Chartered Institute of Arbitrators

CIArb

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

1. Introduction

1.1 A constant theme of modern arbitration practice, rules and legislation is the increased power given to arbitrators to make orders for preliminary and interim relief. This guideline seeks to set out the limits of those powers and provide guidance to arbitrators on how to use this authority.

1.2 Pre-1987 statutes in the countries reviewed here, such as the US Federal Arbitration Act, the Belgian Code judiciaire, the French NCPC (now CPC), Article 1494(2) and the Dutch Burgerlijke Rechswordering 1986, Article 1036 and the original version of the UNCITRAL Model Law (adopted in Germany in ZPO, Article 1041(1)) were silent on the subject of provisional or interim measures. They merely prescribed that the arbitral proceedings were to be conducted in accordance with the parties' agreement and in default of that, the arbitral tribunal. This, subject to the parties' agreement to the contrary, gave the arbitrator the power to grant preliminary and interim relief if any arbitration rules adopted by the parties gave the tribunal that power. In the absence of any relevant applicable arbitration rules, the arbitrator seemed to have the power to make orders of this type as well.

1.3 Article 183(1) of the Swiss LDIP started the trend towards giving arbitrators express powers in these areas. The provision entitles the arbitrator to order provisional or protective measures subject to the possible provision of appropriate security unless the parties otherwise agree.

1.4 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."

1.5 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."

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. Sections 36 to 44 of the Hong Kong Arbitration Ordinance contain the new version of Article 17. Under the Arbitration (Scotland) Act 2010, unless the parties agree otherwise, Article 53 of the Scottish Rules allows the tribunal to make a "provisional award granting any relief on a provisional basis which it has the power to grant permanently".

1.6 The French CPC for cases commenced after 1st May 2011 now contains a provision relating directly to interim measures. Article 1468 which applies to international cases by virtue of Article 1506(3) allows an arbitral tribunal to make provisional or conservatory orders as and subject to any conditions that it considers appropriate. This can be made subject to a penalty for non-compliance. Article 1468(1) makes it clear that freezing orders cannot be issued by an arbitrator. Article 1468(2) makes clear what is implicit in the statutes mentioned elsewhere here, namely that an arbitrator can modify or complete any interim measure ordered under this Article.

1.7. Section 39 English Arbitration Act 1996

1.7.1 Section 39 of the English Arbitration Act 1996 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.

1.7.2 Unusually, under English law, 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.

1.8 In determining issues of provisional relief, arbitrators are in general not bound by law or precedent governing when a court will grant such relief.

2. Arbitration Rules

2.1 Article 28(1) of the ICC rules (2012 version) operates in a very similar way to Swiss law and the revised 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.”

2.2 Article 25(1)(c) of the LCIA rules reads similarly:

> “The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:
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> (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.”

2.3 Article 26 of the UNCITRAL Rules now matches Article 17 of the Model Law. It states that the tribunal may at a party’s request, grant interim measures. These are defined in

exactly the same way as Article 17. The rest of Article 26 is again modelled on the Model Law. It reads:

> "3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
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> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
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> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.
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> The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
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> 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
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> 5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
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> 6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
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> 7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
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> 8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings."

2.4 Article 21 of the ICDR Rules of the American Arbitration Association gives the arbitrator a broad discretion to take whatever interim measures it deems necessary, including injunctive relief. These measures can take the form of an interim award or just a decision. The tribunal can require security for costs for these types of measures and apportion costs associated with applications in either an interim or final award.

2.5 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."

2.6 Like Article 1468 of the French CPC, ACICA Rule 28 makes it clear that 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.

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 Section 39 of the English Arbitration Act 1996 section 39 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 Article 17 of the 2006 version of the Model Law and Article 26 of the UNCITRAL Rules defines an interim measure in a similar but more detailed way as

> "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:
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> > (a) Maintain or restore the status quo pending determination of the dispute;
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> > (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;
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> > (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
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> > (d) Preserve evidence that may be relevant and material to the resolution of the dispute."

3.1.4 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 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 or counter-claimant will recover an equivalent sum of money, or that the property concerned will have to be dealt with in a particular way. The disadvantage of using a partial award, in the case of an ICC arbitration, is that the approval processes for issuing the award as stipulated by the ICC Rules have to be followed. Article 28(1) of the ICC rules (2012 version) gives the arbitrator the power to decide on whether to issue an award or an order as the tribunal "considers appropriate".

3.1.5 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 the formalities for doing so.

3.2 Types of provisional relief

3.2.1 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. Article 17A of the 2006 version of the UNCITRAL Model Law lays down the general requirements on which an arbitrator should insist that:

> “(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
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> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”

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 the part of the award reversing the original order and, further, that a provisional order could compel a party affected by it to abandon the arbitration, thereby resulting in injustice.

3.3.4 Rule 28 of the ACICA Rules repeats the points in Article 17A of the Model Law. It also insists that the requesting party 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.

3.3.5 The usual procedural fairness obligations 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. In cases of urgency, it may be necessary for the tribunal only to hear one side. This is acceptable so long as the respondent is given a reasonable chance to seek the lifting of the relevant order within a reasonably brief period of time.

3. 4 Preliminary or ex parte orders and the procedure that follows

3.4. 1 Article 17B of the 2006 version of the Model Law introduced the idea of preliminary orders which are requested alongside interim measures essentially directing the respondent not to frustrate the purpose of the interim measure. Under Article 17B(2), the arbitrator can grant one of these orders if prior disclosure of the request to the respondent risks frustrating the purpose of the measure. The requirement to balance the harm caused to each side by granting or not granting the order applies here as well. These orders are essentially urgent ex parte orders and seem to be compatible with the legal systems described here.

3.4.2 Once an order has been made, the tribunal must, under Article 17C give notice to all parties of the request for the interim measure, the application for the preliminary order and

any communication between any party and the tribunal on the subject. The arbitrator must then hear any application to modify or set aside the order at the earliest practicable time. A preliminary order expires after twenty days although the arbitrator can issue an interim measure adopting or modifying the order once the respondent has had an opportunity to apply to have it lifted. Preliminary orders bind the parties but cannot be enforced through the courts.

3.4.3 The arbitrator can modify, suspend or terminate an interim measure or preliminary order typically on an application from a party although it can do so on its own initiative having given notice to all sides: Article 17D of the Model Law and Article 26(5) of the UNCITRAL Rules.

3.4.4 The arbitrator can insist on appropriate security being granted by the application for interim measures and must do so with respect to a preliminary order unless he or she considers it inappropriate or unnecessary: Article 17E of the Model Law and Article 26(6) of the Rules.

3.4.5 Under Article 17F, an applicant for a preliminary order must disclose to the tribunal all relevant circumstances and report any changes to it until the respondent has had an opportunity to present its case. More generally, the tribunal may require any party to give prompt disclosure of any material change in the circumstances which formed the basis for the request or granting of any interim measure or preliminary order.

3.4.6 The 2012 version of the ICC rules introduces an "Emergency Arbitrator" procedure where the arbitration agreement was entered into after 1st January 2012 and the parties have not excluded it or agreed to another pre-arbitral procedure of a similar type. This allows a party needing an interim measure to apply to the ICC Secretariat for the appointment of an emergency arbitrator. His or her orders will not bind the arbitral tribunal although the parties agree to be bound by such orders.

3.4.7 The Courts will not be required to enforce a preliminary order under Article 17H of the UNCITRAL Model Law. This presumably covers an emergency arbitrator order under Article 29 of the ICC Rules. By contrast, that section does provide for an enforcement mechanism for ordinary interim measures.

3.5 Matters to consider when deciding whether to make an order for granting provisional monetary compensation

3.5.1 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 this power 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.

3.5.2 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?

3.5.3 In some cases it may be possible to preserve the rights of the respondent by requiring the claimant or other applicant (such as a counter-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.

3.5.4 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 or applicant will at least probably obtain damages against the respondent or some other relevant monetary relief: section 25(4) of the Swedish Act, Article 17A(1)(b) of the 2006 version of the Model Law and Article 28 of the ICC Rules and Article 26(3)(b) UNCITRAL Rules. They should also be satisfied that an order for provisional monetary compensation is for no more than the minimum sum that the claimant or counter-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. The tribunal should be careful not to make orders against parties who may have valid objections to his jurisdiction unless persuaded that they are clearly not valid.

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

3.6.1. 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: Article 17A(1)(a) Model Law and Article 26(3)(b) UNCITRAL Rules.

3.6.2. 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 or applicant is found to be in the right and whether an undertaking to pay damages, from the party seeking the provisional relief to compensate for any damage done in the event of it proving unjustified (usually referred to as a "cross-undertaking"), is adequate to balance out the prejudicial effects on the respondent of any proposed order.

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3.6.3. 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: Article 17(2)(b) UNCITRAL Model Law and Article 26(2)(b) UNCITRAL Rules. In this respect the financial hardship endured by all the parties will have to be considered.

3.7 The effect of an order on the proceedings

3.7.1 As section 39(3) of the English Arbitration Act makes clear but which is implicit in the other rules and statutes considered here, 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.

If the arbitrator subsequently decides that the measure or preliminary order should not have been granted, he or she may award any costs or damages caused and do so at any point in the proceedings: Article 17G of the 2006 version of the Model Law.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

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