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Arbitrators

**CIArb**

## **Guideline 1: Guidelines for Arbitrators on how to approach an application for Provisional or Interim Relief**

### **1. Introduction**

1.1 The English Arbitration Act 1996 s39 gave arbitrators a new power that they did not previously possess in English law. It allows arbitrators to order on a provisional basis any relief that they would have power to grant in a final award such as the payment of money or transfer of property and interim payments on account of the costs of the arbitration. We are not concerned here with directions in relation to the preservation or disclosure of evidence or other matters of procedure. Those issues are dealt with by Sections 34-38 and discussed in other guidelines. Section 39 also does not relate to the arbitrator's power, provided for by Section 47, to make awards on different issues, although the arbitrator may wish to use the power under that section to issue his or her decision in the form of an interim award.

1.2 The arbitrator may only grant provisional or interim relief if the parties have expressly agreed that the power should be available. Such agreement of the parties may be in the original arbitration agreement, the rules chosen by the parties or subsequent written agreement between the parties. In determining issues of provisional relief, arbitrators are not bound by court rules or by case law governing when a court will grant such relief.

### **2. Comparative view**

2.1 A number of countries do not make the distinction found in the 1996 Act between interim relief and other interim measures taken with respect to the preservation of evidence and other aspects of the status quo between the parties. Equally, the tendency is not to require the parties' express agreement to such powers.

For example, Article 183(1) of the Swiss LDIP just gives the arbitrator the power to order provisional or protective measures subject to the possible provision of appropriate security unless the parties otherwise agree.

2.2 Section 25(4) of the Swedish Arbitration Act reads similarly:

"Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators. The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure."

2.3 The Hong Kong Ordinance Section 2GB provides for arbitrators to have similarly broad powers in domestic arbitration.

2.4 In France, an arbitrator has the same power in international cases because of Article 1494(2) which gives the arbitrator the power to fix his own procedure in the absence of any agreement by the parties. This is considered to extend to the power to order interim measures of all types.

2.5 The UNCITRAL Model Law, though, only expressly empowers the arbitrator to make orders to protect the subject-matter in dispute (unless the parties have otherwise agreed). This is reflected in the German statutory provisions contained in its Zivilprozessordnung (ZPO). The power to make such orders is dealt with in another of the Institute's guidelines.

2.6 In 2006, UNCITRAL decided to broaden Article 17 of the Model Law to read:

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim 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."

The new Article 17A lays down three conditions for the granting of interim measures: irreparable harm that cannot be adequately compensated for by an award of damages and that harm substantially outweighing any likely damage to the party required to comply with the measure and a reasonable possibility that the requesting party will succeed on the merits. Article 17B provides for orders to be made ex parte where necessary with the recipient of the order having the right to request variation or termination of the measure. An important feature of the new Article 17H is the way in which courts will be required to enforce an interim measure regardless of whether it was issued by an arbitrator sitting in that jurisdiction.

2.7 One can expect UNCITRAL Model Law countries, such as Hong Kong, Australia, Singapore and Germany to consider whether to implement this revision to the Model Law. Hong Kong has already proposed adopting the revised Article 17A in Clause 36 of its Bill. In view of its contentious history and the nature of its terms, other countries may not necessarily follow this course. Scotland, in particular, in its Bill, seems to have gone in the opposite direction. In the meantime, until such change has been accepted and introduced into the various municipal arbitration laws based on or incorporating the Model Law, Article 17 in its present form remains applicable.

2.8 The US Federal Arbitration Act, the Belgian and Dutch statutes are all silent on the subject of interim measures. One should not deduce from this, however, that the arbitrator in these countries does not have the power to issue interim measures. This would derive from the tribunal's authority to establish the procedure to be followed in the absence of the parties' agreement to the contrary. In the United States, Revised Uniform Arbitration Act §8 allows interim measures (the scope of which and standards for which vary within the states of the United States). By contrast, Article 818 of the Italian Codice di procedura civile forbids arbitrators from issuing attachments.

2.9 Article 23(1) of the ICC rules operates in a very similar way to Swiss law and the proposed new Article 17 of the UNCITRAL Model Law in giving the tribunal wide discretion as to the ordering of interim measures:

"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim ... measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate."

This can constitute the necessary agreement for the purposes of section 39 of the 1996 Act. So can Article 25(1)(c) of the LCIA rules. It reads:

"The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

- (c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties."

2.10 Article 26 of the UNCITRAL Rules limits the arbitrator's powers to the subject-matter of the dispute allowing the tribunal to order its deposit with a third party or in the case of perishable goods, their sale. The measures may be in the form of an interim award. As ever, the tribunal can require security for the costs involved.

2.11 Rule 28 of the ACICA Rules (Australian Centre for International Commercial Arbitration) sets out in some detail the power that it grants to arbitrators to order interim measures generally. These include under Rule 28(2) "any temporary measure by which 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] (c) provide a means of preserving assets out of which a subsequent award may be satisfied."

2.12 Rule 28 goes into considerable detail on how the arbitrator should deal with such an application. The party requesting the measure must show that irreparable harm is likely to result if the measure is

not ordered that substantially outweighs the harm likely to result to the party affected by the proposed measure and that the requesting party has a reasonable possibility of succeeding on the merits. The requesting party must promptly disclose in writing to the arbitrators any material change in the circumstances on which the application or its granting was based. The tribunal can modify, suspend or terminate any of its own interim measures at any time upon the request of any party and in exceptional circumstances, on its own initiative. The tribunal can subsequently make orders for costs or damages with respect to any measure that it subsequently decides should not have been ordered. Finally, it should be noted that in those countries which permit interim or provisional measures of the type described here, the consensus is that the parties do not have to give express consent to them. Under the 1996 Act, such consent does need to be given although it can be found in the institutional rules that the parties may have adopted.

### **3. Provisional Relief**

#### **3.1 Introduction**

3.1.1. A provisional order is one which does not finally determine the rights of either party. Arbitrators are only empowered to order on a provisional basis any relief which they would have power to grant in a final award. Such orders are appropriate where one of the parties to the reference requires immediate assistance or where the circumstances of the case demand that the arbitrators take action in order to protect or preserve the interests of one of the parties or the subject matter of the proceedings. An order by way of provisional relief can be amended subsequently should the arbitrators deem it necessary.

3.1.2 The Arbitration Act 1996 s39 gives two examples of provisional relief namely "payment of money or the disposition of property..." and "interim payment on account of the costs of the arbitrator". This is not an exhaustive list. Further examples of what arbitrators may be asked to order on a provisional basis pending final determination of the dispute, are:

- (a) an order that one of the parties refrain from doing something;
- (b) an order that one of the parties continue to do something.

3.1.3 In international arbitrations, where recourse to a court may be required to enforce such an order, the applicant party may seek the relief in the form of a partial award (under Section 47) rather than a provisional order. The advantage of a partial award is that it may be enforceable under the local law, the law of a foreign country or the New York Convention. A partial award granting such relief will only be appropriate where there is certainty that the claimant will recover an equivalent sum of money, or that the property concerned will have to be dealt with in a particular way.

3.1.4 It is for the arbitrators to decide, for any particular application, in the light of such representations as the parties may make, whether to grant the relief at all. If it is to be granted they must decide whether this should be done by way of a reasoned or unreasoned order or a reasoned award. If the relief sought will be a final determination of the party's rights on any issue, thereby disposing of that issue completely, the arbitrators must issue an award in accordance with Section 47.

#### **3.2 Types of provisional relief**

Applications for provisional relief are essentially of two types:

- 1. for monetary compensation; and
- 2. for any other type of provisional relief.

Effectively, under 2, the arbitrator is entitled to make an order freezing one party's assets but only if the parties have agreed to him having such powers or to the application of rules or a legal system allowing for such orders: *Kastner v. Jason* [2004] EWCA Civ 1599.

#### **3.3 General principles applicable to the granting of all types of interim relief**

3.3.1. The arbitrators must ascertain whether they have been given the power by the parties to make an order for provisional relief.

3.3.2. Such applications should only be granted if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial commonsense.

3.3.3. By granting provisional relief an injustice could be caused to the other party. Accordingly arbitrators should exercise their discretion with due care and diligence. Although an order made on a provisional basis will, in theory, be reversible and be the subject of compensation at a later stage, arbitrators should keep in mind that by the time a final award is made the party seeking the provisional order may have insufficient assets to honour that award and, further, that a provisional order could compel a party affected by it to abandon the arbitration, thereby resulting in injustice.

3.3.4. The usual Section 33 duties of arbitrators apply to applications for provisional relief. Accordingly, arbitrators should give both parties a fair opportunity to put their cases on whether the matter is suitable for provisional relief and whether the actual relief sought is appropriate.

### **3.4 Matters to consider when deciding whether to make an order for granting provisional monetary compensation**

3.4.1 When deciding to order a respondent to make an interim payment (or other form of provisional monetary compensation) arbitrators should bear in mind (a) that the purpose of section 39 is to mitigate the hardship or prejudice which may be occasioned during the interval between the commencement of the arbitration and its ultimate conclusion but (b) that an interim payment order will not be truly "provisional" if the party who obtained the order is subsequently unsuccessful in the arbitration and is then unable to repay the sum covered by the interim order or cannot be forced to do so in enforcement proceedings.

3.4.2 Arbitrators should therefore consider the following:

- (a) Is there sufficient hardship or prejudice to justify making an order for provisional monetary compensation?
- (b) If so, how can the rights of the respondent best be protected?

3.4.3 In some cases it may be possible to preserve the rights of the respondent by requiring the claimant to furnish a bank or other third party guarantee securing that the provisional amount is repaid if it, or part of it, ultimately proves not to be payable.

3.4.4 In all cases, and particularly where no security is ordered, arbitrators should be satisfied, before making an order for provisional monetary compensation, that if the matter goes to a final award, the claimant will at least probably obtain damages against the respondent or some other relevant monetary relief. They should also be satisfied that an order for provisional monetary compensation is for no more than the minimum sum that the claimant is likely to recover in the arbitration. The arbitrators may have to weigh the strength of the applicant's case alongside the likely hardship to each party of making or not making the order.

### **3.5 Matters to consider when deciding whether to make an order granting any other type of provisional relief**

3.5.1. Arbitrators should be certain that the circumstances of the case and the grounds supporting the granting of provisional relief outweigh the grounds favouring denial of the relief.

3.5.2. Arbitrators should always consider whether the provisional relief is unnecessary on the basis that damages at the end of the case will be a sufficient remedy if the claimant is found to be in the right and whether a cross-undertaking to pay damages, from the party seeking the provisional relief, is adequate to balance out the prejudicial effects on the respondent of any proposed order.

3.5.3. Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the order causes the arbitration to be abandoned. In this respect the financial hardship endured by both the claimant and the respondent will have to be considered.

### **3.6 The effect of an order on the proceedings**

3.6.1 As section 39(3) makes clear, an interim order under the section is subject to the tribunal's final adjudication. The tribunal's final award, on the merits or as to costs, must take into account any such order. The arbitrator must proceed to decide all the points in the case, only adjusting the final award(s) to take into account the effect of the earlier orders where appropriate. A provisional conclusion by the arbitral tribunal does not bind it.