

Arbitration Proceedings II

International Commercial Arbitration and International Sales Law

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Schedule

International Arbitration

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29.11 Arbitration proceedings I

06.12 **Arbitration proceedings II**

13.12 Challenge, recognition and enforcement of an award

17.01 Specific types of arbitration

Interim measures

Aim: to preserve evidence, assets, or to maintain the status quo

- (a) the risk of irreparable harm if the measure is not granted;
 - (b) the harm to the requesting party if the order is not given must be greater than the harm to the other party if the order is given (the balance of convenience); and
 - (c) a reasonable chance of success on the merits (a prima facie case).
- ordered by the arbitral tribunal Art. 17A ML
 - ordered by a court Art. 9, 17J ML
 - whether in the form of an award or in another form Art. 17 (2) ML

Non-recognition of interim measures

- The same grounds as for the awards
- The requesting party has not complied with the decision regarding security
- The IM has been terminated or suspended
- The IM is incompatible with the powers conferred upon the court (but can be reformulated)

BUT: no review of the substance of the IM!

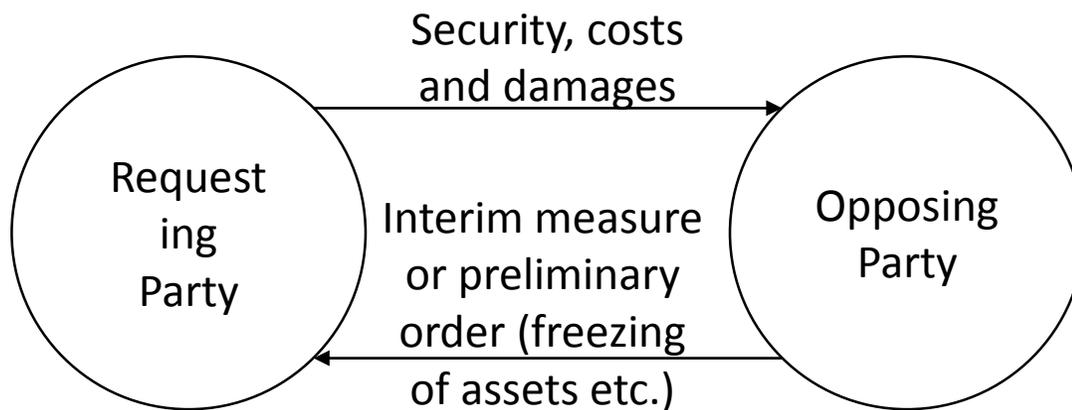
Preliminary orders (ex parte)

a prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure

Special provisions Art. 17C:

- after determination the tribunal notifies about its order
- the opposing party has an opportunity to present its case
- a preliminary order expires after 20 days from the date on which it was issued
- not an award, not subject to enforcement by a court

Security ≠ security for costs



Security for costs:

- the cost of Respondent of defending a claim, if he wins and Claimant cannot cover Respondent's costs
- can be granted in the form of an interim order

Confidentiality

Confidentiality obligations are defined by the law governing the AA. However, an agreement requiring confidentiality can be unenforceable due to the public policy reasons

IBA Rules: documents produced by a Party or non-Party in the arbitration shall be kept confidential by the AT and the other Parties, and shall be used only in connection with the arbitration (Art.3(13)).

Different approaches as to the implied confidentiality obligations: they exist (UK, Singapore), or they do not (Australia, USA)

Confidentiality under institutional rules

UNCITRAL AR

Art. 28 (3) Hearings shall be held in camera unless the parties agree otherwise.

Art. 34 (5) An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

ICC AR

Art. 22 (3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings ... and may take measures for protecting trade secrets and confidential information.

Art. 26 (3) Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.

Joinder and consolidation

Advantages:

- procedural economy,
- saving of costs,
- reducing the risk of inconsistent awards

Disadvantages:

- might be difficult to appoint arbitrators (*Dutco*)
- loss of confidentiality
- the costs of a particular party can increase
- delay in enforcement of the winning party's rights

Joinder and consolidation under institutional rules

ICC Rules: J: upon Request of an existing Party, the Parties shall agree

C: a) the parties have agreed to C; or

b) all of the claims in the arbitrations are made under the same AA; or

c) where the claims in the arbitrations are made under more than one AA, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the AAs to be compatible.

LCIA Rules: J: an existing Party and the Party to be joined agree

no C provisions

Interrelation of courts and ATs

ML: Art. 5 “Extent of court intervention”: In matters governed by this Law, no court shall intervene except where so provided in this Law.

1. appointment (Art. 11)
2. challenge and termination of the mandate of an arbitrator (Art. 13,14)
3. jurisdiction of the arbitral tribunal (Art. 16)
4. court assistance in taking evidence (Art. 27)
5. compatibility of arbitration agreement with court-ordered interim measures (Art. 8, 9, 17J)
6. R&E of interim measures (Art. 17H and Art. 17I)
7. R&E of awards (Art. 35, 36)
8. setting aside of an arbitral award (Art. 34)