

## The Remedy of Provisional or Interim Measures in international Commercial Arbitration and Conditions for grant of such measures

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### **Abstract:**

*In international commercial arbitration the remedy of “provisional or interim measures” is intended to protect the rights of the parties and save from any irreparable harm. The International Arbitration Rules empower the arbitral tribunal to grant such measures and in some institutional arbitration rules, there are special provisions for appointment of emergency arbitrator for granting urgent relief. The paper identifies the provisions of provisional or interim measures under different international commercial arbitration rules, what are the conditions required to grant such measures and what are the circumstances under which a party may seek interim relief from judicial authority rather than from the arbitration tribunal. The number of international arbitration institutions amending their arbitration rules in order to provide provisional or interim measures, through the emergency arbitrator.*

**Keywords:** International Commercial Arbitration, Emergency Arbitrator, Arbitration Tribunal, Provisional Measures, Interim measures, Conservatory measures.

### **1. Introduction:**

Arbitration is a system for settlement of dispute between the parties outside of judicial system. It is based on party's autonomy, therefore, for any arbitration there should be valid arbitration agreement between the parties. The disputed parties are free to choose the arbitration institution and arbitration rules for settlement of their dispute. In international commercial arbitration if a party needs any urgent relief for the purpose of protection rights, there are provisions in arbitration rules to grant provisional or interim measures. The parties' arbitration agreement is the source for tribunal to proceed for grant of any interim measures. When a party seeks interim relief, it is required to verify whether the Arbitration Tribunal possess the authority to order such relief. In general, the question requires consulting three sources: (a) any

applicable international arbitration convention; (b) applicable national laws; and (c) the parties' arbitration agreement.<sup>1</sup>

The existing international commercial arbitration rules contain the provisions for grant of provisional or interim measures, however, the recent trend in arbitration regime is to create special provisions for appointment of Emergency Arbitrator for grant of such measures. Many of the International Arbitration Institutions have amended their arbitration rules in order to provide rules for the appointment of Emergency Arbitrator for grant of such relief. The object of this paper is to identify the provisions under different arbitration rules that recognized the remedy of "provisional or interim measures" from Arbitral Tribunal or Emergency Arbitrator and what are the conditions required for grant of such measures. In certain circumstances courts are proved effective for grant of provisional measures, therefore, the paper also considers the reasons for preferring to national courts over tribunal for grant of interim measures.

## 2. Meaning of "Provisional or Interim Measures":

The remedy of interim measures available under different institutional arbitration rules with a different name. 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.<sup>2</sup> The ICC Arbitration Rules refers to interim measures as "interim or conservatory measures",<sup>3</sup> in the French version, as "*mesures provisoires ou conservatoires*",<sup>4</sup> whilst in the Swiss law, they are referred to as "provisional or conservatory measures".<sup>5</sup>

The interim measures of protection can include "any temporary measure ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. Some common types of interim measures of protection ordered by courts and tribunals include, attachments, injunctions, partial payment of claims, and posting of security for costs.<sup>6</sup> According to the general trend, arbitral tribunals have the power to order such measures, except if the parties have agreed otherwise.<sup>7</sup>

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<sup>1</sup>Gary Born, International Commercial Arbitration, Kluwer Law International, The Netherlands, 2009, Vol. II page 1946.

<sup>2</sup> Art. 26 of UNCITRAL Arbitration Rules.

<sup>3</sup>Articles 28 & 29.

<sup>4</sup>Art. 28 of ICC.

<sup>5</sup>Swiss Private International Law Act 1987, Ch 12, Art. 183.

<sup>6</sup>Stephen M. Ferguson, Interim Measures of protection in International Commercial Arbitration: Problems, proposed solutions, and anticipated Results, (Winter 2003) 12 Currents Int'l Trade Law Journal, 55.

<sup>7</sup>Peter J.W. Sherwin and Douglas C. Rennie, Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis, (2009) 20 American Review of International Arbitration, 317.

### 3. The Provisional or Interim Measures under different Arbitration Rules:

In many cases where interim measures of protection are required, the arbitral tribunal itself has the power to issue them.<sup>8</sup> The international commercial arbitration rules expressly contained the provisions for grant of interim relief<sup>9</sup> and some arbitration rules provided the provisions for appointment of Emergency Arbitrator for grant of such measures, for example the ICC Arbitration Rules,<sup>10</sup> Australian Arbitration Rules.<sup>11</sup>

The subject of interim measures explained under two sub titles; (a) arbitration rules which contained the provisions for interim relief and (b) arbitration rules that contained the provisions for appointment of Emergency Arbitrator, for grant of such relief.

#### 3.1. “Interim measures” from Arbitration Tribunal:

The remedy of ‘provisional or interim measures’ from Arbitral Tribunal provided under the international arbitration rules, such as in UNCITRAL Model Law, UNCITRAL Arbitration Rules, the London Court of International Arbitration Rules (LCIA), The ICSID Arbitration Rules, 1986, Rules of the American Arbitration Association, 1986, The Indian Arbitration and Conciliation Act, 1996, The Netherlands Arbitration Rules and the China International Economic and Trade Arbitration Commission (CIETAC), Arbitration Rules. The details of provisional or interim measures from arbitration tribunal under the different arbitration rules are explained in following paragraphs.

According to UNCITRAL Model Law, the Arbitral Tribunal may, at the request of a party, grant interim measures to maintain or restore the *status quo* pending determination of the dispute.<sup>12</sup> Similar to UNCITRAL Model Law, the UNCITRAL Arbitration rules recognized interim measures in Article 26 of the UNCITRAL Arbitration Rules as revised in 2010.

The UNCITRAL Arbitration rules provide that the arbitral tribunal may, at the request of a party, grant any interim measures and the arbitral tribunal has authority to modify, suspend or terminate an interim measure it has granted.<sup>13</sup> 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.

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<sup>8</sup>Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Commercial Arbitration, 4<sup>th</sup> Edition, 2004, Thomson, Sweet & Maxwell, London.

<sup>9</sup>Article 26 of UNCITRAL Arbitration Rules.

<sup>10</sup>Articles 28.

<sup>11</sup>Schedule 2 of ACICA Arbitration Rules.

<sup>12</sup>Article 17 (1) of UNCITRAL Model Law with amendments as adopted in 2006.

<sup>13</sup>Article 26 (5).

Similarly, the London Court of International Arbitration Rules (LCIA)<sup>14</sup> provide 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 and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances<sup>15</sup>:

- (i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute;
- (ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and
- (iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

According to the ICSID Rules<sup>16</sup> at any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.<sup>17</sup> The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

The Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 2006 [ICSID] provides that except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.<sup>18</sup> The Rules of the American Arbitration Association, 1986, provide that the Arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.<sup>19</sup>

The Indian Arbitration and Conciliation Act, 1996 recognized the remedy of interim measures and provided that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any 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 a party to provide appropriate security in connection with a measure ordered under sub-section.<sup>20</sup> The Netherlands Arbitration Rules provide that at the request of a party, at any point in the proceedings, Arbitrator may provisionally make any decision,

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<sup>14</sup>Effective from 1 October 2014.

<sup>15</sup>Art. 25.

<sup>16</sup> ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1986.

<sup>17</sup>Rule 39.

<sup>18</sup> Article 47.

<sup>19</sup>Rule 34.

<sup>20</sup>Article 17.

including to order the provisional measures. The decision shall in no way prejudice the final judgment of the arbitral tribunal. The request does not preclude a party from requesting a court to grant interim measures.<sup>21</sup>

Under the China International Economic and Trade Arbitration Commission (CIETAC), Arbitration Rules<sup>22</sup>, a party may apply to the Arbitration Court for emergency relief.<sup>23</sup> Where the arbitral tribunal has not yet been formed, a party may apply for emergency relief pursuant to the CIETAC Emergency Arbitrator Procedure.<sup>24</sup> The tribunal may grant an interlocutory or partial arbitral award on any issue of the case at any time during the arbitration before the final award is made that it considers necessary or that a party requests.

The reference of different international commercial arbitration rules show that once the arbitration tribunal has been constituted, upon the request of the parties or if the tribunal itself considers necessary, it may pass appropriate orders in the form of provisional or interim measures.

### **3.2. Interim or provisional measures from “Emergency Arbitrator”:**

The grant of provisional measure is inherent power of arbitration tribunal, unless otherwise agreed by the parties or limited by any law. The new trend is many arbitral institutions have adopted some type of procedure to address a party’s need for emergency relief,<sup>25</sup> such as appointment of Emergency Arbitrator for grant of provisional or interim measures. The reference of ICC, the Japan Commercial Arbitration Rules, SIAC, HKIAC, ACICA and Stockholm Chamber of Commerce arbitration rules are best examples for containing special provisions for appointment of emergency arbitrator.

#### **3.2.1. The ICC Arbitration Rules:**

The International Chamber of Commerce (ICC) has issued a revised set of rules in respect of Arbitration which have come into effect from 1 January 2012. The new rules *inter alia* contains provision for emergency measures, including provision for ‘opt out’ from the emergency arbitration. 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.<sup>26</sup>

##### **3.2.1. 1. Appointment of Emergency Arbitrator:**

The ICC Arbitration Rules provides that a party that need urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“*Emergency Measures*”) may make an application for such measures pursuant to the Emergency Arbitration Rules.<sup>27</sup>

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<sup>21</sup>Article 38.

<sup>22</sup>w.e.f. January 1, 2015.

<sup>23</sup>Article 23 of CIETAC.

<sup>24</sup>Appendix III.

<sup>25</sup>Erin Collins, Pre-Tribunal Emergency Relief in International Commercial Arbitration, (2012) Loyola University Chicago International Law Review, 10 Loy. U. Chi. Int’l L. Rev. 105.

<sup>26</sup>Article 28 of ICC Rules.

<sup>27</sup>Article 29 (1).

Further, the ICC Arbitration rules dictates that the appointment of Emergency Arbitrator should take place as soon as possible, normally within two days of receipt of the application.<sup>28</sup> If a party wishes to challenge an appointment, they must do so within three days of receipt of the appointment.<sup>29</sup> After the appointment is made, the emergency arbitrator must establish a procedural timetable for the proceedings as soon as possible, normally, within two days of getting the File.<sup>30</sup> The Emergency Arbitrator provisions shall apply to parties that are signatories of the arbitration agreement.<sup>31</sup>

### **3.2.2. The Japan Commercial Arbitration Association, Commercial Arbitration Rules:**<sup>32</sup>

A party may apply for interim measures by an “emergency arbitrator”, before the tribunal is constituted or when any arbitrator has ceased to perform his duties.<sup>33</sup> Any emergency measures granted are binding on the parties.<sup>34</sup>

### **3.2.3. The Arbitration Rules of the Singapore International Arbitration Centre (SIAC):**<sup>35</sup>

A party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1 of SIAC Arbitration Rules.<sup>36</sup> If the President of SIAC determines that SIAC should accept the application, he shall seek to appoint an emergency arbitrator within one business day following the receipt of application and fee.<sup>37</sup>

### **3.2.4. Arbitration Rules of Hong Kong International Arbitration Centre (HKIAC):**<sup>38</sup>

A party may apply for urgent interim or conservatory relief prior to the constitution of the arbitral tribunal pursuant to the procedure set out in Schedule 4 of the Rules.<sup>39</sup> If HKIAC determines that it should accept the application, an emergency arbitrator shall be appointed within two days following the receipt of

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<sup>28</sup>Appendix V, Art. 2.

<sup>29</sup>Appendix V, Art. 3.

<sup>30</sup>Appendix V, Art. 5.

<sup>31</sup>App. V.

<sup>32</sup> As Amended and Effective on February 1, 2014.

<sup>33</sup>Rule 70.1.

<sup>34</sup>Art. 72.5.

<sup>35</sup>5<sup>th</sup> Edition, 1 April 2013.

<sup>36</sup>Rule 26 (2).

<sup>37</sup>Schedule 1 para 2.

<sup>38</sup>w.e.f. November 1, 2013.

<sup>39</sup>Article 23.1.

the application and fee.<sup>40</sup> Any emergency decision will also cease to be binding if the Emergency Arbitrator or tribunal so desires, upon the rendering of final award, upon the withdrawal of the claims or termination of the arbitration, or if the tribunal is not constituted within 90 days from the date the emergency arbitrator decision, unless the period is extended under the rules.<sup>41</sup>

### **3.2.5. The Australian Centre for International Commercial Arbitration (ACICA):**

A party in need of emergency interim measures of protection may make an application to ACICA prior to the constitution of Arbitral Tribunal.<sup>42</sup> The decision on application for emergency interim measures of protection shall be made within 5 days from the receiving application by the Emergency Arbitrator. The Emergency Arbitrator shall have the power to pass order or award any interim measures of protection on an emergency basis that deems necessary.<sup>43</sup> The order of any Emergency Interim measure shall, in any event, cease to be binding if;<sup>44</sup> (a) the Arbitral Tribunal makes a final award; (b) the claim is withdrawn; (c) If the Emergency Arbitrator or Arbitral Tribunal so decides; or (d) The Arbitral Tribunal is not appointed within 90 days of the Emergency measures being made.

### **3.2.6. Arbitration Institute of the Stockholm Chamber of Commerce:**

A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal. The powers of the Emergency Arbitrator be terminated when the case has been referred to an Arbitral Tribunal.<sup>45</sup> The Board shall seek appointment of an Emergency Arbitrator with 24 hours of receipt of the application for the appointment of an Emergency Arbitrator.<sup>46</sup> Any emergency decision on interim measures shall be made in writing.<sup>47</sup>

An emergency decision shall be binding on the parties when rendered. The decision ceases to be binding if the Emergency Arbitrator or Arbitral Tribunal so decides, an Arbitral Tribunal makes a final award, the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision. The Arbitral Tribunal is not bound by the decisions and reasons of the Emergency Arbitrator.<sup>48</sup>

## **4. Conditions to be satisfied by the parties for grant of interim measures:**

It is common among the different arbitration rules that a party seeking provisional measures shall demonstrate that it may suffer either “irreparable” or “serious” injury unless provisional relief is granted.

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<sup>40</sup>Schedule 4, para 5.

<sup>41</sup>Schedule 4, para 19 (d).

<sup>42</sup>Article 1.1 -1.3 of Schedule 2 of ACICA Arbitration Rules.

<sup>43</sup>Article 3.3.

<sup>44</sup>Article 4 of Schedule 2 of ACICA.

<sup>45</sup>Article 1 of Appendix II.

<sup>46</sup>Article 4.

<sup>47</sup>Article 9.

<sup>48</sup>Article 9.

Following are the requirement under different arbitration rules for grant of interim measures. According to the ICC Arbitration rules, the applicant should explain the reasons for seeking urgent interim or conservatory measures and that cannot await the constitution of an arbitral tribunal.<sup>49</sup> According to article 17-A of UNCITRAL Model Law on Arbitration and also UNCITRAL Arbitration Rules,<sup>50</sup> there are certain conditions for granting interim measures, which are as follows:

(1) The party requesting an interim measure 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.

According to ACICA Rules for grant of interim measures the party requesting emergency interim measures shall satisfy the emergency arbitrator that;<sup>51</sup> Irreparable harm is likely to result if the Emergency Interim Measures is not ordered; Such harm substantially outweighs the harm that is likely to result to the party affected by the emergency interim measure, if such measure is granted; there is a reasonable possibility that the requesting party will succeed on the merits.

The Arbitral Tribunal may only order provisional measures, if the requesting party has substantiated the threat of a not easily reparable prejudice.<sup>52</sup> It is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted.<sup>53</sup> Existing arbitration rules do not include any guidance as to whether *ex parte* measures of protection should be granted by either an arbitral tribunal or a court.<sup>54</sup> The UNCITRAL Model Law recognized *ex parte* relief under certain special circumstances.<sup>55</sup>

### **5. Emergency Arbitrator's decision is not binding on Arbitral Tribunal:**

The decision of the emergency arbitrator is not binding on the arbitral tribunal once constituted. The latter can modify, suspend or terminate any interim measure granted by the emergency arbitrator.<sup>56</sup> The tribunal may approve, modify, suspend or terminate any emergency measures granted by the emergency

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<sup>49</sup>Article 3 (e) of Appendix V of ICC Arbitration Rules.

<sup>50</sup> Article 26 (3).

<sup>51</sup>Article 3.5 of the Australian Centre for International Commercial Arbitration (ACICA).

<sup>52</sup> ICC Case no. 8786 & ICC Case no. 8894.

<sup>53</sup> Lew, Commentary on interim and Conservatory Measures in ICC Arbitration Cases, (2000) 11 (1) IC Ct. Bull. 23, 28.

<sup>54</sup>Stephen M. Ferguson, Interim Measures of protection in International Commercial Arbitration: Problems, proposed solutions, and anticipated Results, 12 Currents Int'l Trade Law Journal, 55, winter 2003.

<sup>55</sup> Article 17 B of UNCITRAL Model Law.

<sup>56</sup>Article 29(3) of ICC.

arbitrator.<sup>57</sup> Similarly, the Stockholm Arbitration Rules provided that the Arbitral Tribunal is not bound by the decision/s and reasons of the Emergency Arbitrator.<sup>58</sup>

### **6. Application to the Judicial Authority:**

Where the arbitral tribunal has been established to determine a particular dispute or disputes, a party faced with the need to seek interim measures of relief will naturally think first of recourse to that arbitral tribunal.<sup>59</sup> However, a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.<sup>60</sup> The similar provision could be found in other arbitration rules.<sup>61</sup>

In practice, a party needs the assistance of domestic courts when the arbitral tribunal is not yet constituted, or if coercive measures are requested.<sup>62</sup> If the law of the arbitral seat prohibits the arbitrators from grant of provisional measures, they have no such jurisdiction.<sup>63</sup> There are instances in which the national law of the arbitral seat denied the arbitral tribunal the power to grant provisional relief, for example, Argentina, China and Italy.<sup>64</sup> In jurisdictions, such as Argentina and Italy, arbitrators do not have the power to issue interim decisions.<sup>65</sup> The Greek Code of Civil Procedure, provides that the arbitrator may not order, amend or revoke interim measures of protection,<sup>66</sup> Article 818 of the Italian Code of Civil Procedure provides that the arbitrator may not grant attachment or other interim measures of protection.<sup>67</sup>

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<sup>57</sup> Rule 73 of the Japan Commercial Arbitration Association, Commercial Arbitration Rules.

<sup>58</sup> Article 9 (5) of Schedule 2 of Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

<sup>59</sup> Alan Redfern D, Arbitration and the Courts: Interim Measures of Protection, Is the Tide About to Turn? Paper presented in Symposium on International Commercial Arbitration, (winter, 1995) 30, Texas Int'l Law Journal, 71.

<sup>60</sup> Article 26 (9) of UNCITRAL Arbitration Rules.

<sup>61</sup> Article 28 (2) of ICC Rules; Rule 26 (3) of SIAC; [Article VI (4) of the European Convention on International Commercial Arbitration of 1961; and [Article 7 of Schedule 2 of ACICA.

<sup>62</sup> Gregoire Marchac, Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA & UNCITRAL Rules, (1999) 10 American Review of International Arbitration, 123.

<sup>63</sup> ICC Case No. 8113, 11(1) ICC Ct. Bull. 65 (2000).

<sup>64</sup> Gary B. Born, page 1963.

<sup>65</sup> Argentine Code of Civil Procedure, art. 753; Italian Code of Civil Procedure, Art. 818.

<sup>66</sup> Art. 889.

<sup>67</sup> Alan, page 395.

In most jurisdictions, if the tribunal has not yet been constituted, parties may choose to seek provisional measures from a court to protect against some immediate harm.<sup>68</sup> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measures.<sup>69</sup> It is also possible that the parties to the arbitration agreement exclude the arbitral tribunal's power to grant provisional measures. In such situations the parties may opt the jurisdiction of the National Courts to grant any interim or provisional measures. It is also well recognized under the arbitration rules that a party can obtain relief from a court, without losing the right to arbitrate.<sup>70</sup>

## **7. Reasons for preferring to national courts over Tribunals:**

It is open for the parties to seek relief of provisional measures from National Courts or Arbitral Tribunal, including from the Emergency Arbitrator. However, where there is an agreement between the parties to "opt out" from arbitration, for the purpose of interim relief or provisional measures, the national courts have the jurisdiction to grant such measures. Therefore, it is well settled that where there is no agreement in writing, national courts generally possess concurrent jurisdiction to order provisional measures, together with arbitral tribunal. In most circumstances, the only type of agreement that should suffice to exclude the arbitral tribunal's power to order provisional relief should be a written provision expressly denying such authority.<sup>71</sup>

Among the reasons for preferring to judicial authority over arbitration tribunal includes, the Tribunal may not be able to order provisional measures against third parties; the tribunal powers are limited only to the subject matter of dispute; and the decisions of the Tribunal may not be directly enforceable, some times without the help of national courts. In *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*<sup>72</sup> the application for interim measures was made to a court, but the judge was reluctant to make a decision that would risk prejudicing the outcome of the arbitration. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.

### **7.1. The courts are proved effective for granting "provisional measures":**

In some situations seeking relief from the courts is the better option, unless it is otherwise agreed by the parties. There are five situations where the tribunal's powers may be insufficient and thus favors recourse to a national court,<sup>73</sup> they are: (1) the arbitral tribunal may not have necessary powers, to amend or revoke interim measures of protection. The arbitrator may not grant attachment or other interim measures of protection; (2) inability to act prior to the formation of the tribunal; (3) an order can only affect the parties to

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<sup>68</sup>Margaret L. Moses, *The Principles and Practice of international Commercial Arbitration*, 2<sup>nd</sup> ed. Cambridge University Press, page 108.

<sup>69</sup>*Bahia Industrial SA v Eintacar-Cimar SA*, ZVIII YBCA 616 (1993).

<sup>71</sup>Gary Born, page 1974.

<sup>72</sup>(1993) A.C. 334 at 367-68.

<sup>73</sup>Allan, page 395.

the arbitration. A third party order, for example, addressed to a bank holding deposits of a party would not be enforceable against the bank;<sup>74</sup> (4) enforcement difficulties and (5) no *ex parte* application.

### 8. “Opt out” from Emergency Arbitration:

The basic principle for arbitration is party autonomy. Therefore, nothing precludes parties from agreeing that the arbitral tribunal shall not have the power to award provisional relief. The parties are free to decide that the provisional measures application should be made to national court. For example, the ICC Arbitration Rules provides that the Emergency Arbitration Provisions shall not apply if the parties have agreed to opt out of the Emergency Arbitrator Provisions.<sup>75</sup>

In *Massey v. Galvan*<sup>76</sup>, the US Court observed that: “No party is under a duty to arbitrate unless by clear language he has previously agreed to do so; and it must clearly appear that the intention of the parties was to submit their dispute to an arbitration panel and to be bound by the panel’s decision.”

### 9. Enforcement of Interim Measures Order:

The enforcement of interim measures is governed by international conventions, domestic legislation, the arbitration agreement and the *lex arbitri*, which is traditionally the arbitration law of the place of arbitration. The New York Convention requires that, *inter alia*, an award is to be binding for enforcement in accordance with Article V(1)(e) under the law of the state where the award was rendered.<sup>77</sup>

### 10. Conclusion:

The study on arbitral tribunal’s power to grant conservatory or provisional or interim measures gives the conclusion that majority of the institutional arbitration rules contain the provisions for interim measures and recognized the power of tribunal’s to grant such measures in respect of subject matter in dispute and as it deems necessary in that case. In some arbitration rules there are special provisions for appointment of emergency arbitrator to grant such relief on urgent basis. However, the arbitration rules also require the parties seeking interim measures to show of serious or irreparable harm to the applicant and urgency for grant of such measures.

In order to seek such relief, where the Arbitral tribunal is constituted, the party may seek interim measures from arbitral tribunal. Where the Arbitral Tribunal is not yet constituted but the arbitration rules contain a provision for constitution of Emergency Arbitrator, a party may invoke such provisions for interim relief. In a situation where the arbitral tribunal is not yet constituted and there is no provision for appointment of emergency arbitrator, the only available recourse must be to a court of law.

If emergency relief continues to grow and develop, participating in emergency arbitration can become a more attractive option than seeking emergency relief from the courts, just as participating in

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<sup>74</sup>Hanotiau, “Problems raised by Complex Arbitrations involving multiple Contracts, Parties Issues’ (2001)

18 Journal of International Arbitration 251.

<sup>75</sup>Article 29 (6)(b) of ICC Arbitration Rules.

<sup>76</sup>822 S.W.2d 309, 316.

<sup>77</sup>Ali Yesilirmark, Provisional Measures, Pervasive Problems in International Arbitration, Edited by Ioukas A. Mistelis & Julian D.M. Lew, Kluwer Law International, the Netherlands, page, 199.

international arbitration is often a more attractive option than transnational litigation.<sup>78</sup>The arbitration rules require the parties seeking such measure to prove *prima facie* case on the merits. With regard to grant of *ex parte* relief, many commentators concluded that *ex parte* provisional relief is beyond the power of arbitral tribunals.<sup>79</sup>Further, the provisional measures must not “prejudge the merits” of the parties underlying dispute,<sup>80</sup>and the provisional measures should not grant the relief sought in the final award.<sup>81</sup>The decision of the emergency arbitrator is not binding on arbitral tribunal. In certain circumstances, where a party needs coercive measures it is necessary to seek help from a judicial authority.

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<sup>81</sup> ICC Case No. 8115.

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