



Chartered  
Institute of  
Arbitrators

**CI Arb**

## **Practice Guideline 2: Guidelines for Arbitrators on how to approach an application for Interim measures of protection**

### **1. Introduction**

1.1 Modern arbitration statutes and rules almost routinely give the arbitrator the power to issue interim measures of protection or orders to protect or consider property including documents, either required for the arbitration or which form its subject-matter. Although arbitrators need to be aware of the rules under which they are operating, there is relatively little difference between the laws of the major arbitration countries and important arbitration rules.

1.2 It should be remembered that interim measures of protection ordered by the arbitral tribunal may be unenforceable against third parties, and may be buttressed by insufficient sanctions even as against a party. In such circumstances a concerned party would do better to make an application to a competent court.

### **2. Legislative and rule provisions**

2.1 Article 17 of the original UNCITRAL Model Law contained a provision that has been reproduced in Section 25(4) of the Swedish Lag Om Skiljeman (Arbitration Act) and section 1041(1) of the German ZPO:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

Article 183(1) of the Swiss LDIP is in almost identical terms.

## **2.2 The 2006 version of the UNCITRAL Model Law**

2.2.1 The new Article 17 of the Model Law (adopted in 2011 by the Hong Kong Ordinance) and Article 26 of the UNCITRAL Rules expand on the earlier draft. The relevant part of Article 17 reads:

“(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.”

2.2.2 Article 26 of the UNCITRAL Rules is identical to Article 17 of the Model Law except for the absence of any reference to the agreement of the parties in sub-paragraph (1).

Assuming that the parties have not reached a contrary agreement, the arbitrator’s powers are extensive, covering all forms of property, including vessels and even shares.

2.2.3 The revision of Article 17 in the 2006 changes to the Model Law has introduced a preliminary order procedure which allows for an ex parte application in the case of the emergency. Article 17B describes a preliminary order as one 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.

2.3 Neither the US Federal Arbitration Act nor the Belgian or Dutch statutes give any such powers expressly to the arbitrator. However, there has never been much doubt that an arbitrator has them. This is reflected in Article 21 of the ICDR Rules at least for the USA.

2.4 In France, this continues to be the case for arbitrations commenced before 1<sup>st</sup> May 2011 due to Article 1494(2) which like the Belgian and Dutch statutes gives the arbitrator in

international cases the power to fix his own procedure in the absence of any agreement by the parties. Now, Article 1468 of the CPC, rendered applicable to international cases by Article 1506(3), states clearly that an arbitrator has the power to make orders to conserve property on whatever conditions he considers appropriate and if necessary subject to a penalty for non-compliance. He or she can also modify or complete any measure that he has previously ordered.

## **2.5 English 1996 Act Section 38(4)**

2.5.1 Section 38(4) of the English Arbitration Act 1996 entitles the arbitral tribunal, on the request of any party, to order interim measures of protection unless the parties have expressly agreed in writing to the contrary.

2.5.2 Section 38(4) was a new power when the 1996 Act came into force. Section 38 provides that the arbitrators will automatically have certain specific powers unless the parties have expressly agreed to the contrary. Even if there has been no such express agreement it is possible that some institutional or other arbitration rules may overlap, or conflict with it. The powers granted to the arbitrators by this section are discretionary in nature. Arbitrators are not bound by the provisions of the Civil Procedure Rules or case law concerning how or when a court will exercise similar powers.

## **3. Arbitration Rules**

3.1 Article 28(1) of the ICC rules (2012 version) operates in a very similar way to the UNCITRAL Model Law:

“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 or conservatory 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. “

3.2 Article 26 of the UNCITRAL Rules was re-formulated in 2010 to bring it in to line with the 2006 version of the Model Law. It reads:

“1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure 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, for example and without limitation, 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, (i) current or imminent harm or (ii) 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.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal 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

(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.

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.

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.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

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.

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.”

3.3 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 and measures for the protection or conservation of property”. 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.

3.4 The detailed provisions of rule 28 of ACICA (Australian Centre for International Commercial Arbitration) (described more fully in Guideline 1) entitle the arbitrator to make an order 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; and ... (d) preserve evidence that may be relevant and material to the resolution of the dispute”.

3.5 ACICA 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 tribunal 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 arbitrator can subsequently make orders for costs or damages with respect to any measure that he or she subsequently decides should not have been ordered.

#### 4. The powers

4.1 Section 38(4) of the English 1996 Act goes into some detail on the scope of the powers given to arbitrators in this area. Arbitrators have the right to give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings. In this respect, 'property' includes an identifiable fund of money, but does not include security or damages claimed. Arbitrators will exercise the powers granted to them by this section in order to protect or preserve the property of one of the parties, which is a subject of the dispute. It is clear that, under this section arbitrators may only give directions in respect of property which is a subject of the proceedings and is either owned by or possessed by one of the parties.

4.2 Such directions will be 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 property that is the subject of the proceedings. Such a direction will not be final and is reversible at a later date. As indicated above, most modern arbitration legislation does not draw such a tight distinction between interim measures generally and those relating to the conserving property.

4.3 Section 38(4) of the English Arbitration Act provides that arbitrators have the power to give directions

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert, or a party, or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

4.4 The arbitrators must check that the parties have not excluded the powers automatically granted to them. Otherwise, the powers are extensive, covering all forms of property, notably shares in a company: *Emmott v Michael Wilson & Partners Ltd (No 2)* [2009] 1 Lloyd's Rep. 233, and even a vessel: *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep. 371.

## **5. The requirements for making such an order generally**

5.1 Article 17A of the Model Law and Article 26(3) of the UNCITRAL Rules provide useful general criteria for making an order under (a) to (c) that

1) harm is likely to result that cannot be adequately reparable by a damages award if no order is made and that this outweighs the harm likely to result to the respondent if the order is granted; and

2) there is a reasonable possibility that the applicant will succeed on the merits of the relevant claim.

5.2 For applications under (d), which is conservatory order, the tribunal is given a discretion as to whether to apply these factors by Article 17A(2) and Article 26(4) respectively. However, the tribunal is likely to take a similar approach. This is true regardless of whether the UNCITRAL Model Law or Rules applies in this case.

## **6. Matters to consider when deciding whether to give directions in relation to the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert, or a party**

6.1 A distinction needs to be drawn between directions relating to the inspection and photographing of property, and an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party. An application for the detention of the property can potentially cause the other party a greater degree of harm than an application for the inspection or photography of the property.

6.2 By granting a direction for the preservation, custody or detention of property the arbitrators should take particular care to ensure that an injustice is not caused. Although a direction is reversible, the arbitrators should be aware that in some circumstances such a direction could compel the party affected to abandon the arbitration. The preservation or detention of property may have seriously adverse consequences for a party that needs to sell or use the property concerned. The arbitrator may prefer to order inspection, observation, samples or experiments instead. The tribunal may decline to make an order in view of the hardship likely to be caused and the lack of alternatives.

## **7. Matters to consider regarding an application for directions relating to the inspection and photographing of property**

7.1 Arbitrators should only order the inspection and photography of the property if they are satisfied that it is relevant and necessary to the case and the results are likely to provide significant evidence relating to a substantial point in issue in the case.

7.2 Arbitrators should not allow an applicant to use this process to delay or increase the costs of the arbitral proceedings or impose an unreasonable burden on the other party. This is particularly relevant where there are limited sums at stake or where the cost of complying with the order may be significant.

## **8. Matters to consider regarding an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party**

8.1 There should usually be clear evidence that the party against whom the direction is sought is likely, unless restrained by the direction, to dispose of or otherwise deal with the property in dispute in such a manner as to deprive the applicant of the ability to present the case properly or the benefit of any award obtained. Arbitrators should be persuaded that the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief.

8.2 Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the direction causes the arbitration to be abandoned. In this respect, the likely financial hardship to be caused to both parties will have to be considered.

8.3 Arbitrators could consider whether a cross-undertaking to pay damages, from the party seeking the direction, is appropriate to protect the interest of the other party.

8.4 No direction should normally be made for delivery of a party's tools of trade or stock-in-trade, so as to prevent him carrying on his lawful business.

## **9 Matters to consider when deciding whether to give directions ordering that samples taken from any observation be made of, or experiment conducted upon, the property**

9.1 Since a direction ordering that samples be taken, or observations be made of, or experiments be conducted upon the property is not likely in most cases to cause the other party a great degree of harm, the arbitrators need only to consider the same principles that are applicable to an application for directions relating to the inspection and photographing of property. These two principles have been set out above.

9.2 Nevertheless, the tribunal should be aware of the time that sampling and experiments can take, the possibility that damage may be caused, and the consequent risks to the parties' general interests of making orders of this type.

## **10. Dealing with applications**

10.1 Orders of the type under discussion are provisional in nature. It does not finally decide any issue between the parties. The arbitrator cannot usually in practice use a partial award to make a provisional conservatory order. This creates problems with the enforcement abroad of such an order. Perhaps for this reason, Article 28(1) gives the arbitrator a discretion as to whether to use the form of an award if it considers this appropriate. It is hard, though, to imagine a situation where the choice of an award would make sense.

10.2 The burden of proving the need for a direction rests upon the applicant, but the standard may vary depending on the consequences such a direction may have upon the other party to the proceedings. Such directions should only be issued if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial common sense.

10.3 The usual procedural fairness obligations of arbitrators apply to the giving of interim measures of protection. Accordingly, arbitrators should give both parties a fair opportunity to put their cases as to whether it would be appropriate for the direction to be issued. In the event of an emergency requiring an ex parte application, the other side must be able to apply to lift the order within a reasonably brief period of time.

10.4 Once an order has been made, the tribunal must, under Article 17C of the Model Law 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 Model Law 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.

10.5 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 1468 of the French CPC & Article 17D of the Model Law and Article 26(5) of the UNCITRAL Rules.

10.6 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 1468 French CPC and 17E of the Model Law and Article 26(6) of the UNCITRAL Rules.

10.7 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.

10.8 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 UNCITRAL Model Law.

10.9 The 2012 version of the ICC rules introduced an “Emergency Arbitrator” procedure where the arbitration agreement was entered into after 1<sup>st</sup> 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.

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](mailto:nmcnamee@ciarb.org). Thank you in advance.

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