



# Interim and Emergency Relief in Arbitration Proceedings

## By Ira M. Schwartz

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**A look at the law, arbitration rules, and UNCITRAL Model Law provisions on the issue of interim relief in arbitration, as well as the issue of court enforcement.**

Although arbitration offers many benefits to disputants—among them a quicker, less formal and less costly resolution than litigation, the ability to select the decision maker, and privacy—some people erroneously believe that one cannot obtain interim relief in arbitration. The ability to obtain such relief, for example a preliminary injunction, can be highly significant in certain kinds of disputes, especially those involving protection of intellectual property rights.

This perception is wrong because the major institutional arbitration providers do in fact allow for interim relief in arbitration. Although the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration previously had very limited provisions on interim relief, the Commission recently amended the Model Law to allow for stronger interim relief.<sup>1</sup> The International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association (AAA), recently incorporated into its rules a provision allowing parties to obtain emergency relief from an emergency arbitrator before the arbitrator is selected to hear the dispute.<sup>2</sup> The International Chamber of Commerce (ICC) has a separate pre-arbitration procedure for a referee to hear urgent requests for relief, but this procedure has to be expressly stated in the parties' arbitration agreement.<sup>3</sup>

However, orders for interim relief and emergency orders are not self-enforcing. Thus, there is a concern over whether such orders will be enforced in a meaningful manner.

#### When Interim Relief Will Be Sought

A preliminary injunction or other type of interim relief is usually sought by a party who believes it will suffer imminent harm due to an irreparable alteration of the *status quo*. Examples include the adversary's continued violation of copyright or patent rights or misappropriation of trade secrets; danger to party property in the custody of the adversary; and danger that the adversary will dispose of its own property, leaving the party without a meaningful chance of recovery in arbitration.

#### The UNCITRAL Rules and Interim Relief

Article 26 of the UNCITRAL Rules on International Commercial Arbitration (1976) allowed the arbitration panel to grant a request for interim measures in appropriate circumstances.<sup>4</sup> Because the availability of interim relief had become a major issue, the UNCITRAL formed a working group to study that issue. In 2006, it added a new chapter to the UNCITRAL Model Law,<sup>5</sup> which deals with interim relief and a new form of relief called a "preliminary order." It

contains detailed provisions on the type of relief, the conditions for obtaining it, and related matters.

Article 17(1) expressly allows the arbitrator to grant interim measures at the request of a party, unless parties agree otherwise. Article 17(2) defines the term "interim measure" to mean a temporary measure that has one or more of the following purposes: to preserve either the *status quo*, assets from which the final award may be satisfied, or evidence, or protect the arbitration proceeding.

Article 17A sets out the conditions the moving party must meet in order for the panel to grant a request for an interim measure of protection. Basically, this standard is similar to the one U.S. courts use to rule on requests for a preliminary injunction. That is, the party requesting interim relief has to show that it will suffer irreparable injury if the relief is not granted, as well as a reasonable possibility of success on the merits of the claim. However, the tribunal has discretion to apply

these two requirements when interim measures are requested for the purpose of preserving evidence.

Article 17B provides for an earlier type of relief analogous to a temporary restraining order under U.S. law. Called a preliminary order, its purpose is to preserve the *status quo* until an arbitrator can rule on the request for interim relief. As a request for emergency relief, a preliminary order can be requested on an *ex parte* basis simultaneously with the request for interim relief.<sup>6</sup> Article 17C(4) limits the duration of a preliminary order to 20 days. The same conditions for granting a request for interim relief apply to applications for an emergency order.

A preliminary order also may be granted without notice to the party against whom the order is sought if the arbitrator concludes that disclosing the request for interim relief would frustrate the purpose of the measure.

Article 17H(1) provides that courts can enforce an order or award of interim measures just as they would any other arbitration award. In contrast, that is not the case with a preliminary order of emergency relief. Article 17C(5) provides that a preliminary order, although binding on the parties, is not enforceable by a court.

## **Two U.S. courts recently refused to issue preliminary relief when asked to do so in arbitration matters where the arbitral tribunal or the court had authority to issue interim relief.**

Article 17J directs that a court has the same power to issue interim relief in an arbitration proceeding as it would have to issue such relief in a court proceeding.

The UNCITRAL Arbitration Rules have not yet been updated to implement new Chapter IV of the Model Law. However, proposed changes conforming to Chapter IV are under consideration.

In the meantime, since the UNCITRAL rules already authorize arbitrators to entertain requests for and grant interim relief, such relief can be obtained in *ad hoc* (i.e., non-administered) proceedings conducted under those rules.

The next section of this article discusses the availability of interim and emergency relief under the arbitration rules of some of the most prominent institutional arbitration providers. The first to be discussed is the International Arbitration Rules of the ICDR.

### **ICDR International Rules**

The ICDR rules offer two different types of provisional relief, interim relief<sup>7</sup> and emergency relief prior to the constitution of the tribunal.<sup>8</sup>

Article 21(1) expressly authorizes arbitrators to entertain requests for interim measures of protection, including injunctive relief and measures for the protection or conservation of property.

Further, the ICDR rules specifically state that applying to a court for interim protection is not incompatible with these rules.

Article 37 deals with the situation when interim relief is needed by a party to an arbitration but the parties have not yet determined who the arbitrator will be. This article provides a mechanism for such requests to be made and for an "emergency arbitrator" to be appointed by the ICDR to hear this type of request.

The application for emergency relief must set forth the relief requested, the reasons why such relief is needed on an emergency basis, and why the applicant is entitled to the relief. In addition, the application must be made on notice to the other parties. Article 37 requires the applicant for emergency relief to certify that all other parties have been notified of the steps it has taken to give such notice in good faith.

Article 37 goes on to provide for an extremely expedited procedure: the appointment of the emergency arbitrator within one business day of the request; prompt disclosure by the arbitrator of potential conflicts of interest, if any; a prompt challenge procedure, and setting of a schedule for the emergency hearing within two business days. The hearing may be conducted telephonically or by written submissions.

Article 37 authorizes the emergency arbitrator to modify or vacate the relief for good cause shown.

### **ICC Rules of Arbitration**

Like Article 26 of the UNCITRAL Arbitration Rules, Article 23 of the ICC [International Chamber of Commerce] Rules of Arbitration allow the arbitral tribunal to make interim awards in appropriate cases, unless the parties have agreed otherwise.<sup>11</sup> Allowable interim awards include conservatory measures and requiring security.<sup>9</sup>

The ICC rules also allow a party to seek appropriate interim relief from a judicial authority and refer specifically to applications to a judicial authority if needed, prior to the formation of the arbitral panel, although applications to the court are expressly permitted after the formation of the panel. These rules also recite that application to a judicial authority is not a waiver of the right to arbitrate.

Since 1990, the ICC has also had a procedure allowing for the appointment of a referee to address urgent problems prior to the tribunal seizing jurisdiction over the dispute. Unlike the ICDR's emergency relief provisions, which are contained in its International Arbitration Rules, and therefore do not have to be specified in the arbitration agreement, the ICC pre-arbitral referee procedures do have to be referenced in the parties' agreement in order to apply.<sup>10</sup>

If so referenced, then the referee could order a conservatory or restorative measure that is urgently needed to prevent imminent harm to the rights or property of a party and measures to protect or establish evidence. The referee could also compel a party to make a payment, or take steps required by the contract including the signing or delivery of any document.

### **LCIA Arbitration Rules**

The Arbitration Rules of the London Court of International Arbitration (LCIA) authorize the arbitral tribunal to grant interim orders.<sup>11</sup>

Article 25 authorizes three types of interim orders. The first is an order requiring a party responding to a claim or counterclaim to provide security for all or part of the amount in dispute. This rule gives examples of the type of security that arbitrators can require, including cross-indemnities, bank deposits and bank guarantees.

The second is an order requiring the interim storage or preservation of property at issue in the arbitration. The third includes any order it would have the power to grant as part of a final award.

Article 25 also addresses the situation in which

a party fails to comply with an interim order of the tribunal. In this situation, the panel may stay enforcement of the non-complying party's claims or counterclaims or even order them dismissed. It may also require the non-complying party to provide security.

The LCIA rules allow a party to apply to a court for an appropriate judicial order, but limits this right to those cases in which interim relief is required before the arbitral panel can be formed. Judicial intervention can only be sought after the panel has been formed in "exceptional cases."

It should be noted that Article 9 allows the LCIA Court to expedite the formation of the panel upon a showing of exceptional urgency. There is an open question about how this rule dovetails with the right to seek emergency interim relief from a judicial authority.

#### Arbitration Laws, Treaties and Interim Relief

**English Law.** Under the English Arbitration Act 1996, English courts have the power to issue orders in aid of arbitration.<sup>12</sup> For example, orders permitted under the act permit the taking of evidence, the preservation of evidence, and the granting an interim injunction. The act also authorizes orders regarding property at issue in the proceedings. In keeping with the contractual nature of arbitration, these powers are granted to the court unless the parties agreed otherwise.

The English Arbitration Act also allows the parties to agree that the arbitral tribunal has the power to issue interim relief consistent with its power to enter a final award.

Before the 1996 English Arbitration Act was enacted, whether a court could issue an order in aid of arbitration was a difficult question.<sup>13</sup>

**U.S. Law.** The U.S. Arbitration Act, which is known to U.S. practitioners as the Federal Arbitration Act (FAA),<sup>14</sup> does not deal at all with interim measures of protection in arbitration.

In the United States, there is an open question whether a federal district court would have jurisdiction to hear an application for interim relief during a pending arbitration or before arbitration is commenced and the parties' contract requires disputes under it to be arbitrated.

Under the FAA, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which forms a part of the FAA, the only power a court expressly has with regard to

arbitration is to issue an order compelling the parties to arbitrate.<sup>15</sup> Several courts have held that this is the only power they have until such time as the tribunal enters an award.<sup>16</sup> Other courts have criticized this holding, ruling instead that federal district courts do have the power to issue interim orders in aid of arbitration.<sup>17</sup>

**Other Countries.** A minority of countries takes the position that arbitration panels do not have the power to enter interim relief. As of 2002, these include Argentina and Italy.<sup>18</sup>

#### Will the Court Act?

Assuming a court can issue interim relief in aid of arbitration, the next question is, will it?

Two U.S. courts recently refused to issue preliminary relief when asked to do so in arbitration matters where the arbitral tribunal or the court had authority to issue interim relief. In *Simula Inc. v. Autoliv, Inc.*<sup>19</sup> the court ruled that the lower court's denial of a preliminary injunction was appropriate. Because the Swiss arbitral tribunal, operating under the ICC rules, had the ability to issue

interim measures, the court ruled that it would be inappropriate to step in and issue the relief requested.<sup>20</sup>

The court in *China National Metal Products Import/Export co v. Apex Digital, Inc.* made a similar ruling.<sup>21</sup> It declined to issue a writ of attachment after finding that the arbitration rules of the China International Economic and Trade Commission (CIETAC), which were applicable to the arbitration proceeding, allowed for a procedure to obtain provisional relief from the China's People's Court. The court determined that since the applicable arbitration rules had a procedure in place for provisional remedies, the parties should follow the agreed-upon rules to obtain needed relief.

Then there is the question of whether a court will enforce an arbitrator's decision to grant interim relief. This also is an open question in the United States, and to some extent, depends on the form in which the interim order is granted and the jurisdiction where enforcement of the award is sought. The issue arises because arbitrators have limited power to enforce their orders directly, even though they have the discretion to manage the proceedings before them, subject to the parties' agreement and the applicable arbitration rules. But even while some arbitration rules

## ***The Federal Arbitration Act does not deal at all with interim measures of protection in arbitration.***

expressly grant the arbitrators the power to issue interim relief, they cannot, as a practical matter, enforce their orders.

In the United States, court assistance to enforce interim awards is a complicated question. Court cases reviewing related issues have split on these issues.<sup>22</sup> Some U.S. courts have examined their authority over this issue by analyzing whether their actions are interfering with or bypassing the arbitration process or whether the actions of the court are in aid of arbitration.<sup>23</sup>

As already noted, the New York Convention precludes a district court from taking any action (except to compel arbitration) before a foreign arbitral award is rendered. Thus, federal courts are prohibited from allowing the parties to bypass the arbitration procedures by seeking relief in court.

ing the need for such relief should determine where the interim award might need to be enforced and then select that jurisdiction for the arbitration.

In some patent and copyright infringement matters, expediting the arbitration hearing may be a viable alternative to seeking interim relief, whether in arbitration or in court. This is often considered by litigators sometimes expressly and sometimes just as an implicit part of the litigation strategy. This is especially common when the patent infringement defendant makes a viable claim of non-infringement based on patent claim construction arguments. In U.S. patent infringement litigation, "claim construction" is often a preliminary step in litigation. For example, if the defendant can raise at least a plausible argument that a certain claim construction renders the

***[A]rbitrators have limited power to enforce their orders directly, even though they have the discretion to manage the proceedings before them, subject to the parties' agreement and the applicable arbitration rules.***

Some of the larger arbitration providers have made it easier for the courts by providing in their rules that interim relief may be granted in the form of an order or "award."<sup>24</sup> Presumably, this language was used to allow courts to have jurisdiction under the New York Convention.

This is not a big issue in the United Kingdom since the English Arbitration Act specifically gives the courts power to issue orders in support of arbitration.<sup>25</sup>

#### **Drafting Suggestions**

Most of the commonly used arbitration rules authorize the parties to vary the arbitration procedures by agreement if they wish. Thus, the parties can detail their own interim relief provisions in their contract. It is not uncommon for contracts providing for arbitration to include a specific term allowing for either party to apply to a court for preliminary injunctive relief pending arbitration. This type of provision is fairly common in intellectual property licensing agreements. It is likely that courts would entertain preliminary injunction motions under a provision in the parties' agreement, even though the matter of monetary damages and final relief will be determined by arbitration.

To make sure that an interim award of interim relief would be enforceable, the party anticipat-

ing patent not infringed, this will cause the court either to postpone or deny a request for a preliminary injunction.

Since one of the benefits of arbitration is that it is faster than litigation, in intellectual property cases, the arbitral tribunal may be able to convince the parties to agree to an expedited determination on the merits. While the relief may not be as quick as an emergency order, the time frame for determination may be reduced to a period of months, which may correspond to the time to obtain a preliminary injunction hearing in many federal courts. This may provide an attractive alternative in some cases.

#### **Conclusion**

Traditionally, arbitration has offered a positive alternative to litigation of many types of disputes. However, one perceived drawback to arbitration was the inability of arbitrators to grant effective emergency or interim measures. This is no longer the case, as there are now arbitration rules permitting arbitrators to grant provisional relief and for emergency arbitrators to grant emergency relief. New statutes and developing case law are now addressing how interim relief can be obtained and enforced. ■

*(Endnotes are on the next page)*

## ENDNOTES

<sup>1</sup> See UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments adopted in 2006 (UNCITRAL Arbitration Rules 2006), art. 17.1. [www.uncitral.org](http://www.uncitral.org).

<sup>2</sup> American Arbitration Association, International Dispute Resolution Procedures, available at [www.adr.org/sp.asp?id=28144#Interim\\_Measures](http://www.adr.org/sp.asp?id=28144#Interim_Measures). See art. 37.

<sup>3</sup> International Chamber of Commerce, Rules for a Pre-Arbitration Referee Procedure, available at [www.iccwbo.org/court/arbitration/id5101/index.html](http://www.iccwbo.org/court/arbitration/id5101/index.html).

<sup>4</sup> UNCITRAL Arbitration Rules (1976), available at [www.jus.uio.no/lm/un.arbitration.rules.1976](http://www.jus.uio.no/lm/un.arbitration.rules.1976).

<sup>5</sup> UNCITRAL Arbitration Rules 2006, ch. IV.

<sup>6</sup> *Id.*, art. 17B(1).

<sup>7</sup> See ICDR Rules, *supra* n. 2, art. 21. The ICDR Rules also contemplate that a party may apply for interim relief from a court. Article 21(3) makes clear that an application of this type is not incompatible with the arbitration agreement or a waiver of the right to arbitrate.

<sup>8</sup> *Id.*, art. 37.

<sup>9</sup> International Chamber of Commerce, Rules of Arbitration, art. 23. These rules are available at [www.iccwbo.org/court/arbitration/i](http://www.iccwbo.org/court/arbitration/i)

d4199/index.html. The ICC rules also allow a party to seek interim relief from a court prior to and after the formation of the arbitral panel. Like the ICDR rules, this rule also makes plain that an application to a judicial authority for interim relief is not a waiver of the right to arbitrate. *Id.*

<sup>10</sup> See n. 3 *supra*.

<sup>11</sup> LCIA Arbitration Rules, available at [www.lcia.org](http://www.lcia.org).

<sup>12</sup> English Arbitration Act 1996, ch. 23, art. 39, 44.

<sup>13</sup> See *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 (House of Lords).

<sup>14</sup> See 9 U.S.C. 1 *et seq.*

<sup>15</sup> 9 U.S.C. § 4, 5, 206, 207. The court could also appoint the arbitrators if needed.

<sup>16</sup> *McCreary Tire & Rubber Co. v. CEAT, Spa*, 501 F.2d 1032 (3rd Cir. 1974).

<sup>17</sup> *Carolina Power & Light Co. v. Uranex*, 451 F. Supp.1044 (D. Cal. 1977). See also *Borden, Inc. v. Meiji Milk Products Co, Ltd.*, 919 F.2d 822 (2d Cir. 1990); *James Assoc. (USA Ltd.) v. Anhui Machinery Equipment Import & Export Corp.*, 171 F.Supp.2d 1146 (D. Colo. 2001).

<sup>18</sup> See Wang, William, "International Arbitration: The Need for Uniform Interim Measures of

Relief," *Brook J. Int'l L.* n. 240, 241 (June 12, 2004), citing Argentine National Code of Civil and Commercial Procedure (*Codigo procesal Civil y comercial de la Nacion*) Book VI, tit. I, art. 753 reprinted in *International Handbook of Commercial Arbitration, Annex I*, and Italian Code of Civil Procedure (codice civil), Book 4, tit. VIII, Arbitration, as amended by Law, n. 25, Jan. 5, 1994.

<sup>19</sup> 175 F.3d 716 (9th Cir. 1999).

<sup>20</sup> *Id.* at 725, 726.

<sup>21</sup> 155 F. Supp.2d 1174 (C. D. Cal. 2001).

<sup>22</sup> *Compare McCreary Tire & Rubber Co. v. CEAT, Spa*, 501 F.2d 1032 (3rd Cir. 1974); *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (D. Cal. 1977). See also *Borden, Inc. v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822 (2d Cir. 1990); *James Assoc. (USA Ltd.) v. Anhui Machinery Equipment Import & Export Corp.*, 171 F. Supp.2d 1146 (D. Colo. 2001).

<sup>23</sup> *Id.*

<sup>24</sup> See ICDR Rule 21, for example. The UNCITRAL Model Law similarly provides in Article 17 that provisional remedies may take the form of interim "awards."

<sup>25</sup> See n. 12 *supra*.

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