'1.L971(1995);RichardAllanHorning , InterimMeasuresofProtection;Security forClaimsandCosts;AndCommentaryontheWIPOEmergencyReliefR ules(InToto)Article46 ,9Am. Rev.Int'lArb.155,156(1998)

⁹Carbonneau, *Supra*note5

¹⁰B ORN Supranote3at3

¹¹CatherineA.Rogers,ContextandInstitutionalStructure inAttorneyRegulation:Constructingan EnforcementRegimeforInternationalArbitration,39S tan.J.Int'lL.1(2003)

¹², laws supporting arbitration area must. wherejurisdictionalissuesplayanimportantrole Though, initially the states were reluctant to relinq uishcontrol, overthecourse of the last few decadesmoreandmorenationshaveenactedlegislat ionssupportingtheinstitutionof arbitration¹³. Various international treaties, conventions, natio nallegislations, and even forinternational arbitration ¹⁴. Apart from institutionshavebeenformedtoprovidetheframework that UNCITRAL drafted a model code for countries tofollow.Sofarmorethan40countrieshave enactedlegislationsbasedonthemodelcode ¹⁵.ApartfromtheModelLaw,UNCITRALhas comeupwiththeArbitrationRulestosupportpartieswhopr eferad-hocarbitration. Evenmany institutionsofferarbitrationservicesbasedontheU NCITRALArbitrationRules.

Themostimportantandarguablythestartoftheorgan izeddevelopmentprocesswasthe UnitedNationsConventiononRecognitionandEnforc ementofForeignArbitralAwards(the "New York Convention"). The main purpose of the New Yo rkConventionwastoobligate ralawards ¹⁶. This effort was followed by membernationstorecognizeandenforceforeignarbit variousotherconventionsincludingtheEuropeanConven tiononInternationalCommercial Arbitration(the"GenevaConvention")andInter-Amer icanConventiononInternational Commercial Arbitration (the "Inter-American Conventi on").UNCITRAL,thelegalbodyofin U.N.intheinternationaltradelawhasdoneagrea tdealofworkinharmonizingthelegalsetup. UNCITRAL first introduced its Arbitration Rules and la terondraftedtheModelLaw, which has provedinvaluable ¹⁷. Evenoutsidethe United Nations, alotofinstituti ons, both domestic and

. .

¹²B ORN Supranote3at2

¹³ThomasE.Carbonneau,ArbitralJustice:TheDemiseo fDueProcessinAmericanLaw,70Tul.L.Rev. 1945;Rogers *Supra*note11at2

¹⁴Rogers Supranote11at3

¹⁵Schafer Supranote4

¹⁶Convention on Recognition and Enforcement of Foreign USCA § 201, "This Convention shall apply to the recognition the territory of a State other than the State where sought, and arising out of differences between persons, wharbitral awards not considered as domestic awards in the sought".

Arbitral Award, June 7, 1959, Article I(1), on an denforcement of such awards made in the recognition and enforcement of such awards are ether physical or legal. It shall also apply to State where their recognition and enforcement are sought.

¹⁷PieterSanders, *UNCITRAL'sModelLawonConciliation* ,InternationalJournalofDispute Settlement, Vol.12/2002, 1(VerlagRechtundWirtschaft,Heidelberg,2002)

internationalwerecreatedtoprovideaframeworkfo rtheconductofarbitration. Themost notablebeingthe American Arbitration Association, In ternational Chamber of Commerce and the London Court of International Arbitration 18.

Thedevelopmentisanongoingprocessandeventoday variousorganizationsareworking towardsfurtherimprovingtheexistingsystem. Even af terdecadesofprogress there are a sthat stillneeds to be addressed by the world community viz provision of interimmeasures, requirement of written agreements, multi-party arbitrat ion, and the more recent addition, attorney regulation.

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B. InterimMeasuresinInternationalArbitration

1. The Need for Interim Measures

Theavailabilityandhandlingofinterimmeasuresin internationalcommercialarbitration hasbecomeonofthemainissuesindevelopingalegal setupforarbitration.Ininternational litigationandarbitration, the availability or other wiseofprovisionalmeasurescanhavea substantialeffectonthefinalresult, especially when issuesrelatingtoprotectionofevidenceand ings²⁰.Ininternationallitigationthishas assetsarisebeforeorduringthecourseoftheproceed elopedbymostnations ²¹. The state beeneffectivelycoveredbytherulesandproceduresdev ²². Asinlitigation, interimmeasures are the tools courtshavetherighttoolstoenforcetheirorders topreserveandensuretheusefulnessofarbitration.Fa iluretopreservetheevidenceorprotectthe propertyinvolvedinthedisputecanprovedisastrousfor apartyintermsofthefinaloutcome.

¹⁹RichardW.NaimarkandStephanieE.Keer, AnalysisofUNCITRALQuestionnairesonInterimRelief, (March2001) availableat www.globalcenteradr.com

²⁰RaymondJ.Werbicki,ArbitralInterimMeasures:Fact orFiction?,57-JANDisp.Resol.J.62 , 6

¹⁸B ORNSupranote3at2

See BORN supra note3at753,754 ²¹B ORN Supra note3at754

²²B ORN *Supra* note3at754

tosatisfyhisclaim ²³. Areportsubmitted Theremaynotbeanythingleftforthesuccessfulparty ialDisputesclearlyoutlinesthe by the UNS ecretary General on Settlement of commercimportanceofinterimmeasuresandalsothegrowingn eedforinterimrelieffromthetribunals, amongtheparties ²⁴. Asarbitration moves into fields like environmenta ldisputesandintellectual property, where quick decision could mean alot, thene edforinterimmeasuresinarbitrationis goingtoincrease ²⁵. Inthereport, the Secretary General also notes th evariouslegislationsand ointheModelLaw ²⁶.Thethreemain amendmentsthathavebeenmadebythenationsandals issueswhendealingwithinterimmeasuresinarbitrati onarepowerofthecourtstograntinterim orders, power of the arbitrators to order interimrel iefandthepossibilityofenforcementof interimorders granted by the tribunal. Enforcement is suestakeawholenewmeaningwhenthe interimorders involve third parties.

²³RichardW.Naimark&Keer, Supranote19

²⁴ SettlementofCommercialDisputes-Possibleuniformrulesoncert ainissuesconcerningsettlementof commercial disputes: conciliation, interimmeasures of protection, wr ittenformforarbitrationagreement, Report of the Secretary General, United Nations Commission on International Trade La wWorkingGroup onArbitration,32 ndSess.,at24(Para.104),A/CN.9/WG.II/WP.108(Jan.2000)"Repor tsfrom practitionersandarbitralinstitutionsindicatethatpa rtiesareseekinginterimmeasuresinanincreasing number of cases. This trend and the lack of clear guidance to arbitral tribunals a stothes cope of interimmeasuresthatmaybeissuedandtheconditionsfortheir issuancemayhindertheeffectiveandefficient functioning of international commercial arbitration. Totheextentarbitraltribunalsareuncertainabout issuinginterimmeasuresofprotectionandasaresultre frainfromissuingthenecessarymeasures, this may leadtoundesirableconsequences, for example, unnecessary lossordamagemayhappenorapartymay avoidenforcementoftheawardbydeliberatelymakingas setsinaccessibletotheclaimant.Suchasituation may also prompt parties to seek interimme a sures from courtsinsteadofthearbitraltribunalsinsituations where the arbitral tribunal would be well placed to issueaninterimmeasure; this cause sunnecessary cost anddelay(e.g.becauseoftheneedtotranslatedocuments into the language of the court and the need to

presentevidenceandargumentstothejudge)".

²⁵BernardoM.Cremades, IsExclusionofConcurrentCourtsJurisdictionoverConservatoryMeasure sto beIntroducedThroughaRevisionoftheConvention, J.ofInt'lArb.;Dr.FrancisGurry, TheNeedfor Speed,WIPOArbitrationAndMediationCenterBiennialIFCA IConferenceOctober24,1997,Geneva, Switzerland;DavidE.Wagoner, InterimReliefinInternationalArbitration:Enforcementisasubstant ial problem,51-OCTDisp.Resol.J.68,72(1996)

²⁶SettlementofCommercialDisputes,ReportofSecretaryGeneral, Supranote24at24(Para103); See

²⁶ SettlementofCommercialDisputes,ReportofSecretaryGeneral, Supranote24at24(Para103); See alsoUNCITRALM ODEL LAWON INTERNATIONAL COMMERCIAL ARBITRATION Article17.Powerof arbitraltribunaltoorderinterimmeasures: Unlessotherwiseagreedbytheparties,thearbitral tribunalmay, attherequestofaparty,orderanypartytotakesuchin terimmeasureofprotectionasthearbitraltribunal mayconsidernecessaryinrespectofthesubject-matte partytoprovideappropriatesecurityinconnectionwiths uchmeasure, availableat www.uncitral.org

Thepushtowardsinterimmeasureshasnotbeenwithout criticism. Themajorargument against interimre lief is that being a contractual real lationship, there is no need for interimre lief.

Also, the critic spoint out that more than 80% of award sare executed without any problem and the provisional measures will only server a satool to delay the procedure. Another major concern for many is the tribunal's lack of power to enforce it sinterim or ders.

2. Developments in the field of interim measures in international arbitration

Availabilityofinterimmeasureslargelydependsonin ternational conventions.national legislations and institutional rules. Though, interim measuresarebeingusedfrequentlyinthe ²⁷.But recenttimes in arbitration, none of the conventions haveprovisionstoregulateitshandling themanynationshaveamendedtheirlegislationsto provideforinterimmeasures. Manynations likeSwiss,Germany,Argentina,haveeitheramended thespecificprovisionsorhaverepealedthe oldlawandenactednewlegislations.Incommonlaw countries, including United States, United KingdomandIndia, courts have dealt with this issue andhavesetprecedentsonewayortheother onthis subject. Likewise the third set of procedures t hathaveadirectbearingonthisissueisthe institutionalrules. Mostoftheinstitutionalrulesin their current form, address the subject of interimmeasures. Chapter II of this article discusses thehandlingofinterimmeasuresby National courts and legislations. Chapter III deals w iththeprovisionsavailableininternational conventions and institutional rules.

SpecificmentionhastobemadeoftheUNCITRALmodel law.Article17oftheModel

Lawprovidestheauthorityforthetribunalstogranti nterimrelief.Butitdoesnothavea

provision,whichprovidestheexactprocedureforthere cognitionandenforcementoftheinterim awards.Therehasbeenalotofconfusiononwhether thedefinitionofawardinthemodellaw includestheinterimawardsandtheprocedureprescribed fortheenforcementofawardsmaybe usedforinterimawardsalso.UNCITRALrecognizedth issituationandisdiscussingthe

²⁷B ORN Supranote3at756,757

possibilityofaharmonizedlawfortheenforcemento fInterimawards. Aworkinggrouphasbeen setuptospecificallyaddressthisissue. In Chapter IV, Ihavediscussed the present form of Model Lawand proposals of the working group. In conclusion, I have tried to point out the best way of handling all the three issues concerning interimmea sures.

CHAPTERII

INTERIMMEASURESININTERNATIONALARBITRATION-COMP ARATIVE STUDYOFTHENATIONALLEGISLATIONSANDCOURTRULING S

InternationalArbitrationdependsonawidevarietyo flegalsetupforit's functioning viz., nationallegislations, international conventions an dinstitutionalrules. Asitrelieson such avaried structure, there is always difference in the way arbit rationprocessishandled.International conventions for the most part are silent on the issueofinterimmeasures. Butnationallegislations andinstitutionalruleshavedifferinginterpretations .Theprimaryissuesarethepowerofthe courtstosupport(someprefer'interfere'in)arbitratio n, power of arbitrators to provide interim ntofinterimordershavesomeinteresting reliefandtheenforcementoftheorders. Enforceme areaslikeordersinvolvingthirdpartiesandorders byforeigncourts.

A.PowerofCourtstoOrderProvisionalRelief

Itishasincreasinglybeenacceptedthatthesupportof nationalcourtsinhighlyimportant forthesuccessofarbitration.Butthequestionsthat needtobeansweredarewhenandhowmuch shouldthecourtsstepin ²⁸.UsuallytheCourtsarecalleduponeitheratthestar toftheprocessto enforcearbitralagreementorattheendtoenforce awards.Buttherearecircumstanceswherethe Courtsarerequiredtousetheirauthoritytosupportthe process²⁹.Mostlythesecircumstances arisewhenthereisaninvolvementofthirdparty ³⁰.Anotherusualtimingofcourtinterventionfor

²⁸ PrathibaM.Singh&DevashishKrishnan, TheIndian1996ArbitrationAct-SolutionsforaCurrent Dilemma,JournalofInternationalArbitration(inser tfootnotefromlib.)

²⁹R EDFERN Supranote1at233

³⁰R EDFERN Supranote1at234; SeeB ORN Supra note3at771

³¹.Thetime interimreliefisatthestartoftheproceedingswh enthetribunalhasnotbeenformed takentoinitiatetheprocess, appoint the arbitrators andsettlejurisdictionalissues, if any, will take aconsiderabletime. ³²Sointhemeantimepartieshavetoapproachthecourts tomaintainstatus ³³. The courts in extra ordinary circumstances have been quo, protect the property, evidence, etc knowntointerfereevenwhentheproceedingsarein progress, if a party shows proof of partiality orcorruptiononthepartofarbitrators.Infact,som eviewthispowerofthecourtstobeso 34 courtsmanywillnotchoosearbitration importantthattheythinkwithoutsuchbackingfromthe

Thenationalpositiondependsonthelegislationsan dcourtrulings.Mostofthecountries havelegislationsdealingwitharbitration.IntheU nitedStates,FederalArbitrationAct(FAA) governstheconductofarbitration.Butthereisnopro visioninFAAeitherallowingorprohibiting provisionalmeasures.Sothecourtrulingsaretheonly guidelinesavailabletostudythe availabilityofcourtorderedinterimmeasures.Butin UK,theArbitrationActof1996hasa specificprovisiongoverningthecourtpowersexercisable insupportofarbitration 35.The

³¹CharlesN.Brower&W.MichealTupman, *Court-OrderedProvisionalMeasuresUnderTheNewYork Convention*,,80Am.J.Int'lL.24,25(1986)

³² SeeUNCITRALA RBITRATION RULES (1982)Article6&7; SeeR ULESOF PROCEDUREFOR ARBITRATION PROCEEDINGSUNDER INTERNATIONAL CENTERFOR SETTLEMENTOF INVESTMENT DISPUTES Rules 1–4

³³CharlesN.Brower&W.MichealTupman Supra note31

³⁴CharlesH.BrowerII Supranote8at972

³⁵ArbitrationAct, 1996c. 23§44-(1)Unless otherwise agre purposesofandinrelationtoarbitralproceedingsthesa belowasithasforthepurposesofandinrelationto (a)thetakingoftheevidenceofwitnesses;(b)thepre propertywhichisthesubjectoftheproceedingsorasto fortheinspection, photographing, preservation, custodyor samplesbetakenfrom, or any observation bemade of o thatpurposeauthorisinganypersontoenteranypremises arbitration;(d)thesaleofanygoodsthesubjectofth ortheappointmentofareceiver(3)Ifthecaseisone partyorproposedpartytothearbitralproceedings, makesuc ofpreservingevidenceorassets(4)Ifthecaseis application of a party to the arbitral proceedings (upon no withthepermissionofthetribunalortheagreementi courtshallactonlyifortotheextentthatthearb vested by the parties with power in that regard, has no effectively.(6)Ifthecourtsoorders.anordermadeb wholeorinpartontheorderofthetribunalorofan

edbytheparties,thecourthasforthe me power of making orders about the matters listedlegal proceedings. (2) Those matters areservationofevidence;(c)makingordersrelatingto whichanyquestionarisesintheproceedings-(i) detention of the property, or (ii) ordering that rexperimentconductedupon,theproperty;andfor inthepossessionorcontrolofapartytothe eproceedings;(e)thegrantingofaninteriminjunction ofurgency, the court may, on the application of a hordersasitthinksnecessaryforthepurpose notoneofurgency.thecourtshallactonlyonthe ticetotheotherpartiesandtothetribunal)made nwritingoftheotherparties.(5)Inanycasethe itraltribunal, and any arbitral or other institution orperson powerorisunableforthetimebeingtoact vitunderthissectionshallceasetohaveeffectin ysucharbitralorotherinstitutionorpersonhaving

provisionliststhematterswheretheCourtscanexerc suggestthatthelistisexhaustive. The courts can act powerorisunabletoactandalsothecourtorderwill actsonsuchmatter. Themostnotable feature of this partiesdraftingthearbitrationagreement.Butreadin includingSecs.38&39, when the parties opt-out of Sec.44, traditional 'marevainjunctions'. Because when they r measurestothearbitrators, therange of the powers w

isepowers. The wordings of the provisions onlytotheextentthatthetribunalhasno ceasetohaveeffectassoonasthetribunal sectionisthe 'opting-out' optionfor the gfromtheArbitrationActaswhole theywillnothaveaccesstothe estricttheauthoritytograntinterim 36 illbeconfinedtothislistedin38&39

Priortothe1996Act, thelawonarbitration in Indiaw asgovernedbythreedifference legislationsviz.theArbitrationAct,1940,theArbitrat ion(ProtocolandConvention)Act,1937)Act, 1961 ³⁷. The present Indian andtheForeignAwards(RecognitionandEnforcement ArbitrationAct, 1996modeledontheUNCITRALModelLaw. hasprovisionforcourt interimmeasures ³⁸. Thereisalsoaspecific interventionincommercialarbitrationforpurposesof ngevidence ³⁹. Section 9 provides a list provisionregardingcourtsupportforthetribunalintaki

powertoactinrelationtothesubject-matterofthe

appealfromadecisionofthecourtunderthissection.

order.(7)Theleaveofthecourtisrequiredforany

sbycourt§9Apartymay,beforeorduring the arbitral award but before it is enforced inappointmentofaguardianforaminororaperson (ii)foraninterimmeasureofprotectionin)thepreservation,interimcustodyorsaleofanygoods ment;(b)securingtheamountindisputeinthe tionofanypropertyorthingwhichisthesubject-matt onmayarisethereinandauthorisingforanyofthe dinginthepossessionofanyparty,or tobemade, or experiment to be tried, which may be formationorevidence;(d)interiminjunctionor measureofprotectionasmayappeartotheCourttobe powerformaking orders as it has for the purpose of,

ltribunal, or a party with the approval of the eintakingevidence(2)Theapplicationshallspecifyrators;(b)thegeneralnatureoftheclaimandthe cular,-(i)thenameandaddressofanypersontobe hesubject-matterofthetestimonyrequired;(ii)the inspected.(3)Thecourtmay, withinits

er

³⁶Schafer *Supra*note4 ³⁷AIR1999SupremeCourt565at567,568

³⁸ArbitrationandConciliationAct,1996-Interimmeasure arbitralproceedingsoratanytimeafterthemakingof accordancewithsection36,applytoaCourt(i)forthe ofunsoundmindforthepurposesofarbitralproceedings; or respectofanyofthefollowingmatters,namely:-(a whicharethesubject-matterofthearbitrationagree arbitration;(c)thedetention,preservationorinspec ofthedisputeinarbitration, orastowhich any questi aforesaidpurposesanypersontoenteruponanylandorbuil authorisinganysamplestobetakenoranyobservation necessaryorexpedientforthepurposeofobtainingfullin theappointmentofareceiver;(e)suchotherinterim justandconvenient, and the Court shall have the same andinrelationto, any proceedings before it.

³⁹ArbitrationandConciliationAct,1996§27(1)Thearbitra arbitraltribunal, mayapplytothecourtforassistanc (a)thenamesandaddressesofthepartiesandthearbit reliefsought;(c)theevidencetobeobtained,inparti heardaswitnessorexpertwitnessandastatementoft descriptionofanydocumenttobeproducedorpropertytobe

ofissuesonwhichtheCourtcanprovideinterimrelie authoritytograntsuchotherinterimreliefthatmay setupoftheSection9lookslikeacatchallclausegiv grantinterimrelief 40.

f.Section9(e)reservestotheCourtthe appeartobejustandconvenient. The whole ingtheCourtswideandsweepingpowersto

InFrance, the legislative position is similar to U SinthattheNewCodeofCivil Proceduredoesnotmentionabouttheprovisionalmeasure savailablefromthecourts.But,in interimmeasures 41. Article 809 of the New practicethepartiescanapplytotheFrenchCourtsfor CivilProcedureCode ⁴²dealswiththeprotectivemeasuresavailablefromthe Courtsinordinary circumstances. This provision can also be used when arbi trationispendingtoobtaininterim relief.TheGermancivilProcedureCode(GCP)Sec.1033 statesthatitisnotincompatiblewith thearbitrationagreementforthecourtstoorderint erimmeasuresinmattersinvolvingthe dispute⁴³. This provision is very similar to the one found in theIndianArbitrationAct.Butthe provisionismorelikeadeclarationratherthanapr ovisionauthorizingthecourts. Thenature and extentofthejurisdictionavailabletothecourtsare readfromtheGCPprovision914-945, which

competenceandaccordingtoitsrulesontakingevidence,e beprovideddirectlytothearbitraltribunal.(4)Theco urtmay, while making a norder under sub-section (3) issuethesameprocessestowitnessesasitmayissue insuitstriedbeforeit.(5)Personsfailingtoattend accordancewithsuchprocesses, or making anyother defaul any contempt to the arbitral tribunal during the conductofarbitralproceedings, shall be subject to the like disadvantages, penalties and punishments by order of the co astheywouldincurforthelikeoffencesinsuitstried beforethecourt.(6)Inthissectiontheexpression "processes"includessummonsesandcommissionsforthee

xecutetherequestbyorderingthattheevidence

t,orrefusingtogivetheirevidence,orguiltyof

urt on the representation of the arbitral tribunal

xaminationofwitnessesandsummonsesto

in

producedocuments, availableathttp://www.laws4india.com
⁴⁰V.Giri, InterimMeasuresAvailableinArbitrationandConciliationAct,1996 ,ICAArbitration Quarterly, Vol. XXXXX, No. 3, Oct-Dec 2001, availableat http://www.ficci.com/icanet/ICA-Oct/OCT6.htm

⁴¹RichardH.Kreindler, CourtInterventioninCommercialandConstructionArbitration ConstructionLaw.12.16

⁴²N.C.P.C.Art.809-Thepresidentmay, at anytime, eve providebywayofsummaryinterlocutoryproceedingsforsuc keepthestatusquoofthemattersasrequired, eithertopr nuisancemanifestlyillegal. Whereliabilityresultant mayawardaninterimpaymenttothecreditororordert whereitshallbeinthenatureofanobligationtope ⁴³§1033BookTenZPO-Arbitrationagreementandinterimme anarbitrationagreementforacourttogrant, before protection relating to the subject-matter of the arbit

nwhereconfrontedwithseriousobjections, hprotectivemeasuresorsuchmeasuresasto otectfromanimpendingdamage,ortoabatea from an obligation cannot be seriously challenged, he hemandatoryperformanceoftheobligationeven rform, availableathttp://www.lexmercatoria.org asuresbycourt: Itisnotincompatiblewith orduringarbitralproceedings, an interimmeasure of rationuponrequestofaparty.

⁴⁴.GCPalsoprovidesforCourtassistancein dealingeneralwithinterimmeasuresofprotection thematteroftakingevidence ⁴⁵. This is consistent with the traditional German vi ewthatinterim reliefcanbegrantedonlybythecourts.GermanLawd oesnotevenrequiretheplaceofthemain proceedingtobeinGermany. Evenifar bitration has n otstartedatthetimeoffilingforthe interimrelief, if the parties convince the court tha tthefinalawardisenforceableinGermanyand anted⁴⁶.TheGermanCourtscanusetwotypes thereisanimmediateneedforrelief,itwouldbegr ofinterimmeasuresprovidedforbyGCP914-945. One is the functionalequivalentofMareva InjunctioninUK.Thisisusedtopreventthedissipati onofproperty. Theother remedy covers the restofthereliefincludingconservationofevidenc e,etc.IfthepreconditionintheCodeis remedy 47. satisfiedtheCourtsareobligedtogranttherequired

Switzerlandisinanotherextremeposition ⁴⁸, wheremostofthepowerstograntinterim reliefarevested with the arbitration tribunal ⁴⁹. Further, the local courts can assist in taking evidence, assistine stablishing the tribunal and rule on the challenge of the arbitrators. The courts

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⁴⁴Schaefer *supra*note4

⁴⁵§1050BookTenZPO-CourtAssistanceinTakingEvidencean dOtherJudicialActs: Thearbitral tribunalorapartywiththeapprovalofthearbitralt evidenceorperformanceofotherjudicialactswhichth Unlessitregardstheapplicationasinadmissible,thec ontakingevidenceorotherjudicialacts. Thearbitrato evidenceandtoaskquestions.

dOtherJudicialActs: Thearbitral ribunalmayrequestfromacourtassistanceintaking earbitraltribunalisnotempoweredtocarryout. ourtshallexecutetherequestaccordingtoitsrules rsareentitledtoparticipateinanyjudicialtakingof

⁴⁶EricSchwartz&JurgenMark, ProvisionalMeasuresinInternationalArbitration-PartII:Perspecti FromTheICCandGermany ,6WorldArb.&MediationRep.52,56

⁴⁷Schaefer Supranote4

⁴⁸Werbicki Supranote20at67

⁴⁹CharlesPoncet&EmmanuelGaillard, Introductory Note on Swiss Statue on International Arbitration§ III(B) (TheIntroductoryNoteandtranslationwerepreparedfor International Legal Materials by CharlesPoncet, I.L.M. Corresponding Editor for-Switzerland, La wOfficesofCharlesPoncet,Geneva,and EmmanuelGaillard,I.L.M.CorrespondingEditorforFrance ,ProfessorofLaw,UniversityofParisXII, EuropeanCounsel, Shearman & Sterling, Paris) "Swissco urtsmaygrantprovisionalmeasuresbuttheir jurisdictionisclearlysubordinatetothatofthearbi traltribunal.IncontrasttotheConcordat,thefeder a1 statuteprovidesthat provisional remedies, including the f reezingofassets, should be referred to the arbitral tribunalitself.Itisonlyintheeventthat,apart yrefusestocomplywiththearbitraltribunal'sorder thatthe arbitraltribunalmayaskacourtwithproperjurisdiction tointervene(article183)". Article183SwissStatuteonInternationalLaw-1.Unle ssotherwiseagreedbytheparties.thearbitral frequested by one of the parties. 2. If the opposing tribunalmayissueprovisionalorconservatoryordersi thearbitraltribunal, the latter may seek the partydoesnotvoluntarilycomplywiththeorderissuedby assistanceofthecourt, which shall apply its own law .3. Thearbitraltribunalorthecourtmaygrant provisionalorconservatorymeasuressubjecttothere ceiptofadequatesecurityfromtherequestingparty, availableathttp://www.lexmercatoria.org

candoalltheseonlyifthepartiesorthetribunalr equestsittodosoandthesepowershavenot nt⁵⁰.TheNetherlandsArbitrationAct specificallybeentakenawaybythearbitrationagreeme Article 1022 ⁵¹ provides for court ordered interimmeasures of protect ion. Itauthorizes the parties toapproachthedistrictcourtofnecessaryorders.It specificallystatesthatsuchanapproachto nt⁵².Furtheritprovides for interimmeasures thecourtsisnotcontrarytothearbitrationagreeme rationinoutsideNetherlands ⁵³. fromtheCourtsevenincaseswheretheseatofarbit

Havingseenthelegislations, it is interesting to legislations. UnitedStatesCourtssofarhavenotc of opposing views that it borders on confusion. Start in domestic and international arbitration, the circuit courtshavedrawnadistinctionbetweencasesarising (FAA), i.e. domesticar bitration and the internation ofFAA.Sec.3inChapterIofFAAempowerstheCourts arbitrationiscomplete". Whiledealing with cases ar Courtsinterpretedthisasgivingjurisdictionforthe NewYorkConventionintoFAA,thesecondcircuitco

studythecourtinterpretationsofthese omeupwithauniformposition. Therearelots gfromthedifferenceinhandlingbetween, ourtshavegivendifferingdecisions. In US, the underChapterIofFederalArbitrationAct alarbitrationcasesdealtwithunderChapterII to"staytheproceedingsuntil isingoutofthisSection,majorityofthe mtointerfere.Priortotheincorporationofthe urtwasoneofthefirsttoaddressthis

MBEFORECOURT;

1. Acourtseized of a dispute

⁵⁰ Idat§III(A)

⁵¹Article1022ARBITRATIONAGREEMENTANDSUBSTANTIVECLAI ARBITRATIONAGREEMENTANDINTERIMMEASURESBYCOURT inrespectofwhichanarbitrationagreementhasbeen concludedshalldeclarethatithasnojurisdictionifa party invokes the existence of the said agreement beforeinvalid.2. Anarbitrationagreements hall not preclude a measures of protection, or from applying to the President proceedingsinaccordancewiththeprovisionsofarticle caseinaccordancewiththeprovisionsofarticle 1051, ⁵² *Id*

submittingadefense, unless the agreement is partyfromrequestingacourttograntinterim oftheDistrictCourtforadecisioninsummary 289. In the latter case the President shall decide theavailableathttp://www.lexmercatoria.org

⁵³Article1074FOREIGNARBITRATIONAGREEMENTANDSUBSTANT **IVECLAIMBEFORE** DUTCHCOURT; FOREIGNARBITRATIONAGREEMENT AND INTE RIMMEASURESBYDUTCH COURT1. Acourtinthe Netherlandsseized of a disputei nrespectofwhichanarbitrationagreementhas beenconcludedunderwhicharbitrationshalltakeplaceout side the Netherlands shall declare that it has noiurisdictionifapartvinvokestheexistenceofthesai dagreementbeforesubmittingadefence,unlessthe agreementisinvalidunderthelawapplicablethereto.2. Theagreementmentionedinparagraph(1)shall notprecludeapartyfromrequestingacourtintheNetherl and stogrant interimmeasures of protection, or from applying to the President of the District Court foradecisioninsummaryproceedingsinaccordance withtheprovisionsofarticle289, availableathttp://www.lexmercatoria.org

issueininternationalarbitration.InMurrayOilcas e⁵⁴,JudgeLearnedHandupheldanattachment grantedbythelowercourtwhilestayingthecourtproc eedingsinsupportofarbitration ⁵⁵.Many circuitcourtsincludingFirst,Third,Fourth,Seventh andNinthCircuitshaveheldasimilar positiontotheMurrayCase ⁵⁶.ButaftertheNewYorkConventionwasincorporated intothe ChapterIIofFAA,theCourtsinterpretedthatactdif ferentlyfromtheChapterI.Secs.3,4and8 oftheFAA,whichprovideforCourtinterferenceina rbitration.

Threeseminalcases, which considered the availabili tyofinterimmeasuresunderChapter ⁵⁷.Cooperv.AteliersdelaMotobecane II,areMcCrearyTire&RubberC.vCEATS.p.A CarolinaPower&LightCo.v.Uranex ⁵⁹. ThirdcircuitinMcCrearybecamethefirstappellate courttoconsiderthisissue ⁶⁰.Itgrantedstayinsupportofanarbitrationclausebut liquidatedan attachmentgrantedbythestatecourt. The courtreaso nedthatthewords'referthepartiesto arbitration'containedintheNewYorkConventionta kesawayitsjurisdictiontograntinterim measures.ItdifferentiatedbetweenSec.3ofFAAand ChapterIIproceedingsbystatingthatthe courtsretainsufficientpowerstograntinterimmeasur esunderSec.3,asitonlyrequiresastayof 61 Italso theproceedings, whereas Chapter II proceedings require thecourtto'refer'theparties reasonedthatthepurposeoftheconventionwouldbedef eatedifpartiesareexposedtothe

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⁵⁴MurrayOilProdsCo.v.MitsuiCo.,146F.2d381(C.C.A.2NY. 1944)

⁵⁵ *Id.*at384.JudgeLearnedHand:"...anarbitrationclausedoesnot depriveapromiseeoftheusual provisionalremedies, even when heagrees that the disput eisarbitrable."

⁵⁶OrthoPharmaceuticalsCorp.v.Amgen,Inc.,882F.2d806,812(3d Cir.1989);PMSDistrib.Co.,Inc.v. Huber&Shuner,A.G.,863F.2d639,642(9thCir.1988);Teradynev.M ostekCorp.,797F.2d43,51(1st Cir.1986);MerrillLynch,Pierce,Fenner&Smith,Inc. v.Bradley,756F.2d1048,1052(4thCir.1985); CharlesH.BrowerII Supranote8at977,978

⁵⁷McCrearyTire&RubberCo.v.CeatS.p.A., 501F.2d1032(3dCir.1974)

⁵⁸Cooperv.AteliersdelaMotobecane,S.A.,442N.E.2d1239(N. Y.1982)

⁵⁹CarolinaPower&LightCo.v.Uranex, 451F.Supp.1044(N.D.Cal.1977)

⁶⁰CharlesH.BrowerII Supranote8at980;CharlesN.Brower&W.MichealTupman Supra note31 at28

⁶¹McCrearyOilProds,501F.2dat1038"Unlike§3ofthefederal Act,articleII(3)oftheConvention providesthatthecourtofacontractingstateshall'r eferthepartiestoarbitration'ratherthan'stayt hetrialof theaction.'TheConventionforbidsthecourtsofac ontractingstatefromentertainingasuit,whichviola tes anagreementtoarbitrate. Thusthecontentionthata rbitrationismerelyanothermethodoftrial,towhi ch stateprovisionalremediesshouldequallyapply,isunavail able."

ts⁶².Further,itstatedthatattachmentwouldbe uncertaintiesofthestatelawingrantingattachmen ion⁶³.NewYorkCourtofappeals an attempt to by pass the agreed method of disputer esolutfollowedthisdecisioninCooper.Thecourtofappeals gaveanewreasoningbyinterpretingthat sincetheNewYorkconventionspecificallyallowsfo rattachmentsinenforcementofawardsand omitstotalkaboutthatinregardtointerimmeasures ,theframersmusthaveintendedthatkindof bitrators⁶⁴. intervention only after the final decision by the ar

Thefirstfederalcourttorejecttheargumentsofth ethirdcircuitwastheDistrictCourt fortheNorthernDistrictofCalifornia.InCarolin aPowers.theDistrictCourtitrefusedtofollow ention⁶⁵. Following these decisions various McCrearyandgaveitsowninterpretationoftheConv

employtheproceduresandremediesofthestateswhereth

thanobstructstheuseofagreementstoarbitrate.See

contextstheSupremeCourthasconcludedthattheavailabi

II Supranote8 dthereasoningofMcCrearyconvincing. ionitselfsuggeststhatitprecludesprejudgment C.ss1etseq.(1970), which operates much like the orinterstatecommerce, does not prohibit garbitration""First,thecourtnotesthatthe loftheaction,"whiletheConventionrequiresacour tto isdifferencetheMcCrearycourtapparently ontinuedjurisdictionandevenmaintenanceofa heConventioncompletelyouststhecourtof ver, might reflect little more than the fact that th ystems, and possibly incircumstances where the gfuldirective.Furthermore,section4oftheUnited toactually order the parties to arbitration, but this of continuing jurisdiction over the action." inthefactthattheimplementingstatutesofthe alcourts.See9U.S.C.s205(1970).TheThird rremovaljurisdiction)...wastopreventthe 's)fullimplementation.Permittingacontinued iththatpurpose."Itmustbenoted,however,thatanyc ase ion Actalsowould besubject to removal pursuant to havelittleimpactonthe"vagaries"ofstate

RulesofCivilProcedurethedistrictcourts

lityofprovisionalremediesencouragesrather

eysit. Finally, it should be noted that in other

BoysMarket, Inc. v. Retail Clerks Union, 398 U.S.

bitrationsecurity."Thecourtalsogavesome

ntly

⁶² *Id* TheobviouspurposeoftheenactmentofPub.L.91-368,permi ttingremovalofallcasesfalling withinthetermsofthetreaty, wastopreventthey agariesofstatelawfromimpedingitsfull attachmentinbreachoftheagreementis implementation.Permittingacontinuedresorttoforeign inconsistent with that purpose."

⁶³ *Id* "This complaint does not seek to enforce an arbitrati onawardbyforeignattachment.Itseeksto bypasstheagreeduponmethodofsettlingdisputes. Suchabypa ssisprohibitedbytheConventionifone partytotheagreementobjects"

⁶⁴CharlesH.BrowerII Supranote8; Cooper, 442N.E.2d. at 1242. "The UNConvention appare considered the problem and sawn on eed to provide for prearpolicyguidanceforitsdecision-seeCharlesH.Brower ⁵⁵Uranex,451F.Supp.at1051"Thiscourt,however,doesnotfin Asmentioned above, nothing in the text of the Convent attachment. The United States Arbitration Act, 9U.S. Convention for domestic agreements involving maritimemaintenanceofaprejudgmentattachmentduringastaypendin ArbitrationActonlydirectscourtsto"staythetria "referthepartiestoarbitration."501F.2dat1038.Fromth concludes that while the Arbitration Act might permit c prejudgmentattachmentpendingarbitration, application oft jurisdiction. Theuseofthegeneral term "refer, "howe Conventionmustbeappliedinmanyverydifferentlegals useofthetechnicalterm"stay"wouldnotbeameanin States Arbitration Actgrants district courts the power provisionhasnotbeeninterpretedtodeprivethecourts "Second, the McCreary court found support for its position Conventionprovideforremovaljurisdictioninthefeder Circuitconcludedthat"(t)heobviouspurpose(ofprovidingfo vagariesofstatelawfromimpedingits(theConvention resorttoforeignattachment...isinconsistentw fallingwithinsection4oftheUnitedStatesArbitrat 28U.S.C.s1441.Furthermore,removaltofederalcourtcould provisionalremedies, forpursuantto Rule 64 of the Federal

courtshaveelectedtofollowthetwovaryingviews. Somecircuitshavegivenconflicting opinionsoverthepasttwodecades. The First, Third, Fourth and Eighth circuits have followed the66Bros McCrearyviewsalbeitsomedeviations. FourthCircuit, inI.T.A.D.Assoc.v.Podar supported the McCreary decision. When the US buyer in th atcasebroughtasuitinSouth Carolinaforbreachofcontractandsoughtattachment ,theFourthcircuitonappealliquidatedthe ⁶⁷.ThereaftertheFirstCircuitcitedboth attachment citing McCreary to support its conclusionLedeev.CeramicheRagno ⁶⁸.TheFifth McCrearyandI.T.A.DAssoc.tosupportitsdecisionin LAIA⁶⁹andaTennesseeDistrictCourtin CircuitinE.A.S.T,Inc.ofStamford,Conn.V.M/VA ⁷⁰havemoreorlessgonewiththeCarolina SixthCircuitinTennesseeImports,Inc.v.Filippi Powerslineofthinking. The Seventh circuitina mo rerecentdecisionhasalsorecognizedthe tion. This court however reversed the powerofcourtstograntinterimreliefpendingarbitra decisionofthedistrictcourtextendingtheinterim reliefaftertheconstitutionofthetribunal SecondCircuitthattraditionallywentalongwithth eMcCrearyprecedenthoweverreversedits

Circuit, which found a district court's grant of useofdiscretion, seeHovey, 726F.2dat1291-92, extends adinfinitum. Areasonablelimitationisset 1991WL83163at*4.6.1991U.S.Dist. ewithfactssimilartothecasebeforeus. aTROthathadbeenimposedearlier,it letoaddresswhethertheTROshouldremainin trationpanelcanenter

^{235,90}S.Ct.1583,26L.Ed.2d199(1970).Insumthiscourtwillnotfoll owthereasoningofMcCreary Tire&RubberCompanyv.CEAT,S.p.A.,supra.Thereisn oindicationineitherthetextortheapparent policiesoftheConventionthatresorttoprejudgmentat tachmentwastobeprecluded."

⁶⁶ I.T.A.D. Assoc. v. Podar Bros., 636 F. 2d75 (4 thCir.1981)

⁶⁷ *Id*at76"theattachmentobtainedbyI.T.A.D.andthesupe rsedingbondpostedbyPodararecontraryto theparties'agreementtoarbitrateandtheConvention ; therefore, the bond must be released and refunded toPodar."CitingMcCrearyTire&RubberCo.

⁶⁸Ledeev.CeramicheRagno,684F.2d184,187(1stCir.1982)

⁶⁹E.A.S.T.,Inc.ofStamford,Conn.v.M/VALAIA,876F. 2d1168(5 thCir.1989)

⁷⁰TennesseeImports,Inc.,v.Filippi,745F.Supp.1314(M.D.Te nn.1990)

⁷¹ Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Sal agreewithMerrillLynch,however,thattheweightof poweronthepartofthedistrictcourttoissueprelimin beresolvedbyanarbitrationpanel."Thecaselawdoe the district court's authority to grantinjunctive relie AlthoughwedeclinetofollowtheapproachoftheEighth anyinjunctivereliefinanarbitrabledisputetobeanab wedonotgosofarastodeterminethatthatauthority forthin MerrillLynch, Pierce, Fenner & Smith, Inc. v. Patinkin, LEXIS6210at*13,20(N.D.III.May3,1991),adistrictcourtcas Althoughthecourtgrantedtheplaintiff's request to extend explicitlydidsoonly"untilthearbitrationpanelisab effect." Id.at*6,1991U.S.Dist.LEXIS6210at*20.Onceassembled,anarbi whatevertemporaryinjunctivereliefitdeemsnecessar ytomaintainthestatusquo."

vano, 999F.2d211,214,215,7thCir.1993, federal appellate authority recognizes some equitablearyinjunctivereliefindisputesthatareultimatelyto snotclearlyresolve, however, the extent to which fextendedbeyondtheinitialNovember4TRO.

decisioninBorden,Inc.v.MeijiMilkProdsCo. ⁷²toagrantpreliminaryinjunctioninaidof arbitration.LaterinDavidL.Threlkel&Co.v.Met allgesellschaftLtd. ⁷³,itrefusedtobedrawn intothecontroversyuntilthepositionisfurtherdev eloped.

WhereasintheUnitedKingdom,thecourtshavegene rallypreferredtoacknowledge theirpowertoorderinterimmeasurespendingarbitrati on.PreviouslywhentheEnglish ArbitrationActof1950wasinforce,thecourtsgranted interiminjunctionsbasedontheNippon ra, S. Av. International Bulk carriers. YusenKaishav.KarageorgisandMarevaCompaniaNavie But, Rena Kwasone of the first cases in which the Englishcourtaddressedtheavailabilityof interimmeasuresinarbitration ⁷⁴.InRenaK ⁷⁵,thecourtdecidedthatwhilestayingthelitigatio n infavorofarbitration, it had powers to attach the assetsoftheparty. This position was in conformitywiththeArbitrationActof1975,whichincor poratedArticleII(3)oftheNewYork Convention⁷⁶.

TheCourtpositioninEnglandregardingtheinterimo rprovisionalmeasurescanbe clearlystudiedinthecasesconcerningsecurityfor costs.Till1994,theEnglishcourtsruledthat theauthoritytoordersecurityrestssolelywithcour tsifthepartieshadnotpreviouslyagreed otherwise⁷⁷.Kerr.J.gavethetwoleadingjudgmentsinMavani ⁷⁸andBankMellatv.Helliniki TechnikiS.A ⁷⁹.InMavani,hecitedtheSec.12oftheArbitrationA ctof1950tosupporthis position.LaterinBankMellatcaseheforwardedat wo-prongtesttoordersecurityforcostsin casesconcerninginternationalarbitrationviz.the connectionbetweendisputeandtheEnglish

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⁷²Borden,Inc.v.MeijiMilkProdsCo.,919F.2d822(2dCir.1990)

⁷³DavidL.Threkeld&Co.v.MetallgesellschaftLtd.,923F. 2d245(2dCir.1991)

⁷⁴CharlesN.Brower&W.MichealTupman Supra note31at36

⁷⁵RenaK,1Lloyd'sL.R.545[1978]

⁷⁶ *Id*.

⁷⁷ArbitrationAct1950,§12(6),"TheHighCourtshallhave.. thesamepowerofmakingordersinrespect of...SecurityforCosts[inarbitrationcases]... asithasforthepurposeof...anactionormatter intheHigh Court:Providedthatnothinginthissubsectionshallbe takentoprejudiceanypowerwhichmaybevested inanarbitrator[bytheparties]ofmakingorders.... ", availableat http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04045.html;Noah Rubins, InGodWeTrust,AllOthersPayCash:SecurityForCostsInInter nationalCommercial Arbitration,11Am.Rev.Int'lArb.307,323(2000)

⁷⁹[1984]Q.B.291

⁸⁰.ButlaterinKen-Rencase 81, this was taken a step further legalsystemandtheneedforsecurity bytheEnglishCourt.Thatcaseinvolvedadisputebetwe enKenyanGovernmentownedcompany ICCrules 82. Nevertheless, the English andaBelgiumandAustriancompanytoberesolvedunder 83. Butafter the enactment of the 1996 Act, now Courtruledthatitcouldordersecurityforcosts hearbitrator's realm ⁸⁴. The Channel Tunnel thesecurityforcostshasbeenentirelyshiftedtot case⁸⁵isanotherleadingprecedentinthismatterthoughi twasdecidedpriortotheArbitration Actof1996. This involves a dispute between Trans-Manche Link, the contractor, and the Eurotunnel, theowner. They had an arbitration clausei ntheircontract, which provided for settlementbyDisputeResolutionBoardwithin90daysand afterthatbyarbitrationundertheICC rulesinBelgium.WhenthedisputestartedTMLthreaten edtostoptheworkontheproject. Immediately, Eurotunnelapproached the English court for anorderrestrainingTMLfrom suspendingthework. After a spate of appeals, finally t heHouseofLordsruledonthismatter. HouseofLordsagreedthattheEnglishCourtshavejur isdictiontograntinterimmeasures pendingarbitration, but decided that the present casew asnotfittodoso ⁸⁶. The decision by Mr. JusticeBrendoninRenaK ⁸⁷isaleadingprecedentonthisissue.HegrantedaM arevaInjunction inthatcaseandpointedoutthatifapartyiseligibl etoobtainanorderforsecurityincasesthat donotinvolvearbitration clause, there should be nor easonforthepartytoobtainsuchorder ⁸⁸.Citingsomeunreportedcases,hesaidthere wherethelitigationisstayedpendingarbitration

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⁸⁰Id;NoahRubins Supranote77

⁸¹SACoppéeLavalinNVv.Ken-RenChemicalsandFertil izers,[1994]2W.L.R.631.

⁸² *Id*.

⁸³ T.1

⁸⁴NoahRubins Supranote77; SeeArbitrationAct,1996,c.23.§38

⁸⁵ChannelTunnelGroupv.BalfourBeatty[1993]AC334(HL).

⁸⁶Id.;Werbicki Supranote20

⁸⁷RenaK[1978]1Lloyd'sL.R.545

Idat561Mr.JusticeBrendon"Onthefootingthattheproce dureisavailabletoprovideaplaintiff,ina casewherenoquestionofarbitrationarises, withse action,Iseenogoodreasoninprinciplewhyitshouldn actionisbeingstayedontheapplicationofadefendant arbitrationinaccordancewithanarbitrationagreeme awardwhichtheplaintiffmayobtaininthearbitrati

Supra note31at36,37

dureisavailabletoprovideaplaintiff,ina curityforanyjudgmentwhichhemayobtaininan otalsobeavailabletoprovideaplaintiff, whose inorderthattheclaimmaybedecidedby ntbetweenthem, withsecurityforthepaymentofany on"; see Charles N. Brower & W. Micheal Tupman

avegranted such injunctions 89. There havebeenmanyoccasionswhenthecommercialcourtsh arenotmanyEnglishcaselawsregardingthisissue becauseasseenbytheprecedingcasesitis clearthattheEnglishCourtsdonotconsiderinteri mmeasuresasincompatiblewiththe arbitrationagreementsortheNewYorkConvention ⁹⁰. This position is clearly incontrast to the positionadoptedbysomeoftheUSCourts.

v.GouriShanker ⁹¹heldthatthe InIndia, the Supreme Courtin R. McDill & Co. (P) Ltd partiestoarbitrationhaverecoursetoalltheinteri mmeasuresavailableundertheCivilProcedure .NEPCIndiaLtd ⁹²,theSupreme Codeof1908.LaterinM/s.SundaramFinanceLtd.V.M/s Courtconsideredthequestionwhetherapartycanapproa chacourtforinjunctionevenbefore arbitrationprocesshasactuallystartedandanswered intheaffirmative. This Courtrejected the reasoning's given by the lower Courtandheld that in terimmeasuresofprotectioncanbegranted s⁹³.ThecourtreferredtotheArbitrationAct evenpriortotheinitiationofarbitrationproceeding of 1940, the UNCITRAL Model Law, Arbitration Actof 1996 of EnglandandtwoEnglishcases viz.TheChannelTunnelCaseandFranceMancheS.A. v.BalfourBeattyConstructionsLtd. The Supreme Court in its decision points out the relevantsectionsoftheArbitrationActof1940 95. The Delhi High Court followed this decision in thatpermitinterimmeasuresduringarbitration ⁹⁶. Eventhoughitfinally rejected the petition for M/s.BuddhaFilmsPvt.Ltd.V.PrasarBharati interiminjunction on the merits of the case, it hel dthatapetitionforinterimreliefismaintainable

⁸⁹ Charles N. Brower & W. Micheal Tupman Supra note31at37"TheRenaKinvolvedamaritimeandnot acommercialcontract, but it sapplication is not limi tedtomaritimecases. '[T]heCommercialCourt[also] hasgrantedinjunctionson[thebasisofsection12(6)]i nanumberofunreportedcases.""

⁹⁰ Charles N. Brower & W. Micheal Tupman Supra note31at38

⁹¹R.McDill&Co.(P)Ltdv.GouriShanker,(1998)2SCC548.

⁹²M/s.SundaramFinanceltd.,v.M/s.NEPCIndiaLtd.,AI

R1999SupremeCourt565 93 Id.at571"Inviewoftheaforesaiddiscussionsitfollowst hattheHighCourterredincomingtothe conclusion that the Trial Courthad no jurisdiction in entertainingtheapplicationunderSect.9because arbitrationproceedingshadnotbeeninitiatedbytheappe llant." Id.at568,569,570

⁹⁵ Idat569"ThepositionundertheArbitrationAct,1940wastha tapartycouldcommenceproceedingsin CourtbymovinganapplicationunderSect.20forappointment ofanarbitratorandsimultaneouslyitcould moveanapplicationforinterimreliefundertheSecond SchedulereadwithSect.41(b)ofthe1940Act." 96AIR2001Delhi241

pendingarbitrationproceedings ⁹⁷. Butsomerecent decisions, including the latest in thatlineby ationpractitionersinIndia 98. Somecourts Delhi High Courth as raised concerns among the arbitrwhenceasedwiththequestionwhethertheIndianArbi trationandConciliationActempowersit ⁹⁹.As toorderinterimreliefwhentheplaceofarbitration isoutsideIndia, heldinthenegative notedearlier, Sec. 9 of the Arbitration and Concilia tionAct, which resides in Part I of the Act, empowersthecourtstoorderinterimandconservatory measures.Sec.2(2)oftheActlimitsthe applicationofPartIoftheActandhenceSec.9toa rbitrationheldwithinIndia.DelhiHighCourt inMarriottInternationalInc. ¹⁰⁰decidedthatSec.2(2)wouldbecomeredundantifSec.9 ofthe ¹⁰¹. The Supreme Court in 2002 has put to ActisinterpretedtoapplytoarbitrationoutsideIndia restalltheconfusionsthatarosebecauseoftheinte rpretationgivenbytheLowercourts.In ¹⁰², i tinterpretedSec.2(2)asnotlimiting Bhatia Internationalvs.BulkTradingS.A.andAnother theapplicationofPartIoftheActtointernational arbitrationinsideIndia.Itreasonedthatthe objectiveoftheActwouldbenegatediftheinterpreta tion of the Delhi High Court were upheld. Itgavetheoptiontothepartiestodecidewhethertoo ptoutofPart-IoftheActincaseof

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⁹⁷ *Id*.

⁹⁸ZiaMody&ShuvaMandal, CaseComment,India ,Int.A.L.R.2001,4(3),N19-20;V.Giri Supranote 40;EastCoastShippingLimitedVs.M.J.ScrapPvt.Ltd.(CalcuttaHighCourt);CaventerCareLimited Vs.SeagramCompanylimited(CalcuttaHighCourt);Myriad Limited,AIR2000Delhi377;ContraryviewtakeninOlexFoca sPvt.Vs.KodeExportsco.Limted,AIR 2000Delhi161wasreversedinMyriad

 $^{^{99}}$ Id; Jyoti Sagar, Interim Measures By Local Courts in Arbitration Held Overseas — Define the Court of velopmentsin India, NewsandNotesFromTheInstituteforTransnationalA rbitration, 3Vol. 16, No. 4(Autumn 2002); Ramasamy, Interim Measures of Protection under the Indian Arbitration and Conciliation A. And the Conciliation and Conciliation and Conciliation A. And the Conciliation and Conciliation A. And the Conciliation and Conciliation A. And the Concilct1996,1999 ArbitrationInternational; KitechnologyNVv. Unicor GmbHRahnPlastmaschinen,[1998]DelhiReported Judgments397;SeagramCo.Ltd.v.KeventerAgroLtdAPONo. 498of1997, orderdated 27 January 1998 (unreported). The same view was taken by Justice Sharma inDominantOffsetPvt.Ltd.v. AdamovskeStrojirnya.s.,[1997]DelhiReportedJudgments313.". .. Aconjointreading of all the provisionsclearlyindicatesthatsub-section(2)ofSe ction2isaninclusivedefinitionandthatitdoesnot excludetheapplicabilityofPartItothosearbitration s, which are not being held in India. The aforesaid interpretationgetssupportfromtheprovisionsofsub-sec tion(5)ofSection2whichprovidesthatPartI shallapplytoallarbitrationsandtoallproceedingsre latingtheretowhichwould also, in myconsidered opinion, include an international commercial arbitrati on..."

¹⁰⁰ MarriottInternationalInc.v.AnsalHotelsLtd, AIR2000DEL377

¹⁰¹ZiaMody&ShuvaMandal *Supra*note98

Bhatia Internationalys.BulkTradingS.A.andAnother ,2002(4)SCC105

arbitrationheldoutsideIndia ¹⁰³.So,nowifthepartiesdonotspecificallyoptoutof PartIofthe Act,theCourtsinIndiamayorderinterimorconser vatorymeasureprovidedforbySec.9even whenarbitrationispendingoutsideIndia ¹⁰⁴.

The propensity of the French Court stoor derinter immeasurespendingarbitrationwas irerévolutionnaire de Guinée 105. The seeninthematterofAtlanticTritonv.Républiquepopula RennesCourtofAppeal,inthematterinvolvingICSID Arbitrationwentalongwiththeposition takenbytheICSIDguide,interpretingArticle26&47of theWashingtonConventiontogivethe $^{106}. But the French Courde Cassation reversed \\$ tribunalexclusiveauthoritytograntinterimrelief thedecisionoftheRennesCourtbyinterpretingthat Article26oftheWashingtonConvention "wasnotintendedtoprohibitapplicationstothecourts forprotectivemeasuresaimedatensuring ¹⁰⁷In1991,theParisCourtofAppealsinacaseruled theenforcementoftheforthcomingaward." thatithastheauthoritytoorderinterimreliefpen dingarbitrationonsubstantiveissues AnotherCourtwhichretainedjurisdictionforafterd irectingarbitrationwasRouenCourtof Appeals 109. The Courtsaid that it had jurisdiction to order pro tectivemeasures"regardlessof ¹¹⁰ItisclearthatbutforUnitedStates,mostof whetherornotthearbitraltribunalisconstituted". the State Courts grant interimme as ure sin support of ar bitration, though the procedural aspects differ.

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sse,1996REV.ARB.275

¹⁰³ *Id*;JyotiSagar *Supra*note99

¹⁰⁴JyotiSagar Supranote99

¹⁰⁵Cass.leciv.,Rennes,Nov.18,1986,AtlanticTritonv. RépubliquepopulairerévolutionnairedeGuinée, 114J.D.I.125(1987); Seealso F OUCHARD GAILLARD GOLDMANON INTERNATIONAL COMMERCIAL ARBITRATION,PartIVCh.IIIPara1309(EmmanuelGaillard&JohnSav ageeds.,1999)

¹⁰⁶AtlanticTriton,14J.D.I.125(1987) Supra note105

¹⁰⁷ Atlantic Triton, 14J.D.I.125 (1987)
Supra note105; F OUCHARD GAILLARD GOLDMAN, Supranote105
108 F OUCHARD GAILLARD GOLDMAN, Supranote105; CAParis, Dec. 12, 1990, Terexv. Banexi, 1991
BULL JOLY 595

¹⁰⁹CARouen,Sept.7,1995,RotemAmfertNegevv.GrandeParoi ¹¹⁰Id;F OUCHARD GAILLARD GOLDMAN, Supranote105

1. Should Court Interference be Limited?

Though, the court decisions, national legislations and commentators favor the support of interimmeasures from the courts, critics have put forward some arguments to restrict the court's authoritytoorderinterimrelief. One such argument that has some merittoitist hat when decidingtheinterimissue, courts invariably tread onto the mainissue, which should be decided bythearbitrator ¹¹¹. The courts in most countries look to the possibility of success on merits as a ¹¹².Thecriticsfeelthatifthecourtsdecide majorfactorintheirdecisionsoninteriminjunctions onthepossibility of successon the merits in the final issue it would under mine the work of the arbitrators. Though, this is a legitimate concern, in most cases the necessity for interimrelief wouldoutweighthenegativesofrefrainingfromorderinginterimmeasures ¹¹³.Itisalsopointed outthatsincemostnationsrecognize the authority of arbitral tribunal togrant interimmeasures, ¹¹⁴.Itisseenasinterferingwiththe theneedforoverlappingpowerstothecourtsisnotnecessary functions of the tribunal. But, considering that there are many cases where the need for interim measuresisreally anurgent matter and arises even before the formation of the tribunal, if the courtsarerestrictedinprovidinginterimreliefitwouldharmtheeffectivenessoftheultimate resolution of the dispute. Another concernist heavailability of appeals for court orders and consequentdelaysthatmaybecausedinresolvingthedispute ¹¹⁵. This is real concernand has to betakencareofbymakingnecessarylegislativeamendmentstoprovideforeffective enforcementofcourtordersforinterimrelief.

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¹¹¹AlisonC.Wauk, *PreliminaryInjunctionsinArbitrableDisputes:TheCaseforLimitedJurisdiction* UCLAL.Rev.2061,2073,2074,2075(1997)

¹¹²Michael E. Chionopoulos, Preliminary Injunction Through Arbitration: The Franchisor's Weapon of Choice in Trademark Disputes ,20-SUMF ranchise L.J.15(2000)

¹¹³Teradyne,Inc.v.MostekCorp.,797F.2d43,51(1stCir.1986)"Webelievethatthecongressional desiretoenforcearbitrationagreementswouldfrequentlybefrustratedifthecourtswereprecludedfrom issuingpreliminaryinjunctiverelieftopreservethestatusquopendingarbitrationand, *ipsofacto*, the meaningfulnessofthearbitrationprocess."

¹¹⁴Wauk *Supra*note111at2075,2076,2077

¹¹⁵ *Id*

B. PowerofArbitratorstoGrantInterimRelief

Thepowerofarbitratorstograntinterimmeasures, as thatofthe Courts depends largely on the national systems, international conventions, agreement between the parties and the rules adopted by the party 116. In most instance sparties do not deal about that in their contract, so it largely depends on the national law and the rules of the institution that they select 117. The effect of international treaties and institutional rules are discussed in detail in the next chapter. The scope of this section is the impact of the national awon the arbitrator's power to grant in term relief.

Theacceptanceofarbitrator's power to grant interim reliefhasseenachangeinthe recenttimes. Increasingly many states have started torecognizetheneedforinterimrelieffrom thearbitrators ¹¹⁸. Many commentators agree that unless otherwise agre edbytheparties,the ¹¹⁹.Stateshaveadopteddifferingpositiononthiscruci tribunalhaspowerstoorderinterimrelief al issue. Nationslike Argentina and Italyhadlawsproh ibitingarbitratorsfromgrantinginterim measures 120. Whereas some nations like Switzerland (which has beendiscussedindetailbelow) rantinterimrelief ¹²¹.IntheUnitedStates, haveprovided expressauthority for the arbitrators to g FAA does not talk about the powers of arbitrators to aardinterimrelief.Sothenationalposition depends he a vily on the rulings of the Courts. But the Courtsasinthecaseoftheirpowerstogrant interimmeasuresarealsodividedonthisissue.Some Courtshaveheldthattheywouldrecognize aninterimorderofthearbitratoronlyifthepartie shaveexpresslyauthorizedthetribunaltodoso whilesomeothershaverecognizedthearbitratorsaut horitytograntinterimreliefifitis

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¹¹⁶B ORN Supranote3at756

¹¹⁷VivienneM.Ashman, The UNCITRALArbitration Rules and A Review of Certain Practices and Procedures, 648 PLI/Lit 765, 780 (2001)

¹¹⁸TijanaKojovic,CourtEnforcementofArbitralDecis ionsonProvisionalRelief,JournalofInternational Arbitration18(5),p.511

¹¹⁹B ORN Supranote3at768

¹²⁰B ORN Supranote3at768

¹²¹ BORN Supranote3at767

consistent with the arbitration agreement 122. Ninth Circuit has consistently recognized the authority of the arbitrators and has refused to reviewtheirinterimawards.InPacificReinsurance, whilecitingapreviouscase, Judge Wiggins noted the importanceofrecognizingtheinterim ¹²³. Anumber of circuits including the Sixth Circuit and th awardgrantedbythearbitrators e SecondCircuithaverecognizedthispositionof"judic ialreviewofnon-finalarbitrationawards shouldbeindulged, if at all, only in the most extreme cases" and also have a greed that unless specificallyprohibitedbyparties, the arbitrators have powerstograntinterimrelief. 124.Butatthe sametimesomelower US court shave ruled that thear bitratorsdonothavethepowertoissue 125.TheThird providesointheiragreement provisionalreliefunlessthepartiesexpresslyagreeto $^{126}, and other lower US court shave required express provis\\$ CircuitinSwiftIndus.,Inc. ionsinthe arbitrationagreementorcontrollingstatutetoconfe rtheauthorityonthearbitratorstogrant interimrelief ¹²⁷.ButnoCourtinUShassofardeniedtherightoft hepartiestoactuallyconfer therightstothearbitrators

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¹²²B ORN Supranote3at760

 $^{{}^{123}} Pacific Rein surance Management Corp.v. Ohio Rein suran \\$ ceCorp.,935F.2d1019,1022(9thCir.1991) $\hbox{``TheN} in th Circuit has said that because of the Congres$ sionalpolicyfavoringarbitrationwhenagreedtoby theparties, judicial review of non-final arbitration awards "should be indulged, if at all, only i extremecases."Aerojet-GeneralCorp.v.AmericanArb itrationAss'n,478F.2d248,251(9th Cir.1973)...";at1022-1023"Temporaryequitablereliefinarbitrati on may be essential to preserve as sets orenforceperformancewhich, if not preserved or enforce d,mayrenderafinalawardmeaningless" ¹²⁴IslandCreekCoalSalesCo.v.Gainesville,729F.2d1046(6th Cir.1984);SperryInt'lTrade,Inc.v. Israel, 689F.2d301(2dCir.1982); Southern Seas Navigation Ltd.v. PetroleosMexicanos,606F.Supp. 692(S.D.N.Y.1985).

¹²⁵B ORN Supranote3at760

¹²⁶ SwiftIndus.,Inc.v.BotanyIndus.,Inc.,466F.2d1125(3rdCir .1972)

¹²⁷CharlesConstructionCo.v.Derderian,586N.E.3d992(Mass. 1992)"Werejecttheowner'sclaimthat the contractor's only avenue for obtaining interimre liefisthroughacourtorderindependentofthe arbitrationproceeding. We have indeed up held the entry of protectivecourtorderseventhoughadispute betweenthepartiesissubjecttoarbitration.SeeHul lMun.LightingPlantv.MassachusettsMun. WholesaleElec.Co.,399Mass.640,648-649,506N.E.2d140(1987)(prelimin aryinjunctionupheld requiringcontractualpaymentstocontinuewhiledisputeis arbitratedpursuanttocourtorder); Salvucciv. Sheehan, 349 Mass. 659, 663, 212 N.E. 2d243 (1965) (billtoreach and apply fraudulentlyconveyed propertymaybemaintainedbeforearbitrationproceeding isconcluded). If however, there is an express agreementthatauthorizesanarbitratortograntinter imrelief,includinganyauthorizationsetforthin arbitrationrulesincorporatedbyagreementoftheparti es, there is no reason why an arbitrator may not ac underthatauthority. Indeed, in such an instance, the co urtmightbeobligedbothtodefertotheparties' agreementtosubmitthematterofinterimrelieftoa rbitrationandtogiveanysubsequentinterimorderthe arbitrator's final order. Of course, a statute could samedeferentialtreatmentthatmustbeaccordedtoan authorizeanarbitratortograntinterimrelief. Ther efore, if the arbitrators had contractual or statutory

TheGermanCivilProcedurecodeSec.1041dealswiththis issue. Ithas a different approachthantheUSposition ¹²⁹.Itgivesthepartiestheoptiontotakeawaythepow erofthe arbitratorstograntinterimrelief.Priorto1998,whe nthenewarbitrationlawcameintobeing, ibunaltoorderinterimrelief ¹³⁰.Evenifthe theGermanlawdidnotrecognizethepowerofthetr arbitratorsneededtogiveaninterimmeasureithad tobeintheformofanawardandnotan rexequator ¹³¹.Butafterthenewarbitration order. This award required a norder of enforcement o lawbasedontheUNCITRALModelLawcameintobeingm ajorityofthecourtsrecognize ¹³². Apartfromtheprovisionalrelief, Germanlawalso interimordersgrantedbytheTribunal ¹³³. Asnotedearlier, Swisslawtakesan authorizesthearbitratorstoappointexpertsforguidance ns¹³⁴.Art.183oftheSwitzerland'sCodeon entirelydifferentpositionthanthatofothernatio 135. There PrivateInternationalLaw,clearlygivespowertoth etribunaltoorderinterimmeasures isnolimitationthathasbeensetinthelegislatio ntocontroltheauthorityofarbitratorstogrant

authoritytoissueaninterimorder,thecontractorpro was not limited to asking for interimrelief from a co

perlycouldhavesoughtsuchanorderfromthemand urt."

sasfollows:-(1)Unlessotherwise erequestofaparty, order such interimmeasures of saryinrespectofthesubjectmatterofthedispute.Th tesecurityinconnectionwithsuchmeasure.(2) mentofameasurereferredtoinsubsection1unless dybeenmadetoacourt.Itmayrecastsuchan ure.(3)Thecourtmay,uponrequest,repealor measureorderedundersubsection1provestohave itsenforcementis obligedtocompensatetheother measureorfromhisprovidingsecurityinorder the pending arbitral proceedings.

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Supranote46;Schaefer supranote4

edbythearbitraltribunal.Itmayalsorequireaparty ,ortoprovideaccessto,anyrelevantdocuments eedbytheparties, if a party sor equests or if the all, afterdelivery of his written or or alreport,

TAPPOINTEDBYARBITRAL

ltribunalmayappointoneormore

heopportunitytoputquestionstohimandtopresent ssue.(3)Sections1036and1037subs.1and2apply bunal

¹²⁸B ORN Supranote3at760

¹²⁹§1041BookTenZPO(GermanCivilProcedureCode)nowprovide agreedbytheparties,thearbitraltribunalmay,atth protectionasthearbitraltribunalmayconsiderneces arbitraltribunalmayrequireanypartytoprovideappropria The court may, at the request of a party, permiten force applicationforacorrespondinginterimmeasurehasalrea order if necessary for the purpose of enforcing the measamendthedecisionreferredtoinsubsection2.(4)Ifa been unjustified from the outset, the party who obtained party for damages resulting from the enforcement of suchtoavoidenforcement. This claim may be put forward in

¹³⁰ EricSchwartz&JurgenMark ¹³¹EricSchwartz&JurgenMark Supranote46

¹³³§1049BookTenofZPO(GermanCivilProcedureCode):EXPER TRIBUNAL (1)Unlessotherwiseagreedbytheparties,thearbitra expertstoreporttoitonspecificissuestobedetermin togivetheexpertanyrelevantinformationortoproduce orpropertyforhisinspection.(2)Unlessotherwiseagr arbitraltribunalconsidersitnecessary, the expertsh participateinanoralhearingwherethepartieshavet expertwitnessesinordertotestifyonthepointsati mutatismutandistoanexpertappointedbythearbitraltri 134 Seesupra note45

¹³⁵ *Id.*; seealsoM ARC BLESSING, I NTRODUCTIONTO ARBITRATION – S WISSAND INTERNATIONAL PERSPECTIVES, Basel (HelbingandLichtenhahn) 1999, 278

relief.TheEnglishLawliketheGermanlegislation takesamiddlegroundbetweentheUnited StatesandSwissposition.Sec.38&39oftheArbitratio nActof1996providesforvarioustypes ofinterimmeasuresavailablefromthearbitrators ¹³⁶.Sec.38(1)givesthepartiestherightto choosethekindofordersavailabletothetribunal.I fthepartiesfailtodosothearbitratorscan ¹³⁷. The section deals primarily with the provide the orders listed in Sec. 38(3), (4), (5)&(6) orderstoprovidesecurity, protection and examination ofproperty, preservation of evidence, etc. Sec.39oftheActdealswithprovisionalmeasures.But, thepowerstograntprovisionalrelieflike paymentonaccount, payment of money, disposition of pro perty,etc.willbeavailableonlyifthe tribunal ¹³⁸. partiesspecificallyagreetoprovidesuchpowerstothe

Art.1460ofNewCivilProcedureCodeofFranceallowsth earbitratorstolaydownthe rules of procedure unless stipulated by the parties. Since thereisnootherprovisionintheCode, whichdeals with this issue, Art. 1460 may be taken as th econtrollingauthority. Italsoprovides

thearbitraltribunalforthepurposesofandinrelatio tiesthetribunalhasthefollowingpowers. forthecostsofthearbitration. This powershall anindividualordinarilyresidentoutsidetheUnited edorformedunderthelawofacountryoutsidethe is exercised outside the United Kingdom.propertywhichisthesubjectoftheproceedingsoras his owned by or is in the possession of a party toervation, custody or detention of the property by samplesbetakenfrom,oranyobservationbemadeof aydirectthatapartyorwitnessshallbe administeranynecessaryoathortakeany ion sto a party for the preservation for the purposes(1)Thepartiesarefreetoagreethatthetribunal eliefwhichitwouldhavepowertograntinafinal ionalorderforthepaymentofmoneyorthe nordertomakeaninterimpaymentonaccountofthe

EBYTHETRIBUNAL (1)The

¹³⁶ArbitrationAct,1996c.23,§38GENERALPOWERSEXERCISABL partiesarefreetoagreeonthepowersexercisableby totheproceedings.(2)Unlessotherwiseagreedbythepar (3) The tribunal may order a claim ant to provide security notbeexercisedonthegroundthattheclaimantis-(a) Kingdom, or (b) a corporation or association in corporat UnitedKingdom,orwhosecentralmanagementandcontrol (4) The tribunal may give directions in relation to any towhichanyquestionarisesintheproceedings, and whic theproceedings-(a)fortheinspection, photographing, pres thetribunal, an expertor aparty, or (b) ordering that or experiment conducted upon, the property. (5) The tribunal mexaminedonoathoraffirmation, and may for that purpose necessaryaffirmation.(6)Thetribunalmaygivedirect oftheproceedingsofanyevidenceinhiscustodyorcont §39.POWERTOMAKEPROVISIONALAWARDS shallhavepowertoorderonaprovisionalbasisanyr award.(2)This includes, for instance, making-(a)provis disposition of property as between the parties, or (b) a costsofthearbitration.(3)Anysuchordershallbe subjecttothetribunal'sfinaladjudication; and the tribunal'sfinalaward,onthemeritsorastocosts, shalltakeaccountofanysuchorder.(4)Unlessthe partiesagreetoconfersuchpoweronthetribunal, the tribunalhasnosuchpower. This does not affect its powersundersection47(awardsondifferentissues,&c.). ³⁷ Id.

¹³⁸ Id.; Werbicki Supranote20at67

139. The Indian nceavailablewiththeparties thearbitratorsthepowertoenjoinanypieceofevide ArbitrationActprovidesforthearbitratorstoorder interimmeasures of protection, but limits theirauthoritytothesubjectmatterofthedispute.It alsogivesthepowertodemandsecurityfor suchorders ¹⁴⁰. Netherlands Arbitration Act provides for tribunal ord ersinthematterof ¹⁴¹.Butinthematterrelatingtoprovisionalor appointingexpertsandexaminingwitnesses conservatorymeasuresithasnospecificprovisionoth erthantheoneauthorizingthearbitratorsto grantinterimawards. Thereisnoexplanation in the Actofthetypesorthelimitationsonthe arbitratorstograntinterimrelief ¹⁴². However, the parties can by special agreement empower the insummaryproceedings ¹⁴³. tribunalorthechairmantoorderprovisionalmeasures

¹⁴⁰ArbitrationandConciliationAct,1996§17.INTERIMMEASU TRIBUNAL (1)Unlessotherwiseagreedbytheparties,thearbitra orderapartytotakeanyinterimmeasureofprotection respectofthesubject-matterofthedispute.(2)Thearb appropriatesecurityinconnectionwithameasureordered undersub-section(1), availableat http://www.lexmercatoria.org

sforthearbitrationproceedingswithoutbeing ethepartieshavedecidedotherwiseasstipulated e,thegoverningprinciplesofproceedingsasenacted aysbeapplicabletoarbitrationproceedings. e, the arbitrator may enjoin him to produce the same,

RESORDEREDBYARBITRAL ltribunalmay, at the request of a party, asthearbitraltribunalmayconsidernecessaryin itraltribunalmayrequireapartytoprovide

WITNESSES 1.Ifanexaminationof rmine the time and place of the examination and thearbitraltribunaldeemsitnecessary, itshallexamine ticle107(1).2.Ifawitnessdoesnotappear the arbitral tribunal may allow a party whosoraltribunal,topetitionthePresidentoftheDistric ationofthewitnessshalltakeplace.The ordinarycourtproceedings.TheClerkoftheDistrict tunityofattendingtheexaminationofthewitness.3. outdelaytothearbitraltribunalandthepartiesa tribunalmaysuspendtheproceedingsuntiltheday , availableathttp://www.lexmercatoria.org Thearbitraltribunalmayrenderafinal availableathttp://www.lexmercatoria.org

OCEEDINGS1. oritschairmantorenderanawardinsummary Intheeventthat.notwithstandingsuch theDistrictCourtinsummaryproceedings,hemay, takingintoaccountallcircumstances,declaretohave ryarbitralproceedings, unless the saidagreement oceedingsshallberegardedasanarbitralawardto iveofthisTitleshallbeapplicable.4.Inthecase

 $^{^{139}} Art. 1460 NCPC- The arbitrators shall lay down the rule\\$ boundbytherulesgoverningthecourtsoflaw,savewher inthearbitrationagreement. Notwithstanding the abov under Articles 4 to 10, 11 (sub-article 1) and 13 to 21 shall alw Whereapartyhasinhispossessionanitemofevidenc availableathttp://www.lexmercatoria.org

¹⁴¹NetherlandsArbitrationActArticle1041EXAMINATIONOF witnessestakesplace, the arbitral tribunal shall dete mannerinwhichtheexaminationshallproceed.Ifthe the witness esono athor affirmation as provided in arvoluntarilyor, having appeared, refuses to give evidence, requests, within a period of time determined by the arbit Courttoappointajudge-commissarybeforewhomtheexamin examination shall take place in the same manner as inCourtshallgivethearbitratororarbitratorsanoppor The Clerk of the District Court shall communicate withcopyoftherecordoftheexamination.4. The arbitral $on which it has {\it received} the {\it record} of the examination$ ¹⁴²NetherlandsArbitrationActArticle1049TYPESOFAWARD

award, apartial final award, or an interimaward, ¹⁴³Kojovic Supranote118; ArbitrationActArticle1051SUMMARYARBITRALPR Thepartiesmavagreetoempowerthearbitraltribunal proceedings, within the limit simposed by article 289(1).2. agreement, the case is brought before the President of ifapartyinvokestheexistenceofthesaidagreement, nojurisdictionbyreferringthecasetotheagreedsumma isinvalid.3. Adecisionrenderedinsummaryarbitralpr whichtheprovisionsofSectionsThreetoFiveinclus

Animportantandinterestingissueraisedinthisreg ardistheconceptofresjudicata, when a party after denial by the Court to order for interimmeasures, approaches the tribunal for suchameasure. This is suegets added importance in are aswheretheconcurrentjurisdictionofthe Courtsandtribunalisavailable.OneUScourt,whichwa sceasedofsuchamatter, ruled that the tribunalhastheauthoritytograntinterimreliefeve nafterthedenialofsuchareliefbythe Court 144. Someother US lower courts have also stated that a wardsmadebythearbitratorsarenot toprovisional relief 145. reviewable, thoughthose decisions were not relating

C. EnforcementofInterimMeasuresOrderedbyArbitrat ors

Asarbitrationinitselfisavoluntarysubmissiontot hetribunalbasedonanagreement betweenparties, the enforcement of the provisional re lieforderedbythetribunalreliesheavilyon voluntary compliance of the parties 146. But the problemarises when a partyre fuses to comply with these orders. One of the obvious limitations in approachinganarbitraltribunalfor orders 147. Mostofthestatelegislations do provisionalmeasureistheirinabilitytoenforcesuch enforcement 148. Butthear bitrators do have notgiveanypowertothearbitratorsintheissueof certainwaysofenforcingtheirordersinpractice. Forexampleinmatters relating to evidence, the tribunalmaypresumenegativeinferenceifapartyrefuse stoproduceevidencebeforethe tribunal 149. Likewise, it can also uses anctions to force the c omplianceorifithascontroloverany etoenforceitsorders ¹⁵⁰. Alltheseare propertyinvolvedinthedispute,itmaypossessthesam subjecttojudicialchallengeinthenationalcourts.T hetribunalsandinsomecasesthepartiescan

referraltothesummaryarbitralproceedingsmentionedi nparagraph(2)above,noappealmaybelodged against the decision of the President of the DistrictCourt, availableathttp://www.lexmercatoria.org

¹⁴⁴SperryInt'lTrade,Inc.v.Israel,689F.2d301(2dCir.1982) . The Sperry case is discussed in detail in thesectiononenforcementofawards.

¹⁴⁵B ORN Supranote3at820; Michaelsv. MariforumshippingSA, 624F.2d411(2nd Cir.1980)

¹⁴⁶Kojovic *Supra*note118

 $^{^{147}} David Brynmor Thomas, \quad \textit{InterimReliefPursuanttoInstitutionalRulesUnder the EnglishArbit}$ ration Act1996, ArbitrationInternational1997

¹⁴⁸ *Id*;B ORN *Supra*note3at820

Horning Supra note8at111

¹⁵⁰B ORN Supranote3at820

alsoseektheassistanceofthenationalcourtsfor theenforcementoftheirawards ¹⁵¹. Therefore, thepositionofthenationalcourtsandthenational legislationsauthorizingtheenforcementof interimordersmadebythearbitratorsbecomeimportant .Further, other important issues when dealing with enforcementare the scope for review of the order and the ground for refusal to enforce. Can the Courts denyen for cing the interimorders are the enforcement of the enforcement

Thesystemofenforcementofprovisionalorderscan bestudiedintwotopics, viz., the systemwheretheprovisionalremedyisconsideredan awardandexecutedassuchandthesystem whereitisconsideredasanorderandthecourtspro videassistancefortheenforcement.Inthe formerapproachthechanceforjudicialreviewofthe awardislimitedwhileinthelatterthereis scopeforreviewoftheorder.Netherlands,UnitedS tates, France and Belgium subscribe to the elatterapproach ¹⁵².InNetherlands,the formerapproachwhereasSwissandGermanlawtaketh Courtswillenforceprovisionalmeasuresorderedbythe TribunalpursuanttoArticle1051ofthe ialaward ¹⁵³.InUSandsimilarcountries. ArbitrationAct, astheywouldenforceaglobalorpart whichviewtheprovisionalreliefasanawardandse ektoenforcethemassuchhaveconsidered teritseekstoaddress ¹⁵⁴. The Sixth Circuitin the 'interim' awardas finalin relation to the mat IslandCreek 155 caseandNewYorkdistrictcourtinSouthernSeas ¹⁵⁶havetakenthisviewwhile 1¹⁵⁷. Asfaras US is concerned the leading enforcingtheprovisionalawardsgrantedbythetribuna

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¹⁵¹Kojovic Supranote118; Wagoner Supranote24at72

¹⁵²Kojovic Supranote118

¹⁵³ Id

¹⁵⁴ Id;B ORN Supranote3at820

 ¹⁵⁵IslandCreekcoalSalesCo.v.CityofGainesville, Florida729F.2d1046(6thCir.1984)
 ¹⁵⁶SouthernSeasNavigationLimitedofMonroviav.Petro leosMexicanosofMexicoCity606F.Supp.

⁶⁹²⁽S.D.N.Y.1985)

¹⁵⁷ IslandCreekCoalSalesCo.v.CityofGainesville, JudgeAllenconcludedthat"[t]heinterimawarddisposesof Cityisrequiredtoperformthecontractduringthependency separate,discrete,independent,severableissue."Memora findthisconclusiontobeinerror.";SouthernSeasa to CourtcannotacceptPemex'sargument.Thisawardisnota intermediatestepinanongoingarbitralprocessbut,in above,thearbitratorsthemselvesperceivedtherequest ithesenseofbeingan"intermediate"steptowardafurth purposeistoclarifytheparties'rightsinthe"interi m"p

Fla.,729F2d1046,1049(6thCir.1984)"Chief esof oneself-containedissue,namely,whetherthe ofthearbitrationproceedings.Th[is]issueisa ndumOpinion,July24,1983,at8.Wedonot t693,694"Giventheequitablereliefgranted,this partialresolutionoftheparties'claimsasan effect,agrantofapreliminaryinjunction.Asnoted insuchterms""Suchanawardisnot"interim"in erend.Rather,itisanendinitself,foritsvery m"periodpendingafinaldecisiononthemerits.The

ationwastheSperrycase ¹⁵⁸.Inthiscase,the caseonthissubjectarisingfrominternationalarbitr ntoacontractwiththeGovernmentof USCompanySperryInternationalTrade,Inc.enteredi Israel, which had an arbitration clause. When a dispute arosebetweentheparties, Sperry approached the District Court to compelar bitration andforinjunctionrestrainingIsraelfrom drawingonaletterofcreditpendingarbitration.Th eDistrictCourtcompelledarbitration and enjoinedIsraelfromdrawingontheletterofcredi t. Is rae lappealed to the Court of Appeals,whichreversedthepreliminaryinjunctiongrantedbyt heDistrictCourtstatingthatSperryhad notshownirreparableinjurytowarranttheinjunction. Israelimmediatelystartedtodrawonthe letterofcredit.Butbeforethedispersalofthefunds ,SperrymovedtotheNewYorkState SupremeCourtandobtainedanorderofAttachment.Isra elremovedtheactiontotheFederal dacrossmotiontoconfirmthe Courtandmovedtovacatetheattachment.Sperrymove attachmentandalsoarguedbeforethetribunaltoenjoi nIsraelfromdrawingontheletterof credit. The Arbitrators accepted Sperry's argument and providedaprovisionalaward.Sperry informedthistotheFederalcourtandalsobroughta motiontoconfirmtheaward. The District Courtconfirmedtheaward.OnAppealtheCourtofAppeals recognized the authority of the ¹⁵⁹.ItisinterestingtonotethattheCourtof arbitratorstoissueinterimawardsandenforcedit Appealswhendiscussingtheissueofenforcementandre view,tookintoaccount9U.S.C§9,10 and 11 160. These Sections of the FAA deal with the enforceme ntoftheawardsissuedbythe

only meaning ful point at which such an award may be enfoarbitratorshavecompletelyconcludedconsiderationofa

rcediswhenitismade,ratherthanafterthe Iltheparties'claims."

¹⁵⁸SperryInt'lTrade,Inc.v.Israel,689F.2d301(2dCir.1982)

 $^{^{160}\}mathit{Id}$ at 304,305 "It is beyond cavil that the scope of the distr ictcourt'sreviewofanarbitrationawardis limited.Under9U.S.C.s9(1976), "thecourtmustgrant... anorder(confirminganarbitrationaward) unlesstheawardisvacated, modified, or corrected aspre scribedin(9U.S.C.ss10and11(1976))." Section 10 permits the court to vacate an award only in specificsituations, such as "(w) heretheawardwas procuredbycorruption, fraud, or undue means, "s10(a); "(w) he retherewasevidentpartialityorcorruption inthearbitrators, "s10(b);"(w)herethearbitrator swereguiltyof(certaintypesof)misconduct...orof any vebeenprejudiced, "s10(c); or "(w) herethe othermisbehaviorbywhichtherightsofanypartyha arbitratorsexceededtheirpowers,"orfailedtomake"a mutual, final, and definite award upon the subject mattersubmitted, "s10(d). Inaddition, an award may be se tasideon"thenonstatutorygroundof manifest disregard'ofthelaw,"Drayerv.Krasner,572F.2d348,352(2dCi r.), cert.denied, 436U.S. 948, 98S.Ct. 2855,56L.Ed.2d791(1978),but"thispresuppose(s)'somethingbeyondand differentfromamereerrorin

arbitrators. The courtreasoned that the interimawar dthoughinterimintime, is finalin regardto thematteritaimstosolve.Soitappliedthereview groundsavailabletothefinalawardsunder FAA¹⁶¹.EveninacasewheretheMassachusettsStateSuperio rCourtrefusedtoenforcethe interimrelief granted by the arbitrators, it recogni zedtheauthorityofthetribunaltoorderinterim eementbetweentheparties 162. reliefwhenitissupportedbystatuteorarbitrationagr

Swissarbitrationstatuetakesaslightlydifferenta pproachbyauthorizingthearbitrators irinterimorders ¹⁶³. There are differing toseekassistancefromtheCourtsforenforcingthe opinions on the question whether the decision to approa chthecourtsforenforcementliesentirely withthearbitrators. Some experts have said that the partiescanalsoapproachtheCourtfor enforcementoftheorders ¹⁶⁴. Some experts also view the issues of review of the s ubstantive conditions underlying the orders differently 165. The Swiss courts will provide assistance for enforcementoftheinterimorderseveniftheseat ofarbitrationisoutsideSwitzerland.

understandorapplythelaw,"id.(quotingSanMartine thelaworfailureonthepartofthearbitratorsto CompaniadeNavegacion,S.A.v.SaguenayTerminalsLtd., 9USC§9. Awardofarbitrators; confirmation; jurisdicti haveagreedthatajudgmentofthecourtshallbeentered and shall specify the court, the natany time within o arbitrationmayapplytothecourtsospecifiedforano mustgrantsuchanorderunlesstheawardisvacated, modif and 11 of this title. If no court is specified in the agre made to the United States court in and for the districtapplicationshallbeservedupontheadverseparty, and the partyasthoughhehadappearedgenerallyintheproceeding.I withinwhichtheawardwasmade, such service shall be prescribedbylawforserviceofnoticeofmotionin anonresident, then the notice of the applications hal theadversepartymaybefoundinlikemannerasotherpr ¹⁶¹Sperry,689F.2dat306"Inthefinalanalysis" Arbitrators reflectthespiritratherthantheletteroftheagre theyfeelthatthearbitrator'sinterpretationdisrega orresultedfromamisapplicationofsettledlegalprincipl because the arbitrator has exceeded the power the court w chosentolitigate, rather than to arbitrate the disput shouldrecognizethatarbitrationproceduresandawardsoft endifferfromwhatmaybeexpectedincourts

293F.2d796,801(9thCir.1961))." on;procedure:Ifthepartiesintheiragreement upontheawardmadepursuanttothearbitration, neyearaftertheawardismadeanypartytothe rderconfirmingtheaward, and thereupon the court ied, or corrected as prescribed in sections 10 ementoftheparties, then such application may be withinwhichsuchawardwasmade. Notice of the reuponthecourtshallhavejurisdictionofsuch fthe adverse party is a resident of the districtmade upon the adverse party or his attorney asan action in the same court. If the adverse party shallbeservedbythemarshalofanydistrictwithinwhi ocessofthecourt. Seealso 9USC§10&11 maydojustice"andtheawardmaywell ement....Thuscourtsmaynotsetasideanawardbecause rdstheapparent, or eventhe plain, meaning of the words es.Inotherwordsacourtmaynotvacateanaward ouldhave, or would have had if the parties had e. Those who have chosen arbitration, as their forum

¹⁶² See CharlesConstructionCo.v.Derderian,586N.E.3d992(Mass. 1992)

1be ch

 $^{^{163}} See Art. 183 of Swiss Private International Law Supran \\$ ote118

¹⁶⁴Kojovic Supranote118citingopinionsbyleadingexperts

TheGermanarbitrationstatuealsoauthorizesthecourt stoprovideassistancetoenforce theinterimordersprovidedthatnosimilarapplicatio nforinterimreliefispendingbeforethe court 166. Further Art. 1041(2) provides the Courts with the authorit ytoremodeltheinterimrelief 167. This orderedbytribunalstofitthesystemavailabletothe Germancourtsundertheircivillaw issuewasraisedbeforeaGermancourtwhenenforcing aMarevainjunction. The court was faced withdifficultywhentryingtoimplementtheinjunctio nandfinallyenforceditasaninjunction availabletotheGermancourts ¹⁶⁸.InmatterswheretheGermancourtshavealreadyre fused interimreliefandthesamewassubsequentlygrantedby thetribunals.theGermancourtswill ${}^{169}. Enforcement of interimor ders granted by tribunal\\$ enforcetheordersasgrantedbythetribunal sittingoutsideGermanyinGermancourtshasnotbeen clearlyaddressedbythestatute.Sections 1025(2)and(3)whichliststheprovisionsapplicabletoarbit rationwhentheseatisoutside interimreliefviz.Sec.1041 ¹⁷⁰.However. Germanydoesnotcontaintheprovisiondealingwith Sec. 1062 of the German Arbitration Statue which deals wi ththeenforcementofawardsgranted withinandoutsideGermany, is listed in Sec. 1025, this canbeinterpretedtogivepowertothe Germancourtstoenforceevenprovisionalmeasuresgra ntedoutsideGermany.Sec.1062confers jurisdictiontothehigherRegionalCourtwheretheo pposingpartyhasitsplaceofbusinessor

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¹⁶⁶ See Art.1041(2)BookTenofZPO(GCP)

¹⁶⁷ *Id*;Schafer *Supra*note4

¹⁶⁸ Kojovic Supranote118; Schafer Supranote4" Atranslationofa Marevainjunctioninto Germanlaw underthisregime by the Karlsruhe Court of Appealser ves The court discussed different ways of translating a Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might have been suggested at first sight. At anslation of a Marevainjunctionint of a dinglic hear Arrest was ruled out, equally the transfertoan einstweilige Verfuegung arevainjunctionint of Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might are vainjunctionint of Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might arevainjunctionint of Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might arevainjunctionint of Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might arevainjunctionint of Marevainjunctionint of Germanlaw, to meet the preconditions of the certainty principle (Bestimmtheits grunds atz). It proved to be more difficult than might arevainjunctionint of Marevainjunctionint of Marevain

^{170 § 1025} Book Tenof ZPO (GCP) Scope of application: (1) The provisions of this Book apply if the place of arbitration as referred to insection 1043 subs. 1 iss it uated in Germany. (2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (2) The provisions of this Book apply if the place it uated in Germany. (3) If the provision so fiscations to a doubt it uated in Germany. (3) The provision so fiscations is uated in Germany. (4) Sections 104 and 1050 also apply if the place it uated in Germany. (4) Sections 104 and 1050 also apply if the place it uated in Germany. (4) Sections 1050 also apply if the place it uated in Germany. (5) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (6) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (7) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (8) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (8) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (9) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (9) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (9) The provision so fiscations 1032, 1033 and 1050 also apply if the place of arbitration is situated in Germany. (9) The provision so fiscations 1032, 1035 and 1032, 1035 are arbitration is situated in Germany. (9) The provision so fiscation is situated in Germany. (9) The provision so fiscation is situated in Germa

habitualresidenceorwheretheassetsofthepartyor thepropertyindisputeoreffectedbythe matterislocated ¹⁷¹.

Englishlawtakesacompletelydifferentapproachfrom theabovepositions.Sec.39of theArbitrationAct ¹⁷²providesforprovisionalrelieffromthearbitrators. Butthenomenclature giventosuchreliefhascreatedsomeconfusionregar dingtheenforcementofsuchorders ¹⁷³.The questionnowariseswhethersuchreliefgrantedbythe tribunaloughttobeenforcedunderSec. ¹⁷⁵readwithSec.41 ¹⁷⁶oftheAct.Sec.66oftheActprovidesfor

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of

^{171§1062(2)}BookTenofZPO(GCP):Iftheplaceofarbitrati oninthecasesreferredtoinsubsection 1, no.2, firstalternative, nos. 3 and 4 is not in German y, competencelies with the Higher Regional Court (Oberlandes gericht) where the party opposing the application has his place fbusiness or place of habitual residence, or whereas sets of that party or the propert yind is pute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammer gericht) shall be competent.

 ¹⁷² See Arbitration Act, 1996, c. 23§39
 173 Kojovic Supranote 118; Thomas Supranote 147

¹⁷⁴ Arbitration Act, 1996, c. 23, § 66-(1) Anawardmade by the tragreement may, by leave of the court, been forced into to the same effect. (2) Where leave is so given, judgmen to enforce anaward shall not be given where, or to be enforced shows that the tribunal lacked substantive juri such an objection may have been lost (see section 73). (4) Nenforcement of an award under any other enactment or Arbitration Act 1950 (enforcement of awards under Geneva C Act relating to the recognition and enforcement of awards on the award

¹⁷⁵ Arbitration Act, 1996, c. 23, §42-(1) Unless otherwise agre order requiring aparty to comply with a peremptory order ma order under this section may be made-(a) by the tribuna arbitral proceedings with the permission of the tribunal (a the parties have agreed that the powers of the court under shall not act unless it is satisfied that the applicant has exhibit a failure to comply with the tribunal's order. (4) No order satisfied that the person to whom the tribunal's order time prescribed in the order or, if not ime was prescribed court is required for any appeal from a decision of the court is required for any appeal from a decision

courtisrequiredforanyappealfromadecisionoftheco

176 Arbitration Act, 1996, c. 23, §41-(1) Theparties are free
of aparty's failure to do something necessary for the
Unless otherwise agreed by the parties, the following pr
there has been in ordinate and in excusable delay on the pa
the delay-(a) gives rise, or is likely to give rise, to assub
resolution of the issues in that claim, or (b) has cau
respondent, the tribunal may make an award dismissing the
party-(a) fails to attendor be represented at an or al
matters are to be dealt within writing, fails after
submissions, the tribunal may continue the proceedings in
without any written evidence or submission son his beh
evidence before it. (5) If without showing sufficient ca

bythetr ibunalpursuanttoanarbitration
hesamemannerasajudgmentororderofthecourt
tmaybeenteredintermsoftheaward.(3)Leave
heextentthat,thepersonagainstwhomitissoughtto
urisdictiontomaketheaward.Therighttoraise
(4)Nothinginthissectionaffectstherecognitiono
uleoflaw,inparticularunderPartIIofthe
nevaC onvention)ortheprovisionsofPartIIIofthis
rdsundertheNewYorkConventionorbyanaction

debytheparties, the court may make an debythetribunal. (2) An application for an l (uponnotice to the parties), (b) by a party to the al (and uponnotice to the other parties), or (c) where er this section shall be available. (3) The court has exhausted any available arbitral processing spect shall be made under this section unless the court is was directed has failed to comply with it within the bed, within a reasonable time. (5) The leave of the urtunder this section.

properandexpeditiousconductofthearbitration.(2)
gpr ovisionsapply.(3)Ifthetribunalissatisfiedthat
hepa rtoftheclaimantinpursuinghisclaimandthat
oasubstantialriskthatitisnotpossibletohavea fair
)hascaused,orislikelytocause,seriousprejudicetot he
singthe claim.(4)Ifwithoutshowingsufficientcausea
hearingofwhichduenoticewasgiven,or(b)where
duenoticetosubmitwrittenevidenceormakewritten
tingsin theabsenceofthatpartyor,asthecasemaybe,
beh alf,andmaymakeanawardonthebasisofthe
ca useapartyfailstocomplywithanyorderor

theenforcementofawardsmadebytribunals. Bythewa yithasbeendrafted, it has more coercivepowerstoenforceanaward. However, as the provisionalremediesgivenbythe arbitratorsarereferredtoasorders, it is doubtfulw hetherthecourtswillusethissectionto enforcethem ¹⁷⁷. TheotheroptionleftopenforthecourtsistouseS ection42inrelationwithSec 41oftheAct.Section41providesforsomemeasuresthat thearbitratorscanusetoenforceits provisional remedies, provided the parties have agreed tosuchmeasuresintheiragreement. The ¹⁷⁸.If arbitratorscanissueapreemptoryorderiftheparties failtocomplywiththeirinterimorder nonlyafterthedefaultingpartyhasfailedto thepartieshavesoagreed, then the courts can stepi madebythetribunal ¹⁷⁹.Incaseof complywiththearbitralorderandthepreemptoryorder preemptoryorders concerning security for costs, the A ctalsoprovidesforsomeadditional trationcausedduetosuchfailure,etc.are measuresincludingadverseinferenceandcostsofarbi availabletothetribunal ¹⁸⁰.But,theseadditionalmeasuresarenotnecessaryto befollowedprior toapproachingthecourt ¹⁸¹.Ifthepreemptoryorderissuedbythearbitratorsisn otcomplied with, theneitherthetribunalorthepartieswiththepermis sionofthetribunalcanapproachthecourt 182.Section42 stricttheapplicationofSec.42 forenforcement, provided they have not agreed to re whencompared to Sec 66 has considerably less bit einth ematterofenforcement. Another provisionthatthearbitratorscanusetomakethepart iescomplywithitsordersisSec.41(2).

directionsofthetribunal, thetribunal may make apere timeforcompliancewithitasthetribunalconsiders peremptoryorderofthetribunaltoprovidesecurityforc hisclaim.(7)Ifapartyfailstocomplywithanyoth section42(enforcementbycourtoftribunal'speremptory (a) direct that the party indefault shall not be entit subjectmatteroftheorder;(b)drawsuchadverseinfer circumstancesjustify;(c)proceedtoanawardontheba providedtoit;(d)makesuchorderasitthinksfitasto consequenceofthenon-compliance.

177 See Kojovic Supranote118; Thomas Supranote147

mptoryordertothesameeffect, prescribing such appropriate.(6)Ifaclaimantfailstocomplywitha osts, the tribunal may make an award dismissing erkindofperemptoryorder, then, without prejudice to orders), the tribunal may do any of the followingledtorelyuponanyallegationormaterialwhichwast encesfromtheactofnon-complianceasthe sisofsuchmaterialsashavebeenproperly thepaymentofcostsofthearbitrationincurredin

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¹⁷⁸Werbicki Supranote20

¹⁷⁹ See ArbitrationAct, 1996, c. 23§42(3) Supranote174above;alsoseeKojovic Supranote118; Thomas Supranote147; Werbicki Supranote20

¹⁸⁰ See ArbitrationAct, 1996, c. 23§41(7) Supranote175

¹⁸¹ *Id.*; *See*Kojovic *Supra*note118;Thomas Supranote147

¹⁸² See ArbitrationAct, 1996, c. 23§42(2) Supranote174

PursuanttoSec41(2)oftheAct, thetribunalcandismiss inordinatedelaysresultinginapositionwhereafai rusubstantialrisktotherespondent. Taken, asawhole enoughtollsfortheenforcementofinterimorderso frismodeledontheUNCITRALModelLaw, does not have interimmeasuresordered by the tribunal and there is not this issue. Hence, the position that the Indian courts where interimmeasures granted by the tribunals. Aparty tryin aconfusing scenario invarious countries. This positio structure to deal with the interimmeasures.

theclaimofapartyifitsactioncauses
rresolutionisnotpossibleorhascaused
theEnglishArbitrationActhasnotgiven
fthearbitrators 183. TheIndianstatute, which
re anyprovisionfortheenforcementof
oreportedcaselawsofarwhichdeals with
willtakewhenenforcinginterimreliefis
ryalotintheirdealingofenforcementof
gtoenforceinterimmeasures would face
nhighlightstheneedforaharmonized

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¹⁸³ SeeKojovic Supranote118

CHAPTERIIII

PROVISIONSFORINTERIMMEASURESUNDERVARIOUSINSTI TUTIONAL RULESANDINTERNATIONALCONVETIONS

InternationalArbitrationforthemostpartisconduct edundertheauspicesofthe institutionslikeAmericanArbitrationAssociation(A AA),LondonCourtofInternational Arbitration(LCIA), PermanentCourtofArbitration(PC A), International Chamber of Commerce (ICC), and International Council for Settlement of I nvestmentDisputes,etc.Somecontractsmay optforad-hocarbitration, which is usually conducted un dertheUNCITRALArbitrationRules. Incaseswherethepartiesoptforoneoftheabovein stitutionstoconducttheirarbitration, the rulesofsuchinstitutionshavethegoverningeffecto ntheproceduralmatters. Hence, the availabilityortheextenttowhicharbitratorscangr antinterimmeasuresdependheavilyonthe rules of the institutions 184. The other important group that has a binding say over suchmattersare theinternational conventions. In this chapter, the rulesoftheinstitutionsandtheinternational conventions effect on interimrelie far estudied. Th eprovisionsofUNCITRALModelLawand theRules,includingtheproposedchangesthatarebeing consideredarediscussedinthe followingchapters

A. CourtOrderedReliefunderInstitutionalRulesandC onventions

Mostoftheinstitutionruleshaveinsomeformorth eotherprovisionstosupporttheaid of courtsforarbitration 185. The major concernfor parties to arbitration agreem entist hat their approach to the Courtsfor interimrelie finight be seen as a breach of the agreement itself. Rules

 $^{^{184}}$ R EDFERN Supranote1at284;B ORN Supranote3at820,Ashman Supranote117at780 185 GregoireMarchac, InterimMeasuresinInternationalCommercialArbitrationUndertheICC ,AAA, LCIAandUNCITRALRules ,10Am.Rev.Int'lArb.123,134(1999);KeldaGroves , VirtualReality: EffectiveInjunctiveReliefInRelationToInternationalArbitrations ,Int.A.L.R.1998,1(6),188-193

ofICC, AAA and World Intellectual Property Organizat ion(WIPO)ArbitrationRuleshave provisionsthatmakeitclearthatsuchanapproachwil Inotbeconsideredtobeaviolationofthe agreementtoarbitrate ¹⁸⁶.LCIAandtheICSIDrulesdonotprovideforsuchapr ovision, buthave cialauthorities for interimrelief 187. The ageneralprovisionthatallowspartiestoapproachjudi institutionalrulesdonotdiffermuchintheirrecogn itionofcourtspowertograntinterimmeasure pendingarbitration, except for a few instances. For exa mple,LCIArulesrequire'exceptional circumstances' for court intervention after the const itutionofthetribunal, whereasthe ICC rules iustrequire 'appropriate circumstances' 188. It is also interesting to note that the LCIA rules prohibitspartiesfromapproachingnationalcourtsforpro visionalmeasuresonsecurityforcosts, ¹⁸⁹.ICSIDruleallowspartiestoapproach whichhavebeenmadeavailablefromthetribunalitself ¹⁹⁰. Thoughthe ICSI Drules provide for parties thecourtsonlyiftheyhavealreadyagreedtodoso

ayapplytoanycompetentjudicialauthorityfor

bitral Tribunal shall not be deemed to be an

questforinterimmeasuresaddressedbyapartyto

rtytoajudicialauthorityforinterim

patible with the Arbitration Agreement, or

alTribunalunderArticle25.1shallnot

ecourtorotherjudicialauthorityforinterimor

formation of the Arbitral Tribunal shall be

ibunalandallotherparties. However, by

hallpreventtheparties, provided that they have so

requestinganyjudicialorotherauthoritytoorder

urestakenbythejudicialauthoritymustbe

hthe agreement to arbitrate or a waiver of the

 $^{^{186}} ICC Rules of Arbitration Art. 23(2) Before the file is \\$ transmittedtotheArbitralTribunal,andin appropriate circumstances even thereafter, the parties m interimorconservatorymeasures. The application of a partytoajudicialauthorityforsuchmeasuresorfor theimplementationofanysuchmeasuresorderedbyanAr infringementorawaiverofthearbitrationagreement andshallnotaffecttherelevantpowersreservedto the Arbitral Tribunal. Any such application and any meas notified without delay to the Secretariat. The Secreta riat shall inform the Arbitral Tribunal thereof.AAAInternationalArbitrationRulesArticle21(3):Are ajudicialauthorityshallnotbedeemedincompatiblewit righttoarbitrate, availableat http://www.iccwbo.org/court/english/arbitration/rules.a sp WIPOArbitrationRulesArt.46(d)Arequestaddressedbyapa measuresorforsecurityfortheclaimorcounter-clai m, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed in comdeemedtobeawaiverofthatAgreement, availableat http://arbiter.wipo.int/arbitration/rules/index.html ¹⁸⁷LCIAArbitrationRulesArt.25.3ThepoweroftheArbitr prejudicehowsoeveranyparty'srighttoapplytoanystat conservatorymeasuresbeforetheformationoftheAr bitralTribunaland,inexceptionalcases,thereafter. Anyapplicationandanyorderforsuchmeasuresafterthe promptly communicated by the applicant to the Arbitral TragreeingtoarbitrationundertheseRules,thepartiessh allbetakentohaveagreednottoapplytoanystate courtorotherjudicialauthorityforanyorderforsecur ityforitslegalorothercostsavailablefromthe ArbitralTribunalunderArticle25.2., availableat http://www.lcia-arbitration.com/lcia/download/ ICSIDArbitrationrulesSec.39(5)NothinginthisRules stipulated in the agreement recording their consent, from provisionalmeasures, prior to the institution of the pr oceeding.orduringtheproceeding.forthe availableat http://www.worldbank.org/icsid/basicdocpreservationoftheirrespectiverightsandinterests., archive/63.htm

¹⁸⁸See Supranote186and187 ¹⁸⁹ *Id*

 $^{^{190}}Id$

toapproachthecourtsforinterimrelief, considering thatoneofthepartiestothedisputeunder ICSIDisinvariablyastate, the effect of sovereign immunityonsuchmattersaddaninteresting twist 191. This is suegains specific importance in US where the FederalSovereignImmunitiesAct hascomeintoforce. Inoneleading case before the Courtof Appeals for the District of Columbia, theCourtreversedthejudgmentoftheDistrictcourt confirming an award of the arbitrators, notingthatwaiverofsovereignimmunitycanbeassume donlywhenthearbitrationagreement ¹⁹². Apartfromthisissueofsovereign specificallyprovidedforcourtroleinenforcement .26oftheConventionontheSettlementof immunitytheothermajorcauseforconcernistheArt InvestmentDisputes ¹⁹³.Article26oftheConventionexcludesotherremedies outsideofthe ¹⁹⁴.CourtsinsomenationsincludingFrance Convention, unless otherwise agreed by the parties rejectapplicationstoconfirmawardinmatters and Belgium have cited this article, as areas onto ¹⁹⁵.FurtherthecommentmadebyICSIDatthetime wherearbitrationwaspendingbeforeICSID whentheprovision39(5)oftheICSIDrulewasissued,cl earlyreiteratesthepositionofArt.26of theconventionandspecificallystatesthattheonly occasionwhenthepartiescanapproachthe 196 nationalcourtsforinterimrelief, is when they hav eexpresslystipulatedsointheircontract Thepartieshavetoexpresslyprovideforinterimrelie ffromthenationalcourtsinthecasesin whichtheyoptforICSIDarbitration.Itisclearfro mthewaytherulesoftheinstitutionshave beensetupthatallofthemrecognizethepartiesright toapproachthecourtsforinterimrelief albeitwithsomereservations.

 $^{^{191}} Philip D.O'Neill, \quad American Legal Developments in Commercial Arbitration Involving Foreign$ States $and State Enterprises \ , International Commercial Arbitration Recent Devel$ opments(EmmanuelGaillard& Robert B. Von Mehren, Chairmen) 476 Vol. II at 225

¹⁹²MINEv.RepublicofGuinea,693F.2d1094(D.C.Cir.1983);PaulD .Friedland, ProvisionalMeasures andICSIDArbitration ,2Arb.Int'1335(1986)

¹⁹³C ONVENTIONON SETTLEMENTOF INVESTMENT DISPUTES BETWEEN STATESAND NATIONALSOF OTHER STATES, Article 26 Consent of the parties to arbitration under thisConventionshall,unlessotherwise stated.bedeemedconsenttosucharbitrationtotheexc lusionofanyotherremedy. A Contracting State mavrequiretheexhaustionoflocaladministrativeoriudi cialremediesasaconditionofitsconsentto arbitrationunderthisConvention;PaulD.Friedland, ICSIDandCourt-OrderedProvisionalRemedies:An Update,4Arb.Int'1161(1988)

ICSIDConvention Supranote193

¹⁹⁵Friedland Supra note192

¹⁹⁶Marchac Supra note185

TheInternationalconventionsontheotherhanddo notdealwiththeissueofinterim YorkConventionthatreferstotheCourt relieffromtheCourts.TheonlyprovisionintheNew leII(3) ¹⁹⁷. This provision advises the courts to roleinarbitrationbeforeanawardismade.isArtic 'refer'anymatterbeforethemtoarbitration,ifan arbitrationagreementispresent.Exceptioncan behadonlyiftheagreementisnullandvoid,inopera tiveorincapableofbeingperformed. The word'refer'intheArticle, which has been incorpora tedintotheFAA,hascausedlotsof sstatedearlier.differentCourtsintheUS confusioninCourtintervention,specificallyinUS.A ys¹⁹⁸.Otherthanthisprovision,theNewYork haveinterpretedthemeaningof'refer'invariedwa Conventionissilentonthisissue. Probably provisiona Imeasuresasaremedyinarbitration matterwerenotasimportantasitisnow, hencethe silence. The court shave also used Article VI non-interference. Article VI when of the New York Convention to support their position of dealingwiththesecurityforenforcementofawards madebythetribunaldoesnotmention anythingaboutsecurityforenforcementofinterimmea sures. Hencethe USC ourts have reasoned 199 thattheomissiontomentioninterimordersestablis hestheintentoftheframerstoavoid ThoughtheUSCourtshaveinterpretedthisrelevantAr ticlesdifferently, going by the history of theconventionandtherisingtrendtosupportarbitrat ion, there is a case for interpreting this erringthepartiestoarbitration ²⁰⁰.TheEnglish articleasnotprohibitingcourtjurisdictionafterref courtshavenotconsideredArticleII(3)oftheNew YorkConventionasanobstacletoexercise their jurisdiction to order interimrelief. They hav etakenintoaccountthelegislativehistory

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¹⁹⁷U NITED NATIONS CONVENTIONON RECOGNITIONAND ENFORCEMENTOF FOREIGN ARBITRAL AWARDS Art.II(3):ThecourtofaContractingState, whense izedofanactioninamatterinrespectofwhichthe partieshavemadeanagreementwithinthemeaningofth isarticle, shall, attherequestofoneofthepartie referthepartiestoarbitration, unless it finds that the said agreement is null and void, in operative or incapable of being performed. 21 U.S.T. 2517

¹⁹⁸SeeChapterII Supra

¹⁹⁹CharlesH.BrowerII Supranote8

²⁰⁰ ChinaNat.MetalProductsImport/ExportCo.v.ApezDigit al,Inc.,41F.Supp.2d1013,1020,45UCC Rep.Serv.2d492(C.D.Cal.2001) "Thereisnoindicationthatt chosetheword" refer "toserveasacontradistinctio nfromtheFAA's use of the word "stay," or that they were even a ware of the FAA. Moreover, "refer "doesn all jurisdiction over actions so "referred.""

behindtheprovisionsoftheGenevaProtocolof1923tos upporttheirview ²⁰¹.Inspiteofthe differenceofopinionamongtheCourts,theredoesno tseemtobeaspecificprohibitionof interimmeasuresfromcourtsbytheNewYorkConventio n.

NotonlytheNewYorkConvention,butalsotheother internationalconventions includingtheInter-AmericanConvention,GenevaConv ention, et caresilent on this issue. Even thelaterConventionsignoredtheissueofinterimr eliefintheirtexts.TheEuropeanConvention onInternationalCommercialArbitration(GenevaConv ention, 1961) is probably the only conventiontohaveaspecificprovisiononthismatte r.ArticleIV(4)oftheConventionsstates thatapproachtonationalcourtsforinterimmeasuresi snotincompatible with the agreement to arbitrate²⁰². The Convention for Settlement of Investment Dispute sBetweenStatesandNationals ²⁰³.Remediesother ofOtherStatesalsohasaspecificprovision,albeit onethatactsinthereverse thanfromICSIDhavebeenspecificallyprohibitedunless thepartiesagreetoallowsuch remedies²⁰⁴.LikeinthecaseofNewYorkConvention,theprovi sionsofthePanamaConvention (Inter-AmericanConventiononInternationalCommerc ialArbitration)havetobeinterpretedin thelightoftheintentionoftheframers. Article IVallowsthecourtstoenforceawardsmadeby 1 and 1 and 2 a thearbitrators using their procedural rules, as they wo ulddoforanawardmadebylower courts²⁰⁵. The courts are also authorized to order guarantees w heretheawardissoughttobe annulled or suspended, by Article VI of the Convention.Sincetheprovisions show that the intent oftheframerswastoprovideforanenforceableawar dtothewinningparty,theywouldnothave ²⁰⁶.Eventhoughthemajorinternational prohibitedtheuseinterimmeasuresforthesamepurpose

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²⁰¹ReferCharlesH.BrowerII Supranote8

²⁰²E UROPEAN CONVENTIONON INTERNATIONAL COMMERCIAL ARBITRATIONArt.VI(4): Arequestfor interimmeasuresormeasuresofconservationaddressedt incompatible with the arbitration agreement, or regarde court, available at http://www.asser.nl/ica/eur.htm

²⁰³ SeeEuropeanconvention Supranote202Art.IV

²⁰⁴Friedland Supranote192

²⁰⁵SeePanamaConventionArticleIVandVI

²⁰⁶DavidL.Zicherman, TheUseOfPre-JudgmentAttachmentsAndTemporaryInjunctionsIn
InternationalCommercialArbitrationProceedings:AComparativeAnalysis OfTheBritishAndAmerican
Approaches,50U.Pitt.L.Rev.667,682,683(1989)

conventionsdonothaveanyprovisionauthorizingint Statesmostofthenationalcourtshavebeengranting relief.

erimrelieffromcourts, except for United supporttoarbitrationbyprovidinginterim

B. PoweroftheArbitratorstoGrantInterimRelief

underInstitutionalRulesandConventions

Whenitcomestothepowerofthearbitratorstoorde rinterimreliefmostofthe institutions specifically permitthem to do so, but each hasadifferentapproachtothescopeof suchorders ²⁰⁷. Outofallthemajorinstitutions, ICC might havet hewidestscopeforinterim relieffromthearbitrators ²⁰⁸. Its provision gives the tribunal the power to "order" anyinterimor conservatorymeasureitdeemsappropriate" ²⁰⁹. The provisional sogives the parties the right to optoutofanysuchpowertothearbitrator. Mostofthe otherrulesdonothavesuchsweeping provision. Theytrytolistoutthereliefthat can be grantedbythetribunalorlimitthescopeof theirpowers.LCIArules give a range of powers for th earbitratorstoexercisewhengranting ts, preservation of property, etc 210. The interimrelief, including orders for security for cos

Theamountofanycostsandlossespayable

ralTribunalinoneormoreawards;(b)toorder ypropertyorthingunderthecontrolofanypartyand d(c)toorderonaprovisionalbasis, subject to final ralTribunalwouldhavepowertograntinanaward, thedispositionofpropertyasbetweenany upontheapplication of a party, to order any thelegalorothercostsofanyotherpartybyway n such terms as the Arbitral Tribunal considersotherpartyofacross-indemnity, itself secured in

e, for any costs and losses in curred by such

²⁰⁷Marchae Supra note185

²⁰⁸Groves Supranote185at189

²⁰⁹ICCArbitrationRules:ConservatoryandInterimMeas agreed, as soon as the file has been transmitted to it orderanyinterimorconservatorymeasureitdeemsappro grantingofanysuchmeasuresubjecttoappropriatesecurity suchmeasureshalltaketheformofanorder, givingreas considersappropriate, availableathttp://www.iccwbo.org/court/english/arbitration/rules.asp ²¹⁰LCIAArbitrationRulesInterimandConservatoryMeas thepower,unlessotherwiseagreedbythepartiesinwri respondentpartytoaclaimorcounterclaimtoprovidese wayofdepositorbankguaranteeorinanyothermanner considersappropriate. Such terms may include the provision cross-indemnity, itself secured in such manner as the A orlosses incurred by such respondent in providing security. undersuchcross-indemnitymaybedeterminedbytheArbit thepreservation, storage, sale or other disposal of an relatingtothesubjectmatterofthearbitration;an determinationinanaward, anyrelief which the Arbit includingaprovisionalorderforthepaymentofmoneyor parties.25.2TheArbitralTribunalshallhavethepower, claimingorcounterclaimingpartytoprovidesecurityfor ofdepositorbankguaranteeorinanyothermannerandupo appropriate. Such terms may include the provision by that suchmannerastheArbitralTribunalconsidersappropriat

uresArt.23(1)Unlessthepartieshaveotherwise ,theArbitralTribunalmay,attherequestofaparty, priate. The Arbitral Tribunal may make the being furnished by the requesting party. Any ons, or of an Award, as the Arbitral Tribunalures Art. 25.1 The Arbitral Tribunal shall haveting,ontheapplicationofanyparty:a)toorderany curityforallorpartoftheamountindispute,by anduponsuchtermsastheArbitralTribunal bytheclaimingorcounterclaimingpartyofa rbitralTribunalconsidersappropriate,foranycosts

provisionalsogivesthetribunalthepowertoorderon aprovisionalbasis, subject to determinationinthefinalaward,anyreliefwhich thetribunalhaspowertograntinafinal $award^{211}. The AAA Arbitration Rules provide that the tribunal ``m$ aytakewhateverinterim measureitdeemsnecessary, including injunctive relie fandmeasuresfortheprotectionor conservation of property" ²¹². This version of the Rules, give the arbitrators con siderablepowerto eprocedure ²¹³.ButtheAAArulesinits orderinterimreliefandisdraftedtobeaninclusiv previousversionhadrestrictedinterimreliefonlyt otheextentnecessarytosafeguardthe eCharlesConstructioncase ²¹⁴,theUSState propertythatisthesubjectmatterofthedispute. Inth tribunalforthepurposeofproviding courtrefusedtoenforceaninterimordermadebythe securitytowardsthefinalaward. The courtheld that theRulesprovideauthoritytothearbitrators onlyforthesafeguardofthepropertyindisputeandsi ncethespecificcasebeforethemwasa authoritytoprovideinterimorders ²¹⁵.Evenin matterofbreachofcontract, the arbitrators had no alatterversionoftheRules,Art.22gavethearbitrat orsauthorityonlytotake"whateverinterim atterindispute... ²¹⁶"Comparingthese measuresitdeemsnecessaryinrespectofthesubjectm provisionstothelatestversion, the latter one giv esalotmoreleewayforthearbitratorstogrant interimmeasures. Another provision in the AAA rules, which clearly authorizes the arbitrators, is Article27(7). The said provision states that the arbitr atorscanmakeinterim, interlocutory, partial orderorawards ²¹⁷.InacomparableprovisionintheLCIARules,thearbit ratorsareprovidedwith

claimantorcounterclaimantinprovidingsecurity. Thea cross-indemnitymaybedeterminedbytheArbitralTrib claimingorcounterclaimingpartydoesnotcomplywithan maystaythatparty'sclaimsorcounterclaimsordismi

mountofanycostsandlossespayableundersuch unalinoneormoreawards.Intheeventthata yordertoprovidesecurity,theArbitralTribunal sstheminanaward.

²¹² SeeAAAInternationalArbitrationRulesArticle21(1)

 $^{^{214}} Charles Construction Companyv. Derderian, 586 N.E. 2d992 (Maller Market Marke$ ss.1992)

²¹⁵ *Id*586N.E.2dat995

²¹⁶B ORN Supranote3at762

²¹⁷ See AAAInternationalArbitrationRulesArticle27(7)

discretionofmakingawardsondifferentissuesatd ifferenttimes. Thoughnotasclearlystatedas thatofAAARules, this provisional so authorizes the tribunal stomake interima wards 218.

Themajorinstitutionsalsoprovidefortheordering securityforthecostsofsuch measures. The AAAruleshave abrief provision giving a uthority to the arbitrator storequire security for costs 219. Whereas, the LCIARulesis broader than the AAArule sinthat it provides for security for costs including legal expenses and the arbitrator scan order such measure under terms that they consider appropriate. The arbitrator sun der the LCIARules also have the power to dismissor stay the claim of a party defaulting on the eorder to provide security 220. But in contrast the ICCRules does not talk about security for costs.

InrecenttimesWIPO, AAA and ICC have tried to ove rcomethisissuebyprovidinga separateEmergencyRulesspecificallydesignedtomeet theneedsofthepartiesbeforethe tribunalisconstituted ²²¹.WIPORulesnotonlygrantwidepowerstothearbitra torstoorder Rules ²²²asanoptionfortheparties.Art. interimrelief, but also provide WIPO Emergency Relief 46oftheWIPORulesempowersthearbitratorstogranti nterimreliefinawaytheydeem necessaryandgivesaninclusivelistconsistinginj unctions, measurest oprotect the goods ²²³. It further suchitemstoathirdparty involvedinthesubjectmatterofdisputeanddepositof authorizesthearbitratorstorequiresecurityforany claims of counterclaims, albeit only in

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o n;SecurityforClaimsandCostsArticle46(a)At ionalordersortakeotherinterimmeasuresit econservationofgoodswhichformpartofthe itwithathirdpersonorforthesaleofperishable ures subjecttoappropriatesecuritybeing party,theTribunalmay,ifitconsidersittobe art ytoprovidesecurity,inaformtobedetermined ellasforcostsreferredtoinArticle72.

²¹⁸LCIAArbitrationRulesArticle26.7TheArbitralTribun almaymakeseparateawardsondifferent issuesatdifferenttimes.Suchawardsshallhavethes amestatusandeffectasanyotherawardmadebythe ArbitralTribunal.
²¹⁹AAAInternationalArbitrationRulesArt.21(2)Suchint
erimmeasuresmaytaketheformofaninterin

²¹⁹AAAInternationalArbitrationRulesArt.21(2)Suchint erimmeasuresmaytaketheformofaninterim award,andthetribunalmayrequiresecurityforthecost sofsuchmeasures

²²⁰SeeLCIARules

²²¹Werbicki Supranote20

²²²WIPOEmergencyReliefRules,9Am.Rev.Int'lARb.317

²²³WIPOArbitrationRulesInterimMeasuresofProtectio therequestofaparty,theTribunalmayissueanyprovis deemsnecessary,includinginjunctionsandmeasuresforth subject-matterindispute,suchasanorderfortheirdepos goods.TheTribunalmaymakethegrantingofsuchmeasures furnishedbytherequestingparty.(b)Attherequestofa requiredbyexceptionalcircumstances,ordertheotherpart bytheTribunal,fortheclaimorcounter-claim,asw ellast

exceptionalcircumstances ²²⁴. However, the most striking feature of the WIPORule sisthe Emergency Relief Rules option given to the parties. Havingrecognizedtheneedforinterim protectionforthepartiesespeciallyinfastpacedenv ironmentofintellectualpropertyonthe internet, WIPOhasintroduced this Rule. The Emergenc yRulesdoesnotautomaticallylatchonto thecontractsubmittingdisputesforarbitrationbeforeW IPO. The parties have to specifically ²²⁵.Buttomakeitconvenient,themodelcontractclaus mentiontheavailabilityoftheRules mentionstheavailabilityoftheEmergencyRulesand thecommentrecommendsthepartiesnotto takeoutthesaidclause ²²⁶. The Relief Rules protects the parties in the crucial periodbeforethe constitution of the arbitration tribunal 227. There is an arbitrator appointed and available usually EmergencyReliefRules ²²⁸.The within24hoursnotice,todecideonanyissueunderthe assoonasthetribunalisconstituted.But, arbitratorappointedunderthisruleswillloseauthority evenifapartyapproachestheCourtsforinterimrelie f, this arbitrator retain power and will even ²²⁹. The Emergency arbitrator can provide any relief beabletomodifysuchorderfromthecourts thatheisurgentlynecessarytopreservetherights oftheparties. This includes order for interim

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²²⁴ Id

²²⁵Horning *Supra* note8at170 ²²⁶ *Id*

²²⁷WIPOEmergencyReliefRulesArticleIII(b)(i)Ifa Arbitration Rules or the WIPO Expedited Arbitration RulesRequestforReliefhasbeenreceivedbytheCenter,th RequestforReliefshallretainthepowertomakeanaw arbitraltribunalisconstitutedinthearbitrationpurs ExpeditedArbitrationRules.

⁽ii) Apartythatinitiates an arbitration pursuant to ArbitrationRulesinrelationtoadisputebeforetrans thesamedisputeshallbedeemedtohavewaiveditsrights thisAnnexfromthedateonwhichanarbitraltribunal ArbitrationRulesortheWIPOExpeditedArbitrationRules

Horning Supra note8

²²⁹WIPOEmergencyReliefRulesArticleIII(a)Subjectt judicialauthority, orinitiates another arbitrationi ReliefhasbeenreceivedbytheCenter,theEmergency Reliefshallretainthepowertomakeanawardandtom

partyinitiatesanarbitrationpursuanttotheWIPO inrelationtoadisputeinrespectofwhicha eEmergencyArbitratorappointedpursuanttothe ardandtomodifyituntilthedateonwhichan uanttotheWIPOArbitrationRulesortheWIPO

the WIPO Arbitration Rules or the WIPO ExpeditedmittingaRequestforRelieftotheCenterinrespecto torequestinterimreliefundertheprovisionsof isconstitutedinthearbitrationpursuanttotheWIPO

oparagraph(b), if a partyaddresses are quest to a nrelationtoadisputeinrespectofwhichaRequestfor ArbitratorappointedpursuanttotheRequestfor odifvit.

injunction, conservation of property, etc ²³⁰. It even provides for expart the arings in exceptional circumstances²³¹. The extensive and specific provisions provided by WIPO forEmergencyRelief, showstheimportanceattachedtotheavailabilityof interimreliefinarbitration.

InasimilarmannerasthatofWIPO, AAAalsohasO ptionalRules, which provide for rimrelief ²³².ButunliketheWIPO arbitratorsavailablefromAAAhearthecaseforinte EmergencyReliefRules,anex-parteorderisnotpossibl eundertheAAAOptionalRules,asit requires notice to all parties 233. Eventhe ICC has adopted new Optional Rules for the purposesof interimreliefpriortothestartoftheproceedings. ThoughalltheInstitutionalRuleshave provisionsoninterimmeasuresfromtribunal, the Conve ntions, like in the case of court ordered interimrelief, arevoid of any provisions relating tothisissue.

gencyArbitratormaymakeanyawardthatthe servetherightsoftheparties.(b)Inparticular, unctionorrestrainingorderprohibitingthe ofconductbyaparty;(ii)ordertheperformance tofanamountbyonepartytotheotherpartyorto tablishorpreserveevidenceortoascertainthe anymeasurenecessaryfortheconservationofany yforbreachoftheawardundersuchconditions heEmergencyArbitratormaymaketheaward considersappropriate.Inparticular,theEmergency tbetweentheparties, that aparty commence inadesignatedperiodoftime;or(ii)requirethata ity. ionalcircumstances, wherenotice to the eProcedurewouldbedefeated,theClaimant

CenterwithoutservingitontheRespondent.(b)A withparagraph(a)shall,inadditiontothe whynoticetotheRespondentwouldinvolveareal WheresatisfiedthatnoticetotheRespondent wouldbedefeated,theEmergencyArbitrator eabsenceoftheRespondent.Suchanordershall furtherdocumentationastheEmergency dentinthemannerandwithinthetimeorderedby denttobeheardonthematter.(d)Theprovisionsof

this Article, it being understood that the rmadeunderthisArticlebytheEmergency

 $^{^{230}}WIPOEmergencyReliefRulesArticleXI(a) The Emer\\$ EmergencyArbitratorconsidersurgentlynecessarytopre the Emergency Arbitrator may (i) issue an interiming commissionorcontinuedcommissionofanactorcourse ofalegalobligationbyaparty;(iii)orderthepaymen anotherperson;(iv)orderanymeasurenecessarytoes performanceofalegalobligationbyaparty;(v)order property;(vi)fixanamountofdamagestobepaidbyapart astheEmergencyArbitratorconsidersappropriate.(c)T subjecttosuchconditionsastheEmergencyArbitrator Arbitratormay(i)require, having regard to any agreemen arbitrationproceedingsonthemeritsofthedisputewith $party in whose favor an award is made provide a dequate secur \\ ^{231}WIPO Emergency Relief Rules Article XIII(a) In except$ Respondentwouldinvolvearealriskthatthepurposeofth maydeliverortransmittheRequestforRelieftothe RequestforReliefdeliveredortransmittedinaccordance particulars required by Article IV, indicate there as ons riskthatthepurposeoftheProcedurewouldbedefeated.(c) wouldinvolvearealriskthatthepurposeoftheProcedure mayheartheClaimantandproceedtomakeanorderinth bemadesubjecttotheconditionthattheorder, and such Arbitratorconsidersappropriate, beserved on the Respon the Emergency Arbitratorin order to enable the Respon thisAnnexshallapplymutatismutandistoanyprocedureunder provisionsrelatingtoanawardshallsoapplytoanorde Arbitrator. ²³²Werbicki *Supra*note20

²³³ *Id*

C. EnforcementofInterimMeasuresOrderedbytheAr

Both the Institutional rules and the international co

bitrators

are a of enforcement of interimme a sure sordered by th

earbitrators. Authorshave even put

for ward various ideas for developing this area, includ

ing the possibility of a supplementary to the

nventions are heavily lacking in the

NewYork Convention to deal with this issue

 $^{234} Symposium,~40 Years New York Convention: Past, Present and Future Supranote 25$

2VindobonaJ.55 ; Cremades

CHAPTERIV

UNCITRALRULES AND MODELLAW-PRESENTAND PROPOSED

UNCITRAListhetorchbearerinanumberofinternation altradelawissues.Likewise, eveninthefieldofarbitration, UNCITRAL's workha sproveninvaluabletotheinternational community.UNCITRALModelLawandtheRulescanbesai dtobethecornerstonesofthe ngit ²³⁵.TheUNadoptedUNCITRAL developmentofarbitrationandtheinfrastructuresupporti ModelLawintheyear 1985. The ModelLawwas drafted a saguidetothenationsthatare planningtoimplementlegislationsonarbitration.Sin cemorethan40countrieshavealready adoptedtheModelLaw,theimpactofitontheharmon izationofinternationalarbitrationcannot be over stated. To add to the Model Law, UNCITRAL alsohascomeupwithArbitrationRules forpartiestouseincaseofAd-HocArbitration.Apart fromad-hocarbitration, several ²³⁶.ThePermanentCourtofArbitration institutions and tribunals follow the UNCITRAL Rules(PCA)hasdrafteditsrulesbasedmainlyontheUNCIT RALRules. Manynational arbitration centerandotherregionalinstitutionslikeIran-Uni tedStatesClaimsTribunal,Asian-African LegalConsultativeCommission,theAustralianInstitut eofArbitration,theHongKong International Arbitration Center, the Singapore Inter nationalArbitrationCenterhaveadoptedthe UNCITRALRulesofArbitration ²³⁷.EventheNAFTAprovidesanoptiontoaninvestorto use ²³⁸. Asthe Model Lawand the Ruleshave theRulesagainsterringgovernmentsunderNAFTA suchaneffectontheinternationaltreatmentofarbi tration, there is need for it to be constantly

 $^{^{235}} A shman Supranote 117 at 768 \\$

²³⁶Wagoner *Supra*note25at72

²³⁷ Ashman Supra note117 238 See Article1120ofNAFTA,Ashman Supra note117

 $reviewed and updated to meet the changing circumstance \\further strengthen the Model Law by addressing the in \\the Rules and the Model Law in the present stage and the working group.$

 $s. One such effort by UNCITRAL is to \\terimme a sures is sue. This chapter analyses \\the changes proposed to the Model Law by$

A. UNCITRALModelLawandRulesonInterimMeasures— TheCurrentPosition

TheModelLawhasasimpleonelineprovisionregardi ngtherightsofthepartiesto approachastatecourtsforinterimmeasures. It makes sucharequesttothestatecourts ²³⁹.Butthisonelineprovisionleavesoutsome compatiblewiththeagreementtoarbitrate importantaspectsoutofitspurview. For instance, asd iscussedbytheUNCITRALWorking Group, it does not say anything about the scope of their nterimmeasuresthatthecourtscanorder. Article17oftheModelLawthatdealswiththearbitr atororderedinterimmeasureslimitsthe scopetomattersrelatingtothesubjectmatterofthe dispute. The question now is whether such limitationisnecessaryforthecourts. Also, questio nsinvolvingthepreconditionsifanyfor interimmeasures, the types of interimmeasures, etc. isnotanswered. Eventheprovision dealing withpowerofarbitratorstoorderinterimmeasures,i sshortanddoesnotcoverthebasicissues relatingtoit ²⁴⁰.Exceptforalimitationrestrictingsuchinterimmea suresofprotectiontomatters relatingtothesubjectmatterofthedisputeandprovid ingdiscretionaryauthoritytoordersecurity forsuchmeasures, the provision is threadbare. Another importantissuethatismissinginthe provisionisthestatusofexparteorders. Specifically, thisissuebecomesaproblematthetimeof enforcementofsuchorders.Courtscanrefusetorecog nizesuchordersusingArticle34(2)(ii),

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²³⁹UNCITRALModelLawArticle9Arbitrationagreementan dinterimmeasuresbycourt: Itisnot incompatiblewithanarbitrationagreementforaparty torequest,beforeorduringarbitralproceedings, fromacourtaninterimmeasureofprotectionandfora courttograntsuchmeasure, availableat http://www.uncitral.org

²⁴⁰ UNCITRALModelLawArticle17Powerofarbitraltribun altoorderinterimmeasures Unless otherwiseagreedbytheparties,thearbitraltribunal suchinterimmeasureofprotectionasthearbitraltri matterofthedispute. Thearbitraltribunalmayrequire connectionwithsuchmeasure, availableathttp://www.uncitral.org

whichprovidesforrefusalifthepartyhasnotbeengi vennoticeofthearbitralproceedings ²⁴¹
AlsoModelLawhasnoprovisionregardingtheenforc ementofinterimordersmadebythe tribunal.

TheUNCITRALRulescontainsprovisionsregardinginte rimmeasuresfromarbitrators and as in the case of Model Law, it expressly makest herequesttojudicialauthoritiesforinterim measurescompatible with the arbitration agreement. The provisioncontainedinArticle26ofthe Rules²⁴², authorize the arbitrators to order interimmeasures ofprotectioninmattersconcerning the subject matter of dispute. The Articles pecifically includesordersforconservationofproperty bywayoforderingitsdepositwiththirdpersons,sal eofperishablegoods, etc. There is doubt whetherthereferencetotheconservationofproperty isjustanexampleoralimittothescopeof theinterimmeasures ²⁴³. But, the plain reading suggests that it was intended asjustanexample. EventheRulesrestrictthepowersbylimitingtheord erstomattersconcerningthesubjectmatter 'mattersconcerningthesubjectmatterof ofthedispute. Manyhaveinterpreted thereference to

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cifiedinarticle6onlyif:(a)thepartymakingthe itrationagreementreferredtoinarticle7wasunder thelawtowhichthepartieshavesubjecteditor, tate;or(ii)thepartymakingtheapplicationwasnot orofthearbitralproceedingsorwasotherwise thadisputenotcontemplatedbyornotfallingwithin insdecisionsonmattersbeyondthescopeofthe nsonmatterssubmittedtoarbitrationcanbe theawardwhichcontainsdecisionsonmattersnot compositionofthearbitraltribunalorthearbitral the eparties,unlesssuchagreementwasinconflict annotderogate,or,failingsuchagreement,wasnoting transported one

1.Attherequestofeitherparty,thearbitraltribunal maytakeanyinterim pectofthesubject-m atterofthedispute,includingmeasuresforthe thesubject-matterin dispute,suchasorderingtheirdepositwithathird ds.2.Suchinterimm easuresmaybeestablishedintheformofan alshallbeentitle dtorequiresecurityforthecostsofsuchmeasures.3.A essedbyanypartytoaj udicialauthorityshallnotbedeemed waiverofthatagreement, availableat

²⁴¹⁽²⁾Anarbitralawardmaybesetasidebythecourtspe applicationfurnishesproofthat:(i)apartytothearb someincapacity;orthesaidagreementisnotvalidunder failinganyindicationthereon,underthelawofthisS givenpropernoticeoftheappointmentofanarbitrator unabletopresenthiscase;or(iii)theawarddealswi thetermsofthesubmissiontoarbitration,orconta submissiontoarbitration,providedthat,ifthedecisio separatedfromthosenotsosubmitted,onlythatpartof submittedtoarbitrationmaybesetaside;or(iv)the procedurewasnotinaccordancewiththeagreementofth withaprovisionofthisLawfromwhichthepartiesc accordancewiththisLaw;or availableathttp://www.uncitral.org

²⁴²UNCITRALRulesArticle26 1.Attherequestofeit measuresitdeemsnecessaryinrespectofthesubject-m conservationofthegoodsformingthesubject-matterin personorthesaleofperishablegoods.2.Suchinterimm interimaward.Thearbitraltribunalshallbeentitle requestforinterimmeasuresaddressedbyanypartytoaj incompatiblewiththeagreementtoarbitrate,orasa http://www.uncitral.org

²⁴³Marchac Supra note185; John D. Franchini, International Arbitration Under The UNCITRAL Arbitration Rules: A Contractual Provision For Improvement ,62 Fordham L. Rev. 2223,2240 (1994)

limitingthesection ²⁴⁴.Further,itdoesnot the dispute and 'conservation of property' asseverely rderforthearbitratorstoissuetheinterim provideforanypreconditionsthatneedtobemetino measures. The Articleal so authorizes the arbitrators torequiresecurityforgrantingsuchorders. TheRulesarealsosilentregardingtheenforceabilit yofinterimmeasuresorderedbythetribunal. WhenseeninlightofArticle26(2)oftheRules, which providesfortheinterimmeasurestobein the format of awards, the applicability of the New Yorkconventiontotheinterimawardsgranted bythetribunalbecomesimportant. Thegeneral consensus sofarhasbeenthatawardenforcement measures²⁴⁵.Inlightoftheshortcomings provisionsoftheConventiondonotapplyforinterim discussedaboveUNCITRALisatpresentdiscussingthepo ssibilityofamendingtheModelLaw soastofacilitatetheharmonizationofthenation allegislations relating to the interimmeasures.

B. ProposedDraftforUNCITRALModelLaw

TheUNCITRALworkinggrouponarbitrationwasprovided anagendain2000to discussandproposechangesifanyneededtointroduce uniformrulesoncertainissues concerningsettlementofcommercialdisputes:concili ation, interimmeasures of protection, ²⁴⁶. The group when dealing with the interimmeasures writtenformforarbitrationagreement,etc issuenoted various factors, including the need for a harmonizedregime,enforcementofinterim ²⁴⁷. Theworking group has been discussing the awards, possible provisions for change, etc possibilities and considered draft proposal son the enfor cement of interimme a sures for the past 2vears²⁴⁸. The group later extended its scope of purview to other possibleprovisionsrelatingto interimmeasures of protection. It has discussed draft variantsofArticle17authorizingthe

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ArbitrationThirty-secondsessionVienna,20-31March2000P ROVISIONALAGENDA, A/CN.9/WG.II/WP.107

²⁴⁸www.uncitral.org

fitsthirty-secondsession(Vienna, 20-31

²⁴⁴Marchac Supra note185at128; Alan Redfern, Arbitration And The Courts: Interim Measures Of Protection--Is The Tide About To Turn? 30 Tex. Int'l L. J. 71,80(1995)

 ²⁴⁵ Convention, The Arbitral Agenda For UNCITRAL ,10 World Arb. & Mediation Rep. 306 (1999)
 246 UNITEDNATIONS COMMISSION ON INTERNATIONAL TRADEL AWWorking Group on Arbitration Thirty, second descript Vienna 20, 31 March 2000 P. POVISIONAL A GENDA

²⁴⁷ReportoftheWorkingGrouponArbitrationontheworko March2000),A/CN.9/468,p.14,15

tribunaltograntinterimmeasures ²⁴⁹.Further,ithasalsodiscusseddraftsforcourtorde redinterim measures.IntheThirtySeventhsessionUnitedState ssubmittedaproposalfortheconsideration oftheworkinggroup ²⁵⁰.InthelatestsessionoftheworkinggroupinMay2003, itconsideredthe proposaloftheUnitedStatesandalsothedraftputfo rwardontheenforcementissuebythe previoussessions ²⁵¹.Though,theworkinggrouphasnotfinalizeditsfind ingsontheproposals, thisarticlediscussesthelatestofthedraftproposa lputforwardatthethirtyeightsessionofthe group.

1. Interim Measures from the Tribunal:

Thedraftprovisionstriestocoverthewholespectrum of theis sues surrounding interim measures of protection. The working group has had extens ived is cussions regarding each and every a spectof theis sues concerned. Below is a review of the proposal of the provision.

Paragraph1and2

(1) Unless otherwise agreed by the parties, the arbitra l tribunal may, at the requestofaparty, grantinterimmeasures of protection.

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⁽²⁾ An interim measure of protection is any temporary m easure, whether in the form of an award or in another form, by which, at an ytimepriortotheissuance of the award by which the dispute is finally decided, thearbitraltribunalordersa party to: (a) Maintain or restore the status quo pendin g determination of the dispute[,inordertoensureorfacilitatetheeffect iveness of a subsequent award]; (b) Take action that would prevent, or refrain from ta king action that would cause, current or imminent harm [, in order to ensure or facilitate the effectiveness of a subsequent award]; (c) Provide a pre liminary means of securing assets out of which a subsequent award may be sa tisfied; or [(d) Preserve evidence that may be relevant and material to the resolution of the dispute.] ²⁵²

 $^{{}^{249}} Seegenerally Reports of the Working Group on Arbitratio \\ www.uncitral.org$ n from various sessions available at

²⁵⁰ReportofWorkingGroupII(Arbitration)ontheworkof itsthirty-seventhsession(Vienna,7-11 October 2002), A/CN.9/523

²⁵¹Settlementofcommercialdisputes, *Interimmeasuresofprotection* -NotebytheSecretariat, A/CN.9/WG.II/WP.123

ThedraftlanguageasthatofthecurrentArticle17of the option to exclude the power of the arbitrators to orfromthepreviousversion, it authorizes the arbitrator insteadoforderinganypartytotakesuchinterimme doneawaywiththewords 'inrespectofthesubject-ma text.SimilarphraseisusedintheArticle26ofUNCITR hadlimitingeffectonthepowergiventothearbitra Aftersomedeliberation, the Grouphas in the latest ineffectgivethearbitratorsmoreleewaytogrant

theModelLaw, gives the parties derinterimmeasures.But,inavariance sto 'grantinterimmeasures of protection' asureofprotection.Likewise,thegrouphas tterofthedispute'usedintheoriginal ALArbitrationRules ²⁵³.Thewordings torstoorderinterimmeasuresofprotection. draftdoneawaywiththephrase. This would interimmeasures.

interimmeasureofprotection'asa

ardfinallydecidingthedispute. This

esavailablefromthearbitrators

velistofmeasuresthatthetribunal

The proposal in its second paragraph defines the term ' temporary measure granted by the tribunal prior to its awparagraphfurtherexplainsthetermbyprovidinganexhausti mayuse. The list in the latest draft provision in clud esthevariouspurposesforwhichinterim measuresmaybegrantedratherthanthetypesofmeasur Therefore, even if the list is exhaustive, the provisi whichinterimmeasuresofprotectionmightberequested factorstillremainingintheprovisionisthephrase subsequentaward', introduced by the draft proposal submitte grouphasdecidedtofurtherdiscusstheeffectsofsuch hereisthatwilltherebeanysituationwheretheac withthecurrentproceedingsratherthantheeffectiv purposethatthesewordingswillservehastobediscuss thisparagraphisineffectexhaustiveandcoversallt effectiveness of the subsequent award, then the needf

onnowcoversalmostalltheaspectsregarding fromthearbitrators.Butonelimiting 'inordertofacilitatetheeffectivenessofa dbytheUnitedStates.Theworking wordings ²⁵⁵. Thequestiontobeasked tions(orinactions)ofanypartycouldinterfere enessofthesubsequentaward.Furtherthe edbythegroup. If the list provided by hefactorsthatmightinterferewiththe orsuchlimitingconditionsintwoofthe

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²⁵³ See UNCITRALArbitrationRulesArticle26

²⁵⁴ SeeSupra Note246 255 Id

fourfactorsisquestionable. One cause for concern that possibility of a partyrushing to the arbitrators for in carrying on its ordinary business just to frustrate such more or less a verted by the structure of paragraph 3, whi by the requesting party before an interimmeasure is is s

twouldrequiresuchwordingsisthe
terimmeasuretorestraintheotherpartyfrom
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ued.

Paragraph3

(3) The party requesting the interim measure of protect [show] [prove] [establish] that: (a) Irreparable harm w not ordered, and such harm substantially outweighs the the party affected by the measure if the measure is gra reasonable possibility that the requesting party will suc provided that any determination on this possibility sh ofthearbitraltribunalinmakinganysubsequentdetermi

ion shall [demonstrate] ill result if the measure is harm that will result to nted; and (b) There is a uc ceed on the merits, all not affect the discretion nations²⁵⁶.

Paragraph3laysdownthepreconditionsnecessaryfor measures.Previouslytherewasnoguidingfactorfort heart availabilityofinterimmeasures.Thedraftproposalre quire irreparableharmthatsubstantiallyoutweighstheharmt hat suchmeasureweregranted.Alsoitrequiresthepartyt oder merits,butcautionsthatsuchdeterminationontheposs ibil findingsinanysubsequentdetermination.Theprovision ref requirebeforegrantinganinterimrelief 257.

hearbitratorstograntinterim
hearbitratorstousewhendecidingonthe
quirestherequestingpartytoshow
hatwouldresulttotheaffectedpartyif
odemonstratethepossibilityofsuccesson
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reflectstheconditionsthatthecourts

Paragraph4

(4)[Subjecttoparagraph(7)(b)(ii),][exceptwherethe mandatory under paragraph (7) (b) (ii),] the arbitral tri bunal may require the requesting party and any other party to provide appropriat e security as a conditiontogranting an interimmeasure of protectio n^{258} .

²⁵⁶ LA

²⁵⁷Chionopoulos Supranote112

²⁵⁸ SeeSupra note246

 $\label{eq:continuity} Even the current provision gives discretionary powert of the tribunal to require security for granting interimrelief 259. The only difference being the reference to the provision of (7)(b)(ii), which deals with expart einterimmeasures.$

Paragraph5and6

- (5) The arbitral tribunal may modify or terminate an in terim measure of protection at any time [in light of additional infor mation or a change of circumstances].
- (6) The requesting party shall, from the time of the r arbitral tribunal promptly of any material change in the basis of which the party sought or the arbitral tribunal measure of protection. equest onwards, inform the circumstances on the granted the interim

Animportantissuethatwasnotaddressedbypreviously intheModelLawwasthe durationofthevalidityoftheinterimmeasuresorde redbythetribunalandtheirabilitytocorrect orchangingcircumstances ²⁶¹.Butthe suchorderswheninlightofadditionalinformation WorkingGrouphasnotyetfinalizedthephrase'inlig htofadditionalinformationorchanging circumstances' 262. Aplainreading of the draft suggests that the arbit ratorshavetheauthorityto modifyorchangetheiroriginalinterimordersuomo ttowithoutarequestfromtheparties. This giveswidepowerstothearbitratorsanditseemstha ttheycanmodifyaninterimmeasures grantedbythemevenaftertheenforcementofthesa mebythecourts.Paragraph6givesmore balanceburdeningtheparty, which originally requested forinterimmeasurewiththedutyof reportinganychangeincircumstancestothetribunal.

Paragraph7

(7) (a) Unless otherwise agreed by the parties, the ar bitral tribunal may [,in exceptional circumstances,] grant an interim measure of protection, without notice to the party [against whom the measure is dire cted] [affected by the measure], when:(i) There is an urgent need for the me asure;(ii) The circumstances set out in paragraph (3) are met; and (iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is gra nted.(b) The requesting party shall: (i) Beliable for any costs and damages causedbythemeasuretothe

²⁶¹ SeeSupra note259

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 $^{^{259}}$ See UNCITRAL Model Law Article 17

²⁶⁰ SeeSupra note246

²⁶² SeeSupra note246

party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstance s of the case, in light of the final disposition of the claims on the merits]; and(ii)Providesecurityinsuch form as the arbitral tribunal considers appropriate [, fo r any costs and damages referred to under subparagraph (i),] [as a condition to granting a measure under this paragraph]: [(c) [For the avoidance of doubt,] the arbitraltribunalshallhave jurisdiction, inter alia, to determine all issues ari sing out of or relating to [subparagraph (b)] above;][(d) The party [against whom th e interim measure of protection is directed [affected by the measure grant ed] under this paragraph shall be given notice of the measure and an opportunity to be heard by the y to proceed on an ex parte arbitral tribunal [as soon as it is no longer necessar][withinforty-eighthours of basis in order to ensure that the measure is effective thenotice, or on such other date and time as is appropriate in the circumstances];] [(e) Any interim measure of protection ordered under t his paragraph shall be effective for no more than twenty days [from the da te on which the arbitral tribunal orders the measure [from the date on which t he measure takes effect against the other party], which period cannot be extend ed. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by t he measure] has been given notice and an opportunity to be heard;] [(f) A party req uesting an interim measure of protection under this paragraph shall have an obligationtoinformthe arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether th e requirements of this paragraph havebeenmet;] ²⁶³

Thisprovision deals with the possibility of exparte or d ersfromthetribunal. This issue hasneverbeenaddressedbyanyoftherulesintheir presentformexceptfortheWIPO ²⁶⁴. The draft provision is quite Emergency Relief Rules and AAA and ICCOptional Rulesdetailedinnatureandtakesintoaccountalltheaspe ctsconcerned.Inadditiontotherequirements setoutinparagraph3,itrequirestherequestingpartyd emonstratetheurgentneedforsuch interimmeasures and to show that there as on for required in the reason for reason uestingsuchmeasurewouldbefrustratedif noticeisprovidedtotheotherparty. The group is sti lldiscussingthealternativephrasesto addressingtheotherparty. It has inits consider at ionboth 'against whom the measure is directed' and 'affected by the measure' 265. Since the arbitration tribunal does not have jurisdic tionover thirdparties to the dispute, the phrase 'affected by th emeasure' may cause some trouble.

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²⁶³ SeeSupra note246

²⁶⁴Werbicki Supra note20

²⁶⁵ SeeSupra note246

'Againstwhomthemeasureisdirected' mightbeabett exparterelief. The provisional so seeks to make ther costs and damages in curred by the other party in view considerational imiting factor to such liability. The account all of the circumstances of the case, in ligh merits' in consideration ought to be included in the f party would be made liable for all the damages even if measure was necessary. The provisional somakes it ma provides ecurity for such costs and damages as a precon requested by it.

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determining when notices hould be provided to the othe
consideration, though, sets aspecific timelimit whi ch
gives an alternative to the arbitrators to decide on the a
even while deciding on the issue of granting such int
measure is sought to be fixed at twenty days from the d
measure or from the time it takes effect against the oth
not be the ideal condition, because even in cases wher
before such that time, it would not be possible. One sugge
reword (7)(e) as:

againstwhomtheorderismade. The ongernecessarytoproceedonanexpartebasis drequirefurtherdeliberationonthepartof ,regardingthecircumstancessurroundingthe begivenachancetoshowwhythe thismightnotbetheidealcriterionfor he rparty. Thesecondphrasein chagainmightnotbethecorrectapproach, theappropriatetimingoforderingsuchnotice, erimmeasures. Thevalidityoftheinterim ayonwhichthetribunalorderssuch otherparty. Again, fixingasettimelimit will ethereisaneedtoreviewsuchorder gge stiontoalleviatetheproblemisto

(e) Any interim measure of protection ordered under th is paragraph shall be effective for the period fixed by the tribunal, provide exceed more than twenty days from the date on which against the other party and which period cannot be exte shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph against whom the measure is directed has been given n otice and an opportunity tobeheard;

2. Court Ordered Interim Measures:

Thoughtheworkinggrouplookedatsomepossibledraftpr ovisionstodealwiththe powersofthenationalcourtstoawardinterimrelief , it has not yet arrived at any draft proposal to workwith ²⁶⁶. Astheremay bevariations in the preconditions for grantinginterimreliefby nationalcourts, trying to harmonize the issue will n otbeaneasytask. However, evenifthey cannotlaydowntherequisites for interimmeasures, itwoulddoaworldofgoodiftheModel Lawspecificallyauthorizestheavailabilityofinteri mmeasures, before and during the pendency ofarbitration. Asseenin United States, if the Nat ionallegislationissilentonthisissue, thereis a highpossibilityofcontradictorydecisionfromthec ourts. One of the early draft possibilities discussed by the group on this issue is:

(4) The court shall have the same power of issuing intermine measures of protection for the purposes of and in relation to arbitration proceedings as it has forthepurposes of and in relation to proceedings as it has the court.

Thisprovisionifacceptedwouldaddresstheauthority of the court stode a lintervene and support the arbitration before and during the proceedings by granting interimmeasures. Further, the Courts can use the already established rules of procedure that is used in the cases pending before it. Except for this short provision, there is no need for any further clarification on the courts power stoor derinter immeasure.

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²⁶⁶ SeeSupra note246

3. Enforcement of Arbitrators awarded Interim Measure:

The Working group at present is considering two differ entsets of proposals for provisions regarding recognition and enforcement of interimmeasures of protection. The first one seeks to establish a complete enforcement mechanism or the interimmeasures itself, while a new proposal introduced in the 37 th session merges the conditions of enforcement with that of Article 35 and 36 of the Model Law which deals with the enforce ment of a wards made by the tribunals. The group has decided to discuss further on the sed raft proposals.

Proposal1

"(1) Upon an application by an interested party, made wit h the approval of the arbitral tribunal, the competent court shall refuse to re cognize and enforce an interimmeasure of protection referred to inarticle 17, irrespective of the country in which it was ordered, if: *(a) party against who m the measure is invoked furnishes proof that: (i) [Variant 1] The arbitration agreement referred to in article7isnotvalid. [Variant2] Thearbitrationagreementreferredtoinarticle7 appears to not be valid, in which case the court may re fer the issue of the [jurisdiction of the arbitral tribunal] [validity of th e arbitration agreement] to be decided by the arbitral tribunal in accordance with art icle 16 of this Law]; (ii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the a rbitralproceedings[inwhich case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or (iii) The party against whom the interim measure is invoked was unable to present its case with respect to the interim measure [in which case the court may suspend the enforc ement proceedings until the parties have been heard by the arbitral tribunal]; or (iv) The interimmeasure has been terminated, suspended or amended by the arbitra ltribunal.(b)Thecourt finds that: (i) The measure requested is incompatible w ith the powers conferred uponthecourt by its procedural laws, unless the court dec idestoreformulatethe measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or (ii) The recog nition or enforcement of the interim measure would be contrary to the public policy of this State. "(2) Upon application by an interested party, made with the a pproval of the arbitral tribunal, the competent court may, in its discretion, r efuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if the party aga inst whom the measure is invoked furnishes proof that application for the same o r similar interim measure has been made to a court in this State, regardless ofwhetherthecourthastakena decision on the application. "(3) The party who is seek ing enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure. "(4) In reformulating th e measure under

paragraph (1)(b)(i), the court shall not modify the substa nce of the interim measure. 267

Theproposaloriginallyconsideredbytheworkinggroup enforcementeitherbythetribunalortheinterestedpa inclusionofthetribunal.Itwasconsideredthatift approachthecourts, it would put the tribunal in the shoes limitedtherighttotheinterestedpartythattooo Thelimitationregardingtheapprovalofthetribunalc partieseasyaccesstocourtincasewheretheother bythetribunal.Onceapartyapproachesthecourtsforen recognizeandenforceonlyinalimitednumberofcir suchcircumstanceisiftheopposingpartybringsuptheis agreement. The group is considering two variants rega groupiswhetheritshouldrequiretheopposingpartytopr toreducethelevelanotchbelowbyrequiringittopro theagreement. Making aparty prove the invalidity of proceedingfortheenforcementofinterimmeasureof tribunaltodecideonitsownjurisdiction.Hence,Var theissueofvaliditytothetribunalifthepartyshow acceptableofthetwo. The courts can also refuse to en tribunalorofthearbitrationproceedingshasnotbeen abletopresentitscasebeforethetribunalortheinte orterminated by the tribunal.

rty²⁶⁸.Butobjectionswereraisedtothe hetribunalweregiventheauthorityto oftheparties.Butthecurrentdrafthas nlywiththeapprovalofthearbitraltribunal analsobedoneaway, soastogive the partydisregardstheinterimmeasureordered forcement, the courts can refuse to cumstanceslaidoutinthisprovision.One sueofthevalidityofthearbitration rdingthisissue. Thequestion before the ovetheinvalidityoftheagreementor veaprimafaciecaseontheinvalidityof theagreementbeforeacourtina protection, would take away the right of the iant2, which provides for the court to refer sprimafacieevidenceappearstobethe forceifnoticeoftheappointmentofthe servedontheopposingpartyorwasnot rimmeasureitselfwassuspended, annulled

providedforapplicationfor

²⁶⁷Supra239

²⁶⁸SupraReportof32 ndSession ²⁶⁹Supra239noteofsecretariat38

th session

Paragraph5

[Variant 1] to an interim measure of "(5) Paragraph (1)(a)(iii) does not apply. protection that was ordered without notice to the part yagainst whom the measure is invoked provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period. [Variant 2] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that such interim measure is confirmed by the arbitraltribunal after the other party has been able to present its case with respe ct to the interimmeasure. [Variant3] ifthearbitraltribunal,initsdiscretion,determine sthat, in light of the circumstances referred to in article 17(2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to thepartyagainstwhomthemeasureisinvoked."

Paragraph5oftheproposaldealswiththeenforcement ofexparteordersmadebythe tribunal. This paragraph makes the provision for refusal toenforceincasewherethepartywas unabletopresentitscasebeforethetribunal,inapplicable forexparteorders.Butthedifficultyis indefiningtheexparteorder. Threevariants are unde rconsiderationbytheworkinggroup. Variant1triestodefineexparteorderbysettingati melimitstandardtotheorder.Itqualifiesany orderbythetribunalwithoutnoticetotheotherparty, which, does not extend for a period of thirtydays. These condvariant in consideration, qualifies any order that is confirmed by the tribunalaftertheopposingpartyhashadachancetopre sentitscase. The problem that will arise iswhenenforcementissoughtevenbeforetheopposing partyhashadachancetoappearbefore whethertheinterimmeasureofprotection thetribunal. Variant 3 requires the tribunal to decide can be effective only if the enforcement order is issuedbythecourtwithoutnoticetotheparty againstwhomthemeasureisinvoked. This would inef fectrequirethetribunalstodecideonan issuethatisinrealmofcourtpowersunderthecivil procedureofmostofthenations. Further, the provisionsneedtoaddresstheexparteordersgivenby thetribunalsandnotwhetherthecourt

²⁷⁰noteofsecretariat38 thSession

shouldenforceitexparte. Allthethreevariantsunder considerationnowhavesomeshortcoming ortheother. Theissuecanbeaddressed more effectively by rephrasing the proposal as:

(5) Paragraph (1)(a)(iii) does not apply to an interim m easure of protection that wasordered by the arbitral tribunal pursuant to Article 17(7) above

Proposal2

"(1)Interimmeasures of protection is sued and in effec tinaccordancewitharticle 17, irrespective of the country in which they were issue d. and whether reflected in an interim award or otherwise, shall be recognize d as binding and, upon application in writing to the competent court, be enforc ed subject to the provisions of articles 35 and 36, except as otherwise provi dedinthis article. Any determination made on any ground set forth in Articl e 36 in ruling on such an application shall be effective only for purposes of that application. "(2)(a) Recognition or enforcement of interim measures of pro tection shall not be measures are directed did refused on the ground that the party against whom the not have notice of the proceedings on the request for the interim measures or an opportunity to be heard if (i) the arbitral tribunal has d etermined that it is necessary to proceed in that manner in order to ensur e that the measure is effective, and (ii) the court makes the same determi nation. (b) The court may condition the continued recognition or enforcement o f an interim measure issued without notice or an opportunity to be heard on any cond itions of notice or hearing that it may prescribe. "(3) A court may reformul ate the interim measure to the extent necessary to conform the measure to its procedural law, provided terim measure. "(4) While that the court does not modify the substance of the in an application for recognition or enforcement of an i nterim measure is pending, or an order recognizing or enforcing the interim me asures is in effect, the party who is seeking or has obtained enforcement of an int erimmeasureshallpromptly inform the court of any modification, suspension, or t ermination of that measure."271

Thissimplerproposalwasintroducedbyadelegation of theworkinggroup ²⁷².It proposestousetheconditionsofrefusalcontainedin Article36oftheModelLawfor enforcementofinterimmeasuresofprotectiongranted bythetribunal.Buttheproblemwiththis approachisthattheprovisionsofArticle36havebeend raftedwithfinalawardsinmindand thereforemaycausesomeproblemswhentryingtoenfor ceinterimmeasuresofprotection.For instance,Article36requiresproofthattheagreement isnotvalidunderthecontrollinglawforthe

272 Id

²⁷¹ *Id*

^{&#}x27;Id

courtstorefuseenforcement. If this condition were usedincaseofinterimmeasures, the Courts wouldhavetogointodetailregardingthecircumstan cessurroundingtheformationofagreement. This will cause unnecessary delays, which would in turn frustratethewholepurposeofrequesting interimmeasuresofprotectionandalsoeffectthefun ctioningofthetribunal.Likewise, conditions requiring the court decide upon whether the subjectmatterofthedisputeisarbitrable, whethertheawardhasbecomebindingontheparties, a ppointmentofthearbitrators,etc.would delaytheenforcementanddefeatthepurposeofinteri mmeasures. The condition on public policy hasbeenaddressedbygivingthecourtsthepowertore formulatewithoutchangingthesubstance of the interimmeasure. Hence, this proposal does not seemtobesuitabletoeffectivelyaddress theissueofrecognitionandenforcementofinterim measuresofprotection. These are the proposalscurrentlyunderconsiderationoftheworking groupandtheworkinggroupwould proposethefinaldraftatalatterstage.

As a conclusion from the above discussions, I have tri ed to provide a suggestive proposal for UNCITRAL Model Law:

Article 17: Arbitrators power to grant interimmeasures of protection

(1) Unless otherwise agreed by the parties, the arbitra requestofaparty, grantinterimmeasures of protectio

- (2) An interim measure of protection is any temporary m form of an award or in another form, by which, at an issuance of the award by which the dispute is finally d tribunal orders a party to: (a) Maintain or restore th determination of the dispute (b) Take action that would from taking action that would cause, current or immine preliminary means of securing assets out of which a subs be satisfied; or (d) Preserveevidence that may be re resolution of the dispute.
- (3) The party requesting the interim measure of protecti that: (a) Irreparable harm will result if the measure is rharmsubstantially outweighs the harmthat will result the measure if the measure is granted; and (b) There i possibility that the requesting party will succeed on the any determination on this possibility shall not affect arbitral tribunal in making any subsequent determinations
- (4) Subject to paragraph (7) (b) (ii), the arbitral tribunal requesting party and any other party to provide appropriat conditiontograntinganinterimmeasure of protection.

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- (5) The arbitral tribunal may modify or terminate an i nterim measure of protection at any time in light of additional inform ation or a change of circumstances.
- (6) The requesting party shall, from the time of ther arbitral tribunal promptly of any material change in the basis of which the party sought or the arbitral tribunal measure of protection.

 equest onwards, inform the circumstances on the granted the interim
- (7) (a) Unless otherwise agreed by the parties, the ar bitral tribunal may, in exceptional circumstances, grant an interim measure of protection, without notice to the party against whom the measure is direc ted, when: (i) There is an urgent need for the measure; (ii) The circumstances set out in paragraph (3) are met; and (iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpo se of the measure is not frustrated before it is granted. (b) The requesting partyshall:(i)Beliable for any costs and damages caused by the measure to the party against whom it is directed to the extent appropriate, taking into a ccount all of the circumstances of the case, in light of the final dis position of the claims on the merits; and (ii) Provide security in such form as the arbitral tribunal considers appropriate, for any costs and damages refer red to under subparagraph (i), as a condition to granting a measure un derthis paragraph; (d) The party against whom the interim measure of prot ection is directed under this paragraph shall be given notice of the measur eand an opportunity to be heard by the arbitral tribunal within forty-eight hours of the notice, or on such other date and time as is appropriate in the ci rcumstances; (e) Any interim measure of protection ordered under this paragr aph shall be effective for the period fixed by the tribunal, provided such period does not exceed more than twenty days from the date on which the me asure takes effect against the other party and which period cannot be exte nded. This subparagraph shall not affect the authority of the arbitr al tribunal to grant, confirm, extend, or modify an interimmeasure of prote ctionunderparagraph (1) after the party against whom the measure is direct ed has been given ting an interim notice and an opportunity to be heard; (f) A party reques obligationtoinform measure of protection under this paragraph shall have an the arbitral tribunal of all circumstances that the arbi tral tribunal is likely to find relevant and material to its determination whe ther the requirements of thisparagraphhavebeenmet;

Article9:CourtorderedInterimMeasures:

(4) The court shall have the same power of issuing intermined rim measures of protection for the purposes of and in relation to arbitration has forthepurposes of and in relation to proceedings in the court.

Tribunal:

- (1) Upon an application by an interested party, the compet to recognize and enforce an interim measure of protec article 17, irrespective of the country in which it was against whom the measure is invoked furnishes proof th agreement referred to in article 7 appears to not be va court may refer the issue of the validity of the arbit decided by the arbitral tribunal in accordance with art The party against whom the interimmeasure is invoked notice of the appointment of an arbitrator or of the a which case the court may suspend the enforcement procee parties have been heard by the arbitral tribunal; or (iii whom the interim measure is invoked was unable to prese respect to the interim measure in which case the court enforcement proceedings until the parties have been hea tribunal; or (iv) The interim measure has been terminat amended by the arbitral tribunal. (b) The court finds tha requested is incompatible with the powers conferred upon procedural laws, unless the court decides to reformulate extent necessary to adaptit to its own powers and proc of enforcing the measure; or (ii) The recognition or interimmeasurewouldbecontrarytothepublicpolicyof
- (2) Upon application by an interested party, made with the arbitral tribunal, the competent court may, in its discrete recognize and enforce an interimmeasure of protection 17, irrespective of the country in which it was ordered whom the measure is invoked furnishes proof that applicates imilar interimmeasure has been made to a court in the whether the court has taken a decision on the application.
- (3) The party who is seeking enforcement of an interimeasure shall promptly inform the court of any termination, suspension or ame ndment of that measure.
- (4) In reformulating the measure under paragraph (1)(b)(i), the court shall not modifythesubstanceoftheinterimmeasure.

Paragraph(1)(a)(iii)doesnotapplytoaninterimmeas ureofprotectionthatwasordered

bythearbitraltribunalpursuanttoArticle17(7)above.

ent court shall refuse tion referred to in ordered, if: *(a) party at:(i)Thearbitration lid, in which case the ration agreement to be icle16ofthisLaw;(ii) wasnotgivenproper rbitral proceedings in dings until the) The party against nt its case with may suspend the rd by the arbitral ed, suspended or t: (i) The measure the court by its the measure to the eduresforthepurpose

e approval of the iscretion, refuse to nreferred to in article, if the party against tionforthesameor is State, regardless of ion.

enforcement of the

thisState.

CHAPTERV

CONCLUSION

Thecurrentpositiononinterimmeasuresavailableini nternationalarbitrationindifferent legalsystems, including the national legislations, courtruling, international institutions and internationalconventionshavebeenanalyzedinthe precedingchapters. Though, the conditions moreorlessseemtobefavorableforinterimmeasures ofprotection, it is felt that there is a lot of confusionsurroundingthisissue. Inspiteofthecriti cismforcourtinterventionandspecific legislationsregulatingtribunalorderedinterimmeasur e, there is an urgent need for a more rtarbitrationforarbitrationtoadapt favorableandharmonizedinternationalstructuretosuppo itselftothechangingcircumstancesandremainasa nalternativedisputeresolutionmethodin international commerce. For example, the position on i nterimmeasuresinUnitedStatesisstillin greatconfusion. Aparty before agreeing to arbitration hastoknowtheexactpositionofdifferent circuitsonthisimportantissue. The courtshave taken differingviewsinboththeirauthorityto grantinterimmeasures and that of the arbitrators. S owhenapartysignsanarbitrationagreement involvingaUnitedStatesparty,ithasadauntingta skoffindingoutthecircuitcourtthattheywill havetoapproachandthepositionthatthecourtismos tlikelytotakeinenforcingtheinterim measures. Probably the time has come for the Federal A rbitrationActtobeamendedtomeetthe realities of the current international setup.

Asfarasthepresentsystemgoes, English Arbitratio nActprobably is the only national legislation that comes close to providing a comprehen sive coverage of all the issues concerned.

Both the English courts and the legislations have supported the provision of interimmeasures from the courts and the arbitrators. As seen in the Chapters II and III, traditionally the English

havebeenfavorabletotheavailabilityofinterimmea legislation, thereissomedoubtregarding the enforc themselves and the power to approach the courts for enforce most of the countries civil and common lawbased. Hen international setup to address this issue.

suresovertheyears.ButevenintheEnglish
ementofprovisionalordersbythearbitrators
orcement.Thispositionholdsgoodfor
ce,theneedforamoreharmonized

The work of UNCITRAL to a mend the Model Law, so astoprovideforissuesinvolved intheinterimmeasuresofarbitrationisreallyimpor tant. Many nations both developed and developing, are considering the UNCITRAL Model Lawa sabasisfordraftingtheirown legislations.SoacomprehensiveModelLawwoulddefi nitelygoalongwayinsettingupamore harmonizedviewonthisissue. Weareinastagewhe reUNCITRALisworkingtoprovide directioninthisarea.Lookingattheextensivedis cussionssofarintheworkinggroup,they wouldconsiderthevaryingaspectsinvolvedandwould comeupwithcoherent, extensive and universallyacceptableprovisionstodealwiththeall theissuessurroundingtheavailabilityof interimmeasures.

Mostoftheinternationalinstitutionshaveadaptedt heirrulestoprovideinterimmeasures ofprotectionfromthetribunals. However, each rule ha sshortcomingsofvaryingdegrees.WIPO, AAAandICChaveprovidedthepartieswiththechoice ofincorporatingtheirOptionalRules, whichhasbeendesignedspecificallytomeettheneed foremergentinterimreliefpending arbitration. Theinternationalinstitutions may consi deramendingtheirRulesbyprovidingamore elaboratestructureforthetribunalstoworkwith.Sinc eissueslikethepreconditionsnecessaryfor providing interimrelief, the scope of the relief tha tthearbitratorscangrantetcarenotcontained inmostoftherules, the arbitrators may have diffic ultyindecidingwhetheraninterimmeasureis necessaryandwhethertheyhavetheauthoritytogra ntsuchorder.Iwouldsuggestthat LArbitrationRulestomakeitin UNCITRALworkinggroupshouldalsoworkontheUNCITRA consonance with the amendment to the Model Law, so partiesusingtheRulesforad-hoc arbitrationandalsootherinstitutionscantakeadva ntage.

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