

8-1-2003

Interim Measures in International Commercial Arbitration: Past, Present and Future

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INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION:
PAST, PRESENT AND FUTURE

by

SANDEEP ADHIPATHI

(Under the Direction of Professor Gabriel M. Wilner)

ABSTRACT

This work is a comparative study of the availability and handling of interim measures in international commercial arbitration in different legal systems. It studies the difference in handling of interim measures and the need for a harmonized structure. It also contains a review of the proposed draft amendment to the UNCITRAL Model Law and further suggests a different version for the amendment.

INDEX WORDS: Interim Measures, International Commercial Arbitration, Provisional Measures, Interim Relief, UNCITRAL Model Law

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B.A., B.L., University of Madras, India, 2000

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial

Fulfillment of the Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA

2003

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August 2003

ACKNOWLEDGEMENTS

I would like to thank and express my gratitude and appreciation to Prof. Gabriel M. Wilner for guiding me through this thesis and the LLM Program as my Major Professor and Program Advisor. I would also like to thank Prof. Charles R. T. O'Kelley for his prompt appraisal of my thesis as the second reader and committee chair.

I take this opportunity to express my gratitude to my parents and my brother who have always stood by me and encouraged me in all my endeavors.

My cousin Sowmiya R. K. Sika and her husband Ramesh Sika deserve special mention for all the support and guidance they have extended throughout.

I would like to thank the Dean Rusk Center—International, Comparative and Graduate Legal Studies and the University of Georgia School of Law for providing me with the opportunity to pursue my Masters degree at this prestigious institution. I would also like to thank all the wonderful people at the Dean Rusk Center who were always ready and willing to help me throughout the Master's program.

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CHAPTER I

INTRODUCTION

A. International Commercial Arbitration and Trade

1. Arbitration as an alternative dispute resolution method

Evolution of arbitration as a method of dispute resolution can be counted back to the early days of business, when traders looked to their party to solve disputes between them¹. The process has undergone a lot of changes from then, but the basic nature of arbitration remains the same². It depends on a contractual agreement between parties to resolve their dispute before a select group of non-governmental body and accepting its decision as binding.³ But the process has undergone a lot of changes and as a consequence evolution has adapted to the changing times⁴.

Enterprises all over the world have started conducting business on an international scale. Producers and suppliers from different continents contract produce and sell products in the global market through branches and agents. Firms have begun to increasingly look abroad for merger partners, distribution, franchise etc. All these transactions are based on contracts between the parties and therefore there are bound to be questions on interpretation of clauses and others such issues to be settled among the parties. Arbitration has frequently been the choice of these

¹ Robert B. von Mehren, *From Vynior's Case To Mitsubishi: The Future of Arbitration and Public Law*, 12 Brooklyn J. Int'l L. 583 (1986); Bret Fulkerson, *A Comparison of Commercial Arbitration: United States & Latin America*, 23 Hous. J. Int'l L. 537, 539 (2001); William M. Howard, *Evolution of Constitutionally Mandated Arbitration*, 48 Sep ARBJ 27 (1993); ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 2 (1996)

² See REDFERN *supra* note 1

³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES COMMENTARY & MATERIALS 1 (1994)

⁴ J. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, vol. 2.2 Electronic Journal of Comparative Law, (August 1998), available at <http://www.ejcl.org/ejcl/22/art22-2.html>

enterprises in dealing with their counterparts. It has become the dominant method of settlement of international trade disputes and hence its importance has increased⁵. Arbitration can provide a highly efficient alternative means of dispute resolution for banks and financial institutions and is sometimes preferable to litigation⁶.

2. Developments in the Infrastructure for International Arbitration

The debate about arbitration as a viable alternative to litigation is still continuing. But, now in the times a vvy world of entrepreneurs, arbitration with its time saving feature and the just and fair results has made it look appealing to the business world⁷. Combined with this, the need for a neutral decision maker with the knowledge and skill in a specific area and the freedom to set the stage has strengthened the popularity for arbitration⁸. As the business community embraces arbitration and other alternate dispute resolution methods, there has been a lot of concentration on the procedural aspects of arbitration. It has set off the development of an international legal system for commerce⁹. Though arbitration is a process outside the court structure, it needs strong legislations and court assistance for its effective functioning¹⁰. The nation states have to come forward to establish a network and provide means to the willing parties to opt out of the judicial system and adopt their own dispute resolution forum¹¹. Specifically in the international arena,

⁵ Thomas E. Carbonneau, *The Ballad of Transborder Litigation*, 56 U. Miami L. Rev. 773, 778 (July 2002)

⁶ PREAMBLE TO CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, ICSID (W. Bank) available at <http://www.worldbank.org/icsid/basicdoc-archive/11.htm>

⁷ Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration?*, 57 J. Int'l Disp. Resol. 78, 80, 81 (2002-2003)

⁸ 2002 Annual Report 4, ICSID (W. Bank) available at http://www.worldbank.org/icsid/pubs/1998ar/2002_ICSID_ar_en.pdf; Peter K. Yu, Charles H. Brower II, *What I Tell You Three Times is True: U.S. Courts and Pre-Award Interim Measure Under The New York Convention*, 35 Va. J. Int'l L. 971 (1995); Richard Allan Horning, *Interim Measures of Protection, Security for Claims and Costs; And Commentary on the WIPO Emergency Relief Rules (In Toto) Article 46*, 9 Am. Rev. Int'l Arb. 155, 156 (1998)

⁹ Carbonneau, *Supra* note 5

¹⁰ BORN *Supra* note 3 at 3

¹¹ Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 Stan. J. Int'l L. 1 (2003)

where jurisdictional issues play an important role¹², laws supporting arbitration are a must. Though, initially the states were reluctant to relinquish control, over the course of the last few decades more and more nations have enacted legislation supporting the institution of arbitration¹³. Various international treaties, conventions, national legislations, and even institutions have been formed to provide the framework for international arbitration¹⁴. Apart from that UNCITRAL drafted a model code for countries to follow. So far more than 40 countries have enacted legislations based on the model code¹⁵. Apart from the Model Law, UNCITRAL has come up with the Arbitration Rules to support parties who prefer ad-hoc arbitration. Even many institutions offer arbitration services based on the UNCITRAL Arbitration Rules.

The most important and arguably the start of the organized development process was the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The main purpose of the New York Convention was to obligate member nations to recognize and enforce foreign arbitral awards¹⁶. This effort was followed by various other conventions including the European Convention on International Commercial Arbitration (the “Geneva Convention”) and Inter-American Convention on International Commercial Arbitration (the “Inter-American Convention”). UNCITRAL, the legal body of the U.N. in the international trade law has done a great deal of work in harmonizing the legal setup. UNCITRAL first introduced its Arbitration Rules and later on drafted the Model Law, which has proved invaluable¹⁷. Even outside the United Nations, a lot of institutions, both domestic and

¹²B ORN *Supra* note 3 at 2

¹³Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 *Tul. L. Rev.* 1945; Rogers *Supra* note 11 at 2

¹⁴Rogers *Supra* note 11 at 3

¹⁵Schafer *Supra* note 4

¹⁶Convention on Recognition and Enforcement of Foreign Arbitral Award, June 7, 1959, Article I(1), 9 USCA § 201, “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”

¹⁷Pieter Sanders, *UNCITRAL's Model Law on Conciliation*, *International Journal of Dispute Settlement*, Vol. 12/2002, 1 (Verlag Recht und Wirtschaft, Heidelberg, 2002)

international were created to provide a framework for the conduct of arbitration. The most notable being the American Arbitration Association, International Chamber of Commerce and the London Court of International Arbitration¹⁸.

The development is an ongoing process and even today various organizations are working towards further improving the existing system. Even after decades of progress there are areas that still need to be addressed by the world community viz .provision of interim measures, requirement of written agreements, multi-party arbitration, and the more recent addition, attorney regulation.¹⁹

B. Interim Measures in International Arbitration

1. The Need for Interim Measures

The availability and handling of interim measures in international commercial arbitration has become one of the main issues in developing a legal setup for arbitration. In international litigation and arbitration, the availability or otherwise of provisional measures can have a substantial effect on the final result, especially when issues relating to protection of evidence and assets arise before or during the course of the proceedings²⁰. In international litigation this has been effectively covered by the rules and procedures developed by most nations²¹. The state courts have the right tools to enforce their orders²². As in litigation, interim measures are the tools to preserve and ensure the usefulness of arbitration. Failure to preserve the evidence or protect the property involved in the dispute can prove disastrous for a party in terms of the final outcome.

¹⁸B ORN *Supra* note 3 at 2

¹⁹Richard W. Naimark and Stephanie E. Keer, *Analysis of UNCITRAL Questionnaire on Interim Relief*, *Global Center for Dispute Resolution Research*, (March 2001) available at www.globalcenteradr.com

²⁰Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57-JAN Disp. Resol. J. 62, 63 (2002); See BORN *supra* note 3 at 753, 754

²¹B ORN *Supra* note 3 at 754

²²B ORN *Supra* note 3 at 754

There may not be anything left for the successful party to satisfy his claim²³. A report submitted by the UN Secretary General on Settlement of commercial Disputes clearly outlines the importance of interim measures and also the growing need for interim relief from the tribunals, among the parties²⁴. As arbitration moves into fields like environmental disputes and intellectual property, where quick decision could mean a lot, the need for interim measures in arbitration is going to increase²⁵. In the report, the Secretary General also notes the various legislations and amendments that have been made by the nations and also in the Model Law²⁶. The three main issues when dealing with interim measures in arbitration are power of the court to grant interim orders, power of the arbitrator to order interim relief and the possibility of enforcement of interim orders granted by the tribunal. Enforcement is a new issue that takes a whole new meaning when the interim orders involve third parties.

²³ Richard W. Naimark & Keer, *Supra* note 19

²⁴ *Settlement of Commercial Disputes - Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement, Report of the Secretary General*, United Nations Commission on International Trade Law Working Group on Arbitration, 32nd Sess., at 24 (Para. 104), A/CN.9/WG.II/WP.108 (Jan. 2000) "Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases. This trend and the lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration. To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making gas sets inaccessible to the claimant. Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure; this causes unnecessary cost and delay (e.g. because of the need to translate documents into the language of the court and the need to present evidence and arguments to the judge)".

²⁵ Bernardo M. Cremades, *Is Exclusion of Concurrent Courts Jurisdiction over Conservatory Measures to be Introduced Through a Revision of the Convention*, *J. of Int'l Arb.*; Dr. Francis Gurry, *The Need for Speed*, WIPO Arbitration And Mediation Center Biennial IFCA I Conference October 24, 1997, Geneva, Switzerland; David E. Wagoner, *Interim Relief in International Arbitration: Enforcement is a Substantial Problem*, 51-OCT Disp. Resol. J. 68, 72 (1996)

²⁶ *Settlement of Commercial Disputes, Report of Secretary General*, *Supra* note 24 at 24 (Para 103); See also UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION Article 17. Power of arbitral tribunal to order interim measures: Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure, *available at* www.uncitral.org

The push towards interim measures has not been without criticism. The major argument against interim relief is that being a contractual relationship, there is no need for interim relief. Also, the critics point out that more than 80% of awards are executed without any problem and the provisional measures will only serve as a tool to delay the procedure. Another major concern for many is the tribunal's lack of power to enforce its interim orders.

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

Availability of interim measures largely depends on international conventions, national legislations and institutional rules. Though, interim measures are being used frequently in the recent times in arbitration, none of the conventions have provision to regulate its handling²⁷. But the many nations have amended their legislation to provide for interim measures. Many nations like Swiss, Germany, Argentina, have either amended the specific provisions or have repealed the old law and enacted new legislations. In common law countries, including United States, United Kingdom and India, courts have dealt with this issue and have set precedents one way or the other on this subject. Likewise the third set of proceduresthat have a direct bearing on this issue is the institutional rules. Most of the institutional rules in their current form, address the subject of interim measures. Chapter II of this article discusses the handling of interim measures by National courts and legislations. Chapter III deals with the provisions available in international conventions and institutional rules.

Specific mention has to be made of the UNCITRAL model law. Article 17 of the Model Law provides the authority for the tribunal to grant interim relief. But it does not have a provision, which provides the exact procedure for the recognition and enforcement of the interim awards. There has been a lot of confusion on whether the definition of award in the model law includes the interim awards and the procedure prescribed for the enforcement of awards may be used for interim awards also. UNCITRAL recognized this situation and is discussing the

²⁷B ORN *Supra* note 3 at 756, 757

possibility of a harmonized law for the enforcement of interim awards. A working group has been set up to specifically address this issue. In Chapter IV, I have discussed the present form of Model Law and proposals of the working group. In conclusion, I have tried to point out the best way of handling all the three issues concerning interim measures.

CHAPTER II

INTERIM MEASURES IN INTERNATIONAL ARBITRATION – COMPARATIVE STUDY OF THE NATIONAL LEGISLATIONS AND COURT RULINGS

International Arbitration depends on a wide variety of legal setups for its functioning viz., national legislations, international conventions and institutional rules. As it relies on such a varied structure, there is always a difference in the way arbitration process is handled. International conventions for the most part are silent on the issue of interim measures. But national legislations and institutional rules have differing interpretations. The primary issues are the power of the court to support (some prefer 'interfere' in) arbitration, power of arbitrator to provide interim relief and the enforcement of the orders. Enforcement of interim orders has some interesting areas like orders involving third parties and orders by foreign courts.

A. Power of Courts to Order Provisional Relief

It has increasingly been accepted that the support of national courts is highly important for the success of arbitration. But the questions that need to be answered are when and how much should the courts step in²⁸. Usually the Courts are called upon either at the start of the process to enforce arbitral agreement or at the end to enforce awards. But there are circumstances where the Courts are required to use their authority to support the process²⁹. Mostly these circumstances arise when there is an involvement of third party³⁰. Another usual timing of court intervention for

²⁸ Prathiba M. Singh & Devashish Krishnan, The Indian 1996 Arbitration Act - Solutions for a Current Dilemma, *Journal of International Arbitration* (insert footnote from lib.)

²⁹ R EDFERN *Supra* note 1 at 233

³⁰ R EDFERN *Supra* note 1 at 234; See B ORN *Supra* note 3 at 771

interim relief is at the start of the proceedings when the tribunal has not been formed³¹. The time taken to initiate the process, appoint the arbitrators and settle jurisdictional issues, if any, will take a considerable time.³² So in the meantime parties have to approach the courts to maintain status quo, protect the property, evidence, etc.³³ The courts in extraordinary circumstances have been known to interfere even when the proceedings are in progress, if a party shows proof of partiality or corruption on the part of arbitrators. In fact, some view this power of the courts to be so important that they think without such backing from the courts many will not choose arbitration³⁴.

The national position depends on the legislations and court rulings. Most of the countries have legislations dealing with arbitration. In the United States, Federal Arbitration Act (FAA) governs the conduct of arbitration. But there is no provision in FAA either allowing or prohibiting provisional measures. So the court rulings are the only guidelines available to study the availability of court ordered interim measures. But in UK, the Arbitration Act of 1996 has a specific provision governing the court powers exercisable in support of arbitration³⁵. The

³¹ Charles N. Brower & W. Micheal Tupman, *Court-Ordered Provisional Measures Under The New York Convention*, 80 Am. J. Int'l L. 24, 25 (1986)

³² See UNCITRAL ARBITRATION RULES (1982) Article 6 & 7; See RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS UNDER INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES Rules 1-4

³³ Charles N. Brower & W. Micheal Tupman *Supra* note 31

³⁴ Charles H. Brower II *Supra* note 8 at 972

³⁵ Arbitration Act, 1996 c. 23 § 44-(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are- (a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or to which any question arises in the proceedings- (i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering that samples be taken from, or any observation be made of, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of any goods the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties. (5) In any case the court shall act only to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has not acted effectively. (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of an arbitrator or other institution or person having

provision lists the matters where the Courts can exercise powers. The wordings of the provisions suggest that the list is exhaustive. The courts can act only to the extent that the tribunal has no power or is unable to act and also the court order will cease to have effect as soon as the tribunal acts on such matter. The most notable feature of this section is the 'opting-out' option for the parties drafting the arbitration agreement. But read in light from the Arbitration Act as a whole including Secs. 38 & 39, when the parties opt-out of Sec. 44, they will not have access to the traditional 'mare va in junctions'. Because when they restrict the authority to grant interim measures to the arbitrators, the range of the powers will be confined to this listed in 38 & 39³⁶.

Prior to the 1996 Act, the law on arbitration in India was governed by three difference legislations viz. the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961³⁷. The present Indian Arbitration Act, 1996 modeled on the UNCITRAL Model Law, has provision for court intervention in commercial arbitration for purposes of interim measures³⁸. There is also a specific provision regarding court support for the tribunal in taking evidence³⁹. Section 9 provides a list

power to act in relation to the subject-matter of the order. (7) The leave of the court is required for any appeal from a decision of the court under this section.

³⁶ Schafer *Supra* note 4

³⁷ AIR 1999 Supreme Court 565 at 567, 568

³⁸ Arbitration and Conciliation Act, 1996 - Interim measure by court § 9 A party may, before or during the arbitration proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitration proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely: - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any sample to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or necessary or expedient for the purpose of obtaining full information or evidence; (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

³⁹ Arbitration and Conciliation Act, 1996 § 27 (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence (2) The applications shall specify - (a) the names and addresses of the parties and the arbitrators; (b) the general nature of the claim and the reliefs sought; (c) the evidence to be obtained, in particular, - (i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required; (ii) the description of any document to be produced or property to be inspected. (3) The court may, within its

of issues on which the Court can provide interim relief. Section 9(e) reserves to the Court the authority to grant such other interim relief that may appear to be just and convenient. The whole setup of the Section 9 looks like a catchall clause giving the Courts wide and sweeping powers to grant interim relief⁴⁰.

In France, the legislative position is similar to the U.S. in that the New Code of Civil Procedure does not mention about the provisional measure available from the courts. But, in practice the parties can apply to the French Courts for interim measures⁴¹. Article 809 of the New Civil Procedure Code⁴² deals with the protective measures available from the Courts in ordinary circumstances. This provision can also be used when arbitration is pending to obtain interim relief. The German Civil Procedure Code (GCP) Sec. 1033 states that it is not incompatible with the arbitration agreement for the courts to order interim measures in matters involving the dispute⁴³. This provision is very similar to the one found in the Indian Arbitration Act. But the provision is more like a declaration rather than a provision authorizing the courts. The nature and extent of the jurisdiction available to the courts are read from the GCP provision 914-945, which

competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal. (4) The court may, while making an order under sub-section (3) issue the same processes to witnesses as it may issue in suits tried before it. (5) Persons failing to attend in accordance with such processes, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court. (6) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents, available at <http://www.laws4india.com>

⁴⁰V. Giri, *Interim Measures Available in Arbitration and Conciliation Act, 1996*, ICA Arbitration Quarterly, Vol. XXXXX, No. 3, Oct-Dec 2001, available at <http://www.ficci.com/icanet/ICA-Oct/OCT6.htm>

⁴¹Richard H. Kreindler, *Court Intervention in Commercial and Construction Arbitration*, 13-OCT Construction Law. 12, 16

⁴²N.C.P.C. Art. 809- The president may, at any time, even where confronted with serious objections, provide by way of summary interlocutory proceedings for such protective measures or such measures as to keep the status quo of the matters as required, either to protect from an impending damage, or to abate a nuisance manifestly illegal. Where reliability of a claim from an obligation cannot be seriously challenged, he may award an interim payment to the creditor or order the defendant to perform the obligation even where it shall be in the nature of an obligation to perform, available at <http://www.lexmercatoria.org>

⁴³§ 1033 Book Ten ZPO- Arbitration agreement and interim measures by court: It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.

dealing general with interim measures of protection⁴⁴. GCP also provides for Court assistance in the matter of taking evidence⁴⁵. This is consistent with the traditional German view that interim relief can be granted only by the courts. German Law does not even require the place of the main proceeding to be in Germany. Even if arbitration has not started at the time of filing for the interim relief, if the parties convince the court that the final award is enforceable in Germany and there is an immediate need for relief, it would be granted⁴⁶. The German Courts can use two types of interim measures provided for by GCP 914–945. One is the functionally equivalent of Mareva Injunction in UK. This is used to prevent the dissipation of property. The other remedy covers the rest of the relief including conservation of evidence, etc. If the precondition in the Code is satisfied the Courts are obliged to grant the required remedy⁴⁷.

Switzerland is in another extreme position⁴⁸, where most of the power to grant interim relief are vested with the arbitration tribunal⁴⁹. Further, the local courts can assist in taking evidence, assist in establishing the tribunal and rule on the challenge of the arbitrators. The courts

⁴⁴Schaefer *supra* note 4

⁴⁵§ 1050 Book Ten ZPO-Court Assistance in Taking Evidence and Other Judicial Acts: The arbitration tribunal or a party with the approval of the arbitration tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitration tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.

⁴⁶Eric Schwartz & Jurgen Mark, *Provisional Measures in International Arbitration-Part II: Perspectives From The ICC and Germany*, 6 World Arb. & Mediation Rep. 52, 56

⁴⁷Schaefer *Supra* note 4

⁴⁸Werbicki *Supra* note 20 at 67

⁴⁹Charles Poncet & Emmanuel Gaillard, *Introductory Note on Swiss Statute on International Arbitration* § III(B) (The Introductory Note and translation were prepared for International Legal Materials by Charles Poncet, I.L.M. Corresponding Editor for -Switzerland, Law Offices of Charles Poncet, Geneva, and Emmanuel Gaillard, I.L.M. Corresponding Editor for France, Professor of Law, University of Paris XII, European Counsel, Shearman & Sterling, Paris) “Swiss courts may grant provisional measures but their jurisdiction is clearly subordinate to that of the arbitration tribunal. In contrast to the Concordat, the federal statute provides that provisional remedies, including the freezing of assets, should be referred to the arbitration tribunal itself. It is only in the event that, apart from a refusal to comply with the arbitration tribunal's order that the arbitration tribunal may ask a court with proper jurisdiction to intervene (article 183)”. Article 183 Swiss Statute on International Law- 1. Unless otherwise agreed by the parties, the arbitration tribunal may issue provisional or conservatory orders if requested by one of the parties. 2. If the opposing party does not voluntarily comply with the order issued by the arbitration tribunal, the latter may seek the assistance of the court, which shall apply its own law. 3. The arbitration tribunal or the court may grant provisional or conservatory measures subject to the receipt of adequate security from the requesting party, available at <http://www.lexmercatoria.org>

can do all these only if the parties or the tribunal request it to do so and these powers have not specifically been taken away by the arbitration agreement.⁵⁰ The Netherlands Arbitration Act Article 1022⁵¹ provides for court ordered interim measures of protection. It authorizes the parties to approach the district court of necessary orders. It specifically states that such an approach to the court is not contrary to the arbitration agreement.⁵² Further it provides for interim measures from the Court even in cases where the seat of arbitration is outside Netherlands.⁵³

Having seen the legislations, it is interesting to study the court interpretations of these legislations. United States Courts so far have not come up with a uniform position. There are lots of opposing views that it borders on confusion. Starting from the difference in handling between, domestic and international arbitration, the circuit courts have given differing decisions. In US, the courts have drawn a distinction between cases arising under Chapter I of Federal Arbitration Act (FAA), i.e. domestic arbitration and the international arbitration cases dealt with under Chapter II of FAA. Sec. 3 in Chapter I of FAA empowers the Courts to “stay the proceedings until arbitration is complete”. While dealing with cases arising out of this Section, majority of the Courts interpreted this as giving jurisdiction for the court to interfere. Prior to the incorporation of the New York Convention into FAA, the second circuit court was one of the first to address this

⁵⁰ *Id* at § III(A)

⁵¹ Article 1022 ARBITRATION AGREEMENT AND SUBSTANTIVE CLAIM BEFORE COURT; ARBITRATION AGREEMENT AND INTERIM MEASURES BY COURT 1. A court seized of a dispute in respect of which an arbitration agreement has been concluded shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid. 2. An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of article 289. In the latter case the President shall decide the case in accordance with the provisions of article 1051, available at <http://www.lexmercatoria.org>

⁵² *Id*

⁵³ Article 1074 FOREIGN ARBITRATION AGREEMENT AND SUBSTANTIVE CLAIM BEFORE DUTCH COURT; FOREIGN ARBITRATION AGREEMENT AND INTERIM MEASURES BY DUTCH COURT 1. A court in the Netherlands seized of a dispute in respect of which an arbitration agreement has been concluded under which arbitrations shall take place outside the Netherlands shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid under the law applicable thereto. 2. The agreement mentioned in paragraph (1) shall not preclude a party from requesting a court in the Netherlands and to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of article 289, available at <http://www.lexmercatoria.org>

issue in international arbitration. In *Murray Oil*,⁵⁴ Judge Learned Hand upheld an attachment granted by the lower court while staying the court proceedings in support of arbitration.⁵⁵ Many circuit courts including First, Third, Fourth, Seventh and Ninth Circuit have held a similar position to the *Murray* case.⁵⁶ But after the New York Convention was incorporated into the Chapter II of FAA, the Courts interpreted that act differently from the Chapter I. Secs. 3, 4 and 8 of the FAA, which provide for Court interference in arbitration.

Three seminal cases, which considered the availability of interim measures under Chapter II, are *McCreary Tire & Rubber Co. v. CEATS, p.A.*⁵⁷, *Cooperv. Ateliers de la Motobecane*⁵⁸ and *Carolina Power & Light Co. v. Uranex*⁵⁹. Third circuit in *McCreary* became the first appellate court to consider this issue.⁶⁰ It granted stay in support of an arbitration clause but liquidated an attachment granted by the state court. The court reasoned that the words 'refer the parties to arbitration' contained in the New York Convention takes away its jurisdiction to grant interim measures. It differentiated between Sec. 3 of FAA and Chapter II proceedings by stating that the courts retain sufficient power to grant interim measures under Sec. 3, as it only requires a stay of the proceedings, whereas Chapter II proceedings require the court to 'refer' the parties.⁶¹ It also reasoned that the purpose of the convention would be defeated if parties are exposed to the

⁵⁴ *Murray Oil Prods Co. v. Mitsui Co.*, 146 F.2d 381 (C.C.A.2NY. 1944)

⁵⁵ *Id.* at 384. Judge Learned Hand: "... an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable."

⁵⁶ *Ortho Pharmaceuticals Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989); *PMS Distrib. Co., Inc. v. Huber & Shuner, A.G.*, 863 F.2d 639, 642 (9th Cir. 1988); *Teradyne v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985); Charles H. Brower II *Supra* note 8 at 977, 978

⁵⁷ *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032 (3d Cir. 1974)

⁵⁸ *Cooperv. Ateliers de la Motobecane, S.A.*, 442 N.E.2d 1239 (N.Y. 1982)

⁵⁹ *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977)

⁶⁰ Charles H. Brower II *Supra* note 8 at 980; Charles N. Brower & W. Micheal Tupman *Supra* note 31 at 28

⁶¹ *McCreary Oil Prods*, 501 F.2d at 1038 "Unlike § 3 of the federal Act, article II (3) of the Convention provides that the court of a contracting state shall refer the parties to arbitration rather than stay the trial of the action. The Convention forbids the court of a contracting state from entertaining a suit, which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable."

uncertainties of the state law granting attachment⁶². Further, it stated that attachment would be an attempt to bypass the agreed method of dispute resolution⁶³. New York Court of appeals followed this decision in *Cooper*. The court of appeals gave a new reasoning by interpreting that since the New York conventions specifically allow for attachments in enforcement of awards and omit to talk about that in regard to interim measures, the framers must have intended that kind of intervention only after the final decision by the arbitrators⁶⁴.

The first federal court to reject the arguments of the third circuit was the District Court for the Northern District of California. In *Carolina Powers*, the District Court refused to follow *McCreary* and gave its own interpretation of the Convention⁶⁵. Following these decisions various

⁶² *Id.* "The obvious purpose of the enactment of Pub. L. 91-368, permitting removal of all cases falling within the terms of the treaty, was to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with that purpose."

⁶³ *Id.* "This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects"

⁶⁴ Charles H. Brower II *Supra* note 8; *Cooper*, 442 N.E.2d at 1242. "The UN Convention apparently considered the problem and saw no need to provide for prearbitration security." The court also gave some policy guidance for its decision—see Charles H. Brower II *Supra* note 8

⁶⁵ *Uranex*, 451 F.Supp. at 1051 "This court, however, does not find the reasoning of *McCreary* convincing. As mentioned above, nothing in the text of the Convention itself suggests that it precludes prejudgment attachment. The United States Arbitration Act, 9 U.S.C. ss 1 et seq. (1970), which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending arbitration" "First, the court notes that the Arbitration Act only directs courts to "stay the trial of the action," while the Convention requires a court to "refer the parties to arbitration." 501 F.2d at 1038. From this difference the *McCreary* court apparently concludes that while the Arbitration Act might permit continued jurisdiction and even maintenance of a prejudgment attachment pending arbitration, application of the Convention completely ousts the court of jurisdiction. The use of the general term "refer," however, might reflect little more than the fact that the Convention must be applied in many very different legal systems, and possibly in circumstances where the use of the technical term "stay" would not be a meaningful directive. Furthermore, section 4 of the United States Arbitration Act grants district courts the power to actually order the parties to arbitration, but this provision has not been interpreted to deprive the courts of continuing jurisdiction over the action." "Second, the *McCreary* court found support for its position in the fact that the implementing statutes of the Convention provide for removal jurisdiction in the federal courts. See 9 U.S.C. s 205 (1970). The Third Circuit concluded that "(t)he obvious purpose (of providing for removal jurisdiction)... was to prevent the vagaries of state law from impeding its (the Convention's) full implementation. Permitting a continued resort to foreign attachment... is inconsistent with that purpose." It must be noted, however, that any case falling within section 4 of the United States Arbitration Act also would be subject to removal pursuant to 28 U.S.C. s 1441. Furthermore, removal to federal court could have little impact on the "vagaries" of state provisional remedies, for pursuant to Rule 64 of the Federal Rules of Civil Procedure the district courts employ the procedures and remedies of the states where they sit. Finally, it should be noted that in other contexts the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate. See *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S.

courts have elected to follow the two varying views. Some circuits have given conflicting opinions over the past two decades. The First, Third, Fourth and Eighth circuits have followed the McCreary views albeit some deviations. Fourth Circuit, in *I.T.A.D. Assoc. v. Podar Bros*⁶⁶ supported the McCreary decision. When the US buyer in that case brought a suit in South Carolina for breach of contract and sought attachment, the Fourth circuit on appeal liquidated the attachment citing McCreary to support its conclusion⁶⁷. Thereafter the First Circuit cited both McCreary and *I.T.A.D. Assoc. to support its decision in Ledev. Ceramiche Ragno*⁶⁸. The Fifth Circuit in *E.A.S.T., Inc. of Stamford, Conn. v. M/VA LAIA*⁶⁹ and a Tennessee District Court in *Sixth Circuit in Tennessee Imports, Inc. v. Filippi*⁷⁰ have more or less gone with the Carolina Powers line of thinking. The Seventh circuit in a more recent decision has also recognized the power of courts to grant interim relief pending arbitration. This court however reversed the decision of the district court extending the interim relief after the constitution of the tribunal⁷¹. Second Circuit that traditionally went along with the McCreary precedent however reversed its

235, 90S. Ct. 1583, 26L. Ed. 2d 199 (1970). In sum this court will not follow the reasoning of *McCreary Tire & Rubber Company v. CEAT, S.p.A.*, supra. There is no indication in either the text or the apparent policies of the Convention that resort to pre-judgment attachment was to be precluded.”

⁶⁶*I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981)

⁶⁷*Id.* at 76 “the attachment obtained by *I.T.A.D.* and the surety bonding posted by *Podar* are contrary to the parties’ agreement to arbitrate and the Convention; therefore, the bond must be released and refunded to *Podar*.” Citing *McCreary Tire & Rubber Co.*

⁶⁸*Ledev. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982)

⁶⁹*E.A.S.T., Inc. of Stamford, Conn. v. M/VA LAIA*, 876 F.2d 1168 (5th Cir. 1989)

⁷⁰*Tennessee Imports, Inc., v. Filippi*, 745 F.Supp. 1314 (M.D. Tenn. 1990)

⁷¹*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salomone*, 999 F.2d 211, 214, 215, 7th Cir. 1993, “We agree with *Merrill Lynch*, however, that the weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel.” The case law does not clearly resolve, however, the extent to which the district court’s authority to grant injunctive relief extended beyond the initial November 4 TRO. Although we decline to follow the approach of the Eighth Circuit, which found a district court’s grant of any injunctive relief in an arbitrable dispute to be an abuse of discretion, *see Hovey*, 726 F.2d at 1291-92, we do not go so far as to determine that that authority extends *ad infinitum*. A reasonable limitation is set forth in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Patinkin*, 1991 WL 83163 at *4, 6, 1991 U.S. Dist. LEXIS 6210 at *13, 20 (N.D. Ill. May 3, 1991), a district court case with facts similar to the case before us. Although the court granted the plaintiff’s request to extend a TRO that had been imposed earlier, it explicitly did so only “until the arbitration panel is able to address whether the TRO should remain in effect.” *Id.* at *6, 1991 U.S. Dist. LEXIS 6210 at *20. Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo.”

decision in *Borden, Inc. v. Meiji Milk Prods Co.*⁷² to grant preliminary injunction in aid of arbitration. Later in *David L. Threlkel & Co. v. Metallgesellschaft Ltd.*⁷³, it refused to be drawn into the controversy until the position is further developed.

Whereas in the United Kingdom, the courts have generally preferred to acknowledge their power to order interim measures pending arbitration. Previously when the English Arbitration Act of 1950 was in force, the courts granted interim injunctions based on the *Nippon Yusen Kaisha v. Karageorgis and Mareva Compania Naviera, S.A. v. International Bulk Carriers*. But, *Rena K* was one of the first cases in which the English court addressed the availability of interim measures in arbitration⁷⁴. In *Rena K*⁷⁵, the court decided that while staying the litigation in favor of arbitration, it had power to attach the assets of the party. This position was in conformity with the Arbitration Act of 1975, which incorporated Article II(3) of the New York Convention⁷⁶.

The Court position in England regarding the interim or provisional measures can be clearly studied in the cases concerning security for costs. Till 1994, the English courts ruled that the authority to order security rests solely with courts if the parties had not previously agreed otherwise⁷⁷. Kerr, J. gave the two leading judgments in *Mavani*⁷⁸ and *Bank Mellat v. Helliniki Techniki S.A.*⁷⁹. In *Mavani*, he cited the Sec. 12 of the Arbitration Act of 1950 to support this position. Later in *Bank Mellat* case he forwarded a two-prong test to order security for costs in cases concerning international arbitration viz. the connection between dispute and the English

⁷² *Borden, Inc. v. Meiji Milk Prods Co.*, 919 F.2d 822 (2d Cir. 1990)

⁷³ *David L. Threlkel & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245 (2d Cir. 1991)

⁷⁴ Charles N. Brower & W. Micheal Tupman *Supra* note 31 at 36

⁷⁵ *Rena K*, 1 Lloyd's L.R. 545 [1978]

⁷⁶ *Id.*

⁷⁷ Arbitration Act 1950, §12(6), "The High Court shall have... the same power of making orders in respect of... Security for Costs [in arbitration cases]... as it has for the purpose of... an action or matter in the High Court: Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator [by the parties] of making orders....", available at <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04045.html>; Noah Rubins, *In God We Trust, All Others Pay Cash: Security For Costs In International Commercial Arbitration*, 11 Am. Rev. Int'l Arb. 307, 323 (2000)

⁷⁸ [1973] 1 All E.R. 555

⁷⁹ [1984] Q.B. 291

legal system and the need for security⁸⁰. But later in *Ken-Ren* case⁸¹, this was taken a step further by the English Court. That case involved a dispute between a Kenyan Government-owned company and a Belgian and Austrian company to be resolved under ICC rules⁸². Nevertheless, the English Court ruled that it could order security for costs⁸³. But after the enactment of the 1996 Act, now the security for costs has been entirely shifted to the arbitrator's realm⁸⁴. The Channel Tunnel case⁸⁵ is another leading precedent in this matter though it was decided prior to the Arbitration Act of 1996. This involves a dispute between Trans-Manche Link, the contractor, and the Eurotunnel, the owner. They had an arbitration clause in their contract, which provided for settlement by Dispute Resolution Board within 90 days and after that by arbitration under the ICC rules in Belgium. When the dispute started TML threatened to stop the work on the project. Immediately, Eurotunnel approached the English court for an order restraining TML from suspending the work. After a spate of appeals, finally the House of Lords ruled on this matter. House of Lords agreed that the English Courts have jurisdiction to grant interim measures pending arbitration, but decided that the present case was not fit to do so⁸⁶. The decision by Mr. Justice Brennan in *Rena K*⁸⁷ is a leading precedent on this issue. He granted a Mareva Injunction in that case and pointed out that if a party is eligible to obtain an order for security in cases that do not involve an arbitration clause, there should be no reason for the party to obtain such order where the litigation is stayed pending arbitration⁸⁸. Citing some unreported cases, he said there

⁸⁰ *Id.*; Noah Rubins *Supra* note 77

⁸¹ *SACoppée Lavalin NV v. Ken-Ren Chemicals and Fertilizers*, [1994] 2 W.L.R. 631.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Noah Rubins *Supra* note 77; *See* Arbitration Act, 1996, c. 23, § 38

⁸⁵ *Channel Tunnel Group v. Balfour Beatty* [1993] AC 334 (HL).

⁸⁶ *Id.*; Werbicki *Supra* note 20

⁸⁷ *Rena K* [1978] 1 Lloyd's L.R. 545

⁸⁸ *Id.* at 561. Mr. Justice Brennan "On the footing that the procedure is available to provide a plaintiff, in a case where no question of arbitration arises, with security for any judgment which he may obtain in an action, it is also available to provide a plaintiff, whose action is being stayed on the application of a defendant in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award which the plaintiff may obtain in the arbitration"; *see* Charles N. Brower & W. Micheal Tupman *Supra* note 31 at 36, 37

have been many occasions when the commercial courts have granted such injunctions⁸⁹. There are not many English case laws regarding this issue because as seen by the preceding cases it is clear that the English Courts do not consider interim measures as incompatible with the arbitration agreements or the New York Convention⁹⁰. This position is clearly in contrast to the position adopted by some of the US Courts.

In India, the Supreme Court in *R. McDill & Co. (P) Ltd v. Gouri Shanker*⁹¹ held that the parties to arbitration have recourse to all the interim measures available under the Civil Procedure Code of 1908. Later in *M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd*⁹², the Supreme Court considered the question whether a party can approach a court for injunction even before arbitration process has actually started and answered in the affirmative. This Court rejected the reasoning given by the lower Court and held that interim measures of protection can be granted even prior to the initiation of arbitration proceedings⁹³. The court referred to the Arbitration Act of 1940, the UNCITRAL Model Law, Arbitration Act of 1996 of England and two English cases viz. *The Channel Tunnel Case and France Manche S.A. v. Balfour Beatty Constructions Ltd.*⁹⁴ The Supreme Court in its decision points out the relevant sections of the Arbitration Act of 1940 that permit interim measures during arbitration⁹⁵. The Delhi High Court followed this decision in *M/s. Buddha Films Pvt. Ltd. v. Prasar Bharati*⁹⁶. Even though it finally rejected the petition for interim injunction on the merits of the case, it held that a petition for interim relief is maintainable

⁸⁹ Charles N. Brower & W. Micheal Tupman *Supra* note 31 at 37 “The *Rena Kin* involved a maritime and not a commercial contract, but its application is not limited to maritime cases. “[T]he Commercial Court [also] has granted injunctions on [the basis of section 12(6)] in a number of unreported cases.”

⁹⁰ Charles N. Brower & W. Micheal Tupman *Supra* note 31 at 38

⁹¹ *R. McDill & Co. (P) Ltd v. Gouri Shanker*, (1998) 2 SCC 548.

⁹² *M/s. Sundaram Finance Ltd., v. M/s. NEPC India Ltd.*, AIR 1999 Supreme Court 565

⁹³ *Id.* at 571 “In view of the aforesaid discussions it follows that the High Court erred in coming to the conclusion that the Trial Court had no jurisdiction in entertaining the application under Sect. 9 because arbitration proceedings had not been initiated by the applicant.”

⁹⁴ *Id.* at 568, 569, 570

⁹⁵ *Id.* at 569 “The position under the Arbitration Act, 1940 was that a party could commence proceedings in Court by moving an application under Sect. 20 for appointment of an arbitrator and simultaneously it could move an application for interim relief under the Second Schedule read with Sect. 41(b) of the 1940 Act.”

⁹⁶ AIR 2001 Delhi 241

pending arbitration proceedings⁹⁷. But some recent decisions, including the latest in that line by Delhi High Court has raised concerns among the arbitration practitioners in India⁹⁸. Some courts have ceased with the question whether the Indian Arbitration and Conciliation Act empowers it to order interim relief when the place of arbitration is outside India, held in the negative⁹⁹. As noted earlier, Sec. 9 of the Arbitration and Conciliation Act, which resides in Part I of the Act, empowers the court to order interim and conservatory measures. Sec. 2(2) of the Act limits the application of Part I of the Act and hence Sec. 9 to arbitration held within India. Delhi High Court in *Marriott International Inc.*¹⁰⁰ decided that Sec. 2(2) would become redundant if Sec. 9 of the Act is interpreted to apply to arbitration outside India¹⁰¹. The Supreme Court in 2002 has put to rest all the confusion that arose because of the interpretation given by the Lower courts. In *Bhatia International vs. Bulk Trading S.A. and Another*¹⁰², it interpreted Sec. 2(2) as not limiting the application of Part I of the Act to international arbitration inside India. It reasoned that the objective of the Act would be negated if the interpretation of the Delhi High Court were upheld. It gave the option to the parties to decide whether to opt out of Part-I of the Act in case of

⁹⁷ *Id.*

⁹⁸ *Zia Mody & Shuva Mandal, Case Comment, India*, Int. A.L.R. 2001, 4(3), N19-20; V. Giri *Supra* note 40; *East Coast Shipping Limited Vs. M.J. Scrap Pvt. Ltd.* (Calcutta High Court); *Caventer Care Limited Vs. Seagram Company Limited* (Calcutta High Court); *Myriad International Corpn Ltd. Vs. Anson Hotels Limited*, AIR 2000 Delhi 377; *Contrary view taken in Olex Focals Pvt. Vs. Kode Exportsco. Limited*, AIR 2000 Delhi 161 was reversed in *Myriad*

⁹⁹ *Id.*; *Jyoti Sagar, Interim Measures By Local Courts in Arbitration Held Overseas – Developments in India*, News and Notes From The Institute for Transnational Arbitration, 3 Vol. 16, No. 4 (Autumn 2002); *Ramasamy, Interim Measures of Protection under the Indian Arbitration and Conciliation Act 1996*, 1999 *Arbitration International*; *Kitechnology NV v. Unicorn GmbH Rahn Plastmaschinen*, [1998] Delhi Reported Judgments 397; *Seagram Co. Ltd. v. Keventer Agro Ltd* APONo. 498 of 1997, order dated 27 January 1998 (unreported). The same view was taken by Justice Sharma in *Dominant Offset Pvt. Ltd. v. Adamovske Strojirny s.*, [1997] Delhi Reported Judgments 313. “... A conjoint reading of all the provisions clearly indicates that sub-section (2) of Section 2 is an inclusive definition and that it does not exclude the applicability of Part I to those arbitrations, which are not being held in India. The aforesaid interpretation gets support from the provisions of sub-section (5) of Section 2 which provides that Part I shall apply to all arbitrations and to all proceedings relating thereto which would also, in my considered opinion, include an international commercial arbitration...”

¹⁰⁰ *Marriott International Inc. v. Ansal Hotels Ltd*, AIR 2000 DEL 377

¹⁰¹ *Zia Mody & Shuva Mandal Supra* note 98

¹⁰² *Bhatia International vs. Bulk Trading S.A. and Another*, 2002(4) SCC 105

arbitration held outside India¹⁰³. So, now if the parties do not specifically opt out of Part I of the Act, the Courts in India may order interim or conservatory measure provided for by Sec. 9 even when arbitration is pending outside India¹⁰⁴.

The propensity of the French Courts to order interim measures pending arbitration was seen in the matter of *Atlantic Triton v. République populaire révolutionnaire de Guinée*¹⁰⁵. The Rennes Court of Appeal, in the matter involving ICSID Arbitration went along with the position taken by the ICSID guide, interpreting Article 26 & 47 of the Washington Convention to give the tribunal exclusive authority to grant interim relief¹⁰⁶. But the French Cour de Cassation reversed the decision of the Rennes Court by interpreting that Article 26 of the Washington Convention “was not intended to prohibit applications to the courts for protective measures aimed at ensuring the enforcement of the forthcoming award.”¹⁰⁷ In 1991, the Paris Court of Appeals in a case ruled that it has the authority to order interim relief pending arbitration on substantive issues¹⁰⁸. Another Court which retained jurisdiction for after directing arbitration was Rouen Court of Appeals¹⁰⁹. The Courts said that it had jurisdiction to order protective measures “regardless of whether or not the arbitral tribunal is constituted”.¹¹⁰ It is clear that but for United States, most of the State Courts grant interim measures in support of arbitration, though the procedural aspects differ.

¹⁰³ *Id.*; Jyoti Sagar *Supra* note 99

¹⁰⁴ Jyoti Sagar *Supra* note 99

¹⁰⁵ Cass. le civ., Rennes, Nov. 18, 1986, *Atlantic Triton v. République populaire révolutionnaire de Guinée*, 114 J.D.I. 125 (1987); *See also* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Part IV Ch. III Para 1309 (Emmanuel Gaillard & John Savage eds., 1999)

¹⁰⁶ *Atlantic Triton*, 14 J.D.I. 125 (1987) *Supra* note 105

¹⁰⁷ *Atlantic Triton*, 14 J.D.I. 125 (1987) *Supra* note 105; FOUCHARD GAILLARD GOLDMAN, *Supra* note 105

¹⁰⁸ FOUCHARD GAILLARD GOLDMAN, *Supra* note 105; CA Paris, Dec. 12, 1990, *Terex v. Banexi*, 1991 BULL. JOLY 595

¹⁰⁹ CA Rouen, Sept. 7, 1995, *Rotem Amfert Negev v. Grande Paroisse*, 1996 REV. ARB. 275

¹¹⁰ *Id.*; FOUCHARD GAILLARD GOLDMAN, *Supra* note 105

1. Should Court Interference be Limited?

Though, the court decisions, national legislations and commentators favor the support of interim measures from the courts, critics have put forward some arguments to restrict the court's authority to order interim relief. One such argument that has some merit to it is that when deciding the interim issue, courts invariably tread onto the main issue, which should be decided by the arbitrator¹¹¹. The courts in most countries look to the possibility of success on merits as a major factor in their decisions on interim injunctions¹¹². The critics feel that if the courts decide on the possibility of success on the merits in the final issue it would undermine the work of the arbitrators. Though, this is a legitimate concern, in most cases the necessity for interim relief would outweigh the negatives of refraining from ordering interim measures¹¹³. It is also pointed out that since most nations recognize the authority of arbitral tribunals to grant interim measures, the need for overlapping powers to the courts is not necessary¹¹⁴. It is seen as interfering with the functions of the tribunal. But, considering that there are many cases where the need for interim measures is really an urgent matter and arises even before the formation of the tribunal, if the courts are restricted in providing interim relief it would harm the effectiveness of the ultimate resolution of the dispute. Another concern is the availability of appeals for court orders and consequent delays that may be caused in resolving the dispute¹¹⁵. This is a real concern and has to be taken care of by making necessary legislative amendments to provide for effective enforcement of court orders for interim relief.

¹¹¹ Alison C. Wauk, *Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Jurisdiction*, 44 UCLAL Rev. 2061, 2073, 2074, 2075 (1997)

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

¹¹³ *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) "We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process."

¹¹⁴ Wauk *Supra* note 111 at 2075, 2076, 2077

¹¹⁵ *Id*

B. Power of Arbitrators to Grant Interim Relief

The power of arbitrators to grant interim measures, as that of the Courts depends largely on the national systems, international conventions, agreement between the parties and the rules adopted by the party¹¹⁶. In most instances parties do not deal about that in their contract, so it largely depends on the national law and the rules of the institution that they select¹¹⁷. 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 law on the arbitrator's power to grant interim relief.

The acceptance of arbitrator's power to grant interim relief has seen a change in the recent times. Increasingly many states have started to recognize the need for interim relief from the arbitrators¹¹⁸. Many commentators agree that unless otherwise agreed by the parties, the tribunal has power to order interim relief¹¹⁹. States have adopted differing positions on this crucial issue. Nations like Argentina and Italy had laws prohibiting arbitrators from granting interim measures¹²⁰. Whereas some nations like Switzerland (which has been discussed in detail below) have provided express authority for the arbitrator to grant interim relief¹²¹. In the United States, FAA does not talk about the powers of arbitrators to award interim relief. So the national position depends heavily on the rulings of the Courts. But the Courts as in the case of their power to grant interim measures are also divided on this issue. Some Courts have held that they would recognize an interim order of the arbitrator only if the parties have expressly authorized the tribunal to do so while some others have recognized the arbitrators authority to grant interim relief if it is

¹¹⁶BORN *Supra* note 3 at 756

¹¹⁷Vivienne M. Ashman, *The UNCITRAL Arbitration Rules and A Review of Certain Practices and Procedures*, 648 PLI/Lit 765, 780 (2001)

¹¹⁸Tijana Kojovic, *Court Enforcement of Arbitral Decision on Provisional Relief*, *Journal of International Arbitration* 18(5), p. 511

¹¹⁹BORN *Supra* note 3 at 768

¹²⁰BORN *Supra* note 3 at 768

¹²¹BORN *Supra* note 3 at 767

consistent with the arbitration agreement¹²². Ninth Circuit has consistently recognized the authority of the arbitrators and has refused to review their interim awards. In *Pacific Reinsurance*, while citing a previous case, Judge Wiggins noted the importance of recognizing the interim award granted by the arbitrators¹²³. A number of circuits including the Sixth Circuit and the Second Circuit have recognized this position of “judicial review of non-final arbitration awards should be indulged, if at all, only in the most extreme cases” and also have agreed that unless specifically prohibited by parties, the arbitrators have power to grant interim relief.¹²⁴ But at the same time some lower US courts have ruled that the arbitrators do not have the power to issue provisional relief unless the parties expressly agree to provide so in their agreement¹²⁵. The Third Circuit in *Swift Indus., Inc.*¹²⁶, and other lower US courts have required express provisions in the arbitration agreement or controlling statute to confer the authority on the arbitrator to grant interim relief¹²⁷. But no court in US has so far denied the right of the parties to actually confer the rights to the arbitrators¹²⁸.

¹²²B ORN *Supra* note 3 at 760

¹²³*Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1022 (9th Cir. 1991) “The Ninth Circuit has said that because of the Congressional policy favoring arbitration when agreed to by the parties, judicial review of *non-final* arbitration awards” should be indulged, if at all, only in the most extreme cases.” *Aerogel-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973) . . . ; at 1022-1023 “Temporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless”

¹²⁴*Island Creek Coal Sales Co. v. Gainesville*, 729 F.2d 1046 (6th Cir. 1984); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F.Supp. 692 (S.D.N.Y. 1985).

¹²⁵B ORN *Supra* note 3 at 760

¹²⁶*Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3rd Cir. 1972)

¹²⁷*Charles Construction Co. v. Derderian*, 586 N.E.3d 992 (Mass. 1992) “We reject the owner’s claim that the contractor’s only avenue for obtaining interim relief is through a court order independent of the arbitration proceeding. We have indeed upheld the entry of protective court order even though a dispute between the parties is subject to arbitration. See *Hulimun Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 648-649, 506 N.E.2d 140 (1987) (preliminary injunction upheld requiring contractual payments to continue while dispute is arbitrated pursuant to court order); *Salvucci v. Sheehan*, 349 Mass. 659, 663, 212 N.E.2d 243 (1965) (bill to reach and apply fraudulently conveyed property may be maintained before arbitration proceeding is concluded). If, however, there is an express agreement that authorizes an arbitrator to grant interim relief, including any authorization set forth in arbitration rules incorporated by agreement of the parties, there is no reason why an arbitrator may not act under that authority. Indeed, in such an instance, the court might be obliged both to defer to the parties’ agreement to submit the matter of interim relief to arbitration and to give any subsequent interim order the same deferential treatment that must be accorded to an arbitrator’s final order. Of course, a statute could authorize an arbitrator to grant interim relief. Therefore, if the arbitrator had contractual or statutory

The German Civil Procedure Code Sec. 1041 deals with this issue. It has a different approach than the US position¹²⁹. It gives the parties the option to take away the power of the arbitrator to grant interim relief. Prior to 1998, when the new arbitration law came into being, the German law did not recognize the power of the tribunal to order interim relief¹³⁰. Even if the arbitrators needed to give an interim measure it had to be in the form of an award and not an order. This award required an order of enforcement to be executed¹³¹. But after the new arbitration law based on the UNCITRAL Model Law came into being, a majority of the courts recognize interim orders granted by the Tribunal¹³². Apart from the provisional relief, German law also authorizes the arbitrator to appoint experts for guidance¹³³. As noted earlier, Swiss law takes an entirely different position than that of other nations¹³⁴. Art. 183 of the Switzerland's Code on Private International Law, clearly gives power to the tribunal to order interim measures¹³⁵. There is no limitation that has been set in the legislation to control the authority of arbitrator to grant

authority to issue an interim order, the contractor properly could have sought such an order from the mandant.¹²⁸ BORN *Supra* note 3 at 760

¹²⁹ § 1041 Book Ten ZPO (German Civil Procedure Code) now provides as follows:—(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. (2) The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1 unless application for a corresponding interim measure has already been made to a court. It may rescind such an order if necessary for the purpose of enforcing the measure. (3) The court may, upon request, repeal or amend the decision referred to in subsection 2. (4) If a measure ordered under subsection 1 proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damages resulting from the enforcement of such measure or from his providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.

¹³⁰ Eric Schwartz & Jurgen Mark *Supra* note 46; Schaefer *supra* note 4

¹³¹ Eric Schwartz & Jurgen Mark *Supra* note 46

¹³² *Id.*

¹³³ § 1049 Book Ten of ZPO (German Civil Procedure Code): EXPERIMENTAL APPOINTMENT BY ARBITRAL TRIBUNAL (1) Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. It may also require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents or property for his inspection. (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue. (3) Sections 1036 and 1037 subs. 1 and 2 apply mutatis mutandis to an expert appointed by the arbitral tribunal.

¹³⁴ *See supra* note 45

¹³⁵ *Id.*; see also MARC BLESSING, INTRODUCTION TO ARBITRATION—SWISS AND INTERNATIONAL PERSPECTIVES, Basel (Helbing and Lichtenhahn) 1999, 278

relief. The English Law like the German legislation takes a middle ground between the United States and Swiss position. Sec. 38 & 39 of the Arbitration Act of 1996 provides for various types of interim measures available from the arbitrators.¹³⁶ Sec. 38(1) gives the parties the right to choose the kind of orders available to the tribunal. If the parties fail to do so the arbitrators can provide the orders listed in Sec. 38(3), (4), (5) & (6).¹³⁷ This section deals primarily with the orders to provide security, protection and examination of property, preservation of evidence, etc. Sec. 39 of the Act deals with provisional measures. But, the power to grant provisional relief like payment on account, payment of money, disposition of property, etc. will be available only if the parties specifically agree to provide such power to the tribunal.¹³⁸

Art. 1460 of New Civil Procedure Code of France allows the arbitrator to lay down the rules of procedure unless stipulated by the parties. Since there is no other provision in the Code, which deals with this issue, Art. 1460 may be taken as the controlling authority. It also provides

¹³⁶ Arbitration Act, 1996 c. 23, § 38 GENERAL POWER EXERCISABLE BY THE TRIBUNAL (1) The parties are free to agree on the power exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings. (2) Unless otherwise agreed by the parties the tribunal has the following powers. (3) The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is - (a) an individual ordinarily resident outside the United Kingdom, or (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom. (4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings - (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property. (5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation. (6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

§ 39. POWER TO MAKE PROVISIONAL AWARDS (1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any award. (2) This includes, for instance, making - (a) a provisional order for the payment of money or the disposition of property as between the parties, or (b) a provisional order for the payment on account of the cost of the arbitration. (3) Any such orders shall be subject to the tribunal's final adjudication; and the tribunal shall take account of any such order. (4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power. This does not affect its powers under section 47 (awards on different issues, &c.).

¹³⁷ *Id.*

¹³⁸ *Id.*; Werbicki *Supra* note 20 at 67

the arbitrator the power to enjoin any piece of evidence available with the parties¹³⁹. The Indian Arbitration Act provides for the arbitrator to order interim measures of protection, but limits their authority to the subject matter of the dispute. It also gives the power to demand security for such orders¹⁴⁰. Netherlands Arbitration Act provides for tribunal orders in the matter of appointing experts and examining witnesses¹⁴¹. But in the matter relating to provisional or conservatory measures it has no specific provision other than the one authorizing the arbitrator to grant interim awards. There is no explanation in the Act of the types or the limitations on the arbitrator to grant interim relief¹⁴². However, the parties can by special agreement empower the tribunal or the chairman to order provisional measures in summary proceedings¹⁴³.

¹³⁹ Art. 1460 NCPC- The arbitrator shall lay down the rules for the arbitration proceedings without being bound by the rules governing the courts of law, save where the parties have decided otherwise as stipulated in the arbitration agreement. Notwithstanding the above, the governing principles of proceedings as enacted under Articles 4 to 10, 11 (sub-article 1) and 13 to 21 shall always be applicable to arbitration proceedings. Where a party has in his possession an item of evidence, the arbitrator may enjoin him to produce the same, available at <http://www.lexmercatoria.org>

¹⁴⁰ Arbitration and Conciliation Act, 1996 § 17. INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1), available at <http://www.lexmercatoria.org>

¹⁴¹ Netherlands Arbitration Act Article 1041 EXAMINATION OF WITNESSES 1. If an examination of witnesses takes place, the arbitral tribunal shall determine the time and place of the examination and the manner in which the examination shall proceed. If the arbitral tribunal deems it necessary, it shall examine the witnesses on oath or affirmation as provided in article 107(1). 2. If a witness does not appear voluntarily or, having appeared, refuses to give evidence, the arbitral tribunal may allow a party whose requests, within a period of time determined by the arbitral tribunal, to petition the President of the District Court to appoint a judge-commissary before whom the examination of the witness shall take place. The examination shall take place in the same manner as in ordinary court proceedings. The Clerk of the District Court shall give the arbitrator or arbitrators an opportunity of attending the examination of the witness. 3. The Clerk of the District Court shall communicate with the arbitral tribunal and the parties a copy of the record of the examination. 4. The arbitral tribunal may suspend the proceedings until the day on which it has received the record of the examination, available at <http://www.lexmercatoria.org>

¹⁴² Netherlands Arbitration Act Article 1049 TYPES OF AWARD The arbitral tribunal may render a final award, a partial final award, or an interim award, available at <http://www.lexmercatoria.org>

¹⁴³ Kojovic *Supra* note 118; Arbitration Act Article 1051 SUMMARY ARBITRAL PROCEEDINGS 1. The parties may agree to empower the arbitral tribunal or its chairman to render an award in summary proceedings, within the limits imposed by article 289(1). 2. In the event that, notwithstanding such agreement, the case is brought before the President of the District Court in summary proceedings, he may, taking into account all circumstances, declare to have no jurisdiction by referring the case to the agreed summary arbitration proceedings, unless the said agreement is valid. 3. A decision rendered in summary arbitration proceedings shall be regarded as an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable. 4. In the case of a

An important and interesting issue raised in this regard is the concept of *res judicata*, when a party after denial by the Court to order for interim measures, approaches the tribunal for such a measure. This issue gets added importance in areas where the concurrent jurisdiction of the Courts and tribunals is available. One US court, which was seized of such a matter, ruled that the tribunal has the authority to grant interim relief even after the denial of such relief by the Court¹⁴⁴. Some other US lower courts have also stated that awards made by the arbitrators are not reviewable, though those decisions were not relating to provisional relief¹⁴⁵.

C. Enforcement of Interim Measures Ordered by Arbitrators

As arbitration in itself is a voluntary submission to a tribunal based on an agreement between parties, the enforcement of the provisional relief ordered by the tribunal relies heavily on voluntary compliance of the parties¹⁴⁶. But the problem arises when a party refuses to comply with these orders. One of the obvious limitations in approaching an arbitral tribunal for provisional measure is their inability to enforce such orders¹⁴⁷. Most of the state legislations do not give any power to the arbitrators in the issue of enforcement¹⁴⁸. But the arbitrators do have certain ways of enforcing their orders in practice. For example in matters relating to evidence, the tribunal may presume negative inference if a party refuses to produce evidence before the tribunal¹⁴⁹. Likewise, it can also use sanctions to force the compliance or if it has control over any property involved in the dispute, it may possess the same to enforce its orders¹⁵⁰. All these are subject to judicial challenge in the national courts. Tribunals and in some cases the parties can

referral to the summary arbitral proceedings mentioned in paragraph (2) above, no appeal may be lodged against the decision of the President of the District Court, available at <http://www.lexmercatoria.org>

¹⁴⁴ *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982). The Sperry case is discussed in detail in the section on enforcement of awards.

¹⁴⁵ B ORN *Supra* note 3 at 820; *Michaels v. Mariforum Shipping SA*, 624 F.2d 411 (2nd Cir. 1980)

¹⁴⁶ *Kojovic* *Supra* note 118

¹⁴⁷ David Brynmor Thomas, *Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996*, *Arbitration International* 1997

¹⁴⁸ *Id.*; B ORN *Supra* note 3 at 820

¹⁴⁹ *Horning* *Supra* note 8 at 111

¹⁵⁰ B ORN *Supra* note 3 at 820

also seek the assistance of the national courts for the enforcement of their awards¹⁵¹. Therefore, the position of the national courts and the national legislations authorizing the enforcement of interim orders made by the arbitrators become important. Further, other important issues when dealing with enforcement are the scope for review of the order and the ground for refusal to enforce. Can the Courts deny enforcing the interim orders if they are ex-parte orders?

The system of enforcement of provisional orders can be studied in two topics, viz., the system where the provisional remedy is considered an award and executed as such and the system where it is considered as an order and the courts provide assistance for the enforcement. In the former approach the chance for judicial review of the award is limited while in the latter there is scope for review of the order. Netherlands, United States, France and Belgium subscribe to the former approach whereas Swiss and German law take the latter approach¹⁵². In Netherlands, the Courts will enforce provisional measures ordered by the Tribunal pursuant to Article 1051 of the Arbitration Act, as they would enforce a global or partial award¹⁵³. In US and similar countries, which view the provisional relief as an award and seek to enforce them as such have considered the 'interim' award as final in relation to the matter it seeks to address¹⁵⁴. The Sixth Circuit in *Island Creek*¹⁵⁵ case and New York district court in *Southern Seas*¹⁵⁶ have taken this view while enforcing the provisional awards granted by the tribunal¹⁵⁷. As far as US is concerned the leading

¹⁵¹ Kojovic *Supra* note 118; Wagoner *Supra* note 24 at 72

¹⁵² Kojovic *Supra* note 118

¹⁵³ *Id.*

¹⁵⁴ *Id.*; BORN *Supra* note 3 at 820

¹⁵⁵ *Island Creek Coal Sales Co. v. City of Gainesville*, Florida 729 F.2d 1046 (6th Cir. 1984)

¹⁵⁶ *Southern Seas Navigation Limited of Monrovia v. Petros Mexicanos of Mexico City* 606 F.Supp. 692 (S.D.N.Y. 1985)

¹⁵⁷ *Island Creek Coal Sales Co. v. City of Gainesville*, Fla., 729 F.2d 1046, 1049 (6th Cir. 1984) "Chief Judge Allen concluded that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings. Th[is] issue is a separate, discrete, independent, severable issue." Memorandum Opinion, July 24, 1983, at 8. We do not find this conclusion to be in error."; *Southern Seas* at 693, 694 "Given the equitable relief granted, this Court cannot accept Pemex's argument. This award is not a partial resolution of the parties' claims as an intermediate step in an ongoing arbitral process but, in effect, a grant of a preliminary injunction. As noted above, the arbitrator themselves perceived the request in such terms" "Such an award is not "interim" in the sense of being an "intermediate" step toward a further purpose is to clarify the parties' rights in the "interim" period pending a final decision on the merits. The

case on this subject arising from international arbitration was the Sperry case¹⁵⁸. In this case, the US Company Sperry International Trade, Inc. entered into a contract with the Government of Israel, which had an arbitration clause. When a dispute arose between the parties, Sperry approached the District Court to compel arbitration and for injunction restraining Israel from drawing on a letter of credit pending arbitration. The District Court compelled arbitration and enjoined Israel from drawing on the letter of credit. Israel appealed to the Court of Appeals, which reversed the preliminary injunction granted by the District Court stating that Sperry had not shown irreparable injury to warrant the injunction. Israel immediately started to draw on the letter of credit. But before the dispersal of the funds, Sperry moved to the New York State Supreme Court and obtained an order of Attachment. Israel removed the action to the Federal Court and moved to vacate the attachment. Sperry moved across motion to confirm the attachment and also argued before the tribunal to enjoin Israel from drawing on the letter of credit. The Arbitrators accepted Sperry's argument and provided a provisional award. Sperry informed this to the Federal court and also brought a motion to confirm the award. The District Court confirmed the award. On Appeal the Court of Appeals recognized the authority of the arbitrator to issue interim awards and enforce it¹⁵⁹. It is interesting to note that the Court of Appeals when discussing the issue of enforcement and review, took into account 9 U.S.C § 9, 10 and 11¹⁶⁰. These Sections of the FAA deal with the enforcement of the awards issued by the

only meaningful point at which such an award may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties' claims."

¹⁵⁸ Sperry Int'l Trade, Inc. v. Israel, 689 F.2d 301 (2d Cir. 1982)

¹⁵⁹ *Id*

¹⁶⁰ *Id* at 304, 305 "It is beyond cavil that the scope of the district court's review of an arbitration award is limited. Under 9 U.S.C. s9 (1976), "the court must grant... an order (confirming an arbitration award) unless the award is vacated, modified, or corrected as prescribed in (9 U.S.C. ss 10 and 11 (1976))." Section 10 permits the court to vacate an award only in specific situations, such as "(w) herethe award was procured by corruption, fraud, or undue means," s10(a); "(w) heretherewasevident partiality or corruption in the arbitrators," s10(b); "(w) herethe arbitratorswere guilty of (certain types of) misconduct... or of any other misbehavior by which the rights of any party have been prejudiced," s10(c); or "(w) herethe arbitratorsexceeded their powers," or failed to make "a mutual, final, and definite award upon the subject matters submitted," s10(d). In addition, an award may be set aside on "the nonstatutory ground of manifest disregard" of the law, "Dray v. Krasner, 572 F.2d 348, 352 (2d Cir.), cert. denied, 436 U.S. 948, 98 S.Ct. 2855, 56 L.Ed.2d 791 (1978), but" this presuppose(s) something beyond and different from a mere error in

arbitrators. The court reasoned that the interim award, although interim in time, is final in regard to the matter it aims to solve. So it applied the review grounds available to the final awards under FAA¹⁶¹. Even in a case where the Massachusetts State Superior Court refused to enforce the interim relief granted by the arbitrators, it recognized the authority of the tribunal to order interim relief when it is supported by statute or arbitration agreement between the parties¹⁶².

Swiss arbitration statute takes a slightly different approach by authorizing the arbitrators to seek assistance from the Courts for enforcing the interim orders¹⁶³. There are differing opinions on the question whether the decision to approach the courts for enforcement lies entirely with the arbitrators. Some experts have said that the parties can also approach the Court for enforcement of the orders¹⁶⁴. Some experts also view the issues of review of the substantive conditions underlying the orders differently¹⁶⁵. The Swiss courts will provide assistance for enforcement of the interim order even if the seat of arbitration is outside Switzerland.

the law or failure on the part of the arbitrator to understand or apply the law," id. (quoting *San Martine Companiade Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961))." 9 USC § 9. Award of arbitrators; confirmation; jurisdiction; procedure: If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in a motion in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. See also 9 USC § 10 & 11

¹⁶¹ Sperry, 689 F.2d at 306 "In the final analysis" Arbitrators may do justice" and the award may well reflect the spirit rather than the letter of the agreement.... Thus courts may not set aside an award because they feel that the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words or resulted from a misapplication of settled legal principles. In other words a court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than to arbitrate the dispute. Those who have chosen arbitration, as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law.

¹⁶² See *Charles Construction Co. v. Derderian*, 586 N.E.3d 992 (Mass. 1992)

¹⁶³ See Art. 183 of Swiss Private International Law Supra note 118

¹⁶⁴ Kojovic *Supra* note 118 citing opinions by leading experts

¹⁶⁵ *Id*

The German arbitration statute also authorizes the court to provide assistance to enforce the interim orders provided that no similar application for interim relief is pending before the court¹⁶⁶. Further Art. 1041(2) provides the Courts with the authority to remodel the interim relief ordered by tribunals to fit the system available to the German courts under their civil law¹⁶⁷. This issue was raised before a German court when enforcing a Mareva injunction. The court was faced with difficulty when trying to implement the injunction and finally enforced it as an injunction available to the German courts¹⁶⁸. In matters where the German courts have already refused interim relief and the same was subsequently granted by the tribunals, the German courts will enforce the orders as granted by the tribunal¹⁶⁹. Enforcement of interim orders granted by tribunals sitting outside Germany in German courts has not been clearly addressed by the statute. Sections 1025(2) and (3) which lists the provisions applicable to arbitration when the seat is outside Germany does not contain the provision dealing with interim relief viz. Sec. 1041¹⁷⁰. However, Sec. 1062 of the German Arbitration Statute which deals with the enforcement of awards granted within and outside Germany, is listed in Sec. 1025, this can be interpreted to give power to the German courts to enforce even provisional measures granted outside Germany. Sec. 1062 confers jurisdiction to the higher Regional Court where the opposing party has its place of business or

¹⁶⁶ See Art. 1041(2) Book Ten of ZPO (GCP)

¹⁶⁷ *Id.*; Schafer *Supra* note 4

¹⁶⁸ Kojovic *Supra* note 118; Schafer *Supra* note 4 “A translation of a Mareva injunction into German law under this regime by the Karlsruhe Court of Appeals serves to illustrate the difficulties (OLG Karlsruhe). The court discussed different ways of translating a Mareva injunction into German law, to meet the preconditions of the certainty principle (*Bestimmtheitsgrundsatz*). It proved to be more difficult than might have been suggested at first sight. A translation of a Mareva injunction into a *dinglichen Arrest* was ruled out, equally the transfer to an *einstweilige Verfügung*. The court decided to enforce it under section 890 CCP, which bears an injunctive title. Zuckerman and Grunert (1996, p. 102)”

¹⁶⁹ Kojovic *Supra* note 118.

¹⁷⁰ § 1025 Book Ten of ZPO (GCP) Scope of application: (1) The provisions of this Book apply if the place of arbitration as referred to in section 1043 subs. 1 is situated in Germany. (2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated outside Germany or has not yet been determined. (3) If the place of arbitration has not yet been determined, the German courts are competent to perform the court functions specified in sections 1034, 1035, 1037a and 1038 if the respondent or the claimant has his place of business or habitual residence in Germany. (4) Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.

habitual residence or where the assets of the party or the property in dispute or effected by the matter is located ¹⁷¹.

English law takes a completely different approach from the above positions. Sec. 39 of the Arbitration Act ¹⁷² provides for provisional relief from the arbitrators. But the nomenclature given to such relief has created some confusion regarding the enforcement of such orders ¹⁷³. The question now arises whether such relief granted by the tribunal ought to be enforced under Sec. 66 ¹⁷⁴ of the Act or under Sec. 42 ¹⁷⁵ read with Sec. 41 ¹⁷⁶ of the Act. Sec. 66 of the Act provides for

¹⁷¹ § 106(2) Book Ten of ZPO (GCP): If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (*Oberlandesgericht*) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (*Kammergericht*) shall be competent.

¹⁷² See Arbitration Act, 1996, c. 23 § 39

¹⁷³ Kojovic *Supra* note 118; Thomas *Supra* note 147

¹⁷⁴ Arbitration Act, 1996, c. 23, § 66-(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. (2) Where leave is so given, judgment may be entered in terms of the award. (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award. The right to raise such an objection may have been lost (see section 73). (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part II of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award

¹⁷⁵ Arbitration Act, 1996, c. 23, § 42-(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. (2) An application for an order under this section may be made—(a) by the tribunal (upon notice to the parties), (b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or (c) where the parties have agreed that the powers of the court under this section shall be available. (3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of the order. (4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time. (5) The leave of the court is required for any appeal from a decision of the court under this section.

¹⁷⁶ Arbitration Act, 1996, c. 23, § 41-(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. (2) Unless otherwise agreed by the parties, the following provisions apply. (3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or (b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim. (4) If without showing sufficient cause a party—(a) fails to attend or be represented at an oral hearing of which due notice was given, or (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submission on his behalf, and may make an award on the basis of the evidence before it. (5) If without showing sufficient cause a party fails to comply with any order or

the enforcement of awards made by tribunals. By the way, if a provisional remedy has been drafted, it has more coercive power to enforce an award. However, as the arbitrators are referred to as orders, it is doubtful whether the courts will use this section to enforce them¹⁷⁷. The other option left open for the courts is to use Section 42 in relation with Section 41 of the Act. Section 41 provides for some measures that the arbitrators can use to enforce its provisional remedies, provided the parties have agreed to such measures in their agreement. The arbitrators can issue a preemptory order if the parties fail to comply with their interim order¹⁷⁸. If the parties have so agreed, then the courts can step in only after the defaulting party has failed to comply with the arbitral order and the preemptory order made by the tribunal¹⁷⁹. In case of preemptory orders concerning security for costs, the Act also provides for some additional measures including adverse inference and costs of arbitration caused due to such failure, etc. are available to the tribunal¹⁸⁰. But, these additional measures are not necessary to be followed prior to approaching the court¹⁸¹. If the preemptory order issued by the arbitrators is not complied with, then either the tribunal or the parties with the permission of the tribunal can approach the court for enforcement, provided they have not agreed to strict the application of Sec. 42¹⁸². Section 42 when compared to Sec 66 has considerably less bite in the matter of enforcement. Another provision that the arbitrators can use to make the parties comply with its orders is Sec. 41(2).

directions of the tribunal, the tribunal may make a preemptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate. (6) If a claimant fails to comply with a preemptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim. (7) If a party fails to comply with any other kind of preemptory order, then, without prejudice to section 42 (enforcement by court of tribunal's preemptory orders), the tribunal may do any of the following - (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such material as has been properly provided to it; (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

¹⁷⁷ See Kojovic *Supra* note 118; Thomas *Supra* note 147

¹⁷⁸ Werbicki *Supra* note 20

¹⁷⁹ See Arbitration Act, 1996, c. 23 § 42(3) *Supra* note 174 above; also see Kojovic *Supra* note 118; Thomas *Supra* note 147; Werbicki *Supra* note 20

¹⁸⁰ See Arbitration Act, 1996, c. 23 § 41(7) *Supra* note 175

¹⁸¹ *Id.*; See Kojovic *Supra* note 118; Thomas *Supra* note 147

¹⁸² See Arbitration Act, 1996, c. 23 § 42(2) *Supra* note 174

Pursuant to Sec 41(2) of the Act, the tribunal can dismiss the claim of a party if its action causes inordinate delays resulting in a position where a fair resolution is not possible or has caused substantial risk to the respondent. Taken as a whole, the English Arbitration Act has not given enough tolls for the enforcement of interim orders of the arbitrators¹⁸³. The Indian statute, which is modeled on the UNCITRAL Model Law, does not have any provision for the enforcement of interim measures ordered by the tribunal and there is no reported case law so far which deals with this issue. Hence, the position that the Indian courts will take when enforcing interim relief is unclear. As in other areas, the national positions vary a lot in their dealing of enforcement of interim measures granted by the tribunals. A party trying to enforce interim measures would face a confusing scenario in various countries. This position highlights the need for a harmonized structure to deal with the interim measures.

¹⁸³ See Kojovic *Supra* note 118

CHAPTER III
PROVISIONS FOR INTERIM MEASURES UNDER VARIOUS INSTITUTIONAL
RULES AND INTERNATIONAL CONVENTIONS

International Arbitration for the most part is conducted under the auspices of the institutions like American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA), International Chamber of Commerce (ICC), and International Council for Settlement of Investment Disputes, etc. Some contracts may opt for ad-hoc arbitration, which is usually conducted under the UNCITRAL Arbitration Rules. In cases where the parties opt for one of the above institutions to conduct their arbitration, the rules of such institutions have the governing effect on the procedural matters. Hence, the availability or the extent to which arbitrators can grant interim measures depend heavily on the rules of the institutions¹⁸⁴. The other important group that has a binding say over such matters are the international conventions. In this chapter, the rules of the institutions and the international convention effect on interim relief are studied. The provisions of UNCITRAL Model Law and the Rules, including the proposed changes that are being considered are discussed in the following chapters

A. Court Ordered Relief under Institutional Rules and Conventions

Most of the institution rules have in some form or the other provision to support the aid of courts for arbitration¹⁸⁵. The major concern for parties to arbitration agreement is that their approach to the Courts for interim relief might be seen as a breach of the agreement itself. Rules

¹⁸⁴ R EDFERN *Supra* note 1 at 284; BORN *Supra* note 3 at 820, Ashman *Supra* note 117 at 780

¹⁸⁵ Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 *Am. Rev. Int'l Arb.* 123, 134 (1999); Kelda Groves, *Virtual Reality: Effective Injunctive Relief In Relation To International Arbitrations*, *Int. A.L.R.* 1998, 1(6), 188-193

of ICC, AAA and World Intellectual Property Organization (WIPO) Arbitration Rules have provisions that make it clear that such an approach will not be considered to be a violation of the agreement to arbitrate.¹⁸⁶ LCIA and the ICSID rules do not provide for such a provision, but have a general provision that allows parties to approach judicial authorities for interim relief.¹⁸⁷ The institutional rules do not differ much in their recognition of courts' power to grant interim measures pending arbitration, except for a few instances. For example, LCIA rules require 'exceptional circumstances' for court intervention after the constitution of the tribunal, whereas the ICC rules just require 'appropriate circumstances'.¹⁸⁸ It is also interesting to note that the LCIA rules prohibit parties from approaching national courts for provisional measures on security for costs, which have been made available from the tribunal itself.¹⁸⁹ ICSID rule allows parties to approach the courts only if they have already agreed to do so.¹⁹⁰ Though the ICSID rules provide for parties

¹⁸⁶ ICC Rules of Arbitration Art. 23(2) Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measure taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof. AAA International Arbitration Rules Article 21(3): Are request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate, *available at* <http://www.iccwbo.org/court/english/arbitration/rules.a> WIPO Arbitration Rules Art. 46(d) Are request addressed by a party to a judicial authority for interim measures or for security for the claim or counter-claim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement, *available at* <http://arbitrator.wipo.int/arbitration/rules/index.html>

¹⁸⁷ LCIA Arbitration Rules Art. 25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2., *available at* <http://www.lcia-arbitration.com/lcia/download/> ICSID Arbitration rules Sec. 39(5) Nothing in this Rules shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests., *available at* <http://www.worldbank.org/icsid/basicdoc-archive/63.htm>

¹⁸⁸ See *Supra* note 186 and 187

¹⁸⁹ *Id*

¹⁹⁰ *Id*

to approach the courts for interim relief, considering that one of the parties to the dispute under ICSID is invariably a state, the effect of sovereign immunity on such matters adds an interesting twist¹⁹¹. This issue gains specific importance in US where the Federal Sovereign Immunities Act has come into force. In one leading case before the Court of Appeals for the District of Columbia, the Court reversed the judgment of the District court confirming an award of the arbitrators, noting that waiver of sovereign immunity can be assumed only when the arbitration agreement specifically provided for court role in enforcement¹⁹². Apart from this issue of sovereign immunity the other major cause for concern is the Art. 26 of the Convention on the Settlement of Investment Disputes¹⁹³. Article 26 of the Convention excludes other remedies outside of the Convention, unless otherwise agreed by the parties¹⁹⁴. Courts in some nations including France and Belgium have cited this article, as a reason to reject applications to confirm an award in matters where arbitration was pending before ICSID¹⁹⁵. Further the comment made by ICSID at the time when the provision 39(5) of the ICSID rule was issued, clearly reiterates the position of Art. 26 of the convention and specifically states that the only occasion when the parties can approach the national courts for interim relief, is when they have expressly stipulated so in their contract¹⁹⁶. The parties have to expressly provide for interim relief from the national courts in the cases in which they opt for ICSID arbitration. It is clear from the way the rules of the institutions have been set up that all of them recognize the parties right to approach the courts for interim relief albeit with some reservations.

¹⁹¹ Philip D. O'Neill, *American Legal Developments in Commercial Arbitration Involving Foreign States and State Enterprises*, International Commercial Arbitration Recent Developments (Emmanuel Gaillard & Robert B. Von Mehren, Chairmen) 476 Vol. II at 225

¹⁹² *MINE v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1983); Paul D. Friedland, *Provisional Measures and ICSID Arbitration*, 2 Arb. Int' 1335 (1986)

¹⁹³ CONVENTION ON SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, Article 26 Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention; Paul D. Friedland, *ICSID and Court-Ordered Provisional Remedies: An Update*, 4 Arb. Int' 1161 (1988)

¹⁹⁴ ICSID Convention *Supra* note 193

¹⁹⁵ Friedland *Supra* note 192

¹⁹⁶ Marchac *Supra* note 185

The International conventions on the other hand do not deal with the issue of interim relief from the Courts. The only provision in the New York Convention that refers to the Court role in arbitration before an award is made, is Article II(3)¹⁹⁷. This provision advises the courts to 'refer' any matter before them to arbitration, if an arbitration agreement is present. Exception can be had only if the agreement is null and void, inoperative or incapable of being performed. The word 'refer' in the Article, which has been incorporated into the FAA, has caused a lot of confusion in Court intervention, specifically in the US. As stated earlier, different Courts in the US have interpreted the meaning of 'refer' in varied ways¹⁹⁸. Other than this provision, the New York Convention is silent on this issue. Probably provisions in a matter were not as important as it is now, hence the silence. The courts have also used Article VI of the New York Convention to support their position of non-interference. Article VI when dealing with the security for enforcement of awards made by the tribunal does not mention anything about security for enforcement of interim measures. Hence the US Courts have reasoned that the omission to mention interim orders establishes the intent of the framers to avoid¹⁹⁹. Though the US Courts have interpreted this relevant Articles differently, going by the history of the convention and the rising trend to support arbitration, there is a case for interpreting this article as not prohibiting court jurisdiction after referring the parties to arbitration²⁰⁰. The English courts have not considered Article II(3) of the New York Convention as an obstacle to exercise their jurisdiction to order interim relief. They have taken into account the legislative history

¹⁹⁷UNITED NATIONS CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS Art. II(3): The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. 21 U.S.T. 2517

¹⁹⁸See Chapter II *Supra*

¹⁹⁹Charles H. Brower II *Supra* note 8

²⁰⁰China Nat. Metal Products Import/Export Co. v. Apez Digital, Inc., 41 F. Supp. 2d 1013, 1020, 45 UCC Rep. Serv. 2d 492 (C.D. Cal. 2001) "There is no indication that the signatories to the Convention consciously chose the word 'refer' to serve as a contradistinction from the FAA's use of the word 'stay,' or that they were even aware of the FAA. Moreover, 'refer' does not necessarily mean that a court has been stripped of all jurisdiction over actions so 'referred.'"

behind the provisions of the Geneva Protocol of 1923 to support their view²⁰¹. In spite of the difference of opinion among the Courts, there does not seem to be a specific prohibition of interim measures from courts by the New York Convention.

Not only the New York Convention, but also the other international conventions including the Inter-American Convention, Geneva Convention, etc. are silent on this issue. Even the later Conventions ignored the issue of interim relief in their texts. The European Convention on International Commercial Arbitration (Geneva Convention, 1961) is probably the only convention to have a specific provision on this matter. Article IV(4) of the Convention states that a request for interim measures from national courts is not incompatible with the agreement to arbitrate²⁰². The Convention for Settlement of Investment Disputes Between States and Nationals of Other States also has a specific provision, albeit one that acts in the reverse²⁰³. Remedies other than from ICSID have been specifically prohibited unless the parties agree to allow such remedies²⁰⁴. Like in the case of New York Convention, the provisions of the Panama Convention (Inter-American Convention on International Commercial Arbitration) have to be interpreted in the light of the intention of the framers. Article IV allows the courts to enforce awards made by the arbitrators using their procedural rules, as they would do for an award made by lower courts²⁰⁵. The courts are also authorized to order guarantees where the award is sought to be annulled or suspended, by Article VI of the Convention. Since the provisions show that the intent of the framers was to provide for an enforceable award to the winning party, they would not have prohibited these interim measures for the same purpose²⁰⁶. Even though the major international

²⁰¹ Refer Charles H. Brower II *Supra* note 8

²⁰² EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION Art. VI(4): A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court, available at <http://www.asser.nl/ica/eur.htm>

²⁰³ See European convention *Supra* note 202 Art. IV

²⁰⁴ Friedland *Supra* note 192

²⁰⁵ See Panama Convention Article IV and VI

²⁰⁶ David L. Zicherman, *The Use Of Pre-Judgment Attachments And Temporary Injunctions In International Commercial Arbitration Proceedings: A Comparative Analysis Of The British And American Approaches*, 50 U. Pitt. L. Rev. 667, 682, 683 (1989)

conventions do not have any provision authorizing interim relief from courts, except for United States most of the national courts have been granting support to arbitration by providing interim relief.

B. Power of the Arbitrator to Grant Interim Relief under Institutional Rules and Conventions

When it comes to the power of the arbitrator to order interim relief most of the institutions specifically permit them to do so, but each has a different approach to the scope of such orders²⁰⁷. Out of all the major institutions, ICC might have the widest scope for interim relief from the arbitrators²⁰⁸. Its provision gives the tribunal the power to “order any interim or conservatory measure it deems appropriate”²⁰⁹. The provision also gives the parties the right to opt out of any such power to the arbitrator. Most of the other rules do not have such sweeping provision. They try to list out the relief that can be granted by the tribunal or limit the scope of their powers. LCIA rules give a range of powers for the arbitrator to exercise when granting interim relief, including orders for security for costs, preservation of property, etc²¹⁰. The

²⁰⁷ Marchac *Supra* note 185

²⁰⁸ Groves *Supra* note 185 at 189

²⁰⁹ ICC Arbitration Rules: Conservatory and Interim Measures Art. 23(1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate, *available at* <http://www.iccwbo.org/court/english/arbitration/rules.asp>

²¹⁰ LCIA Arbitration Rules Interim and Conservatory Measures Art. 25.1 The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party: (a) to order any respondent party to claim or counterclaim to provide security for all or part of the amount in dispute, by way of depositor bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards; (b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and (c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties. 25.2 The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of depositor bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such

provision also gives the tribunal the power to order on a provisional basis, subject to determination in the final award, any relief which the tribunal has power to grant in a final award²¹¹. The AAA Arbitration Rules provide that the tribunal “may take whatever interim measure it deems necessary, including injunctive relief and measures for the protection or conservation of property”²¹². This version of the Rules, give the arbitrators considerable power to order interim relief and is drafted to be an inclusive procedure²¹³. But the AAA Rules in its previous version had restricted interim relief only to the extent necessary to safeguard the property that is the subject matter of the dispute. In the Charles Construction case²¹⁴, the US State court refused to enforce an interim order made by the tribunal for the purpose of providing security towards the final award. The court held that the Rules provide authority to the arbitrators only for the safeguard of the property in dispute and since the specific case before them was a matter of breach of contract, the arbitrators had no authority to provide interim orders²¹⁵. Even in a latter version of the Rules, Art. 22 gave the arbitrators authority only to take “whatever interim measures it deems necessary in respect of the subject matter in dispute...”²¹⁶. Comparing these provisions to the latest version, the latter one gives a lot more leeway for the arbitrators to grant interim measures. Another provision in the AAA Rules, which clearly authorizes the arbitrators, is Article 27(7). The said provision states that the arbitrators can make interim, interlocutory, partial order or awards²¹⁷. In a comparable provision in the LCIA Rules, the arbitrators are provided with

claimant or counterclaimant in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards. In the event that a claiming or counterclaiming party does not comply with an order to provide security, the Arbitral Tribunal may stay that party's claims or counterclaims or dismiss them in an award.

²¹¹ *Id.*

²¹² See AAA International Arbitration Rules Article 21(1)

²¹³ *Id.*

²¹⁴ Charles Construction Company v. Derderian, 586 N.E.2d 992 (Mass. 1992)

²¹⁵ *Id.* 586 N.E.2d at 995

²¹⁶ BORN *Supra* note 3 at 762

²¹⁷ See AAA International Arbitration Rules Article 27(7)

discretion of making awards on different issues at different times. Though not as clearly stated as that of AAA Rules, this provision also authorizes the tribunal to make interim awards²¹⁸.

The major institutions also provide for the ordering of security for the costs of such measures. The AAA rules have a brief provision giving authority to the arbitrator to require security for costs²¹⁹. Whereas, the LCIA Rules is broader than the AAA rule in that it provides for security for costs including legal expenses and the arbitrator can order such measure under terms that they consider appropriate. The arbitrators under the LCIA Rules also have the power to dismiss or stay the claim of a party defaulting on the order to provide security²²⁰. But in contrast the ICC Rules does not talk about security for costs.

In recent times WIPO, AAA and ICC have tried to overcome this issue by providing a separate Emergency Rules specifically designed to meet the needs of the parties before the tribunal is constituted²²¹. WIPO Rules not only grant wide power to the arbitrator to order interim relief, but also provide WIPO Emergency Relief Rules²²² as an option for the parties. Art. 46 of the WIPO Rules empowers the arbitrator to grant interim relief in a way they deem necessary and gives an inclusive list consisting in injunctions, measures to protect the goods involved in the subject matter of dispute and deposit of such items to a third party²²³. It further authorizes the arbitrator to require security for any claims of counterclaims, albeit only in

²¹⁸ LCIA Arbitration Rules Article 26.7 The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal.

²¹⁹ AAA International Arbitration Rules Art. 21(2) Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures

²²⁰ See LCIA Rules

²²¹ Werbicki *Supra* note 20

²²² WIPO Emergency Relief Rules, 9 Am. Rev. Int'l Arb. 317

²²³ WIPO Arbitration Rules Interim Measures of Protection; Security for Claims and Costs Article 46(a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject-matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party. (b) At the request of a party, the Tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counter-claim, as well as for costs referred to in Article 72.

exceptional circumstances²²⁴. However, the most striking feature of the WIPO Rule is the Emergency Relief Rules option given to the parties. Having recognized the need for interim protection for the parties especially in fast paced environment of intellectual property on the internet, WIPO has introduced this Rule. The Emergency Rules does not automatically latch onto the contract submitting disputes for arbitration before WIPO. The parties have to specifically mention the availability of the Rules²²⁵. But to make it convenient, the model contract clause mentions the availability of the Emergency Rules and the comment recommends the parties not to take out the said clause²²⁶. The Relief Rules protects the parties in the crucial period before the constitution of the arbitration tribunal²²⁷. There is an arbitrator appointed and available usually within 24 hours notice, to decide on any issue under the Emergency Relief Rules²²⁸. The arbitrator appointed under this rules will lose authority as soon as the tribunal is constituted. But, even if a party approaches the Courts for interim relief, this arbitrator retain power and will even be able to modify such order from the courts²²⁹. The Emergency arbitrator can provide any relief that is urgently necessary to preserve the rights of the parties. This includes order for interim

²²⁴ *Id*

²²⁵ Horning *Supra* note 8 at 170

²²⁶ *Id*

²²⁷ WIPO Emergency Relief Rules Article III(b)(i) If a party initiates an arbitration pursuant to the WIPO Arbitration Rules or the WIPO Expedited Arbitration Rules in relation to a dispute in respect of which a Request for Relief has been received by the Center, the Emergency Arbitrator appointed pursuant to the Request for Relief shall retain the power to make an award and to modify it until the date on which an arbitral tribunal is constituted in the arbitration pursuant to the WIPO Arbitration Rules or the WIPO Expedited Arbitration Rules.

(ii) A party that initiates an arbitration pursuant to the WIPO Arbitration Rules or the WIPO Expedited Arbitration Rules in relation to a dispute before transmitting a Request for Relief to the Center in respect of the same dispute shall be deemed to have waived its rights to request interim relief under the provisions of this Annex from the date on which an arbitral tribunal is constituted in the arbitration pursuant to the WIPO Arbitration Rules or the WIPO Expedited Arbitration Rules.

²²⁸ Horning *Supra* note 8

²²⁹ WIPO Emergency Relief Rules Article III(a) Subject to paragraph (b), if a party addresses a request to a judicial authority, or initiates another arbitration in relation to a dispute in respect of which a Request for Relief has been received by the Center, the Emergency Arbitrator appointed pursuant to the Request for Relief shall retain the power to make an award and to modify it.

injunction, conservation of property, etc.²³⁰ It even provides for ex parte hearings in exceptional circumstances²³¹. The extensive and specific provisions provided by WIPO for Emergency Relief, shows the importance attached to the availability of interim relief in arbitration.

In a similar manner as that of WIPO, AAA also has Optional Rules, which provide for arbitrators available from AAA hear the case for interim relief²³². But unlike the WIPO Emergency Relief Rules, an ex parte order is not possible under the AAA Optional Rules, as it requires notice to all parties²³³. Even the ICC has adopted new Optional Rules for the purposes of interim relief prior to the start of the proceedings. Though all the Institutional Rules have provisions on interim measures from tribunal, the Conventions, like in the case of court ordered interim relief, are void of any provisions relating to this issue.

²³⁰ WIPO Emergency Relief Rules Article XI(a) The Emergency Arbitrator considers urgently necessary to preserve the rights of the parties. (b) In particular, the Emergency Arbitrator may (i) issue an interim injunction or restraining order prohibiting the conduct by a party; (ii) order the performance of a legal obligation by a party; (iii) order the payment of a legal obligation by a party; (iv) order any measure necessary to establish or preserve evidence or to ascertain the performance of a legal obligation by a party; (v) order any measure necessary for the conservation of any property; (vi) fix an amount of damages to be paid by a party for breach of the award under such conditions as the Emergency Arbitrator considers appropriate. (c) The Emergency Arbitrator may make the award under such conditions as the Emergency Arbitrator considers appropriate. In particular, the Emergency Arbitrator may (i) require, having regard to any agreement between the parties, that a party commence arbitration proceedings on the merits of the dispute within a designated period of time; or (ii) require that a party in whose favor an award is made provide adequate security.

²³¹ WIPO Emergency Relief Rules Article XIII(a) In exceptional circumstances, when notice to the Respondent would involve a real risk that the purpose of the Procedure would be defeated, the Claimant may deliver or transmit the Request for Relief to the Center without serving it on the Respondent. (b) A Request for Relief delivered or transmitted in accordance with paragraph (a) shall, in addition to the particulars required by Article IV, indicate the reasons why notice to the Respondent would involve a real risk that the purpose of the Procedure would be defeated. (c) Where satisfied that notice to the Respondent would involve a real risk that the purpose of the Procedure would be defeated, the Emergency Arbitrator may hear the Claimant and proceed to make an order in the absence of the Respondent. Such an order shall be made subject to the condition that the order, and such further documentation as the Emergency Arbitrator considers appropriate, be served on the Respondent in the manner and within the time ordered by the Emergency Arbitrator in order to enable the Respondent to be heard on the matter. (d) The provisions of this Annex shall apply mutatis mutandis to any procedure under this Article, it being understood that the provisions relating to an award shall so apply to an order made under this Article by the Emergency Arbitrator.

²³² Werbicki *Supra* note 20

²³³ *Id*

C. Enforcement of Interim Measures Ordered by the Arbitrators

Both the institutional rules and the international conventions are heavily lacking in the area of enforcement of interim measures ordered by arbitrators. Authors have even put forward various ideas for developing this area, including the possibility of a supplementary to the New York Convention to deal with this issue²³⁴.

²³⁴Symposium, *40 Years New York Convention: Past, Present and Future* 2 Vindobona J.55 ; Cremades *Supra* note 25

CHAPTER IV

UNCITRAL RULES AND MODEL LAW – PRESENT AND PROPOSED

UNCITRAL is the torch bearer in a number of international trade law issues. Likewise, even in the field of arbitration, UNCITRAL's work has proven invaluable to the international community. UNCITRAL Model Law and the Rules can be said to be the cornerstones of the development of arbitration and the infrastructure supporting it.²³⁵ The UN adopted UNCITRAL Model Law in the year 1985. The Model Law was drafted as a guide to the nations that are planning to implement legislation on arbitration. Since more than 40 countries have already adopted the Model Law, the impact of it on the harmonization of international arbitration cannot be overstated. To add to the Model Law, UNCITRAL also has come up with Arbitration Rules for parties to use in case of Ad-Hoc Arbitration. Apart from ad-hoc arbitration, several institutions and tribunals follow the UNCITRAL Rules.²³⁶ The Permanent Court of Arbitration (PCA) has drafted its rules based mainly on the UNCITRAL Rules. Many national arbitration centers and other regional institutions like Iran-United States Claims Tribunal, Asian-African Legal Consultative Commission, the Australian Institute of Arbitration, the Hong Kong International Arbitration Center, the Singapore International Arbitration Center have adopted the UNCITRAL Rules of Arbitration.²³⁷ Even the NAFTA provides an option to an investor to use the Rules against a government under NAFTA.²³⁸ As the Model Law and the Rules have such an effect on the international treatment of arbitration, there is need for it to be constantly

²³⁵ Ashman *Supra* note 117 at 768

²³⁶ Wagoner *Supra* note 25 at 72

²³⁷ Ashman *Supra* note 117

²³⁸ See Article 1120 of NAFTA, Ashman *Supra* note 117

reviewed and updated to meet the changing circumstances. One such effort by UNCITRAL is to further strengthen the Model Law by addressing the interim measures issue. This chapter analyses the Rules and the Model Law in the present stage and the changes proposed to the Model Law by the working group.

A. UNCITRAL Model Law and Rules on Interim Measures – The Current Position

The Model Law has a simple on-line provision regarding the rights of the parties to approach state courts for interim measures. It makes such a request to the state courts compatible with the agreement to arbitrate²³⁹. But this on-line provision leaves out some important aspects out of its purview. For instance, as discussed by the UNCITRAL Working Group, it does not say anything about the scope of the interim measures that the courts can order. Article 17 of the Model Law that deals with the arbitrator or ordered interim measures limits the scope to matters relating to the subject matter of the dispute. The question now is whether such limitation is necessary for the courts. Also, questions involving the preconditions if any for interim measures, the types of interim measures, etc. is not answered. Even the provision dealing with power of arbitrator to order interim measures, is short and does not cover the basic issues relating to it²⁴⁰. Except for a limitation restricting such interim measures of protection to matters relating to the subject matter of the dispute and providing discretionary authority to order security for such measures, the provision is threadbare. Another important issue that is missing in the provision is the status of ex parte orders. Specifically, this issue becomes a problem at the time of enforcement of such orders. Courts can refuse to recognize such orders using Article 34(2)(ii),

²³⁹UNCITRAL Model Law Article 9 Arbitration agreement and interim measures by court: It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure, *available at* <http://www.uncitral.org>

²⁴⁰UNCITRAL Model Law Article 17 Power of arbitral tribunal to order interim measures Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure, *available at* <http://www.uncitral.org>

which provides for refusal if the party has not been given notice of the arbitral proceedings²⁴¹. Also Model Law has no provision regarding the enforcement of interim orders made by the tribunal.

The UNCITRAL Rules contains provisions regarding interim measures from arbitrators and as in the case of Model Law, it expressly makes here request to judicial authorities for interim measures compatible with the arbitration agreement. The provision contained in Article 26 of the Rules²⁴², authorize the arbitrator to order interim measures of protection in matters concerning the subject matter of dispute. The Article specifically includes orders for conservation of property by way of ordering its deposit with third persons, sale of perishable goods, etc. There is doubt whether the reference to the conservation of property is just an example or a limit to the scope of the interim measures²⁴³. But, the plain reading suggests that it was intended as just an example. Even the Rules restrict the powers by limiting the order to matters concerning the subject matter of the dispute. Many have interpreted the reference to 'matters concerning the subject matter of

²⁴¹(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with matters not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision is separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or *available at* <http://www.uncitral.org>

²⁴²UNCITRAL Rules Article 26 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures. 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or a waiver of that agreement, *available at* <http://www.uncitral.org>

²⁴³Marchac *Supra* note 185; John D. Franchini, *International Arbitration Under The UNCITRAL Arbitration Rules: A Contractual Provision For Improvement*, 62 Fordham L. Rev. 2223, 2240 (1994)

the dispute' and 'conservation of property' as severely limiting this section²⁴⁴. Further, it does not provide for any precondition that need to be met in order for the arbitrator to issue the interim measures. The Article also authorizes the arbitrators to require security for granting such orders. The Rules are also silent regarding the enforceability of interim measures ordered by the tribunal. When seen in light of Article 26(2) of the Rules, which provides for the interim measures to be in the format of awards, the applicability of the New York Convention to the interim awards granted by the tribunal becomes important. The general consensus so far has been that a award enforcement provisions of the Convention do not apply for interim measures²⁴⁵. In light of the shortcomings discussed above UNCITRAL is at present discussing the possibility of amending the Model Law so as to facilitate the harmonization of the national legislations relating to the interim measures.

B. Proposed Draft for UNCITRAL Model Law

The UNCITRAL working group on arbitration was provided an agenda in 2000 to discuss and propose changes if any needed to introduce uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement, etc²⁴⁶. The group when dealing with the interim measures issued noted various factors, including the need for a harmonized regime, enforcement of interim awards, possible provisions for change, etc²⁴⁷. The working group has been discussing the possibilities and considered draft proposals on the enforcement of interim measures for the past 2 years²⁴⁸. The group later extended its scope of purview to other possible provisions relating to interim measures of protection. It has discussed draft variants of Article 17 authorizing the

²⁴⁴ Marchac *Supra* note 185 at 128; 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 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW Working Group on Arbitration Thirty-second session Vienna, 20-31 March 2000 PROVISIONAL AGENDA, A/CN.9/WG.II/WP.107

²⁴⁷ Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20-31 March 2000), A/CN.9/468, p. 14, 15

²⁴⁸ www.uncitral.org

tribunal to grant interim measures²⁴⁹. Further, it has also discussed drafts for court ordered interim measures. In the Thirty Seventh session United States submitted a proposal for the consideration of the working group²⁵⁰. In the latest session of the working group in May 2003, it considered the proposal of the United States and also the draft put forward on the enforcement issue by the previous sessions²⁵¹. Though, the working group has not finalized its findings on the proposals, this article discusses the latest of the draft proposal put forward at the thirty eight session of the group.

1. Interim Measures from the Tribunal:

The draft provision tries to cover the whole spectrum of the issues surrounding interim measures of protection. The working group has had extensive discussions regarding each and every aspect of the issues concerned. Below is a review of the proposal of the provision.

Paragraph 1 and 2

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
- (2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute [in order to ensure or facilitate the effectiveness of a subsequent award];
 - (b) Take action that would prevent, or refrain from taking action that would cause, current or imminent harm [in order to ensure or facilitate the effectiveness of a subsequent award];
 - (c) Provide a preliminary means of securing assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.]²⁵²

²⁴⁹ See generally Report of the Working Group on Arbitration from various sessions available at www.uncitral.org

²⁵⁰ Report of Working Group II (Arbitration) on the work of its thirty-seventh session (Vienna, 7-11 October 2002), A/CN.9/523

²⁵¹ Settlement of commercial disputes, *Interim measures of protection* - Note by the Secretariat, A/CN.9/WG.II/WP.123

²⁵² *Id.*

The draft language as that of the current Article 17 of the Model Law, gives the parties the option to exclude the power of the arbitrator to order interim measures. But, in a variance from the previous version, it authorizes the arbitrator to ‘grant interim measures of protection’ instead of ordering any party to take such interim measure of protection. Likewise, the group has done away with the words ‘in respect of the subject-matter of the dispute’ used in the original text. Similar phrase is used in the Article 26 of UNCITRAL Arbitration Rules²⁵³. The wordings had limiting effect on the power given to the arbitrator to order interim measures of protection. After some deliberation, the Group has in the latest draft done away with the phrase. This would in effect give the arbitrators more leeway to grant interim measures.

The proposal in its second paragraph defines the term ‘interim measure of protection’ as a temporary measure granted by the tribunal prior to its award finally deciding the dispute. This paragraph further explains the term by providing an exhaustive list of measures that the tribunal may use. The list in the latest draft provision includes the various purposes for which interim measures may be granted rather than the types of measures available from the arbitrators²⁵⁴. Therefore, even if the list is exhaustive, the provision now covers almost all the aspects regarding which interim measures of protection might be requested from the arbitrators. But one limiting factor still remaining in the provision is the phrase ‘in order to facilitate the effectiveness of a subsequent award’, introduced by the draft proposal submitted by the United States. The working group has decided to further discuss the effects of such wordings²⁵⁵. The question to be asked here is that will there be any situation where the actions (or inactions) of any party could interfere with the current proceedings rather than the effectiveness of the subsequent award. Further the purpose that these wordings will serve has to be discussed by the group. If the list provided by this paragraph is in effect exhaustive and covers all the factors that might interfere with the effectiveness of the subsequent award, then the need for such limiting conditions in two of the

²⁵³ See UNCITRAL Arbitration Rules Article 26

²⁵⁴ See *Supra* Note 246

²⁵⁵ *Id*

four factors is questionable. One cause for concern is the possibility of a party rushing to the arbitrators for carrying on its ordinary business just to frustrate such more or less averted by the structure of paragraph 3, which provides for the conditions to be met by the requesting party before an interim measure is issued.

Paragraph 3

(3) The party requesting the interim measure of protection shall [demonstrate] [show] [prove] [establish] that: (a) Irreparable harm will result if the measure is not ordered, and such harm substantially outweighs the harm that will result to the party affected by the measure if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determinations²⁵⁶.

Paragraph 3 lays down the preconditions necessary for the arbitrator to grant interim measures. Previously there was no guiding factor for the arbitrator to use when deciding on the availability of interim measures. The draft proposals require the requesting party to show irreparable harm that substantially outweighs the harm that would result to the affected party if such measure were granted. Also it requires the party to demonstrate the possibility of success on merits, but cautions that such determination on the possibility of success should not affect the findings in any subsequent determination. The provision reflects the conditions that the courts require before granting an interim relief²⁵⁷.

Paragraph 4

(4) [Subject to paragraph (7)(b)(ii),] [except where the provision of a security is mandatory under paragraph (7) (b) (ii),] the arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection²⁵⁸.

²⁵⁶ *Id.*

²⁵⁷ Chionopoulos *Supra* note 112

²⁵⁸ *See Supra* note 246

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Paragraph5and6

(5) The arbitral tribunal may modify or terminate an interim measure of protection at any time [in light of additional information or a change of circumstances].

(6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.²⁶⁰

An important issue that was not addressed by previously in the Model Law was the duration of the validity of the interim measures ordered by the tribunal and their ability to correct such orders when in light of additional information or changing circumstances²⁶¹. But the Working Group has not yet finalized the phrase ‘in light of additional information or changing circumstances’²⁶². A plain reading of the drafts suggests that the arbitrators have the authority to modify or change their original interim orders without a request from the parties. This gives wide power to the arbitrators and it seems that they can modify an interim measure granted by them even after the enforcement of the same by the courts. Paragraph 6 gives more balance burdening the party, which originally requested for interim measure with the duty of reporting any change in circumstances to the tribunal.

Paragraph7

(7) (a) Unless otherwise agreed by the parties, the arbitral tribunal may [, in exceptional circumstances,] grant an interim measure of protection, without notice to the party [against whom the measure is directed] [affected by the measure], 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 purpose of the measure is not frustrated before it is granted. (b) The requesting party shall: (i) Be liable for any costs and damages caused by the measure to the

²⁵⁹ See UNCITRAL Model Law Article 17

²⁶⁰ See *Supra* note 246

²⁶¹ See *Supra* note 259

²⁶² See *Supra* note 246

party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]; and (ii) Provide security in such form as the arbitral tribunal considers appropriate [for 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 arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to [subparagraph (b)] above;] [(d) The party [against whom the interim measure of protection is directed] [affected by the measure granted] under this paragraph shall be given notice of the measure and an opportunity to be heard by the arbitral tribunal [as soon as it is no longer necessary to proceed on an ex parte basis in order to ensure that the measure is effective] [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];] [(e) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which period cannot be extended. 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 the measure] has been given notice and an opportunity to be heard;] [(f) A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;]

This provision deals with the possibility of ex parte orders from the tribunal. This issue has never been addressed by any of the rules in their present form except for the WIPO Emergency Relief Rules and AAA and ICC Optional Rules²⁶⁴. The draft provision is quite detailed in nature and takes into account all the aspects concerned. In addition to the requirements set out in paragraph 3, it requires the requesting party to demonstrate the urgent need for such interim measures and to show that the reason for requesting such a measure would be frustrated if notice is provided to the other party. The group is still discussing the alternative phrases to addressing the other party. It has in its consideration both ‘against whom the measure is directed’ and ‘affected by the measure’²⁶⁵. Since the arbitration tribunal does not have jurisdiction over third parties to the dispute, the phrase ‘affected by the measure’ may cause some trouble.

²⁶³ See *Supra* note 246

²⁶⁴ Werbicki *Supra* note 20

²⁶⁵ See *Supra* note 246

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(e) Any interim measure of protection ordered under this paragraph 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 measure takes effect against the other party and which period cannot be extended. 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 has been given notice and an opportunity to be heard;

2. Court Ordered Interim Measures:

Though the working group looked at some possible draft provisions to deal with the powers of the national courts to award interim relief, it has not yet arrived at any draft proposal to work with²⁶⁶. As there may be variations in the preconditions for granting interim relief by national courts, trying to harmonize the issue will not be an easy task. However, even if they cannot lay down the requisites for interim measures, it would do a world of good if the Model Law specifically authorizes the availability of interim measures, before and during the pendency of arbitration. As seen in United States, if the National legislation is silent on this issue, there is a high possibility of contradictory decision from the courts. One of the early draft possibilities discussed by the group on this issue is:

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

This provision if accepted would address the authority of the court to deal with and support the arbitration before and during the proceedings by granting interim measures. Further, the Court 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 court's power to order interim measure.

²⁶⁶ See *Supra* note 246

3. Enforcement of Arbitrators awarded Interim Measure:

The Working group at present is considering two different sets of proposals for provisions regarding recognition and enforcement of interim measures of protection. The first one seeks to establish a complete enforcement mechanism for the interim measure itself, while a new proposal introduced in the 37th session merges the conditions of enforcement with that of Article 35 and 36 of the Model Law which deals with the enforcement of awards made by the tribunals. The group has decided to discuss further on these draft proposals.

Proposal 1

“(1) Upon an application by an interested party, made with the approval of the arbitral tribunal, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if: * (a) party against whom the measure is invoked furnishes proof that: (i) [Variant 1] The arbitration agreement referred to in article 7 is not valid. [Variant 2] The arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the arbitral tribunal in accordance with article 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 arbitral proceedings [in which 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 enforcement proceedings until the parties have been heard by the arbitral tribunal]; or (iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal. (b) The court finds that: (i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or (ii) The recognition 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 approval of the arbitral tribunal, the competent court may, in its discretion, refuse 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 against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application. “(3) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure. “(4) In reformulating the measure under

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

The proposal originally considered by the working group provided for application for enforcement either by the tribunal or the interested party²⁶⁸. But objections were raised to the inclusion of the tribunal. It was considered that if the tribunal were given the authority to approach the courts, it would put the tribunal in the shoes of the parties. But the current draft has limited the right to the interested party that too only with the approval of the arbitral tribunal²⁶⁹. The limitation regarding the approval of the tribunal cannot also be done away, so as to give the parties easy access to court in case where the other party disregards the interim measure ordered by the tribunal. Once a party approaches the courts for enforcement, the courts can refuse to recognize and enforce only in a limited number of circumstances laid out in this provision. One such circumstance is if the opposing party brings up the issue of the validity of the arbitration agreement. The group is considering two variants regarding this issue. The question before the group is whether it should require the opposing party to prove the invalidity of the agreement or to reduce the level a notch below by requiring it to prove a prima facie case on the invalidity of the agreement. Making a party prove the invalidity of the agreement before a court in a proceeding for the enforcement of an interim measure of protection, would take away the right of the tribunal to decide on its own jurisdiction. Hence, Variant 2, which provides for the court to refer the issue of validity to the tribunal if the party shows prima facie evidence appear to be acceptable of the two. The courts can also refuse to enforce if notice of the appointment of the tribunal or of the arbitration proceedings has not been served on the opposing party or was not able to present its case before the tribunal or the interim measure itself was suspended, annulled or terminated by the tribunal.

²⁶⁷Supra 239

²⁶⁸Supra Report of 32nd Session

²⁶⁹Supra 239 note of secretariat 38th session

Paragraph 5

“(5) Paragraph (1)(a)(iii) does not apply. [Variant 1] to an interim measure of protection that was ordered without notice to the party against 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 arbitral tribunal after the other party has been able to present its case with respect to the interim measure. [Variant 3] if the arbitral tribunal, in its discretion, determines that, 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 the party against whom the measure is invoked.”²⁷⁰

Paragraph 5 of the proposal deals with the enforcement of ex parte orders made by the tribunal. This paragraph makes the provision for refusal to enforce in a case where the party was unable to present its case before the tribunal, inapplicable for ex parte orders. But the difficulty is in defining the ex parte order. Three variants are under consideration by the working group. Variant 1 tries to define ex parte order by setting a time limit standard to the order. It qualifies any order by the tribunal without notice to the other party, which, does not extend for a period of thirty days. The second variant under consideration, qualifies any order that is confirmed by the tribunal after the opposing party has had a chance to present its case. The problem that will arise is when enforcement is sought even before the opposing party has had a chance to appear before the tribunal. Variant 3 requires the tribunal to decide whether the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the measure is invoked. This would effectively require the tribunal to decide on an issue that is in the realm of court powers under the civil procedure of most of the nations. Further, the provisions need to address the ex parte orders given by the tribunals and not whether the court

²⁷⁰note of secretariat 38th Session

should enforce it *ex parte*. All three variants under consideration now have some shortcomings or the other. The issue can be addressed more effectively by rephrasing the proposal as:

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

Proposal 2

“(1) Interim measures of protection issued and in effect in accordance with article 17, irrespective of the country in which they were issued, and whether reflected in an interim award or otherwise, shall be recognized as binding and, upon application in writing to the competent court, be enforced subject to the provisions of articles 35 and 36, except as otherwise provided in this article. Any determination made on any ground set forth in Article 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 protection shall not be refused on the ground that the party against whom the measures are directed did 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 determined that it is necessary to proceed in that manner in order to ensure that the measure is effective, and (ii) the court makes the same determination. (b) The court may condition the continued recognition or enforcement of an interim measure issued without notice or an opportunity to be heard on any conditions of notice or hearing that it may prescribe. “(3) A court may reformulate the interim measure to the extent necessary to conform the measure to its procedural law, provided that the court does not modify the substance of the interim measure. “(4) While an application for recognition or enforcement of an interim measure is pending, or an order recognizing or enforcing the interim measure is in effect, the party who is seeking or has obtained enforcement of an interim measure shall promptly inform the court of any modification, suspension, or termination of that measure.”²⁷¹

This simpler proposal was introduced by a delegation of the working group²⁷². It proposes to use the conditions of refusal contained in Article 36 of the Model Law for enforcement of interim measures of protection granted by the tribunal. But the problem with this approach is that the provisions of Article 36 have been drafted with final awards in mind and therefore may cause some problems when trying to enforce interim measures of protection. For instance, Article 36 requires proof that the agreement is not valid under the controlling law for the

²⁷¹ *Id*

²⁷² *Id*

court to refuse enforcement. If this condition were used in case of interim measures, the Courts would have to go into detail regarding the circumstances surrounding the formation of agreement. This will cause unnecessary delays, which would frustrate the whole purpose of requesting interim measures of protection and also effect the functioning of the tribunal. Likewise, conditions requiring the court to decide upon whether the subject matter of the dispute is arbitrable, whether the award has become binding on the parties, appointment of the arbitrators, etc. would delay the enforcement and defeat the purpose of interim measures. The condition on public policy has been addressed by giving the courts the power to formulate without changing the substance of the interim measure. Hence, this proposal does not seem to be suitable to effectively address the issue of recognition and enforcement of interim measures of protection. These are the proposals currently under consideration of the working group and the working group would propose the final draft at a latter stage.

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

Article 17: Arbitrators power to grant interim measures of protection

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
- (2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute (b) Take action that would prevent, or refrain from taking action that would cause, current or imminent harm; (c) Provide a preliminary means of securing assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
- (3) The party requesting the interim measure of protection shall demonstrate that: (a) Irreparable harm will result if the measure is not ordered, and such harm substantially outweighs the harm that will result to the party affected by the measure if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determinations.
- (4) Subject to paragraph (7) (b) (ii), the arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.

- (5) The arbitral tribunal may modify or terminate an interim measure of protection at any time in light of additional information or a change of circumstances.
- (6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.
- (7) (a) Unless otherwise agreed by the parties, the arbitral tribunal may, in exceptional circumstances, grant an interim measure of protection, without notice to the party against whom the measure is directed, 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 purpose of the measure is not frustrated before it is granted. (b) The requesting party shall: (i) Be liable for any costs and damages caused by the measure to the party against whom it is directed to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits; and (ii) Provide security in such form as the arbitral tribunal considers appropriate, for any costs and damages referred to under subparagraph (i), as a condition to granting a measure under this paragraph; (c) The party against whom the interim measure of protection is directed under this paragraph shall be given notice of the measure and 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 circumstances; (e) Any interim measure of protection ordered under this paragraph 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 measure takes effect against the other party and which period cannot be extended. 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 has been given notice and an opportunity to be heard; (f) A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;

Article 9: Court ordered Interim Measures:

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

New Article on Recognition and Enforcement of Interim Measures Granted By Arbitral

Tribunal:

- (1) Upon an application by an interested party, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if: (a) a party against whom the measure is invoked furnishes proof that the arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the validity of the arbitration agreement to be decided by the arbitral tribunal in accordance with article 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 arbitral proceedings in which 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 enforcement proceedings until the parties have been heard by the arbitral tribunal; or (iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal. (b) The court finds that: (i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or (ii) The recognition 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 approval of the arbitral tribunal, the competent court may, in its discretion, refuse 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 against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application.
 - (3) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.
 - (4) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.
- Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered

by the arbitral tribunal pursuant to Article 17(7) above.

CHAPTER V

CONCLUSION

The current position on interim measures available in international arbitration in different legal systems, including the national legislations, court ruling, international institutions and international conventions have been analyzed in the preceding chapters. Though, the conditions more or less seem to be favorable for interim measures of protection, it is felt that there is a lot of confusions surrounding this issue. In spite of the criticism for court intervention and specific legislations regulating tribunal ordered interim measure, there is an urgent need for a more favorable and harmonized international structure to support arbitration for arbitration to adapt itself to the changing circumstances and remain as a alternative dispute resolution method in international commerce. For example, the position on interim measures in United States is still in great confusion. A party before agreeing to arbitration has to know the exact position of different circuits on this important issue. The courts have taken differing views in both their authority to grant interim measures and that of the arbitrators. So when a party signs an arbitration agreement involving a United States party, it has a daunting task of finding out the circuit court that they will have to approach and the position that the court is most likely to take in enforcing the interim measures. Probably the time has come for the Federal Arbitration Act to be amended to meet the realities of the current international setup.

As far as the present system goes, English Arbitration Act probably is the only national legislation that comes close to providing a comprehensive coverage of all the issues concerned. Both the English courts and the legislations have supported the provision of interim measures from the courts and the arbitrators. As seen in the Chapters II and III, traditionally the English

have been favorable to the availability of interim measures over the years. But even in the English legislation, there is some doubt regarding the enforcement of provisional orders by the arbitrators themselves and the power to approach the courts for enforcement. This position holds good for most of the countries civil and common law based. Hence, the need for a more harmonized international set up to address this issue.

The work of UNCITRAL to amend the Model Law, so as to provide for issues involved in the interim measures of arbitration is really important. Many nations both developed and developing, are considering the UNCITRAL Model Law as a basis for drafting their own legislations. So a comprehensive Model Law would definitely go a long way in setting up a more harmonized view on this issue. We are in a stage where UNCITRAL is working to provide direction in this area. Looking at the extensive discussions so far in the working group, they would consider the varying aspects involved and would come up with coherent, extensive and universally acceptable provisions to deal with the all the issues surrounding the availability of interim measures.

Most of the international institutions have adapted their rules to provide interim measures of protection from the tribunals. However, each rule has short comings of varying degrees. WIPO, AAA and ICC have provided the parties with the choice of incorporating their Optional Rules, which has been designed specifically to meet the need for emergent interim relief pending arbitration. The international institutions may consider amending their Rules by providing a more elaborate structure for the tribunals to work with. Since issues like the preconditions necessary for providing interim relief, the scope of the relief that the arbitrators can grant etc are not contained in most of the rules, the arbitrators may have difficulty in deciding whether an interim measure is necessary and whether they have the authority to grant such order. I would suggest that UNCITRAL working group should also work on the UNCITRAL Arbitration Rules to make it in consonance with the amendment to the Model Law, so parties using the Rules for ad-hoc arbitration and also other institutions can take advantage.

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