

Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief

Bernd D. Ehle
LALIVE Attorneys-at-Law
Geneva, Switzerland

Introduction

Interim measures are procedural mechanisms used by courts and arbitral tribunals to address urgent matters generally at an early stage of the proceedings, but also at later stages, chiefly with a view to protecting the subject matter of the dispute.¹ Typical examples of interim measures are orders to refrain from drawing on a bank guarantee or from disposing of an object. Such measures can indeed be crucial in ensuring the ultimate satisfaction of a judgment or final award.²

Interim relief in arbitration is one of the main interfaces between state courts and arbitral tribunals. Parties to an arbitration agreement can have a critical interest in obtaining interim relief swiftly and effectively. Time is of the essence when a party's interest may be irreparably harmed by the conduct of the opposing party. Therefore, there is a need for an efficient legal infrastructure to provide the requested relief.³ In cases in which the parties have chosen arbitration as their dispute resolution mechanism, the critical question is: which body may grant interim relief and which body provides interim relief best — the state courts, the arbitrators, or does the answer depend on the particular circumstances?

The present article will focus on some of the complexities hidden behind the widely prevalent existence of concurrent jurisdiction of the courts and arbitral tribunals to order interim measures. It will consider the possibility of exclusion agreements and discuss considerations which play a role when deciding whether to apply to the arbitral tribunal or to the courts for interim relief.

1 In this article, the term 'interim measures' is used in a broad sense, encompassing all interim, precautionary and conservatory measures, measures of protection and injunctions.

2 Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice', 11/1 *ICC Bulletin* (2000), at p 31.

3 Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at p 69.

Concurrent Jurisdiction of Arbitral Tribunals and Courts

Acceptance of Concurrent Jurisdiction

When evaluating whether the party to an arbitration agreement may or should apply to the arbitral tribunal or to a court for interim relief, one must consider whether the terms of the arbitration agreement, including any applicable arbitration rules, permit such an application, and also whether the applicable substantive law and *lex arbitri* permit it.⁴

With the exception of a few jurisdictions it is today recognized in most modern arbitration laws and under the rules of the major arbitral institutions that arbitral tribunals and state courts have concurrent jurisdiction to order provisional or protective measures.⁵ In other words, parties to an arbitration agreement in need of immediate protection are free to seek interim relief either from the arbitral tribunal or from a competent court.

This situation is the result of an evolution that has taken place over the last few decades. Before, it was commonly held that only courts could provide provisional relief. Today, this restrictive perception can still be found in the laws of a few countries such as, until recently, Italy, where arbitrators had no jurisdiction to order interim relief.⁶ Indeed, this was also the case in Switzerland until the entry into force of the Swiss Private International Law Act in 1989 (Article 183).

The arbitration rules most commonly used today go further than simply omitting to exclude a jurisdiction of arbitral tribunals concurrent with that of courts. Most arbitration rules now positively provide for such concurrent jurisdiction. For example, Article 23 of the 1998 Rules of Arbitration of the International Chamber of Commerce (ICC Rules) provides:

Conservatory and Interim Measures:

- (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.
- (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

4 Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at p 70.

5 Poudret, Besson, 'Droit comparé de l'arbitrage international' (2002), at pp 551 *et seq.*; Lévy, 'When Time Matters — Provisional Measures, Preliminary Injunctions and Interim Relief', Paper presented at the 8th IBA International Arbitration Day, at p 3.

6 Until 2 February 2006, when the law amending the Italian Code of Civil Procedure entered into force, art 818 of the Code of Civil Procedure read: 'The arbitrators may not grant attachment or other interim measures of protection'. In its amended version the provision reads: 'The arbitrators may not grant attachment or other interim measures of protection, unless otherwise provided in the law'.

infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

The compatibility of court-ordered provisional or protective measures with the arbitration agreement is also set forth, for example, in Article 26(3) of the of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Article 21(3) of the international branch of the Arbitration Rules of the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), and Article 31(2) of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

No Waiver of Arbitration Agreement

The main consequences of the concurrent jurisdiction are that by applying to a state court for provisional or protective relief, and obtaining such relief, a party does not waive its right to go to arbitration; and that a national court is not prevented from granting such measures by the existence of an arbitration agreement — the opposing party cannot object to the court's jurisdiction.

While this 'duality principle' may seem commonplace, it is not always applied with certainty. For example, in the recent *Dong Won SA v Compañía Petrolera Petroleum World SA* case before the Argentine Commercial Court, the plaintiff filed a request for precautionary measures against the defendant, notwithstanding an arbitration agreement whereby any issues arising between the parties were to be resolved by the General Arbitral Tribunal of the Buenos Aires Stock Exchange. Despite the plaintiff's explanations in the request that the substantive matters of the dispute would be brought before the arbitral tribunal, the Commercial Court declared itself incompetent. The plaintiff challenged this decision and the Commercial Court of Appeal vacated it on the grounds that, under the applicable Arbitration Rules, a party may file a request for precautionary measures with the state courts, and that such a request shall not imply a waiver of the agreement to arbitrate.⁷

Regarding the interplay between the jurisdiction of the arbitral tribunal and that of any judicial authority to which such an application might be made, a distinction must be made in regard to a further factor, namely whether or not the arbitral tribunal has already been constituted.

Prior to Constitution of the Arbitral Tribunal

It is clear that, for an arbitral tribunal to consider and grant interim measures, it must have been empanelled and it must have received the file from the arbitral institution, if any. It

⁷ *Dong Won SA v Compañía Petrolera Petroleum World SA*, Chamber B of the Argentine Commercial Court of Appeal, decision of 16 December 2005, published on www.eldial.com on 20 March 2006. See also *Searle Ltd v Roemmers SA/CF*, Chamber D of the Argentine Commercial Court of Appeals, decision of 22 September 2005.

takes time to establish an arbitral tribunal and during that time damage to a party might occur. It is highly unusual — and indeed not advisable — to name the arbitrators in the arbitration agreement and to empower them or a named chairman in the arbitration agreement to issue interim relief.

Arbitral institutions generally have no scheme for allowing ‘standby arbitrators’ to issue provisional measures quickly. An important exception is the recent Article 37 of the International Arbitration Rules of the AAA/ICDR, whereby parties may, as an ‘opt-out’ rule, apply for interim measures of protection to an ‘emergency arbitrator’ before the regular arbitral tribunal is in possession of the file.⁸ In contrast, the parties to an ICC arbitration must actively ‘opt into’ the Pre-Arbitral Referee Procedure (Article 3.1 of the 1990 ICC Rules for a Pre-Arbitral Referee Procedure).⁹

As a whole, it must be considered a practical reality that parties are not only at liberty but rather obliged to resort to the competent courts when seeking interim relief prior to the constitution of the arbitral tribunal.¹⁰ This is expressly recognized in the arbitration rules of many institutions, for example, Article 23(2) of the ICC Rules cited above. The judiciary’s power is, however, limited to interim measures and may not encroach upon the arbitrators’ exclusive power to decide upon the merits of the case.

After Constitution of Arbitral Tribunal

In General

The allocation of jurisdiction between arbitral tribunals and the courts is not so clear once the arbitral tribunal is functioning. There are two diverging views on this allocation. The first one argues that the intervention of the courts is subsidiary whereas the other advocates parties’ complete freedom of choice to apply to whatever body they wish.

Subsidiarity of Judicial Intervention?

Certain arbitration laws and arbitration rules reflect the notion that a party seeking interim relief should first resort to the arbitral tribunal and only subsidiarily to a competent court. A good example is Article 23(2) of the 1998 ICC Rules. It reads in relevant part:

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. [Emphasis added].

⁸ Article 37 of the International Arbitration Rules of the AAA/ICDR automatically applies to all arbitrations under agreements entered into on or after 1 May 2006, unless the parties have specifically agreed otherwise. Sheppard Jr., Townsend, ‘Holding the Fort until the Arbitrators Are Appointed: The New ICDR International Emergency Rule’, *Dispute Resolution Journal* (May–July 2006), at pp 74–81.

⁹ Garaud, de Taffin, ‘The ICC Rules for a Pre-Arbitral Referee Procedure’, 16/1 *ICC Bulletin* (2005), at pp 38 and 39; Tercier, ‘Le référé pré-arbitral’, 3 *ASA Bulletin* (2004), at pp 464–478; Berger, ‘Die Rechtsstellung des Pre-Arbitral Referees’, *SchiedsVZ* (2006), at pp 176–182.

¹⁰ Yesilirmak, ‘Interim and Conservatory Measures in ICC Arbitral Practice’, 11/1 *ICC Bulletin* (2000), at p 34.

This wording is broader than former Article 8(5) of the 1988 ICC Rules of Arbitration, which used the term ‘exceptional circumstances’.¹¹

Whether ‘appropriate circumstances’ exist or not is to be decided by the judicial authority to which the application is made. Where the circumstances are not appropriate, any application to a judicial authority for a measure may be deemed to be an infringement or even a waiver of the right to arbitrate. As such an infringement or waiver may give rise to damages (mainly for the costs incurred in connection with the local court action), the interpretation of the term ‘appropriate’ turns out to be quite important. In general, it can be assumed that the circumstances are appropriate where:

- The request is for an interim measure;
- There is (extreme) urgency; and
- An arbitral tribunal does not have the power to grant the measure requested (eg, where direct coercive power is required), or is paralyzed or unable to operate.¹²

Therefore, once the panel of arbitrators has been seized of the file, applications for interim measures should normally be addressed to it.¹³ A party to an ICC arbitration agreement should avoid seeking broader than necessary judicial relief or taking any other court action that could be interpreted as a waiver or infringement of the arbitration agreement.

The ‘court-subsidiarity model’ is also found in the United Kingdom. Section 44(5) of the Arbitration Act 1996 commands that court-ordered measures be limited to cases where the arbitral tribunal is not yet constituted and the measure requested is urgent:

In any case the court shall act only if or 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 no power or is unable for the time being to act effectively.

The task of granting interim relief is in the first place allocated to the arbitral tribunal; court intervention is the last resort. In the *Channel Tunnel* case, the House of Lords held that:

There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff’s claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone.¹⁴

11 Poudret, Besson, ‘Droit comparé de l’arbitrage international’ (2002), at p 559.

12 Yesilirmak, ‘Interim and Conservatory Measures in ICC Arbitral Practice’, 11/1 *ICC Bulletin* (2000), at p 35.

13 Derains, Schwartz, ‘A Guide to the ICC Rules of Arbitration’ (2005), at p 300; Knoepfler, ‘Les mesures provisoires et l’arbitrage international’, in Kellerhals (ed.), *Schiedsgerichtsbarkeit* (1997), at p 322.

14 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, [1993] AC 334, at pp 367–368.

This approach was recently confirmed by the English Court of Appeal in the case *Cetelem SA v Roust Holdings Limited*¹⁵ the courts need to apply an effectiveness and urgency test to decide whether they can step in or not.

Furthermore, according to Article 25(3) of the Rules of Arbitration of the London Court of International Arbitration (LCIA), the right of the parties to initiate parallel court proceedings for interim measures is limited — similarly to Article 8(5) of the 1988 ICC Rules of Arbitration — to ‘exceptional cases’ once the arbitral tribunal has been constituted:

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. [Emphasis added].

It may also be mentioned that Rule 39(5) of the 1984 Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) requires the parties to have expressly stipulated a right of judicial recourse in their agreement to arbitrate:

Provisional Measures

(. . .)

(5) Nothing in this Rule 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.

If the parties have not included such a provision in their arbitration clause, this will generally be construed as the parties’ waiver of their rights of judicial recourse or the confirmation of the absence of such rights.¹⁶

Finally, business needs could impose the court-subsidiarity model. Pierre A. Karrer considered the matter from this angle:

What are the needs of international business? In general I think we can say that there is a need that the arbitral tribunal itself should issue interim measures and parties should not have to go to the state courts.¹⁷

15 *Cetelem SA v Roust Holdings Limited*, Court of Appeal (Civil Division) on appeal from the High Court of Justice Commercial Court (Honorable Mr Justice Beatson), *Cetelem SA, Claimant/Respondent and Roust Holdings Limited, Defendant/Appellant* [2005] EWCA Civ. 618 of 24 May 2005, 1 *ASA Bulletin* (2006), at pp 142–143 with Comments by Young and Shore, at pp 143–152.

16 Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (1999), at p 714.

17 Karrer, ‘Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please’, in van den Berg (ed.), *Congress Series of the International Council for Commercial Arbitration on: International Arbitration and National Courts: The Never Ending Story* (2001), at p 100.

Full Jurisdiction of the Courts? — The 'Free Choice' Approach

The prevailing opinion in the majority of national arbitration laws and arbitration rules is to give full parallel jurisdiction to the courts to grant interim relief, even after the arbitral tribunal has been constituted and even if the latter acts effectively. If the parties have not provided otherwise, they are free to apply to a court or an arbitrator to request an interim measure.¹⁸

Article 26(3) of the UNCITRAL Arbitration Rules, which served as a model for many rules of arbitration worldwide, provides that:

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

In countries such as Switzerland¹⁹ and Germany,²⁰ similar provisions can be found which follow the free-choice approach, ie, there are no restrictions imposed on the parties' access to the courts. Article 26(3) of the Swiss Rules of International Arbitration adopted Article 26(3) of the UNCITRAL Arbitration Rules without any changes. Section 20(2) of the Rules of Arbitration of the German Institution of Arbitration (DIS) makes the free choice very clear by stipulating that:

It is not incompatible with an arbitration agreement for a party to request an interim measure of protection in respect of the subject-matter of the dispute from a court *before or during arbitral proceedings*.²¹ [Emphasis added]

In the United States, the parties are equally at liberty to seek interim measures from either the arbitral tribunal or the state courts.²² The international arbitration rules of the AAA/ICDR follow this broad approach and abstain from imposing limitations on parallel court actions for interim measures either before or after the arbitral tribunal is formed.

18 Poudret, Besson, 'Droit comparé de l'arbitrage international' (2002), at p 555.

19 Wirth, 'Interim or Preventive Measures in Support of International Arbitration in Switzerland', 1 *ASA Bulletin* (2000), at pp 42–43; Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland, A Handbook for Practitioners* (2005), ch 5, at p 84; Knoepfler, 'Les mesures provisoires et l'arbitrage international', in Kellerhals (ed.), *Schiedsgerichtsbarkeit* (1997), at pp 316, 318 and 321; Poudret, Besson, 'Droit comparé de l'arbitrage international' (2002), at p 561.

20 Schwab, Walter, *Schiedsgerichtsbarkeit Systematischer Kommentar zu den Vorschriften der Zivilprozessordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (2005), ch 17a, n 24; Sachs, 'Interim Measures in Arbitration in Germany', Paper presented at the IBA Conference in Barcelona 1999, Committee D, at p 11.

21 This provision is in line with Article 1033 of the German Civil Procedure Code, whereby '[i]t 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.' [Emphasis added].

22 Rau, 'Provisional Relief in Arbitration: How Things Stand in the United States', 1 *J. Int'l Arb.* (2005), at pp 7 *et seq.*; Reed, 'Interim Measures in Support of International Arbitration under US Law', Paper presented at the 1999 Conference of the International Bar Association in Barcelona, at p 5.

Similar to Article 26(3) of the UNCITRAL Arbitration Rules, Article 21(3) of the ICDR Rules of Arbitration, entitled 'Interim Measures of Protection', provides:

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

In the absence of explicit United States legislation — the Federal Arbitration Act is silent on the issue of interim measures²³ — interim measures are governed by Federal case law. An analysis of the cases shows that there is a risk that a court in the United States will refrain from issuing interim measures for fear of interfering with the arbitrators' jurisdiction.²⁴

The affirmation of the concurrent jurisdiction between arbitral tribunals and state courts generally rests on the practicability arguments that:

- Judges are oftentimes faster and more efficient when ordering interim measures;
- Interim measures ordered by arbitral tribunals are generally not directly enforceable; additional assistance of the state courts is necessary; and
- The free-choice model has the advantage that it leaves the assessment of where to apply to obtain the most efficient provisional remedy to the parties, thereby minimizing grounds for dispute over the dispute resolution mechanism.

Risk of Conflicting Decisions and 'Exhaustion of the Remedy'

A party may be tempted to file simultaneous applications for interim relief before both the arbitral tribunal and a court or, after having failed to obtain interim relief from a court, a party may apply for the same relief from the arbitral tribunal in the hope of securing a more favorable ruling, or *vice versa*.

With respect to interim measures, arbitral tribunals and courts are not bound by the doctrines of *lis pendens* and *res iudicata*. However, it has been suggested that these principles should at least apply by analogy: the competence to order the measures is deemed to lie with the body with which the request has first been filed.²⁵ In any event, in order to prevent conflicting decisions and promote adjudicative efficiency, arbitral tribunals and courts often decide that a party may not apply for interim relief before two instances at the same time and, once a court has dismissed a request for interim relief, a party should not have a second chance to obtain the same interim relief from the arbitral tribunal, or *vice versa* before the courts.

23 9 United States Code, paras 1–16 (1999). Chapter 2 incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Reed, 'Interim Measures in Support of International Arbitration under US Law', Paper presented at the 1999 Conference of the International Bar Association in Barcelona, at p 12.

24 Rau, 'Provisional Relief in Arbitration: How Things Stand in the United States', 1 *J. Int'l Arb.* (2005), at pp 7 *et seq.*

25 Poudret, 'Les mesures provisionnelles et l'arbitrage. Aperçu comparatif des pouvoirs respectifs de l'arbitre et du juge', in Bohnet, Wessner (eds), *Mélanges en l'honneur de François Knoepfler* (2005), at p 240.

Can the arbitral tribunal reconsider a court's decision on interim measures and, as the case may be, reverse it, or is there an effect of estoppel from seeking in the arbitration the same measures which it unsuccessfully sought to obtain in the courts?

Some arbitrators have been reported to have refused to entertain the new application for reasons of procedural economy and lack of sufficient protective interest of the petitioner. Others have argued that the jurisdiction of the courts does not deprive them of the possibility of ruling in the last resort since the decision of the arbitral tribunal, the body on which the parties agreed for the settlement of the dispute and which has jurisdiction to rule on the merits of the dispute, should prevail.²⁶ This latter view is supported by Article 23(2) of the ICC Rules which clearly shows that, in ICC arbitration, it is for the arbitrator to rule on interim measures:

The application of a party to a judicial authority for [interim or conservatory] measures . . . shall not . . . affect the relevant powers of the Arbitral Tribunal.

There is agreement that a party should not be given a second chance to obtain interim measures from the arbitral tribunal where:

- The party had already applied unsuccessfully for identical interim relief before a court;
- The application for interim relief before the arbitral tribunal was based upon the same facts and evidence as the one brought before the court;
- The arbitral tribunal would apply the same standards in deciding on the application for interim relief as had the court; and
- Due process had been granted in the court proceedings.²⁷

Conversely, a party's prior application to a court should be no bar against the arbitral tribunal exercising its jurisdiction to order interim measures if:

- New facts had arisen since the decision of the court or new evidence had become available; and/or
- The criteria for making the decision and the legal tests applied differ, even if the state court had previously ruled on a similar or even identical application.

An arbitral tribunal, therefore, has to examine in each case whether, under the law governing the arbitration, the circumstances, on which the applicant relies, justify granting the measures sought, and has to determine whether it has power to grant the specific measures applied for. The findings by a state court previously seized of the same application may be different from those of the arbitral tribunal, precisely because it examined the application by reference to a different law.

26 Poudret, Besson, *Droit comparé de l'arbitrage international* (2002), at p 556.

27 Wirth, 'Do Arbitral Tribunals Really Have the Courage to Grant Interim Measures? — Some Empirical Observations', Paper presented at the Arbitration Day of the International Bar Association in 2004, at p 3; Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at p 86.

A partial solution has been found by the German legislator in the Code of Civil Procedure, Section 1041(2) and (3):

- (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 recast 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.

This provision admits *lis pendens* and empowers the court to revisit and modify its order.²⁸ However, conflicting decisions are not completely ruled out.²⁹

Exclusion Agreements

The principle of concurrent jurisdiction of the arbitrators and the courts to grant interim relief is limited by the parties' freedom of contract and freedom to define the scope of their arbitration agreement. If the parties do not want the courts to be empowered to grant interim relief, they may agree to depart from this principle,³⁰ except for those areas where the courts have exclusive jurisdiction, such as in enforcement matters. It is also generally accepted that the parties can agree to exclude all jurisdiction of the arbitrators to order interim measures, leaving it exclusively to the courts to order such measures.

Exclusion agreements can be effected as part of the arbitration clause or separately before or even after the commencement of the arbitration agreement. They must be explicit and specific.³¹

Is the exclusion of the jurisdiction of either the courts or the arbitral tribunal advisable? Not generally. There may nevertheless be specific reasons that justify an agreement excluding interim relief by the state courts such as:

- The need for confidentiality;³²
- Concerns about the risk of parallel proceedings before multiple instances; or

28 Schwab, Walter, *Schiedsgerichtsbarkeit Systematischer Kommentar zu den Vorschriften der Zivilprozessordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (2005), ch 17a, n 23; Schroth, 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ* (2003), at p 105.

29 Sachs, 'Interim Measures in Arbitration in Germany', Paper presented at the IBA Conference in Barcelona 1999, Committee D, at pp 8–9 and 11–12.

30 Wirth, 'Interim or Preventive Measures in Support of International Arbitration in Switzerland', 1 *ASA Bulletin* (2000) 40–41; Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice', 11/1 *ICC Bulletin* (2000), at p 36; Schwab, Walter, *Schiedsgerichtsbarkeit Systematischer Kommentar zu den Vorschriften der Zivilprozessordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (2005), ch 17a, n 24.

31 Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at p 85.

32 Poudret, 'Les mesures provisionnelles et l'arbitrage. Aperçu comparatif des pouvoirs respectifs de l'arbitre et du juge', in Bohnet, Wessner (eds), *Mélanges en l'honneur de François Knoepfler* (2005), at p 241.

- An interest in strengthening the mutual obligation to abide by decisions of the arbitral tribunal.

An exclusion of the court's jurisdiction to order interim measures should however be drafted or construed in a way that does not validly exclude the state judge's powers to assist in the enforcement of a measure ordered by the arbitral tribunal. Under most jurisdictions, the enforcement of interim measures ordered by an arbitral tribunal requires action by the national courts.³³ Article II(3) of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, which provides that the courts must decline jurisdiction where there is an arbitration agreement between the parties, does not apply to the enforcement of interim measures.³⁴

Deciding between Arbitral Tribunal and Court

In General

Depending on which arbitration laws and rules apply, a party seeking interim relief may be able to choose freely between the arbitration tribunal (once constituted) and the competent courts. Even though much depends on the relevant law and the nature of the relief sought, the following are criteria to be taken into consideration when deciding whether to apply to the arbitral tribunal or to the state courts for obtaining an interim measure.

Urgency

If the relief is needed on an immediate or emergency basis and the arbitration tribunal has not yet been constituted, the application will obviously have to be made to the state courts.³⁵ Arbitral tribunals are generally not 'standing bodies' and also not used to granting interim relief as much as state court judges. Therefore, from a purely practical point of view and unless the arbitral tribunal consists of a sole arbitrator or a panel of arbitrators that are quick decision-makers and inclined to grant interim measures, courts are often-times more efficient when ordering interim measures.³⁶

However, in other cases, if the party seeking interim relief considers there to be no great urgency, it appears to be more prudent to seek the arbitral tribunal's intervention first, in

33 Schroth, 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ* (2003), at p 104; Poudret, 'Les mesures provisionnelles et l'arbitrage. Aperçu comparatif des pouvoirs respectifs de l'arbitre et du juge', in Bohnet, Wessner (eds), *Mélanges en l'honneur de François Knoepfler* (2005), at p 243.

34 Lévy, 'When Time Matters — Provisional Measures, Preliminary Injunctions and Interim Relief', Paper presented at the 8th IBA International Arbitration Day, at p 4.

35 Sachs, 'Interim Measures in Arbitration in Germany', Paper presented at the IBA Conference in Barcelona 1999, Committee D, at p 13; Schroth, 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ* (2003), at p 108.

36 Schwab, Walter, *Schiedsgerichtsbarkeit Systematischer Kommentar zu den Vorschriften der Zivilprozessordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (2005), ch 17a, n 23.

particular in ICC arbitrations. Indeed, the court might decline if it feels that it would take out of the hands of the arbitrators a power of decision which the parties have entrusted to them alone.

Compliance

If there is a risk that the opposing party will not voluntarily comply with any order granted by the arbitral tribunal but rather ignore such orders, then it might be advisable to obtain relief from a court, which has effective coercive powers over the opposing party.³⁷

It must be taken into account that, unless the parties abide by an order of the arbitral tribunal, the enforcement of interim measures of protection ordered by an arbitral tribunal requires court authorization, whereas court decisions are immediately enforceable. On the other hand, experience shows that parties prefer not to run the risk of 'disobeying' the tribunal.

Know-How and Knowledge of File

If interim relief is sought while an arbitration is ongoing and the facts or the technical or legal issues are rather complicated, it is advisable to apply to the arbitral tribunal, which has already extensively dealt with the case and its merits and thus knows the case far better than the judge who has not been involved in the matter so far.³⁸ In addition, arbitrators are mostly chosen with regard to their specific industry knowledge or experience; consequently, an application should be made to the arbitral tribunal to obtain a reasonable decision.

Confidentiality

Where the parties have a prevailing interest in keeping the existence of the proceedings confidential, they may want to have the arbitral tribunal exclusively deal with the matter.

Third Parties

The powers of an arbitral tribunal are generally limited to the parties involved in the arbitration itself. If third parties are involved or measures against third parties sought, for example, the blocking of a bank account, sometimes only courts can ensure effective relief.³⁹

37 Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at 80.

38 Schroth, 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ* (2003) 109; Sachs, 'Interim Measures in Arbitration in Germany', Paper presented at the IBA Conference in Barcelona 1999, Committee D, at p 13.

39 Lévy, 'When Time Matters — Provisional Measures, Preliminary Injunctions and Interim Relief', Paper presented at the 8th IBA International Arbitration Day, at p 3; Segesser, Kurth, 'Interim Measures', in Kaufmann-Kohler, Stucki (eds), *International Arbitration in Switzerland A Handbook for Practitioners* (2005), ch 5, at p 74.

Scope of Remedies

In some jurisdictions (for example in Germany),⁴⁰ the state courts' range of potential interim measures is narrower than that of an arbitral tribunal sitting in these countries. Depending on the kind of relief sought, this may be a decisive reason to make the application for interim relief to the arbitral tribunal. As seen above, however, the same may be true the other way around as certain relief can only be awarded by the courts.

Conclusion

The availability of effective interim relief proceedings is vital to the arbitral process. This process does not always get around court involvement. Indeed, it is hoped that the above has conveyed how essential the role of the state courts in the context of interim relief can be under certain circumstances to render the process fully effective.

Thanks to the wide acceptance of the concurrent competence between arbitral tribunals and state courts, a party seeking interim relief can be 'spoilt for choice'. The above comments have sought to show that the right course of action and the access to the most efficient remedy will depend very much on the particular circumstances of the case and on the nature of the relief sought. In each case consideration will need to be given to the relevant arbitration rules and the procedural law applicable to determine whether the power to grant the relief sought is conferred upon the arbitral tribunal or the courts and whether an application is best made to the one or the other. It is counsel's task to recommend to the client the best possible way. The strategic decision-making starts with the choice of the right arbitrators as some are known to be more inclined to grant interim measures than others.

40 Schroth, 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ* (2003), at p 109.

**INTERNATIONAL
ARBITRATION AND
MEDIATION — FROM
THE PROFESSIONAL'S
PERSPECTIVE**

Editors

Anita Alibekova and Robert Carrow

Published by Yorkhill Law Publishing

Typeset in Times New Roman
by the Center for International Legal Studies

All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, or stored in any retrieval system of any nature without written permission of the copyright holder and publisher, application for which must be made to the publisher.

©
Yorkhill Law Publishing
2007