Interim Measures and Emergency Arbitrator Proceedings

Mika SAVOLA *

The role of interim measures in international arbitration has expanded in recent years. Parties often find it necessary to seek interim measures of protection in order to safeguard their substantive rights before the commencement of arbitral proceedings or during the pendency of the arbitration but prior to the final resolution of the dispute. State courts are not always available, or they may be otherwise ill-equipped, to provide effective interim relief in cross-border commercial disputes. That is why most jurisdictions nowadays approve also the arbitrators’ power to order interim measures. However, one key problem with arbitrator-ordered interim relief is that an arbitral tribunal cannot function before it has been properly constituted. Therefore many arbitration institutes have recently adopted separate “emergency arbitrator rules”, which are meant to provide an effective mechanism whereby a party in need of urgent interim relief that cannot await the constitution of an arbitral tribunal may apply for the appointment of an “emergency arbitrator”, who is vested with the power to grant interim measures at very short notice. This paper discusses certain key aspects of arbitrator-ordered interim relief and the new emergency arbitrator regimes, focussing also on the challenges they pose to the users of international commercial arbitration.

Keywords: pre-arbitral interim measures, arbitrator-ordered interim measures, emergency arbitrator, emergency arbitrator rules, enforcement of arbitrator-ordered interim measures, enforcement of emergency arbitrator decisions.

I. Introduction

Many jurisdictions recognize that parties to arbitral proceedings may need to seek interim measures of protection in order to safeguard their rights pending final resolution of the dispute. Indeed, a party may be irreparably prejudiced if its counterparty takes deliberate steps to evade its obligations in the course of the proceedings, for example by dissipating its assets, disposing of the object of the dispute, or destroying evidence that is material to the outcome of the case. Not infrequently, the efficacy of arbitration as a dispute resolution method is ultimately dependent on the power of an arbitral tribunal (or a competent state court, as the case may be) to order interim measures to protect the parties’ rights and/or the tribunal’s own remedial authority before the issuance of a final award on the merits.

Historically, the power to order interim measures of protection was vested with state courts. In many countries, courts are well-equipped to deal with urgent ap-
lications and able to provide effective interim relief also for parties in need of immediate protection during the pendency of arbitral proceedings. However, in some instances, court-ordered interim relief may be unsatisfactory for various reasons. First of all, having to resort to a state court might undermine the very purpose for which the parties chose international arbitration as a dispute resolution method in the first place, such as their desire to resolve any disputes confidentially before a neutral tribunal with special expertise. It can also happen that a competent state court lacks the authority to grant the type of interim measure sought; the proceedings before the court may be too slow and cumbersome; or the applicant may have a reason to suspect the court’s impartiality. Even in the absence of such overriding concerns, parties will typically frown upon the imposition of foreign state court procedures, need for translation and use of a foreign language, as well as the need to retain a local counsel, all of which will increase the costs of the arbitration. Added to that, especially in cross-border disputes where the interim relief sought concerns multiple jurisdictions, it is often preferable to have one single tribunal experienced in the settlement of international commercial disputes by arbitration to evaluate the applicant’s request and to order the interim measure sought, thereby avoiding the need to submit applications for interim relief to a number of different state courts in different jurisdictions, with the related risk of contradictory decisions.

For the above reasons, many countries have gradually removed historic limitations on the arbitral tribunal’s authority to grant interim relief: nowadays most jurisdictions approve the arbitrators’ power to order interim measures of protection, either by virtue of specific legislation or case law and legal literature.\(^1\) The majority tendency seems to grant judicial authorities and arbitral tribunals concurrent jurisdiction to issue provisional measures in arbitration. This development reached an important milestone in 2006 in connection with the revision of the UNCITRAL Model Law on International Commercial Arbitration, Chapter IV A. of which contains detailed provisions on arbitrator-ordered interim measures. However, to date, only a limited number of countries have passed national legislation adopting the new provisions of the Model Law.

One notable shortcoming of arbitrator-ordered interim relief is that an arbitral tribunal obviously cannot order interim measures of protection before it has been properly constituted. In international disputes, it is not unusual that the appointment of arbitrator(s) can take many weeks, if not months, especially if the arbitration agreement provides for a three-person tribunal and one of the parties is

\(^1\) Despite this general development, there are still a few jurisdictions which expressly forbid arbitrator-ordered provisional measures, e.g. China, Czech Republic, and Italy. See Lawrence W. Newman – Colin Ong (ed.), Interim Measures in International Arbitration, 2014, at 169, 215-216, 438, 447-450.
uncooperative or downright obstructive. Considering that the most crucial time for seeking provisional measures is often at the outset of the parties’ dispute, this inherent limitation may have severe consequences for a party and, in the worst case scenario, frustrate the arbitral tribunal’s ability to provide effective final relief (e.g., if a recalcitrant party deliberately proceeds to dissipate its assets in order to render itself “judgment-proof”).\(^2\) In recent years, many arbitration institutes have attempted to fill this void by adopting separate “emergency arbitrator rules”. The chief purpose of such rules is to provide the users of arbitration with an effective mechanism whereby a party in need of urgent interim relief that cannot await the constitution of an arbitral tribunal may apply for the appointment of an “emergency arbitrator”, who is vested with the power to grant interim relief at very short notice.

In the following, I will discuss certain key aspects of arbitrator-ordered interim measures and the new emergency arbitrator regimes, focussing also on the challenges they pose to the users of international commercial arbitration. I will start by analyzing arbitral provisional measures (section 2) and then proceed to address the special features of emergency arbitrator proceedings (section 3).

II. Arbitrator-ordered interim measures of protection

While arbitrator-ordered interim measures of protection have been the subject of much debate for the past few years, there is still no universally accepted definition of the concept of “interim measures”. Furthermore, they are sometimes referred to by other names, such as “provisional” or “conservatory” measures, often interchangeably. That said, Article 17(2) of the UNCITRAL Model Law 2006 provides the following “statutory definition” of arbitral provisional measures:

“(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

Article 26(2) UNCITRAL Arbitration Rules (as revised in 2010) is essentially similar to the above-quoted Article 17(2) Model Law. Both stand in contrast to most national arbitration laws and institutional arbitration rules, which fail to specify the types of interim measures that may be granted by arbitral tribunals. A common feature of many arbitration rules is to give the arbitrators the power to order “any
interim measure" they deem necessary or appropriate, thus permitting the tribunal to construe the concept of interim measure as broadly as it wishes with a view to finding the most suitable measure in the circumstances of each individual case. Importantly, subject to any mandatory provisions of the law of the seat of arbitration, the forms of provisional relief available in international arbitration are very extensive, and not necessarily limited to those which could be ordered by judicial authorities at the place of arbitration.

For example, under both Finnish and Swedish law, it is unclear whether a court of law may grant an interim order for the preservation of evidence in arbitral proceedings. The prevailing view seems to be that court-ordered interlocutory injunctions are not available for the purposes of securing evidence. But there is little doubt that arbitral tribunals are empowered to issue provisional measures conserving evidence that is needed for the resolution of the merits of the dispute. In fact, evidentiary orders are one example of arbitrator-ordered interim measures specifically mentioned in Article 17(2)(d) UNCITRAL Model Law 2006.

Anti-suit injunctions are another case in point. An anti-suit injunction may be defined as an order issued by a state court or an arbitral tribunal prohibiting a party bound by an arbitration agreement from commencing or continuing legal proceedings before another state court in breach of its agreement to arbitrate. In the famous West Tankers case, the European Court of Justice ("ECJ") held that anti-suit injunctions issued by EC member state courts are incompatible with the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), meaning that the courts are precluded from granting injunctions enjoining proceedings in the courts of other EC member states. However, more recently in its judgment in the Gazprom case, the ECJ ruled that arbitral tribunals are not bound by the “principle of mutual trust”, accorded by EC member states to one another’s legal systems and judicial institutions, on which the Brussels I Regulation is based. Therefore, arbitrator-ordered anti-suit injunctions are not prohibited by the Brussels I Regulation.


In arbitration practice, tribunals have issued a number of different types of interim measures of protection. Broadly speaking, arbitrator-ordered provisional measures typically fall into one of the following categories:

(i) **Measures aimed at facilitating the conduct of arbitral proceedings.** Examples include: order for the preservation of evidence relevant to the outcome of the case; order providing for the inspection of particular goods, property, machinery, site, or documents; order forbidding public statements in breach of confidentiality obligations or otherwise likely to aggravate the parties’ dispute; anti-suit injunctions restraining a party from pursuing litigation outside the contractual arbitral forum in violation of the parties’ arbitration agreement.  

(ii) **Measures aimed at preserving or restoring status quo, or otherwise clarifying the parties’ contractual relationship, during the pendency of the arbitral proceedings.** Examples include: order to refrain from disposing of the object of the dispute; order to deposit the goods in dispute with a custodian; order for the sale of perishable goods and placing the proceeds of the sale in an escrow account; order requiring a contractor to continue construction works and/or compelling the owner to continue paying instalments, if necessary into an escrow account controlled by the arbitral tribunal; order requiring a manufacturer to continue supplying a distributor, or requiring a distributor to continue selling a manufacturer’s product; order prohibiting a party from continuing to manufacture and sell products which are the subject of disputed patent rights; order to stop using disputed trademarks; order authorizing a party to discontinue or suspend work or the performance of other contractual obligations; order prohibiting a party from calling upon a bank guarantee, or returning to the bank a guarantee called upon in an unjustified manner; order suspending the effect of a corporate resolution; order confirming that an individual has, for

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the time being, no authority to act on behalf of another party; order ensuring the claimant’s enjoyment of its rights (e.g., voting shares in compliance with a shareholders’ agreement); order providing access to company records in order to supervise the company’s management and performance; order directing a party to abstain from undertaking certain activities which do not correspond to the regular course of business; order appointing a neutral manager for some or all of the company’s activities.7

(iii) Measures aimed at facilitating the enforcement of a future arbitral award. Examples include: order freezing the assets of a party; order not to move assets or the subject-matter of the dispute out of a jurisdiction; order directing a party to provide the applicant with a bank guarantee; order for a separation of a sum of money in order to secure payment of the applicant’s monetary claim in the event of the respondent’s imminent insolvency (to the extent permitted under applicable insolvency legislation).8

(iv) Orders for security for costs, i.e., an order designed to ensure that if the claimant loses its case and legal costs are awarded to the winning party, there will be funds available to meet that award.9

For the avoidance of doubt, the above classification is by no means exhaustive.10 Some legal academics have distinguished also other types of provisional measures, such as interim payment of the claimant’s main claim that is submitted to arbitration.11 Most arbitration laws and rules are silent on whether this kind of provisional relief is permissible. In practice, ordering interim payment of the underlying claim

7 See Blackaby – Partasides – Redfern – Hunter, op. cit. n. 6, at 456-458; Born, op. cit. n. 2, at 2484-2488; Graham, op. cit. n. 6, at 575-577; Lew – Mistelis – Kröll, op. cit. n. 6, at 596-597; Redfern, op. cit. n. 6, at 372; Poudret – Besson, op. cit. n. 6, at 538; Savola, op. cit. n. 6, at 651-652; Yesilirmak, op. cit. n. 6, at 208-210; Nathalie Voser, Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach, Dispute Resolution International, Vol. 1, No. 2, December 2007, at 181-183.

8 See Born, op. cit. n. 2, at 2492-2494; Graham, op. cit. n. 6, p. 576; Lew – Mistelis – Kröll, op. cit. n. 6, pp. 597-600; Poudret – Besson, op. cit. n. 6, p. 538; Redfern, op. cit. n. 6, p. 372; Savola, op. cit. n. 6, pp. 654-656; Yesilirmak, op. cit. n. 6, pp. 213-214.

9 See Blackaby – Partasides – Redfern – Hunter, op. cit. n. 6, pp. 324-325; Born, op. cit. n. 2, pp. 2495-2497; Lew – Mistelis – Kröll, op. cit. n. 6, pp. 600-602; Poudret – Besson, op. cit. n. 6, pp. 523-524, 538; Savola, op. cit. n. 6, pp. 656-657; Waincymer, op. cit. n. 6, pp. 636, 642-654; Yesilirmak, op. cit. n. 6, pp. 214-218.

10 Also, some measures listed above may fall into more than one category. For instance, an order to refrain from disposing of the object of the dispute may be regarded not only as preserving status quo but also as facilitating the enforcement of a future award.

11 See Born, op. cit. n. 2, pp. 2499-2501; Lew – Mistelis – Kröll, op. cit. n. 6, p. 602; Poudret – Besson, op. cit. n. 6, p. 538; Yesilirmak, op. cit. n. 6, pp. 218-219.
is problematic in that it effectively results in the granting of final relief sought by the applicant before issue of final award. Therefore, even where not prohibited under the *lex arbitri*, arbitrators are likely to exercise special care and restraint in ordering such far-reaching measure.12

While the arbitrators’ authority to order interim measures of protection is widely recognized in contemporary international arbitration, it is subject to important limitations. Some of them are a natural corollary of the fundamental feature of arbitration as a contractual dispute resolution mechanism between parties to a specific arbitration agreement. Consequently, absent extraordinary circumstances, an arbitral tribunal cannot issue provisional measures that would have any binding effect on third parties not bound by the arbitration agreement from which the tribunal derives its authority. For example, the majority of legal scholars in most jurisdictions seem to agree that arbitrators lack the power to order attachment of property in the custody or control of a third party.13

Another key limitation follows from the inability of arbitrators to order provisional measures on an *ex parte* basis, i.e., without affording the party against whom the measure is sought an opportunity to be heard. In state court proceedings, *ex parte* provisional measures serve an important function in cases where the element of surprise is critical, for example, when it is necessary to immediately stop the opposing party from transferring property to third parties or destroying evidence that is material to the outcome of the dispute. However, it is widely accepted that there is no place for purely *ex parte* arbitral interim relief in international arbitration.

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12 See Born, *op. cit.* n. 2, pp. 2499-2501; Yesilirmak, *op. cit.* n. 6, pp. 213-214. – Specifically with regard to ICC arbitration practice, it has been reported that “[i]n the interim award (2003) in case 12196, the tribunal granted the request for an interim payment, whereas in the partial award (2004) in case 12553 the arbitrator rejected the application for an interim payment on the ground that the applicant would not suffer irreparable damage if the measure were not granted and there was no urgency for such relief.” See Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008*, ICC International Court of Arbitration Bulletin, Vol. 22, Special supplement, 2011, p. 8.

13 According to Poudret and Besson, the prevailing view among legal academics is that there is no room for arbitrator-ordered provisional measures connected with enforcement proceedings, e.g., “*saisie conservatoire*” in France or “*sequestre*” in Switzerland. They also note that a similar restriction has been advocated by Dutch legal scholars. By contrast, the majority of German authors consider that ZPO, § 1041(1) gives arbitrators the power to order an attachment (* Arrest*). See Poudret – Besson, *op. cit.* n. 6, pp. 522-523; and Born, *op. cit.* n. 2, pp. 2445-2446, who further notes that “[d]espite the foregoing, an arbitral tribunal would have the power to order a party to take steps vis-à-vis third parties to prevent or accomplish specified actions. For example, a corporate entity could be ordered to direct its subsidiary to take certain steps (e.g., return or preserve specified property, deliver or safeguard funds). Such orders test the limits of arbitral powers, but, in appropriate cases, where necessary to accomplish justice, a tribunal has the authority to issue them.”
The main problem with *ex parte* applications in arbitration is that they appear to infringe the principle of equal treatment of the parties, since one party is allowed to address the tribunal without the other party knowing about it; obviously, arbitrators should not hear evidence and arguments from one party in the absence of the other. Apart from that, *ex parte* processes can provide a party desirous to gain leverage or tactical advantage over the other party an opportunity to file inappropriate submissions that cannot readily be challenged on an immediate basis. Many commentators therefore conclude that *ex parte* provisional relief is beyond the power of arbitral tribunals.

Most arbitral rules do not permit *ex parte* applications. Additionally, some arbitration laws expressly forbid a tribunal from granting such measures. The revised UNCITRAL Model Law 2006 introduced a somewhat controversial distinction between “interim measures” proper and “preliminary orders”; only the latter may be granted on an *ex parte* basis, provided that the arbitral tribunal considers that a prior disclosure of the request for an interim measure risks frustrating the purpose of such measure. The system is intended to work so that a party submits a dual petition to the arbitral tribunal: an application for a “preliminary order” and a request for an “interim measure”. The counterparty receives no notice of the petition at this stage. If the tribunal considers that it is justified not to give notice of the petition to the counterparty, it may issue a “preliminary order” *ex parte*. However, immediately after that, it shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, as well as all other communications (both written and oral) between any party and the arbitral tribunal. At

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14 See Redfern, *op. cit.* n. 6, p. 402 (fn. 50); Hans van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, Arbitration International, Vol. 20, No. 1, 2004, p. 91. Van Houtte points out that “[a] request for interim measures *ex parte* inevitably will lead to an *ex parte* discussion of the merits and the context of the case. How will the other party know precisely what the requesting party has been told? If the request *ex parte* is dismissed, it may never learn about it. But even when the request is granted and a contradictory debate is organized at a later stage, the other party will never be informed exactly what was said *ex parte*. Consequently a later contradictory hearing will not repair the initial breach of the ‘contradictoire’.”

15 See Waincymer, *op. cit.* n. 6, pp. 628-630; Born, *op. cit.* n. 2, pp. 2509-2511; and van Houtte, *op. cit.* n. 14, p. 89, where the author also notes that *ex parte* measures are incompatible with the consensual nature of arbitration. Since arbitration is based on the agreement of the parties, the arbitration process has to respond to their common expectations. According to van Houtte: “It is very likely that, if asked whether or not their arbitrator should be entitled to order measures *ex parte*, the parties categorically would refuse him such power. Consequently the jurisdiction to issue *ex parte* decision goes in most cases against the common intention of the parties. It could undermine the fundamental principle of agreement upon which the arbitration is based and through which it is most effective.”
the same time, it shall afford an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. A preliminary order shall expire after twenty days from the date on which it was issued. The arbitral tribunal may, however, issue an interim measure adopting or modifying the preliminary order after the party against whom the order is directed has been given notice and an opportunity to plead its case. A preliminary order is binding on the parties, but it is not enforceable by a state court.16

There is a general consensus among legal academics that the law governing the arbitrators’ power to order interim measures is the *lex arbitri*. In contrast, different views have been expressed as to which law should provide the standards for a tribunal’s decision whether to accept, or reject, a request for provisional measures. Three principal choices seem possible for the law governing the standards for arbitrator-ordered interim relief: (1) the *lex arbitri*; (2) the law governing the parties’ underlying contract (*lex causae*); or (3) international standards.17

As Born convincingly submits, there is little reason to conclude that *lex arbitri* provides the substantive standards for an arbitral tribunal’s decision whether to issue provisional measures. This is so already for the reason that no national arbitration statute (other than the 2006 revisions to the Model Law) provides meaningful standards governing an arbitral tribunal’s decision whether to order interim measures. Secondly, it seems equally insupportable to contend that *lex causae* provides the standards for granting arbitral interim relief: the fact that the parties have subjected their contract under a particular substantive law provides little, if any, indication as to their intentions regarding the granting of provisional measures.18 It follows that international sources – and not any national system of law, or decisions of national courts – should provide the standards for the grant of interim measures in international arbitration. The problem, however, is that there is no set-

16 See Article 17B and 17C UNCITRAL Model Law 2006. – The Swiss Rules of International Arbitration (in force as of 1 June 2012) are unique in that they provide for the possibility of *ex parte* applications for emergency relief in limited circumstances. Article 26(3), which is influenced by the aforementioned provisions of the revised Model Law, reads as follows: “In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.” See Christian Oetiker, commentary on Article 26 Swiss Rules, in Tobias Zuberbühler – Christoph Müller – Philipp Habegger, Swiss Rules of International Arbitration: Commentary, Second Edition, 2013, pp. 290, 297-300.

17 See Born, *op. cit.* n. 2, pp. 2458-2459, 2463.

18 See Born, *op. cit.* n. 2, pp. 2464-2465.
tted body of jurisprudence on this topic yet. On the contrary, the relevant standards are still evolving.¹⁹

Some tentative conclusions may nevertheless be drawn from the international arbitration practice. Three preconditions for the grant of interim measures seem to be widely accepted by legal academics and arbitration practitioners: (i) an arguable case on the merits; (ii) a risk of “irreparable” or at least “serious” harm, which cannot be adequately compensated for by damages, if the measure is not taken urgently; and (iii) no prejudging of the merits.²⁰ However, these prerequisites are not all-encompassing. In many cases, arbitrators have invoked also other considerations to justify the granting, or denial, of an application for interim relief. For example, a request may have been denied if the applicant did not have “clean hands”, the requested measure was not capable of being carried out or preventing the alleged harm, or the application was presented at too late stage of the proceedings.²¹ Arbitrators may also put emphasis on certain additional “positive requirements”, such as the principle of proportionality (meaning that the possible injury caused by the requested measure must not be out of proportion with the advantage which the applicant hopes to derive from it), and providing security for damage that the measure may cause to the party against whom it is directed.²²

On the other hand, it appears unwarranted to impose the same prerequisites for all arbitral provisional measures regardless of the circumstances. A number of commentators have rightly noted that the criteria for granting provisional relief are not necessarily the same for different types of interim measures. In particular, some provisional measures typically require strong showings of serious injury, urgency and a prima facie case (e.g., maintaining or restoring the status quo, or ordering performance of a contract or other legal obligation), while other provisional measures are unlikely to demand the same showings (e.g., preservation of evidence, or enforcement of confidentiality obligations).²³ Thus, there is no “one-size-fits-all”

¹⁹ See Born, op. cit. n. 2, p. 2465; Redfern, op. cit. n. 6, p. 402.


²¹ See Poudret – Besson, op. cit. n. 6, p. 537; Savola, op. cit. n. 6, pp. 658-659; Yesilirmak, op. cit. n. 6, pp. 183-190.

²² See Born, op. cit. n. 2, pp. 2507-2508; Redfern, op. cit. n. 6, pp. 394-395; Voser, op. cit. n. 7, pp. 177-178; Yesilirmak, op. cit. n. 6, p. 182, 187-189. See also Article 17A(1)(a) and 17E UNCITRAL Model Law 2006.

²³ See Born, op. cit. n. 2, p. 2468.
solution to the question of which standards should apply for the granting of different provisional measures which serve different purposes.

In addition, even the three “basic” prerequisites mentioned above are subject to differing interpretations. Let us take the requirement of “irreparable” or “serious” harm as an example. Should the applicant indeed establish that an “irreparable” harm may be excepted if the requested measure is denied? Or should it be enough for it to show that “serious” harm is otherwise likely to ensue? The question is not purely academic. In commercial cases, it may be virtually impossible to demonstrate truly “irreparable” harm that cannot be compensated by money damages in a final award. Therefore, a literal “irreparable harm” requirement might have the undesirable effect of limiting provisional measures to cases where one party is insolvent, or where enforcement of a final award would be impossible for some other reason.24

Some arbitration practitioners have argued that the trend in international arbitration nowadays is towards a more business-oriented approach, where the threshold for granting interim measures is (or at least should be) lower than in the past. According to this view, arbitrators are entitled to order interim relief even in the absence of “irreparable” harm: it would suffice for the applicant to show that if the measure is not ordered, the losses it would suffer might not be fully reparable by a subsequent award of damages.25 Reportedly, some arbitral tribunals have gone even further and granted provisional relief even though the requesting party has not been able to show irreparable or even serious harm, simply in order to reduce the overall commercial damage to the respondent and claimant in the arbitration (e.g., by ordering continued sales of products, or continued licensing of intellectual property). However, while arguably commercially-sensible, the grant of provisional measures in such circumstances “would ordinarily exceed the limits of existing legal standards which require a genuine showing of grave harm”.26

All in all, the lack of uniform standards for the grant of arbitral provisional measures poses challenges to parties and arbitral tribunals alike. For applicants, it creates uncertainty on whether the request for an interim measure will meet the threshold that an arbitral tribunal chooses to set in an individual case; and for ar-

24 See Born, op. cit. n. 2, pp. 2469-2471. – Also, as pointed out by Waincymer, how one identifies when harm is irreparable depends in part on one’s views about remedies generally: “For legal systems that believe damages are adequate compensation, there is less likelihood that harm would be seen as irreparable. Conversely, systems that support specific performance might see damages as inadequate in such circumstances and be more inclined towards interim measures that preserve the status quo.” See Waincymer, op. cit. n. 6, pp. 626.

25 See Voser, op. cit. n. 7, pp. 176-177.

26 See Born, op. cit. n. 2, p. 2472.
bitral tribunals, the evolving nature of relevant standards may leave the arbitrators insecure about the criteria to be applied in casu. Furthermore, while international arbitration calls for an international approach – meaning that the standards for preliminary measures applied in court proceedings at the place of arbitration should not be imported into arbitration – there is a risk that the lack of explicit standards will nonetheless cause arbitrators to look to national procedural law and practice for guidance.27

The revised UNCITRAL Model Law 2006 seeks to harmonize the preconditions for granting arbitrator-ordered interim relief. Article 17A of the Model Law reads as follows:

“(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.”

Article 26(3)-(4) of the UNCITRAL Arbitration Rules 2010 sets forth similar requirements for obtaining an interim measure. Interestingly, none of the other major international arbitration rules provides for a corresponding test. In fact, the international arbitration community has been divided in its reaction to the Model Law’s attempt to harmonize the standards for arbitrator-ordered interim measures. While some welcome Article 17A as a useful tool, others have voiced critical opinions. For example, Born argues that

“Article 17A’s formula is lacking in a number of respects. Among other things, Article 17A apparently makes no provision for parties’ agreements on the standards of proof, omits any reference to urgency, unduly focuses “irreparable” harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for different types of interim relief and omits reference to security for costs.”28

It remains to be seen to what extent national legal systems are prepared to adopt Article 17A of the Model Law 2006.


28 See Born, op. cit. n. 2, p. 2466 (fn. 231).
Finally, there remains the problem of enforcement. One of the major disadvantages of arbitrator-ordered interim measures in comparison with court-ordered provisional relief relates to the lack of enforceability: in most jurisdictions, arbitral interim measures are not enforceable through the judicial system. Furthermore, the prevailing view is that interim measures are not enforceable under the New York Convention either. The reason for this is that, in order to qualify as an award under the New York Convention, the decision must finally resolve a dispute submitted to arbitration; interim measures, by definition, are temporary in nature. As they do not satisfy the requirement of finality set out in Article V(1)(e), it is widely considered that decisions granting interim relief are not subject to the recognition and enforcement under the New York Convention.

Not all commentators would agree, though. In her oft-quoted article, Tijana Kojovic submits that “[i]f the focus is on the fact that the merits of a dispute may be ultimately decided differently, it is difficult to escape the conclusion that an interim award granting provisional relief is not “final” because it can be changed or revoked by another interim decision. This is, however, a wrong perspective from which to observe the notion of finality. (...) An interim award on provisional relief resolves whether the request for provisional measure should be granted or not. It represents a final determination of the issue thus defined. The fact that the ruling can be revoked or modified by a subsequent interim decision with different terms or by the final award on the merits should not matter for the purpose of enforcement. ‘Finality’ of an interim award should be observed on its own terms.” – Gary Born concurs, referring to a number of decisions by the U.S. courts holding that arbitrator-ordered provisional measures are to be treated as “final” awards and subject to recognition and enforcement. According to Born, “[t]he better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards in the Convention and most national arbitration regimes. Provisional measures are ‘final’ in the sense that they dispose of a request for relief pending the conclusion of the arbitration.”

29 Notable exceptions include, e.g., England, Germany and Switzerland, where national laws provide a mechanism for the enforcement of arbitral provisional measures. See Born, op. cit. n. 2, pp. 2516-2519; Poudret – Besson, op. cit. n. 6, p. 542. For another example, see Article 16(2) Croatian Law on Arbitration (Official Gazette no. 88/2001).

30 See Voser, op. cit. n. 7, p. 184.


32 See Born, op. cit. n. 2, pp. 2514-2515.
However, the view in favour of enforceability of arbitral provisional measures under the New York Convention is probably still a minority view, at least outside the United States. As such, few would deny that, in many cases, it is important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures issued by arbitrators. And one may legitimately raise the question that V. V. Veeder formulated as follows: “If an award can be enforced under the [New York] Convention, then why not an interim order made by the same arbitral tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common sense.”33 But despite these policy justifications, most European arbitration practitioners arguably still think that the New York Convention is not applicable to provisional measures ordered by an arbitral tribunal, even if they were issued in the form of an “arbitral award”. As noted by Poudret and Besson, the concept of an award under the Convention implies a “final” decision, which irrevocably determines the questions which it addresses. The reference to the “binding” character of the award in Article V(1) (e) indicates that “[w]hatever interpretation is given to this term, the authors did not envisage that a decision of an arbitrator could be questioned by a subsequent decision, and this is precisely an essential characteristic of provisional measures”.34

Having said that, the lack of enforceability does not automatically mean that arbitrator-ordered interim measures would be completely ineffective in practice. First, the need for enforceability is not the same for all types of arbitral interim measures. To illustrate, it may be critical in respect of provisional measures which aim at preventing dissipation of assets with a view to facilitating the eventual enforcement of an award; but it is arguably less pressing in respect of interim measures which merely aim at preserving evidence for the purposes of the arbitration. This is because, in the latter case, an arbitral tribunal may substitute the enforceability with other available tools, in particular the power to draw adverse inferences from a party’s failure to comply with an arbitrator-ordered evidentiary measure. Furthermore, the arbitral tribunal may take such failure into account in the final award when allocating the costs of the arbitration between the parties.35

34 See Poudret – Besson, op. cit. n. 6, p. 546.
35 See Yesilirmak, op. cit. n. 6, pp. 245-246.
Secondly, anecdotal evidence suggests that there is generally a high degree of voluntary compliance with interim measures ordered by arbitral tribunals. Indeed, according to Redfern and Hunter, it would take a “brave (or even foolish) party” to choose to deliberately ignore interim measures ordered by the tribunal that will judge the merits of a dispute. Another seasoned practitioner echoes: “Parties seeking to appear before the arbitrators as good citizens who have been wronged by their adversary will generally not wish to defy instructions given to them by those whom they wish to convince of the justice of their claims.” In this author’s view, there is certainly merit in the argument that parties, and especially their external counsel, are often sensitive to how their procedural behaviour will reflect on the arbitrators when the tribunal reaches its final decision on the merits. Consequently, it comes as no surprise that arbitrator-ordered interim measures are frequently complied with without coercion, and that parties do not readily disregard an interim decision while a decision on the merits is pending.

As alluded above, the consequences of the lack of enforceability of arbitral provisions may also be diluted, at least to some extent, by the arbitral tribunal’s power to draw adverse inferences. But there are limits to that power as well. For instance, I doubt whether it is correct to conclude that “[n]on-compliance with an order for interim measures may (...) have an adverse impact on the arbitral tribunal’s assessment of damages in the final award.” This view probably overstates somewhat the scope and practical significance of adverse inferences.

An example where an adverse inference may be appropriate is where an interim measure sought preservation or production of evidence, and the party against whom the order was directed failed to abide by it without giving any reasons for its non-compliance. However, the extent to which an arbitral tribunal is empowered

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36 See Blackaby – Partasides – Redfern – Hunter, op. cit. n. 6, p. 450.
40 In practice, it is rather uncommon for a party to refrain from giving any explanation for its failure to abide by the arbitral tribunal’s order. Adverse inferences are arguably appropriate only where there is no logical reason for failure to comply, and parties are often able to “[a]dduce reasons of local law, changed circumstances, acts of third parties, or other issues that at least partially excuse or blur their noncompliance”; see Born, op. cit. n. 2, pp. 2448; and Waincymer, op. cit. n. 6, pp. 624. – For further analysis of the requirements for drawing adverse inferences, see Jeremy K. Sharpe, Drawing Adverse Inferences from the Non-production of Evidence, Arbitration International, Vol. 22, No. 4, 2006, pp. 549-571.
to draw adverse inferences from a party’s non-compliance with arbitral decisions providing for interim measures other than disclosure-related orders is highly uncertain. According to Yesilirmak, “[t]he response should be in the negative because the tribunal should not hold a party liable on the substance of the case just because the party is uncooperative in regard of the tribunal’s ruling on a provisional measure”.41 This is supported by Born, who emphasises that

“[e]ven if a party has not behaved as a ‘good citizen,’ the tribunal remains obliged to decide the parties’ claims in accordance with the law and evidentiary record. If an arbitral tribunal were to draw adverse inferences from a party’s refusal to comply with provisional measures (other than disclosure-related orders), it might very well depart from its arbitral mandate and obligation to resolve the dispute impartially.”42

It follows that one should not exaggerate an arbitral tribunal’s “informal” powers of encouraging compliance with its provisional measures. Cynical as it may sound, “[p]arties may well be willing to sacrifice some measure of their appearance as ‘good citizens’ if non-compliance with provisional measures brings them significant benefits”.43 For example, if a dispute concerns ownership of disputed property, which cannot easily be reclaimed once transferred to third parties, a recalcitrant party may choose to proceed with a forbidden transfer irrespective and in violation of an arbitrator-ordered interim measure.44 Some commentators therefore contend that, in modern international arbitration, “[p]arties are often reluctant to rely on the other parties’ good will (voluntary compliance)”, and that “[t]he traditional view that parties comply with the decisions of arbitrators who are appointed by them does not find general acceptance nowadays.”45

The revised UNCITRAL Model Law 2006 is designed to fix the problem of lack of enforceability of arbitral provisional measures. The enforcement regime set forth in Articles 17(H) and 17(I) of the Model Law provides for the enforcement of interim measures issued by an arbitral tribunal, irrespective of the country in which the measure was issued and regardless of whether the measure was taken in the form of an order or award. Many practitioners have hailed this as a major improvement in the Model Law, and in the effectiveness of arbitrator-ordered interim relief. In the words of one commentator, “[w]hat the New York Convention is to enforcement of arbitral awards, article 17(H) and (I), if widely implemented, may become to the enforcement of interim measures”.46 Yet, to be truly effective, the new provi-

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41 See Yesilirmak, op. cit. n. 6, pp. 242.
42 See Born, op. cit. n. 2, pp. 2448.
43 Ibid.
44 See Born, op. cit. n. 2, pp. 2248 (fn. 130).
45 See Yesilirmak, op. cit. n. 6, pp. 239.
46 See Madsen, op. cit. n. 27, pp. 349.
sions of the Model Law should be passed into law in a sufficiently large number of countries. By way of example, it may not be enough that arbitrator-ordered interim measures are enforceable in the country of the seat of arbitration, because the parties have frequently fixed the seat in a “neutral third country” with no connections to any of the parties. As a consequence, the seat will not necessarily coincide with the country where an arbitral interim measure might have to be enforced. The country of enforcement is ordinarily either the country of respondent’s domicile or any other country where it has assets.47

The above suffices to show that arbitral provisional measures are subject to a number of limitations. Still, they play an important role in supplementing court-ordered interim relief, and not infrequently, they may in fact provide the applicant with a better alternative than resorting to state courts. But one situation where arbitrator-ordered interim measures clearly are of no avail is where the tribunal is yet to be constituted. In such event, if a party does not wish to seek interim measures of protection from a state court – or where the competent court is precluded from, or unwilling to, provide the interim relief requested – a question arises as to who may grant urgent interim protection that the applicant may need in a given case. This is where the new emergency arbitrator regimes come into the picture.

III. Emergency arbitrator proceedings

Since the introduction of the first emergency arbitrator provisions by the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”) in 2006, emergency arbitrator regimes have proliferated. Over the past few years, a number of different arbitral institutions have adopted specific emergency arbitrator rules, and other institutes are likely to follow suit. By way of example, at the time of writing, the following institutional arbitration rules contain separate emergency arbitrator provisions (the year of entry into force of the respective emergency rules is mentioned in the parentheses): the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules”, 2010), the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”, 2010), the Rules of Arbitration of the Australian Centre for International Commercial Arbitration (“ACICA Rules”, 2011), the Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”, 2012), the Swiss Rules of International Arbitration (“Swiss Rules”, 2012), the Arbitration Rules of the Finland Chamber of Commerce (“FAI Rules”, 2013), the Hong Kong International Arbitration Centre Administered Arbitration Rules (“HKIAC Rules”, 2013), the World Intellectual Property Organ-

47 See Kojovic, op. cit. n. 31, pp. 520.
zation Arbitration Rules (“WIPO Rules”, 2014), and the LCIA Rules (2014). The list does not purport to be exhaustive.

Even before the ICDR emergency arbitrator rules took effect, the ICC had issued so-called Rules for Pre-Arbital Referee Procedure already in 1990. The purpose of those rules was to allow the parties to have a rapid recourse to a neutral “referee” empowered to provide provisional relief prior to the constitution of an ICC arbitral tribunal. While still in existence, the use of ICC Pre-Arbital Referee Rules has remained modest: as of 2014, only 14 pre-arbitral referee cases had been filed with the ICC. One may assume that the key reason for this remarkably meagre uptake is the “opt-in” system on which the Pre-Arbital Referee Rules are based: the parties must specifically agree to their application, either before or after a dispute has arisen. Experience shows that an “opt-in” approach results in little use of any rules. Therefore, when subsequently introducing new emergency arbitrator provisions, arbitral institutions have generally preferred to adopt an “opt-out approach” which makes the procedures automatically applicable, unless the parties have explicitly contracted out of the emergency arbitrator provisions.

The basic concept underlying all emergency arbitrator regimes is simple. The party seeking emergency relief must file a written request to that effect with the arbitral institution, which will then (subject to the fulfilment of any applicable prima facie jurisdictional test) appoint a solo emergency arbitrator at very short notice. The rules typically confer upon the emergency arbitrator the power to order any interim measure he/she deems appropriate, provided that the requirement of urgency is met and the arbitral tribunal has not been appointed yet. A further common feature of many emergency arbitrator rules is that they empower the emergency arbitrator to provide interim measures of protection either in the form of an “order” or “award”. A notable exception are the ICC emergency arbitrator rules, which only permit the issuance of emergency measures in the form of an order, and not award.

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There is a limited, but steadily growing, body of case law on pre-arbitral interim measures. To my knowledge, since 2006 through 31 March 2014, the ICDR had 39 emergency arbitrator applications (out of which 25 were granted partially or in full, 9 requests were denied, 3 were settled, 1 was withdrawn and 1 was pending); the SIAC had 34 emergency relief applications filed from July 2010 through 2013; and the ICC has witnessed 24 applications under the 2012 Emergency Arbitrator Rules. In Scandinavia, Sweden leads the way: since the enactment of the SCC Emergency Arbitrator Rules in 2010 through 31 December 2014, there have been 13 reported applications (out of which 3 were granted and 10 denied). By way of comparison, no applications for the appointment of an emergency arbitrator have been filed under the FAI Rules thus far.

The types of emergency measures sought have been wide-ranging. In the ICC practice, the reported cases have fallen into four categories of interim relief: (i) measures aimed at securing enforcement of the future award, (ii) measures aimed at preserving the status quo, (iii) anti-suit injunctions, and (iv) orders for interim relief.

50 Note by William K. Slate II in Panel 1: Professor Don Wallace’s Opening Remarks and the Power of the Arbitral Tribunals to Offer Interim Relief, in Diora Ziayeva (ed.): Interim and Emergency Relief in International Arbitration, 2015, pp. 75.
51 Ibid. 
52 This information was received from the ICC Secretariat on 21 November 2015. – The first 10 cases conducted under the ICC Emergency Arbitrator Rules are analyzed in Carlevaris – Feris, op. cit. n. 38, pp. 28-38. According to the authors, the 10 applications resulted in 8 ICC emergency arbitrator orders. Out of those, 4 rejected the application, while 4 granted the relief requested at least in part.
54 The FAI emergency arbitrator provisions came into force on 1 June 2013 in connection with the revised FAI Rules. They have no retroactive effect, meaning that they only apply to emergency arbitrator proceedings initiated under FAI arbitration agreements concluded on or after 1 June 2013, subject to party agreement to the contrary. See Article 52.2(a) FAI Rules; Article 10.4 FAI Emergency Arbitrator Rules; and Savola, op. cit. n. 49, pp. 38-41, 344-345.
55 For example, there have been two requests for sums to be placed in an escrow account pending the outcome of the arbitration proceedings. See Carlevaris – Feris, op. cit. n. 38, pp. 34.
56 For example, in one case relating to the applicant’s purchase of the responding party’s equity interest in a third company, the applicant requested the emergency arbitrator to order the responding party to refrain from transferring its equity interest and selling the company’s assets to third parties until such time as the dispute over the responding party’s right to terminate the purchase agreement had been resolved. In two other cases, the relief requested was an order preventing a responding party from calling upon a bank guarantee pending the resolution of the dispute. Ibid.
57 Ibid.
In the SCC practice, applicants have sought, e.g., orders prohibiting respondent from disposing of its equity interest in a company, from collecting an amount under a guarantee, and from continuing parallel proceedings in a state court; orders directing respondent to deliver certain products to the applicant at a “fair market value”, or directing respondent to grant the applicant access to certain services or objects; orders declaring that the applicant is the lawful owner of certain property, or that the applicant has the right to postpone completion of works under a construction contract; and orders blocking respondent’s bank accounts.

Consistent with the provisions governing arbitrator-ordered interim relief contained in various institutional arbitration rules, the emergency arbitrator provisions do not normally lay down any substantive standards for the grant of provisional measures, other than the requirement of urgency. In the reported ICC cases, emergency arbitrators have typically considered whether there was a prima facie case for the measures requested and whether there was a risk of irreparable harm; failure to meet either of these requirements has generally been considered sufficient to reject the application. As for the SCC practice, emergency arbitrators have developed the following prerequisites for the grant of interim measures: (i) a prima facie jurisdiction, (ii) a reasonable possibility that the applicant will prevail with its claim on the merits, and (iii) the requirement of urgency as well as the closely interconnected standard of irreparable harm. Looking at the 10 applications that were unsuccessful, the most common ground for rejecting the request for emergency interim relief was the lack of urgency (in 8 cases) and the lack of irreparable harm (in 7 cases). Unsurprisingly, in the two cases where the applicant sought relief targeted against a party not bound by the arbitration agreement, the emergency arbitrator denied the request on the grounds that he had no jurisdiction over any third parties.

Despite the growing body of case law, emergency procedures are still a relatively new creature, which raises difficult questions of interpretation. For example, does – or should – an emergency arbitrator qualify as an “arbitrator” proper? And can the decision issued by an emergency arbitrator (whether in the form of an order or award) be enforced through the judicial system? These questions have been intensely debated among legal academics and arbitration practitioners, but the answers are still uncertain. Ultimately, they will depend on the national legislation

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58 Ibid.
59 See Lundstedt and Knapp, op. cit. n. 53.
60 See Carlevaris – Feris, op. cit. n. 38, pp. 36.
61 See Lundstedt and Knapp, op. cit. n. 53.
and attitude of the courts at the place where enforcement of an emergency arbitrator decision is sought.\textsuperscript{62}

Most national laws are silent on the enforceability of emergency arbitrator decisions. Hong Kong and Singapore constitute a rare exception.\textsuperscript{63} Also in the United States, there are reported cases where courts have enforced emergency arbitrator decisions when enforcement was considered necessary to avoid an irremediable harm to the applicant or to the integrity of the arbitral process.\textsuperscript{64}

As noted above, the revised UNCITRAL Model Law 2006 provides for the enforcement of arbitrator-ordered interim measures, whether issued in the form


\textsuperscript{63} Sections 22A and 22B of Part 3A of the Hong Kong’s Arbitration Ordinance define “emergency arbitrator” and stipulate that emergency decisions are enforceable in the same manner as interim orders awarded by the courts. The Arbitration Ordinance also provides that emergency arbitrator decisions will be enforced in Hong Kong irrespective of whether they were rendered in or outside Hong Kong. – In Singapore, changes were recently made to the International Arbitration Act to clarify that an emergency arbitrator falls within the definition of “arbitral tribunal” for the purposes of enforcement. However, the Act is not clear as to whether emergency relief issued outside Singapore is enforceable in Singapore. Arguably, this is the case, considering that Section 12(6) of the Singapore International Arbitration Act permits the enforcement of all orders or directions made by arbitral tribunals, which probably includes also arbitral tribunals seated in countries other than Singapore. See Chiann Bao, Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Center, in Diora Ziayeva (ed.): Interim and Emergency Relief in International Arbitration, 2015, pp. 282-283.

\textsuperscript{64} See Baigel, op. cit. n. 62, pp. 17; Santacroce, op. cit. n. 62, pp. 305; Grant Hanessian, Emergency Arbitrators, in Lawrence W. Newman – Richard D. Hill (ed.), Leading Arbitrators’ Guide to International Arbitration, Third Edition, 2014, pp. 360-365; Kassi Tallent, Emergency Relief Pending in the U.S. Context, in Diora Ziayeva (ed.): Interim and Emergency Relief in International Arbitration, 2015, pp. 299-308. – It is probably irrelevant, for the purposes of enforcement, whether an arbitrator-ordered or pre-arbitral decision on provisional measures has been issued in the form of an “award” or simply as an “order”. The U.S. courts have historically rejected a formalistic distinction between “orders” and “awards”: what matters is not the nomenclature used, but the true nature and content of the decision subject to enforcement; see Hanessian, pp. 361-363; Tallent, pp. 299-300; Ghaffari – Walters, op. cit. n. 62, pp. 162-164. – Also some European practitioners contend that the distinction between an “order” and an “award” is “of little practical relevance when it comes to enforceability, since most jurisdictions apply the principle of ‘substance over form’ to any type of interim measure, regardless of the form in which it was ordered”; see Voser – Boog, op. cit. n. 49, pp. 86.
of orders or awards. In the legal literature, it has been submitted that where these provisions are implemented in the national system of law, they should permit also the enforcement of emergency arbitrator decisions. But this argument is not necessarily fullproof. Article 17H(1) Model Law 2006 reads as follows: “An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court (...)”. The language used simply begs the question as to whether an “emergency arbitrator” equates with an “arbitral tribunal”. Article 2(b) of the Model Law, which defines arbitral tribunal as “a sole arbitrator or a panel of arbitrators”, fails to give any meaningful guidance. In the absence of a clear definition of “arbitral tribunal” and “arbitral award” in both the Model Law and the New York Convention, it is unclear how the orders or awards issued by emergency arbitrators will be dealt with under these instruments by national courts at the place where enforcement is sought.

Where the law is silent on the enforceability of an emergency arbitrator decision, it may be difficult to argue that such measures should be enforced by judicial authorities. Leaving aside the question of whether an emergency arbitrator is an “arbitrator” in the first place, the fact remains that decisions by emergency arbitrators are only temporary. Typically, emergency arbitrator rules provide that such decisions are not binding on the arbitral tribunal, which may revoke or modify them at any time. This is instinctively incongruent with the requirement that, in order to be susceptible to enforcement, an arbitral decision should be “final and binding”. And the fact that many emergency arbitrator rules grant the emergency arbitrator the power to “award” interim measures is unlikely, in and of itself, to add to their enforceability, because parties are not free to define what an “award” is; this obviously extends to any provisions of institutional arbitration rules as well. Rather, it is the various national laws which determine whether or not a provisional measure can take the form of a proper award and be the object of enforcement.

As such, many rules stipulate that emergency arbitrator decisions are binding on the parties, who undertake to comply with them. But this is different from the issue of enforceability. Depending on the applicable law, it may mean that parties are contractually bound by an emergency arbitrator decision, and that failure to comply with that decision may give rise to claim for damages, or specific performance.

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65 See Bao, op. cit. n. 63, pp. 282-283; Fry – Greenberg – Mazza, op. cit. n. 49, pp. 304 (fn. 62); Voser – Boog, op. cit. n. 49, pp. 86.

66 See Baigel, op. cit. n. 62, pp. 6 and 8.

67 See Poudret – Besson, op. cit. n. 6, pp. 540.
Additionally, it may give the arbitral tribunal (once constituted) the right to draw adverse inferences from a party’s non-compliance.\(^{68}\) It does not, however, translate into enforceability of the emergency arbitrator decision \textit{per se}.\(^{69}\)

In this context, it merits mentioning that the question of the legal nature of an order issued by an \textit{ICC pre-arbitral referee} has been put to the test before the French courts. In its decision of 29 April 2003, the Paris Court of Appeal refused to set aside such an order. In so doing, the Court noted that the drafters of the Pre-Arbitral Referee Rules had carefully avoided using the term “arbitration”, and that the binding nature of the referee’s order derived solely from the parties’ agreement. The role of the referee was therefore akin to that of an expert, or an adjudicator, rather than an arbitrator. By the same token, the referee’s decision was not of a judicial nature; instead, it had the same binding effect between the parties as a contractual provision, meaning that any failure to comply with it could be considered a contractual breach. On this basis, the Paris Court of Appeal concluded that, as a matter of French law, a party could neither enforce the order nor seek for its annulment before a state court.\(^{69}\)

Some commentators opine that one should not overstate the importance of enforceability of emergency arbitrator decisions, as parties usually comply with them voluntarily.\(^{70}\) But this is not necessarily always the case. As explained above, there may be instances where enforcement of pre-arbitral interim measures is critical so as to avoid the risk that a recalcitrant party will succeed in evading its obligations and frustrating the whole purpose of the arbitration. In such circumstances, a party may have no other choice but to resort to judicial authorities for their assistance.

To sum up, if used properly and with good judgment, the new emergency arbitrator procedures may reduce the need for parties to seek pre-arbitral interim relief from state courts and to facilitate expeditious and cost-efficient resolution of disputes. But like all procedural devices, emergency arbitrator rules also have the potential to give ammunition to combative parties willing to delay and derail the arbitration

\(^{68}\) See Fry – Greenberg – Mazza, \textit{op. cit.} n. 49, pp. 304-305; Ghaffari – Walters, \textit{op. cit.} n. 62, pp. 164; Santacroce, \textit{op. cit.} n. 62, pp. 289; Savola, \textit{op. cit.} n. 49, pp. 343; Shaughnessy, \textit{op. cit.} n. 27, pp. 346-347; Voser – Boog, \textit{op. cit.} n. 49, pp. 86.


\(^{70}\) See Bao, \textit{op. cit.} n. 63, pp. 282; Fry, \textit{op. cit.} n. 62, pp. 196; Fry – Greenberg – Mazza, \textit{op. cit.} n. 49, pp. 304-305; and Carlevaris – Feris, \textit{op. cit.} n. 38, pp. 37-38, who further note that “[e]xperience suggests also that an emergency arbitrator’s order can be a powerful incentive for the parties to settle. Not just the content of the order, but also the mere availability of emergency arbitrator proceedings may contribute to, and even facilitate, the amicable resolution of the dispute.”
process (e.g., by raising procedural objections against the emergency arbitrator’s jurisdiction, refusing to comply with the emergency arbitrator decision, or resisting its enforcement, possibly by instituting parallel court proceedings). Given that most of these rules have only been in place for a relatively short time – coupled with the dearth of reported emergency arbitration cases – there is no conclusive evidence yet as to how successfully they operate in practice. Only time will tell whether the new emergency arbitrator rules will become a truly effective tool in the resolution of international commercial disputes.71

IV. Concluding remarks

The role of provisional measures in international arbitration has expanded over the past few years. This trend will probably continue and intensify for a number of reasons. First of all, modern world provides uncooperative parties with more room for manoeuvre than ever before: while “‘twinkling of a telex’ was enough to dissipate assets ten years ago, a ‘click of a mouse’ from anywhere in the world is sufficient today”,72 On the other hand, “[a]dvances in telecommunications have made it feasible for the parties to serve submissions, and for the tribunal to deliberate, essentially instantaneously, thereby making it much more practicable for even geographically-dispersed tribunals to entertain provisional measures applications”.73 In addition, “[a]s the size and contentiousness of arbitral disputes has increased, parties have increasingly been willing to take steps designed to preempt the arbitral process and, conversely, to seek provisional measures preventing such steps”.74 All these factors contribute to the growing importance of provisional measures in international arbitration.

This paper has advanced the position that pre-arbitral and arbitrator-ordered interim measures of protection have various benefits. Especially in cases where the courts cannot be trusted for whatever reason, they may prove invaluable to an applicant in need of urgent interim relief. However, for pre-arbitral and arbitrator-ordered provisional measures to be fully effective, national laws should provide a

71 See Patricia Shaughnessy, The New SCC Emergency Arbitrator Rules, in Kaj Hobér – Annette Magnusson – Marie Öhrström (ed.), Between East and West: Essays in Honour of Ulf Franke, 2010, pp. 465, 479-480, where the author also notes that “[u]ltimately, the success of the Emergency Rules depends on the skill and judgment of the men and women appointed as emergency arbitrators and the commitment of counsel to understand and implement proper use of the new rules. The future of arbitration lies in the hands of its users, and users should strive to ensure that arbitration developments promote effective and cost-efficient resolution of disputes.”

72 See Yesilirmak, op. cit. n. 6, pp. 245.

73 See Born, op. cit. n. 2, pp. 2462 (fn. 211).

74 Ibid.
proper mechanism for their enforcement through the judicial system. Otherwise the parties may need to rely exclusively on the arbitrators’ persuasive powers and limited authority to draw adverse inferences from a party’s non-compliance with a decision granting interim relief. And even where the national legal system permits the enforcement of orders or awards issued by arbitral tribunals or emergency arbitrators, there will probably still be a finite number of instances where state courts remain the only viable alternative – particularly when extreme urgency requires action in a matter of hours, or there is otherwise a need for full-scale ex parte relief.