

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

## **Applications for Interim Measures**

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## **Applications for Interim Measures**



## Applications for Interim Measures

### *Introduction*

This Guideline sets out the current best practice in international commercial arbitration in relation to the arbitrators' power to grant interim measures. It provides guidance on:

- i. interim measures in general (Articles 1 to 6);
- ii. *ex parte* applications (Article 7); and
- iii. emergency arbitrators (Article 8).

### *Preamble*

1. Historically, the power to grant interim measures in international arbitration was solely reserved to national courts. Today, many countries have modified their national arbitration laws to expressly recognise that courts and arbitrators possess concurrent jurisdiction to grant these types of measures.<sup>1</sup> Additionally, many arbitral institutions have also revised their rules to expressly give arbitrators power to grant interim measures. Both national laws and arbitration rules generally give broad powers to arbitrators to grant any measure that they consider necessary and/or appropriate.
2. One of the main challenges for arbitrators considering applications for interim measures is that the national laws and arbitration rules rarely provide any procedural rules or guidance on how an application for interim measures should be dealt with or what measures can be granted and in what circumstances. This is intended to give arbitrators a wide discretion as to the procedures they may adopt and the types of interim relief they may grant to suit the particular circumstances of each arbitration. When considering how to exercise this discretion, arbitrators should bear in mind that they are not bound to apply the procedures and principles developed in the national courts as these may not be relevant or suitable for arbitration. An alternative source of guidance may be found in arbitration practice sources developed by the international

arbitration community. These include scholarly commentaries, opinions, awards and orders.<sup>2</sup>

3. Applications for interim measures typically, but not exclusively, arise at the first procedural hearing attended by all the parties (and their representatives). Sometimes an application by one party in the absence of the other party (an *ex parte* application) may be required mainly because of the nature of the relief sought.
4. Additionally, the matter may be so urgent that a party needs to make an application for relief before an arbitral tribunal has been properly constituted. To cater for this situation some institutions have incorporated procedural provisions that enable a party to ask the institution to appoint an ‘emergency arbitrator’ to hear an emergency application for relief pending the formation of an arbitral tribunal.<sup>3</sup> Emergency arbitrators have substantially the same powers and responsibilities in relation to the grant of interim measures as the regular tribunal, even though they are appointed solely for the emergency application. Accordingly, all references to arbitrators’ powers or responsibilities in this Guideline relating to interim measures are equally applicable to emergency arbitrators and arbitral tribunals.

#### Article 1 — General principles

1. Arbitrators should deal with applications for interim measures promptly and expeditiously.
2. Arbitrators faced with an application for interim measures should establish whether they have both the jurisdiction to hear the dispute and the power to order the interim measure being applied for under the arbitration agreement, including any applicable rules and the law of the place of arbitration (*lex arbitri*).
3. Where the arbitration agreement, including any applicable rules and the *lex arbitri* contain provisions for granting interim measures,

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**arbitrators should adhere to the stipulated requirements and limitations, if any.**

- 4. Although the circumstances may warrant a preliminary *ex parte* decision, before reaching a final decision on an application for an interim measure, arbitrators should ensure that both parties have been given a fair opportunity to present their case.**

*Commentary on Article 1*

*Paragraph 1*

*Applications for interim measures*

- a) Interim measures usually arise out of an application by one of the parties.<sup>4</sup> An application may be made orally during a hearing or at any other time in writing supported by evidence. The application should provide sufficient detail to enable the other parties to respond to it and for the arbitrators to make their decision. More specifically, the application should identify (1) the right(s) to be protected; (2) the nature of the measure(s) that the party is seeking; and (3) the circumstances that require such a measure.<sup>5</sup> If the application does not specify all of these elements, arbitrators should consider requesting further information before deciding on the application.

*Priority to be given to applications for interim measures*

- b) Arbitrators should give priority to applications for interim measures without disturbing the smooth progress of the arbitration. They should deal with the application as quickly as possible and in a manner that will, if possible, avoid adding costs and unnecessary delay to the proceedings. Sometimes applications for interim measures may be used as a delaying tactic or to harass the opposing party. In such cases, if the arbitrators consider that an application for interim measures is not made in good faith, they should reject it promptly.

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*Paragraph 2*

*Express powers*

- a) An important pre-condition for the granting of interim measures is the establishment of the arbitrators' power to grant the requested measure. Even though it is unusual for the arbitration agreement itself to include an express provision for granting interim measures, it is common for national laws and arbitration rules to include general powers to grant interim measures.

*Implied powers*

- b) If there are no express provisions allowing the arbitrators to grant interim measures and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*, arbitrators may conclude that they have an implied power to do so.<sup>6</sup>

*Paragraph 3*

*Applicable law(s)*

- a) Arbitrators should take care to establish whether any aspects of the interim measures being requested are subject to any requirements or limitations imposed by law. They need to consider (1) the criteria for granting interim measures, (2) the types of interim measures that can be granted and (3) the procedure for granting such measures pursuant to the applicable law(s).<sup>7</sup>
- b) Where there are specific requirements concerning the arbitrators' powers to grant interim measures and/or the procedure to be followed, these provisions should be complied with.
- c) In the absence of any provisions in the applicable law(s), arbitrators may consider it appropriate to apply standards developed in international arbitration practice (see Article 2 below).

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- d) Arbitrators may also consider whether the interim measure requested may contravene the law of the place where the measure is likely to be performed or enforced (*lex loci executionis*).<sup>8</sup> In those circumstances the local courts may refuse to enforce the measure.<sup>9</sup> Arbitrators should therefore consider if there is an alternative relief that can be granted that will not contravene that law.

*Paragraph 4*

*Fair opportunity to present their case*

- a) Interim measures are usually granted on an *inter partes* basis, i.e. after both the applicant and the opposing party are heard.<sup>10</sup> A party against whom a measure is sought should be notified of the application for the interim measure at the earliest opportunity, provided with copies of all evidence and/or documents relied on by the applicant, and given a fair opportunity to respond before any final decision on the application is made.
- b) In the case of *ex parte* applications, the granting of an interim measure should be followed by submissions so that the parties have a fair and equal opportunity to present their case (see Article 7 below).

**Article 2 — Criteria for granting interim measures**

- 1. When deciding whether to grant interim measures arbitrators should examine all of the following criteria:**
- i) *prima facie* establishment of jurisdiction;**
  - ii) *prima facie* establishment of case on the merits;**
  - iii) a risk of harm which is not adequately reparable by an award of damages if the measure is denied; and**
  - iv) proportionality.**
- 2. Depending on the nature of the interim measure requested and the particular circumstances of the case, some of the criteria may not**

**apply or may be relaxed.**

- 3. When assessing the criteria, arbitrators should take great care not to prejudge or predetermine the merits of the case itself.**
- 4. Arbitrators may require a party applying for an interim measure to provide security for damages as a condition of granting an interim measure.**

*Commentary on Article 2*

*Paragraph 1*

*Criteria for granting interim measures*

Arbitrators should follow a structured analysis that examines the criteria set out in Article 2, paragraph 1. If the applicant fails under any one element, arbitrators should refuse to grant the interim measure save for the requirement in item 3 (see Article 2, paragraph 2 below).

*i) Prima facie establishment of jurisdiction*

- a) Before considering whether to grant an interim measure, arbitrators should determine whether they have *prima facie* jurisdiction over the dispute. This includes an examination of the evidence as to whether there is a valid arbitration agreement. This is usually satisfied by clear evidence of the existence of a written agreement to arbitrate between the parties.<sup>11</sup>
- b) Even if there is a pending jurisdictional challenge to the arbitrators' authority, which they have not ruled on, arbitrators may still consider an application for interim measures and issue such measures, so long as they are satisfied that there is *prima facie* basis to assert jurisdiction.<sup>12</sup> If arbitrators consider there is need for an interim measure, for example, to protect the *status quo* and/or to preserve evidence, then they do not have to delay their decision on the interim measures application pending consideration of the full jurisdictional challenge. The reason for this is

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that the decision as to whether to order an interim measure is not a final determination on jurisdiction.<sup>13</sup>

- c) If, however, arbitrators consider that there is little or no chance that they will have jurisdiction, they should first consider the jurisdictional challenge before dealing with the application for interim measures.

*ii) Prima facie establishment of case on the merits*

Arbitrators considering an application for interim measures should be satisfied on the information before them that the applicant has a reasonably arguable case.<sup>14</sup> This means that arbitrators should be satisfied on a very preliminary review of the applicant's case that it has a probability of succeeding on the merits of its claim; however arbitrators should not prejudge the merits of the case (see Article 2, paragraph 3 below).

*iii) A risk of harm which is not adequately  
reparable by an award of damages*

Arbitrators need to be satisfied that the party applying for an interim measure is likely to suffer harm if the measure is not granted. They do not need to be satisfied that the harm will definitely occur, rather they need to be satisfied that there is a risk that the harm is likely to occur. If the harm can be adequately compensated for by an award of monetary damages (that is likely to be honoured) it may not be appropriate to grant the interim measure.<sup>15</sup> Arbitrators should therefore determine whether a given harm can be sufficiently and adequately compensated through damages on a case-by-case basis. The test to be applied to determine the level of harm that justifies an interim measure varies depending on the type of measure sought and the circumstances of the case.<sup>16</sup>

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*iv) Proportionality*

- a) Arbitrators need also to consider any harm likely to be caused to the opposing party if they grant the interim measure. Any harm caused by granting the measure should be weighed against the likely harm to the applicant if the measure is not granted. They should consider whether the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief or vice versa.
- b) Arbitrators may need to consider the relative financial position of the parties to ensure that a party will not be substantially disadvantaged if the interim measure is granted such that the arbitration is abandoned. In this situation, the likely financial hardship to be caused to both parties should be carefully weighed and considered.

*Paragraph 2*

*Specific requirements for certain types of interim measures*

While the requirements detailed in Article 2, paragraph 1 should all be considered, their precise application will depend to a great extent on the facts of the case and the type of interim measure which is sought. For example, requests for measures to preserve evidence may not need to satisfy the requirements for irreparable or serious harm (unless the preservation of evidence is costly or requires unusual efforts). In addition, when considering applications for security for costs, arbitrators should take into account their specific requirements.<sup>17</sup>

*Paragraph 3*

*No prejudgment of the case*

- a) When deciding applications for interim measures, arbitrators should be careful not to prejudge or predetermine the dispute itself. They should not finally decide any issue in the dispute based on the evidence and

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argument in support of, or in opposition to, an application for interim measures. This also means that arbitrators should keep an open mind when hearing later submissions and evidence. Where arbitrators consider that the interim measure cannot be granted without making a decision on the merits of the case as a whole, they may either refrain from granting such a measure<sup>18</sup> or proceed to an accelerated hearing on the merits.

- b) Arbitrators should emphasise to the parties that, in reaching their decision on an application for interim measures, they have not prejudged or fully decided any issue in the dispute. Failing to do so may result in later challenges to the arbitrators' appointment on the basis of lack of impartiality.

### *Paragraph 4*

#### *Security for damages*

- a) Arbitrators may consider it appropriate to make the granting of interim measures conditional upon the applicant providing security for any damages that may be suffered by the opposing party as a consequence of the measure being granted. Some national arbitration laws and some arbitration rules expressly provide for such a condition.<sup>19</sup> Even without an express stipulation, it is common practice in international arbitration to attach conditions to the grant of interim measures to protect the interests of the opposing party in case the measure or measures turn out to have been unnecessary or inappropriate.
- b) In practice, the opposing party will usually ask the arbitrators to require the applicant to provide security for any damage that may be caused by an interim measure. However, arbitrators may order security for damages on their own motion, for example, where an inexperienced party is involved and where the requested measure has the potential to cause damage to the opposing party.

- c) Arbitrators should consider factors such as (1) the actual expense to be incurred by the opposing party in complying with the measure; (2) the potential damage to the opposing party if the measure is subsequently found to have been unnecessary or inappropriate; and (3) the financial capacity of the applicant to provide the security. They should be wary of not stifling a meritorious application by an excessive order for security.
- d) Arbitrators have the discretion to decide on the amount of any security and the manner in which it is to be provided (e.g., bank guarantee, cash, cheque deposit, parent company guarantee, bond, payments into escrow account, liens on property, deposit with an independent stakeholder). The amount should cover any actual expenses incurred and damages likely to be suffered by the opposing party. Arbitrators should be wary of requiring security to be provided by taking possession of the opposing party's stock-in-trade or tools of trade as this could prevent that party from carrying on its lawful business.

**Article 3 — Limitations on the power to grant interim measures**

- 1. Arbitrators cannot grant interim measures requiring actions by third parties.**
- 2. Arbitrators do not have the power to directly enforce interim measures they may grant.**
- 3. Arbitrators cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*.**

*Commentary on Article 3*

*Paragraph 1*

*Interim measures and third parties*

Arbitrators' authority derives from the arbitration agreement and, as a result, their powers do not extend beyond the parties to the arbitration.

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Arbitrators therefore cannot grant interim measures that are binding on third parties.<sup>20</sup> However, arbitrators can require a party to the arbitration to take steps in relation to a third party.<sup>21</sup> For example, a parent company can be required to direct its subsidiary to act in a particular manner. Nonetheless, arbitrators do not have power to order the attachment of assets which belong to, or are under control of, a third party.

#### *Paragraph 2*

##### *Interim measures and national courts*

Arbitrators lack coercive powers to enforce their decisions on interim measures. In most cases where enforcement is necessary, this has to be done through national courts. There is no general consensus as to whether arbitrators' decision granting interim measures should be issued in the form of a procedural order or an award capable of being enforced under the New York Convention. Some national courts consider that while an interim measure is only temporary in nature, it is, however, final for the purposes of enforcement.<sup>22</sup> Arbitrators should bear in mind that any state which has adopted Articles 17H and 17I of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) will have a regime for recognition and enforcement of interim measures issued in the form of an interim award.<sup>23</sup>

#### *Paragraph 3*

##### *Penalties for non-compliance with measures ordered*

- a) Arbitrators cannot impose penal sanctions or punitive damages for non-compliance with a decision ordering an interim measure unless the parties' agreement, including the arbitration rules and/or the *lex arbitri* confer such a power on them.<sup>24</sup>

- b) However, depending on the type of measure, arbitrators may impose different sanctions to promote compliance, including, among other things, the drawing of adverse inferences and taking into account the conduct of the recalcitrant party when allocating the costs of the arbitration.<sup>25</sup>

**Article 4 — Denying an application for interim measures**

- 1. In addition to the limitations on the arbitrators' powers detailed in Article 3, arbitrators may decline an application for an interim measure in any of the following situations:**
  - i) the measure sought is incapable of being carried out;**
  - ii) the measure sought is incapable of preventing the alleged harm;**
  - iii) the measure sought is tantamount to final relief; and/or**
  - iv) the measure sought is applied for late and without good reason for the delay.**
- 2. Arbitrators may deny a request for an interim measure where the opposing party declares, or undertakes, in good faith that it will take steps to render the interim measure unnecessary.**

*Commentary on Article 4*

*Paragraph 1*

When considering an application for interim measures, arbitrators should take into account the factors listed in Article 4, paragraph 1 and, if any of them apply, the request for the interim measure(s) may be denied.

*i) Interim measures incapable of being carried out*

Arbitrators should consider whether the interim measure is capable of being carried out.<sup>26</sup> Otherwise, it may be a waste of time and money to grant such a measure.

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*ii) Interim measures incapable of preventing the alleged harm*

Arbitrators should only grant measures that are capable of preventing the alleged harm. If the specific measures applied for are not capable of preventing the alleged harm, arbitrators may, on their own motion, grant a different and effective type of interim measure that is more appropriate. In doing so arbitrators should be very careful not to go beyond what has been requested.

*iii) Interim measures tantamount to final relief*

Arbitrators should consider denying an application that is, in fact, a disguised application for a final award on the merits. For example, where the subject matter of the dispute between the parties relates to the storage charges of a warehouse where goods are kept and the main claim requests a transfer of such goods to a different place, an interim measure having the same effect (i.e. transfer of the goods), will be tantamount to a final relief because it will involve a decision on one of the main claims.<sup>27</sup>

*iv) Timing of applications for interim measures*

Arbitrators should consider denying applications for interim measures which are made late and without good reason being provided for the delay. Arbitrators need to be satisfied that the applicant has made the application promptly, i.e. within a reasonable time of becoming aware of the necessary facts.<sup>28</sup>

*Paragraph 2*

*Undertaking in good faith*

Instead of granting interim measures, arbitrators may decide it is more appropriate to accept an undertaking made in good faith by the party against whom the measures are sought. In such circumstances,

arbitrators may decide on the application solely based on the undertaking offered by the opposing party without considering whether or not the requirements for an interim measure have in fact been satisfied.

**Article 5 — Types of interim measures**

- 1. As a general rule, arbitrators may grant any measure that they deem necessary and appropriate in the circumstances of the case.**
- 2. Unless otherwise provided in the applicable national law and the applicable arbitration rules,<sup>29</sup> arbitrators may grant any or all measures which fall within, but are not limited to, one of the following categories:**
  - i) measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;**
  - ii) measures for maintaining or restoring the *status quo*;**
  - iii) measures to provide security for costs;<sup>30</sup> and**
  - iv) measures for interim payments.**

*Commentary on Article 5*

*Paragraph 1*

Arbitrators can construe the term ‘interim measures’ as broadly as possible in the particular circumstances. It is important to note that the measures arbitrators can grant are not necessarily limited to measures available to state courts at the place of arbitration. However, arbitrators should look at the likely place of performance and align the relief granted with the relevant laws in that jurisdiction to ensure that the interim measure can be successfully enforced (see Article 1, paragraph 3 above).

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*Paragraph 2*

In practice, the measures granted by arbitrators should aim to prevent damage to, or loss of, the subject matter of the dispute. Such measures should also facilitate the conduct of the arbitral proceedings and/or the enforcement of any final award.

*i) Measures to preserve evidence and/or to detain property*

- a) Provided that the parties have not agreed to the contrary, arbitrators' powers are usually extensive, covering all forms of property, including shares and identifiable funds of money. Arbitrators have the powers to grant measures (1) for the inspection, preservation, custody or detention of evidence including property which is the subject matter of the dispute and (2) for samples and photographs to be taken from, or any observation be made of property, and/or to make the property available for expert testing.
- b) Applications for the preservation or detention of property have the potential to cause the opposing party a greater degree of harm than an application for inspection of the property. This is because preservation or detention of property may have serious and adverse consequences for a party that needs to use or sell the property. Consequently, arbitrators should take particular care to avoid any injustice being caused in such cases.

*ii) Measures to maintain or restore the status quo*

Arbitrators may grant interim measures which require a party to take, or refrain from taking, specified actions. For example, arbitrators may order a party to continue the performance of contractual obligations, such as carrying out construction works, to continue shipping products or providing intellectual property. If perishable goods are the subject of a dispute, arbitrators may order that a party sells them and keeps the

proceeds of sale in an escrow account until a further decision or a final award is issued.

*iii) Measures to provide security for costs*

In international arbitration, where the costs may be considerable,<sup>31</sup> a party may be entitled to a level of costs protection from frivolous claims or claims brought by insolvent parties. Security for costs is a specific type of interim measure which requires the claiming party to provide security for the whole or part of the party's anticipated costs<sup>32</sup> where there is a risk that they will be unable to pay those costs if their claim fails. This particular interim measure raises complex issues which are dealt with in the *Guideline on Applications for Security for Costs*.<sup>33</sup>

*iv) Measures for interim payments*

Arbitrators may grant measures for interim payments where it is considered necessary to enable the applicant to remain in business or to facilitate the execution of a particular project.<sup>34</sup> Before granting such a measure, they should be satisfied that the receiving party is entitled to the amount of the payment. In addition, when making their final award, arbitrators need to take account of any interim payments that have been made.

**Article 6 — Form of interim measures**

- 1. Unless otherwise specified in the *lex arbitri* and the applicable arbitration rules, arbitrators should grant interim measures in the form of a reasoned procedural order.**
- 2. Depending on the circumstances of the case, however, arbitrators may consider it appropriate to grant interim measures in the form of an interim award.**
- 3. Given the temporary nature of interim measures, if presented with**

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**new evidence justifying a change to interim measures previously granted, arbitrators may modify, suspend or terminate them.**

*Commentary on Article 6*

Arbitrators should take into account specific provisions as to the form of interim measures in any relevant arbitration rules as well as any mandatory provisions of the *lex arbitri*. However, the majority of arbitration laws and arbitration rules do not specify the form in which an interim measure should be granted in which case it is for the arbitrators to decide the appropriate course.<sup>35</sup>

*Paragraph 1*

*Procedural order*

- a) It is generally accepted that where an interim measure is needed as a matter of urgency, the quickest and simplest way of providing the relief is to issue a procedural order.<sup>36</sup> Procedural orders generally do not need to comply with any formalities.<sup>37</sup> However, it is advisable to expressly state that they may be varied upon further consideration of the application or if there is a change of circumstances that justifies the previous order being modified, suspended or terminated.
- b) Time permitting, it is good practice to include in any order reasons for granting or rejecting an application for interim measures to avoid the decision being perceived as arbitrary and to provide guidance to any enforcing authority, unless the parties agree that they do not need a reasoned decision.

*Paragraph 2*

*Matters to consider when deciding the form of the decision*

- a) Arbitrators should evaluate the advantages and disadvantages of the different forms of order including a procedural order and an interim

award. Matters arbitrators should take into account when deciding on the form for interim measures include (1) any potential savings of time and costs, (2) how best to achieve the objective for which the interim measure is applied, (3) the parties' specific requests and comments, (4) the likelihood of compliance with the measure, (5) any requirements imposed in the applicable arbitration rules and/or the *lex arbitri* and (6) whether the courts in the place where the interim measures will be implemented recognise and enforce, or do not recognise and enforce, a particular form of arbitral decisions.

- b) Where a request for an interim measure has been refused, arbitrators should issue their decision in the form of an order.<sup>38</sup>
- c) Finally, some institutional rules require that all draft awards be reviewed by the institution before they are issued and this may cause considerable delay.<sup>39</sup> Procedural orders do not require such scrutiny and can be issued more promptly.
- d) Arbitrators should consider granting interim measures in the form of an interim award if there are concerns regarding compliance because it is generally accepted that this has a strong positive effect on persuading the party to comply.<sup>40</sup> Describing their decision as an 'interim award' reflects the fact that the award is provisional in nature and does not finally decide any issues between the parties.<sup>41</sup>
- e) While the term 'award' generally has no clear definition, the national laws of certain jurisdictions provide that an award is final as to its decisions and interim measures can be granted only by way of procedural orders.<sup>42</sup> Therefore arbitrators should always check the applicable *lex arbitri* and/or arbitration rules and make sure that they have powers to grant interim measures in the form of an award (see Article 3, paragraph 2 above).

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*Paragraph 3*

*Modification, suspension or termination of interim measures*

- a) Where an interim measure is granted, arbitrators may subsequently modify, suspend or terminate the measure if presented with new evidence or argument that justifies the change. Ordinarily, arbitrators will do so upon request of one of the parties. In exceptional cases, for example, where the measure has been granted on an erroneous or fraudulent basis, arbitrators may do so on their own motion. When modifying an order on their own motion arbitrators need to consider carefully what change needs to be made and notify the parties of any changes.<sup>43</sup>
- b) It is common practice, when granting interim measures, for arbitrators to expressly require any party to give prompt disclosure of any material change in the circumstances which formed the basis for granting the interim measures. Arbitrators should consider emphasising the temporal character of any interim measures by including wording in their decision such as ‘during the course of the proceedings’ or ‘until a further decision or Final Award on the merits’.<sup>44</sup>

**Article 7 — *Ex parte* applications**

- 1. Interim measures can be granted either *ex parte* or after receiving submissions from both parties.**
- 2. Interim measures granted *ex parte* are subject to further review pending an *inter partes* hearing.**

*Commentary on Article 7*

*Paragraph 1*

*Ex parte applications for interim measures*

- a) The majority of national laws and arbitration rules are silent as to whether an application for interim measures needs to be notified to all

the parties involved in the arbitration and whether arbitrators can grant such measures *ex parte*. What the laws and rules usually provide is that both parties should be given a fair and equal opportunity to present their case (see Article 1, paragraph 4 above), which has been interpreted as precluding *ex parte* applications.

- b) However, in cases of extreme urgency or where an element of surprise or confidentiality is required to make the order effective, it may be appropriate for arbitrators to grant an interim measure on an *ex parte* basis, i.e. without notice to the party against whom the measure is sought and hearing initially submissions only from the party making the application,<sup>45</sup> so long as it is not prohibited under the arbitration agreement, including any arbitration rules and the *lex arbitri*.<sup>46</sup> In addition, the appropriate safeguards should be put in place to protect the interests of the party that is not heard, including making the necessary arrangements for that party (1) to be notified of any order made, (2) to be given copies of any evidence and documents submitted in connection with the application and (3) to be given a fair opportunity to be heard as soon thereafter as is reasonably practicable.<sup>47</sup> Finally, when faced with an *ex parte* application, arbitrators should also bear in mind that they are hearing one side only, and even though they will make a provisional order pending an *inter partes* hearing, it is appropriate to test the applicant's case and submissions more rigorously than might be normal, and to seek full and frank disclosure of points adverse to the applicant.<sup>48</sup>
- c) Arbitrators should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and additionally (2) that the disclosure of the application to the other party may well frustrate the purpose for which the relief is sought and render it, if granted, ineffective. For example, if an application for an interim measure were made to restrain assets being moved, the arbitrators would need to be satisfied that there was a genuine risk that the opposing party,

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upon notice of the application, would move the assets in order to defeat the purpose of any decision.

*Paragraph 2*

When granting interim measures on an *ex parte* basis, arbitrators should emphasise that any such measure is provisional in that it is effective only for a limited time and pending the hearing of all parties. This stresses the temporary nature of any *ex parte* measure granted and serves to remind the parties that arbitrators may decide that it is appropriate to modify, suspend or terminate any provisional measure once they have heard from the opposing party at an *inter partes* hearing (see Article 6, paragraph 3 above).

**Article 8 — Emergency arbitrators**

- 1. If the parties' arbitration agreement, including any arbitration rules, so permits, applications for interim measures can be granted by an emergency arbitrator before a regular tribunal has been formed.**
- 2. Once a regular tribunal has been formed, all requests for additional interim measures should be heard by that tribunal.**

*Commentary on Article 8*

*Paragraph 1*

*Emergency arbitrator*

- a) The need for emergency interim measures often arises simultaneously with the dispute but before any arbitrators have been appointed. In practice, it can take weeks or months to appoint a regular arbitral tribunal. If a party needs emergency relief during this period, it can only apply to the local courts for relief, unless the arbitration agreement between the parties incorporates provisions for the appointment of an

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emergency arbitrator.<sup>49</sup>

- b) An emergency arbitrator is typically a neutral appointed by an arbitral institution specifically to deal with an application for urgent interim relief which cannot wait for the constitution of the arbitral tribunal. The power of an emergency arbitrator is limited to decisions on interim measures and does not extend to any decisions on the merits of the case. Moreover, the decision of an emergency arbitrator does not bind the regular arbitrators and they may modify, suspend or terminate any order or interim award granted by the emergency arbitrator.

*Urgency*

- c) An emergency arbitrator should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and (2) that immediate or urgent measures are required which cannot wait for the constitution of the arbitral tribunal; otherwise, the emergency arbitrator may reject the application solely on the basis that it can wait.<sup>50</sup>

*Ex parte applications for emergency relief generally not allowed*

- d) Most arbitration rules containing provisions for emergency arbitrators explicitly provide that both parties are to be notified of any application for emergency relief and given an opportunity to be heard and make submissions in relation to such an application.<sup>51</sup>

*Paragraph 2*

- a) Arbitration rules typically provide that emergency arbitrators become *functus officio* once a regular tribunal has been composed and that once they have issued a decision on the applications for emergency relief, they cannot act as arbitrators in the subsequent arbitral proceedings, unless the parties agree otherwise.<sup>52</sup>

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- b) If the arbitral tribunal is constituted while the emergency arbitration proceedings are pending, the emergency arbitrator needs to consider whether they can still make a decision. In certain rules the emergency arbitrators may make their decision even if an arbitral tribunal has been constituted in the meantime,<sup>53</sup> whereas in other rules, the matter should be transferred to the arbitral tribunal because once constituted all requests for interim measure should be addressed to it.<sup>54</sup>

*Conclusion*

1. There is little controversy about the authority of arbitrators to grant interim measures. They are generally given very broad powers to grant any interim measure they consider necessary and/or appropriate in the circumstances of the case before them. Nevertheless, numerous issues arise concerning the nature of the relief arbitrators may grant as well as its form and effectiveness. Also, different laws may govern different aspects of the process for granting interim measures and therefore great care should be taken to consider the appropriate laws.
2. With this in mind, the present Guideline attempts to highlight best practice so as to assist arbitrators in dealing with applications for interim measures in an effective and efficient manner.

**NOTE**

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to [psc@ciarb.org](mailto:psc@ciarb.org)

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*Endnotes*

1. For a recent detailed overview of the availability of interim measures in support of arbitration in 43 different jurisdictions worldwide, see Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris 2014). See also, IBA Arbitration Committee, Arbitration—Country Guides, which give further information on the law and practice of arbitration in more than 50 countries, available at <<http://www.ibanet.org>>.
2. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), p. 172; José Maria Abascal Zamora, ‘The Art of Interim Measures’ in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), pp. 753-755; and John Beechey and Gareth Kenny, ‘How to Control the Impact of Time Running Between the Occurrence of the Damage and its Full Compensation’ in Filip de Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (ICC 2008), pp. 109-110.
3. Such institutions include, *inter alia*, the Chartered Institute of Arbitrators (CI Arb), the International Centre for Dispute Resolution (ICDR/AAA), the Australian Centre for International Commercial Arbitration (ACICA), the International Chamber of Commerce (ICC), the Stockholm Centre of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Swiss Chambers’ Arbitration Institution (Swiss), the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA). Certain arbitral institutions use procedures other than emergency arbitrator, which are analogous in their nature, see, for example, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI),

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emergency arbitrator functions are performed by the President of the Court.

4. See e.g., Article 26(1) UNCITRAL Rules (2010/2013), Article 17 UNCITRAL Model Law 1985 (with amendments as adopted in 2006), Article 25(1) LCIA Rules (2014) and Article 23 ICC Rules (2012). Arbitrators should be wary of granting interim measures, on their own motion, even though exceptional circumstances may apply. They should only grant provisional relief without the previous request of one of the parties if any rules governing the arbitration expressly permit it and it is not contrary to the law of the place of the arbitration.
5. David D. Caron and Lee M. Caplan, 'Chapter 17: Interim Measures', *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, Oxford University Press 2013), p. 517.
6. See ICC Case No. 7589 and ICC Case No. 7210 in Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), p. 2454 (where the arbitral tribunals assumed they had the power to grant interim measures even though the ICC Rules 1988 did not expressly provide for such a power). See also Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pp. 593-594.
7. Born, n 6, pp. 2457 and 2463 ("Relatively little attention has been devoted to the question of what law applies to determine an arbitral tribunal's power to grant provisional measures in an international arbitration. Preliminarily, the law governing the tribunal's power to grant provisional measures is to be distinguished from the law governing the standards applicable to a grant of provisional measures.") See generally Christopher Boog, 'The Laws Governing Interim Measures' in Franco Ferrari and Stephan Kröll (eds),

- Conflict of Laws in International Arbitration* (Sellier 2011), pp. 409-458.
8. Boog, n 7, p. 432.
  9. Beechey and Kenny, n 2, p. 116. See, for example, Article 17I UNCITRAL Mode Law.
  10. See Article 25(1) LCIA Rules (2014) which expressly states that “the arbitral tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application [...]”
  11. See generally CIArb Guideline on Jurisdictional Challenges.
  12. See e.g., ICC Case 12361 (2003), (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 61.
  13. Born, n 6, pp. 2481-2483. This was the approach adopted in a number of arbitral cases, e.g., *Biwater Gauff (Tanzania) Ltd v United Repub. Of Tanzania*, Procedural Order No. 1 (ICSID Case No. ARB/05/22 of 31 March 2006) at para. 70 (“It is also clear...that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction.”) See also Ibrahim F. I. Shihata and Antonio R. Parra, ‘The Experience of the International Centre for Settlement of Investment Disputes’, (1999) 14 ICSID Review 326.
  14. ICC Interlocutory Award 10596 (2000) (unpublished) and Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 in *Yesilirmak*, n 2, p. 180. See also, Julian D. M. Lew, ‘Commentary on Interim and Conservatory Measures in ICC Arbitration Cases’ (2000) 11 ICC Bulletin, p. 27.
  15. *Yesilirmak*, n 2, p. 180; Caron and Caplan, n 5, p. 537.
  16. Certain arbitral tribunals require an “irreparable harm”, see Born, n 6, p. 2470 citing ICSID and Iran-United States Claims Tribunal

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- awards. However the establishment of such a high barrier is not widely accepted in international commercial arbitration where tribunals only require a showing of a grave, serious or substantial harm. See e.g., Interlocutory Award in ICC Case No. 10596 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXX (Kluwer Law International 2005); Interim Award in ICC Case No. 8786 (2000) and Interim Award in ICC Case No. 8786 in (1990) 11(1) ICC Bulletin.
17. See CIArb Guideline on Applications for Security for Costs.
  18. See e.g., ICC Case No. 6632, ICC Second Partial Award 8113 of 1995 and ICC First Partial Award 8540 of 1999 in Yesilirmak, n 2, pp. 183-184.
  19. See e.g., Article 28(1) of the ICC Rules (2012), Article 24 ICDR/AAA Rules (2014), Article 23(6) HKIAC Rules (2013), Article 25 (1) LCIA Rules (2014), Article 26(6) UNCITRAL Rules (2010/2013).
  20. See ICC Case 10062 (2000) in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 31 (“[a]ny award made by an arbitral tribunal, be it final or interim, may only address the parties of the arbitration agreement and any award involving third persons is a domain strictly reserved to state courts and, may, consequently, not be awarded by this arbitral tribunal.”) See also, ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 78.
  21. Born, n 6, pp. 2445-2446.
  22. Amir Ghaffari and Emmylou Walters, ‘The Emergency Arbitrator: The Dawn of a New Age?’ (2014) 30(1) *Arbitration International*, pp. 159-163 and Guillaume Lemenez and Paul Quigley, ‘The ICDR’s Emergency Arbitrator Procedure in Action: Part II’ (2008)

- Dispute Resolution Journal, p. 3. But see the Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, UN Doc A/CN.9/460, para. 121 (“The prevailing view, confirmed...by case law in some States, appears to be that the [New York] Convention does not apply to interim awards.”)
23. See Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at <<http://www.uncitral.org/>>. However, there is no case law reported under this Section of the UNCITRAL Model Law, see UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 93.
  24. Rufus Rhoades and others, *Practitioner’s Handbook on International Arbitration and Mediation* (2nd ed, Juris 2007), p. 228. This is namely the case of France, Belgium and the Netherlands.
  25. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
  26. See e.g., ICC Case No. 7210 (1994) and ICC Case No. 5835 (1992) in Yesilirmak, n 2, pp. 185-186. See also, *Burlington Resources Inc. et al. v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador* (ICSID Case No ARB/08/05), Procedural Order 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009.
  27. Yesilirmak, n 2, pp. 183-185.
  28. Yesilirmak, n 2, pp. 185-186 citing a case where the claimant did not do anything for more than two years and then requested an interim measure.
  29. English Arbitration Act 1996 is unusual in the sense that arbitrator’s powers to grant interim measure depend to a great extent on the parties’ agreement. The Act provides that the arbitrator may only

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grant certain interim measure without the express agreement of the parties. These include measures for the preservation, detention, inspection or sampling of “property which is the subject matter of the dispute” and the preservation of evidence. For any other type of measure parties’ agreement is required. Section 38 Arbitration Act 1996. In the case of both UNCITRAL Model Law and UNCITRAL Arbitration Rules, the relevant provisions provide a generic list which groups the interim measures into broad categories describing their functions. A more detailed list has been provided by the UNCITRAL Working Group, see Note by the Secretariat (30 January 2002), UN Doc. A/CN.9/WG.II/WP.119.

30. See CIArb Guideline on Applications for Security for Costs.
31. See CIArb Costs of International Arbitration Survey 2011.
32. For the purposes of security for costs, costs in arbitration should be understood as the legal costs of the parties as well as the arbitrators’ fees and expenses, fees and expenses of the arbitral institutional and other costs (non-legal) of the parties. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley 2014), p. 199.
33. See CIArb Guideline on Applications for Security for Costs.
34. See e.g., ICC Case No. 7544 (1996), (2000) 11(1) ICC Bulletin, p. 56.
35. See e.g., Article 24(2) ICDR/AAA Rules (2014) (“interim order or award”), Article 32 SCC Rules (2012) (“an order or an award”), Article 30(1) SIAC Rules (2016) (“an order or an Award”) and Article 23(3) HKIAC Rules (2013) (“an order or an award or in another form”) .
36. See e.g., ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79 (explaining that the ICC Commission

- reached a conclusion that “decisions on requests to issue an interim measure should not be taken in the form of arbitral awards” due to the related practical problems with recognition and enforcement of awards containing an interim award under the New York Convention.)
37. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
  38. ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79.
  39. This is the notably the case of the ICC where the Court must review all draft awards pursuant to Article 33 ICC Rules (2012).
  40. Melissa Magliana, ‘Commentary on the Swiss Rules: Article 26 Interim Measures of Protection’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (Kluwer Law International 2013), p. 526.
  41. See generally CIArb Guideline on Drafting Arbitral Awards Part I—General. See also, UNCITRAL Report of the Working Group on Arbitration on the work of its thirty-sixth session, UN Doc. A/CN.9/508 (12 April 2002), para. 66 (“One suggestion was that the words “arbitral award” should be replaced by the words “partial or interim award”. In support to that proposal it was stated that the words “arbitral award” were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words “partial award”, since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measures.”)

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42. See e.g., Articles 12 and 19B Singapore International Arbitration Act 2012.
43. Christopher Boog, 'Interim Measures in International Arbitration' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 1363 and Marianne Roth, 'Interim Measures' (2012) *Journal of Dispute Resolution*, p. 431.
44. Kaj Hobér, 'Interim Measures by Arbitrators' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), p. 739.
45. UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-third session (22 September 2000), UN Doc. A/CN.9/WG.II/WP.110, para. 69 (“[...] such measures may be appropriate where an element of surprise is necessary, i.e. where it is possible that the affected party may try to preempt the measure by taking action to make the measure moot or unenforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued; [...]”)
46. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Seventh Session (25 September 2007), UN Doc. A/CN.9/641, para. 57 (“After discussion, the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15(1), the [UNCITRAL] Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders.”)
47. See e.g., Articles 17B and 17C of the UNCITRAL Model Law which set a specific regime for *ex parte* preliminary orders and

- Article 26(3) Swiss Rules (2012).
48. See e.g., Article 17F(2) UNCITRAL Model Law and UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-sixth session (12 April 2002), UN Doc. A/CN.9/508, para. 78.
  49. Emergency Arbitration Rules as an opt-out regime, i.e. they apply automatically to parties' arbitration agreement unless otherwise agreed by the parties. See Grant Hanessian, 'Emergency Arbitrators' in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd ed, Juris 2014), pp. 346-347.
  50. Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions 1 January 2010-31 December 2013, available at <<http://www.sccinstitute.com/>>
  51. See e.g., Article 1(5), Appendix V, ICC Rules (2012); para. 6, Schedule 1, SIAC Rules (2016); Article 3, Appendix II, SCC Rules (2012); Article 9B, para. 9.5 LCIA Rules (2014). See also, Bernd Ehle, 'Emergency Arbitration in Practice' in Christopher Muller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (Schulthess 2013), pp. 97-98. But see the Swiss Rules (2012) which allow the emergency arbitrator to order emergency relief ex parte pursuant to Article 43(1) which makes reference to Article 26(3). See generally, Christopher Boog and Bertrand Stoffel, 'Preliminary Orders and the Emergency Arbitrators: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances', Nathalie Voser (ed), *Ten Years of Swiss Rules of International Arbitration*, ASA Special Series No. 44 (JurisNet 2014), pp. 71-82.
  52. See e.g., Article 2(5), Appendix I CIArb Rules (2015); Article 6(5) ICDR/AAA Rules (2014); para. 6, Schedule 1 SIAC Rules (2016).
  53. See e.g., Article 13, Schedule 4 HKIAC Rules (2013); Article 2(2),

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- Annex V, ICC Rules (2012) and Article 43(7), Swiss Rules (2012).
54. See e.g., para.10, Schedule 1 SIAC Rules (2016) and Article 6(5) ICDR/AAA Rules (2014).