Document information

Publication

- International Commercial Arbitration (Third Edition)

Bibliographic reference

'Chapter 17: Provisional Relief in International Arbitration', in Gary B. Born , International Commercial Arbitration (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021) pp. 2601 - 2758

Chapter 17: Provisional Relief in International Arbitration (1)

This Chapter addresses the subject of provisional or interim measures of protection and conservation ("provisional measures"), designed to protect parties or property during the
P 2604
pendency of international arbitral proceedings. The Chapter first discusses the extent to which international arbitral tribunals are authorized to grant provisional relief and the circumstances in which they will be willing to do so. Second, the Chapter addresses the enforceability in national courts of provisional measures ordered by international arbitral tribunals. Finally, the Chapter considers when national courts may grant provisional relief in aid of an international arbitration, whether concurrently with arbitral tribunals or independently.

§17.01 INTRODUCTION

Contemporary litigation and arbitration in most legal systems is accompanied by procedural safeguards and opportunities for all parties to be heard. One inevitable consequence of these procedural protections is delay in the ultimate resolution of the parties' dispute; in turn, this delay can prejudice one party, sometimes seriously or irreparably. Classic examples of such prejudice include dissipation of assets, destruction of evidence, loss of market value of property, disruption of a joint venture's operations, destruction of an ongoing business, disclosure of confidential information, or misuse of intellectual property, interference with customer relations, and pursuit of satellite litigations. These sorts of damage can be exacerbated where one party seeks deliberately to take advantage of or create delays in the dispute resolution procedures, in order to improve its overall tactical or commercial position or exert pressure on its adversary.

Given the foregoing, national legislatures and courts have developed means for granting interlocutory or interim provisional measures designed to safeguard parties from serious injury caused by delays in the litigation process. These provisional measures rest on a simple premise: in order for a dispute resolution process to function in a fair and effective manner, it is essential that an adjudicative body possesses broad power to safeguard the parties' rights and its own remedial authority during the pendency of the dispute resolution proceedings. Unless a tribunal is able to grant provisional measures, its ability to provide effective, final relief may be frustrated, one party may suffer grave damage, or the parties' dispute may be unnecessarily exacerbated during the pendency of the dispute resolution process. As explained in a frequently-cited Advocate General's opinion for the European Court of Justice:

> "[i]nterim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection." (2)

P 2606
Provisional measures have particular importance in international disputes. (3) Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant tribunals or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unlikely.

As discussed below, historically there were significant limits on, or prohibitions against, the power of arbitral tribunals to order provisional relief, while tribunals were reluctant to exercise those powers that they did possess. (4) More recently, as also discussed below, national law has removed many of the historic limits on the powers of arbitrators to grant provisional measures of protection, while tribunals have demonstrated increased willingness to make use of such powers; at the same time, many national courts have become more reluctant to grant provisional measures in aid of international arbitrations, instead deferring to the remedial powers of arbitral tribunals. (5) These developments have made provisional measures increasingly important in contemporary international arbitration, both as a means of protecting parties' legitimate interests and as tactical devices capable of exerting pressure on adverse parties.

Properly defined, “provisional measures” are awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process. Most often, as discussed below, provisional measures are “intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the [tribunal] having jurisdiction as to the substance of the case.” (6)

The 2006 Revisions to Article 17 of the UNCITRAL Model Law provide a representative list of “interim measures” as follows:

> “[a]n 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.” (7)

Additionally, as also discussed below, provisional measures of protection can extend beyond merely preserving the factual or legal status quo, to require restoring a previous state of affairs or taking new actions. (8)

Provisional measures are variously referred to as “interim” or “pre-award” relief or as “conservatory” or “protective” measures. (9) These terms are often used interchangeably, or in combination, without particular precision. All of these terms are employed to refer to two related, but separate, concepts: (a) “interim” and “provisional” decisions that are made prior to a final award, where the relief granted is usually, but not necessarily, designed to protect a party during the pendency of the proceedings, and which are potentially subject to alteration or elimination in the final award; (10) and (b) on other occasions, “protective” or “conservatory” measures refer to relief that is designed to protect or conserve particular rights, regardless of whether it is granted in an interim or a final award. (11) As a practical matter, interim relief usually,
P 2607
but not always, involves conservatory and/or protective measures, while conservatory and protective measures are usually, but not always, granted at an interim stage of proceedings (*i.e.*, before a final award). (12)

§17.02 PROVISIONAL MEASURES ORDERED BY INTERNATIONAL ARBITRAL TRIBUNALS

Provisional measures in connection with an international arbitration are, in principle, available from either an arbitral tribunal or a national court. This section first considers the circumstances in which arbitral tribunals are authorized – under the parties’ arbitration agreement, any relevant institutional arbitration rules and applicable national law – to grant provisional relief in international arbitrations. (13) The section next discusses whether and how arbitrators in practice exercise any power they may enjoy to order provisional relief. (14)

[A] Arbitrators’ Authority to Order Provisional Relief

The threshold question for a party seeking pre-award relief is whether the arbitral tribunal possesses the authority to order provisional measures. (15) In general, the answer to that question depends on three sources: (a) any applicable international arbitration convention; (b) applicable national laws; and (c) the parties’ arbitration agreement, including any relevant institutional rules. As detailed below, all of these sources show a continuing evolution, away from historic limits on, or prohibitions against, tribunal-ordered provisional measures and towards broad powers on the part of arbitrators to grant effective provisional relief. (16)

[1] Authority of Arbitrators to Order Provisional Relief Under International Arbitration Conventions

For the most part, international arbitration conventions do not expressly deal with the authority of arbitrators to order provisional measures. Like the Geneva Protocol and Geneva Convention before it, the New York Convention does not specifically refer to the issuance of provisional measures by arbitrators or to the power of arbitrators to make such orders; (17) the
P 2608
Inter-American Convention is the same. (18)

In contrast, the European Convention does address the general subject of provisional relief in international arbitration, although it only provides that "[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court." (19) This language permits parties to an international arbitration agreement to seek provisional measures from a national court without thereby either waiving their rights to arbitrate or violating their agreement to arbitrate. (20) Like the New York Convention, however, the European Convention does not specifically address whether or when an arbitral tribunal may itself grant provisional measures, or the relationship between applications for tribunal-ordered and court-ordered provisional measures.

Unlike the New York and European Conventions, the ICSID Convention expressly recognizes at least limited power on the part of ICSID arbitral tribunals to grant provisional relief. Article 47 of the ICSID Convention provides that arbitral tribunals may "recommend" that a party adhere to "any provisional measures which should be taken to preserve the respective rights of either party." (21) The Convention thus, unusually, specifically recognized the power of arbitral tribunals to consider and rule upon requests for provisional relief; its reference to "recommendations" for provisional relief was originally motivated by concerns about interfering with state prerogatives and sovereignty, (22) but ICSID arbitral awards have consistently interpreted Article 47 as also permitting the ordering of binding provisional measures. (23)

P 2609
The evolution of international conventions reflects more general developments with regard to provisional measures in international arbitration. This evolution progressed from the absence of any reference to provisional measures in the Geneva Protocol and Convention (1923 and 1927) and New York Convention (1958), to an express recognition of court-ordered provisional measures and an indirect acknowledgement of tribunal-ordered interim measures in the European Convention (1961), to an express grant of power to arbitral tribunals to order provisional measures in the ICSID Convention (1965). As detailed below, this progressive recognition of the role of provisional measures in international arbitration, and of the authority of arbitral tribunals to grant such measures, parallels developments in both national laws and arbitral practice. (24)

[2] Effect of New York Convention on Authority of Arbitrators to Order Provisional Measures

Although the issue has not been expressly considered in any detail by national courts or other authorities, the New York Convention should be interpreted as impliedly precluding Contracting States from adopting national laws that deny effect to international arbitration agreements granting arbitrators the power to order provisional measures. (25) As discussed above, Article II of the Convention obliges Contracting States to recognize and give effect to the material terms of agreements to arbitrate. (26) Where the parties' arbitration agreement grants the arbitral tribunal the power to decide requests for provisional relief, Article II in principle requires that the parties' agreement be upheld and forbids Contracting States from simply denying effect to such agreements. (27)

The foregoing argument might be considered to be in tension with legislation, historically extant in some countries when the New York Convention was drafted, denying arbitrators the power to order provisional measures. (28) Such legislation was not expressly said at the time to violate the Convention, as arguably would have been the case had the Convention been intended to affect the status of tribunal-ordered provisional relief.

P 2610
On the other hand, as discussed elsewhere, the Convention was recognized as a "constitutional" instrument, which would inevitably impose obligations on Contracting States to eliminate historic national law rules restricting the efficacy of international arbitration agreements. (29) Given this, the better view is that the text and structure of the Convention forbid Contracting States from denying effect to international arbitration agreements empowering arbitrators to grant provisional measures. (30) National law rules denying recognition of agreements to submit requests for provisional measures to arbitration would violate the obligation of Contracting States under Article II(1) of the Convention to recognize all material terms of international arbitration agreements. (31)

[3] Authority of Arbitrators to Order Provisional Relief Under National Arbitration Legislation

National arbitration legislation plays a significant role in the availability of provisional relief from international arbitral tribunals. As a practical matter, an arbitrator will generally not grant provisional relief unless he or she is satisfied that the law applicable to the arbitral proceedings (typically, the arbitration legislation of the arbitral seat) (32) allows the tribunal to do so. (33) Likewise, tribunal-ordered provisional relief may not be enforceable in a national court unless the law(s) governing the arbitral proceedings permit(s) such relief. (34) Nonetheless, particularly in recent decades, both

arbitral tribunals and national courts have generally concluded that national arbitration legislation is consistent with the New York Convention (and that it authorizes tribunal-ordered provisional measures).

[a] Historic Prohibitions Against Tribunal-Ordered Provisional Relief

Historically, national law not infrequently denied arbitrators the power to order interim measures. (35) This was the case, for example, in Switzerland, where the 1969 Cantonal Concordat formerly reserved the power to issue provisional relief to the Swiss courts, although arbitrators were permitted to recommend interim relief; in particular, Article 26(1) of the Concordat provided that "[t]he public judicial authorities alone have jurisdiction to make provisional orders." (36) Legislation in a few other states, including Austria, Italy, Spain, Greece
P 2611
and Argentina imposed similar prohibitions against tribunal-ordered provisional measures. (37)

The rationale for historic prohibitions against tribunal-ordered relief appears to have been an application of the traditional precept that arbitrators, in contrast to national courts, may not issue coercive measures, coupled with the view that provisional relief is a coercive measure. (38) This rationale was unsatisfactory, and it has rightly been almost universally abandoned.

An arbitral tribunal's issuance of provisional measures, by way of an order or interim award directed at a party, was no more the exercise of coercive powers than the making of a final award granting injunctive or other relief. In each case, the tribunal's order or award directs a party to do (or not to do) specified actions, but the tribunal itself lacks the power directly to require compliance with such an order or to punish noncompliance. Rather, orders of both provisional relief and final relief can only be coercively enforced by proceedings in national courts. Historic national law prohibitions against orders of provisional relief by arbitral tribunals therefore rested from the outset on an inaccurate characterization of such orders.

Equally important, prohibitions against provisional relief by arbitral tribunals are inconsistent with the terms of (most) international arbitration agreements and the basic purposes of the arbitral process. By agreeing to arbitrate, parties presumptively intend to have their disputes resolved in a single proceeding before a neutral international tribunal: (39) insofar as possible, that includes disputes regarding the availability of provisional measures, which are not infrequently a key aspect of commercial disputes. (40) Moreover, parties to arbitration agreements also desire a practical, effective dispute resolution mechanism which finally resolves their dispute; (41) in many instances, it is essential that provisional measures be available as part of that mechanism in order to accomplish this objective.

Finally, particular risks arise from requiring requests for provisional measures to be resolved by national courts. Such requests often require consideration, at least to some extent, of the merits of the parties' underlying claims, thereby creating the possibility that national courts will purport to preempt or prejudge decisions of the arbitral tribunal on the merits of the parties' dispute. This is again inconsistent with the objectives of the international arbitral process. (42) At the same time, the arbitral tribunal will ordinarily, if already constituted, be able to provide interim relief more expeditiously and efficiently than national courts. All of these arguments weigh decisively in favor of permitting arbitral tribunals to grant provisional measures (unless the parties have agreed otherwise).
P 2612

[b] National Legislation Recognizing Power of Arbitral Tribunal to Order Provisional Relief

Consistent with the foregoing analysis, over the past several decades, virtually all developed jurisdictions have rejected historic prohibitions against the authority of arbitral tribunals to grant provisional measures. Instead, they have adopted arbitration legislation that expressly confirms the power of arbitrators to issue provisional relief, provided that this is consistent with the parties' agreement; this power is subject to various limits (detailed below), which vary from jurisdiction to jurisdiction, but which ultimately affirm the general authority of international arbitral tribunals to grant provisional relief. (43) Most national arbitration statutes also provide, or national courts have held, that the parties will be presumed, absent clear contrary indication, to have agreed to authorize the arbitral tribunal to grant provisional measures (or, at least, certain types of provisional measures). (44)

The trend towards recognition of greater powers on the part of arbitrators to order provisional measures reflects the increasing acceptance of arbitration as a satisfactory mechanism for resolving complex international commercial disputes, (45) an increasing recognition by national courts that interlocutory judicial involvement in the arbitral process can be counterproductive (46) and an acknowledgement that (in many cases) it is desirable to have the same tribunal resolve both the merits of a dispute and any requests for provisional relief.

Of course, as with most other aspects of international arbitration, the parties remain free to alter this

general approach by agreeing that the arbitrators shall not have the power, or shall have only limited power, to grant provisional measures. (47) Absent such agreement, however, parties presumptively intend to confer power to order provisional measures on the arbitrators.

[i] UNCITRAL Model Law: Original Text and 2006 Revisions

The UNCITRAL Model Law is a leading example of the contemporary trend towards expansive arbitral authority to grant interim relief. That is particularly true when the 2006 Revisions to the Model Law are considered.

Article 17 of the Model Law, as adopted in 1985, provides that "[u]nless 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." (48) While the original text of Article 17 placed restrictions on a tribunal's powers to order interim relief (*i.e.*, such relief must be "necessary" and "in respect of the subject-matter of the dispute"), (49) it expressly confirmed the power of a tribunal to order a significant range of provisional measures, provided that the parties' arbitration agreement is not to the contrary.

P 2613
Properly interpreted, Article 17's original limitation to provisional measures "in respect of the subject matter of the dispute" does not restrict the arbitral tribunal to orders presenting or detaining a particular item of disputed property (*e.g.*, a shipment of goods or parcel of real property). Rather, as discussed below, the original text of Article 17 permits such orders as one example of available provisional relief, but more broadly allows any provisional measures that the tribunal considers "necessary," provided that such measures have a reasonable relation to the subject matter of the dispute. (50) Whatever Article 17's limitations, however, it is clear that the provision affirmed the arbitrators' presumptive authority to order interim relief in a significant range of cases.

As discussed in greater detail below, Article 17 of the Model Law was extensively revised in 2006. (51) Among other things, Article 17(1) was amended to provide that, "[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures." (52) This formulation confirms the expansive scope of Article 17, by omitting the provision's original language suggesting that interim measures may only be granted where a tribunal considers them "necessary" and "in respect of the subject-matter of the dispute." (53)

Article 17 of the Model Law, both as originally drafted and as revised in 2006, also provides that, "[u]nless otherwise agreed," arbitrators have the power to order interim measures of protection. This provision presumes that the parties intend to confer the power to order specified "interim measures of protection" on the arbitral tribunal, and effectively requires evidence of a contrary agreement to deny a tribunal such power. (54) In the words of one award, "it is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to … [order] provisional measure[s] (as, for example, in Article 17 of the newly revised UNCITRAL Model Law)." (55) Thus, as most commentary correctly concludes, the Model Law does not require an affirmative agreement *granting* the arbitrators the power to order interim measures, but instead requires an express agreement *withdrawing or limiting* such power; absent such a prohibition or restriction, Article 17 rests on the premise that international arbitral tribunals presumptively have the authority to order provisional measures. (56)

P 2614
This approach is sensible and consistent with the objectives of most commercial parties in agreeing to arbitrate, as well as with basic considerations of fairness and efficiency. In concluding agreements to arbitrate, reasonable parties intend that the international arbitral process will be effective and capable of resolving all of their disputes. (57) They also should be presumed to intend that the tribunal have the authority, even when not expressly granted, to resolve the sorts of disputes that ordinarily arise during the arbitral process, including disputes over interim relief. Conversely, reasonable parties cannot be presumed to intend that their chosen dispute resolution mechanism should lack important procedural protections, should reward dilatory tactics by one party, or should require recourse to national courts for effective relief. Accordingly, absent explicit contrary indication in the parties' agreement, it is both sensible and necessary to presume that arbitration agreements impliedly include a broad grant of authority to order interim relief.

[ii] Swiss Law on Private International Law

The historic trend rejecting legislative limitations on arbitrators' authority to order provisional measures is well-illustrated by Swiss law. There, the historic prohibitions in the 1969 Cantonal Concordat (58) were reversed with respect to international arbitration by the 1987 Swiss Law on Private International Law, which expressly confirmed the arbitrators' power to grant provisional relief. Thus, Article 183 of the Swiss Law on Private International Law now provides "[u]nless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures." (59) Under this provision, Swiss authority recognizes broad power, absent contrary agreement, on the part of international arbitral tribunals seated in Switzerland to grant

provisional relief. [60] Proposed amendments to the Swiss Law on Private International Law would confirm, and expand, this authority. [61]

P 2615

[iii] U.S. Federal Arbitration Act

In the United States, the text of the FAA is silent on the arbitrators' powers to order provisional measures. Nonetheless, after some early doubts, U.S. courts now recognize broad authority on the part of arbitral tribunals to grant interim relief, again, absent contrary agreement.

Early U.S. judicial decisions frequently held that arbitrators lacked the authority to issue provisional relief, generally relying on narrow readings of the parties' arbitration agreement. [62] In contrast, more recent U.S. lower court decisions have consistently held that arbitrators may issue provisional relief, once more, provided that the parties have not agreed to the contrary. [63]

P 2616

In the words of one U.S. lower court, "[a]rbitrators normally have the power to grant interim relief unless the parties specify otherwise in the contract." [64] Another decision under the FAA explained that, "temporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless." [65] Indeed, a refusal to give effect to an agreement providing arbitrators power to grant provisional measures would contravene the FAA's basic rule that agreements to arbitrate are valid and enforceable; that rule encompasses disputes over interim relief, as well as other types of disputes, requiring that agreements granting arbitrators authority to order interim relief be given full effect. [66]

U.S. courts also generally hold that the parties' agreement that the arbitrators have the power to grant interim measures will be implied, absent contrary indication in the arbitration agreement. [67] As one U.S. state court reasoned:

> "[I]n general …, in the absence of an agreement or statute to the contrary, an arbitrator has inherent authority to order a party to provide security while the arbitration is continuing. It is reasonable to assume that parties, in agreeing to arbitration, implicitly intended that the arbitration not be fruitless and that interim orders to preserve the status quo or to make meaningful relief possible would be proper. In such a circumstance, the arbitrator's authority to act would reasonably be implied from the agreement to arbitrate itself." [68]

Most U.S. commentators also conclude that arbitral tribunals presumptively have the power to order provisional relief, unless otherwise agreed. [69] Equally, as discussed below, U.S. courts have not imposed significant limitations on the scope of the arbitrators' authority to grant provisional measures (other than any limits contained in the parties' agreement). [70]

Although of limited direct relevance in international matters, U.S. state arbitration statutes also increasingly contain language specifically providing arbitrators the authority to grant provisional measures. [71] For example, the U.S. Revised Uniform Arbitration Act provides, in §8(b)(1):

P 2617

> "[a]fter an arbitrator is appointed and is authorized and able to act: (1) the arbitrator may issue such order for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action." [72]

Provisions of state arbitration statutes granting arbitrators authority to order provisional measures have not frequently been relied upon by international arbitral tribunals seated in the United States, although, in principle, there is no reason that they could not be. Nonetheless, these statutes reflect and confirm the inherent power of arbitral tribunals, absent contrary agreement, to grant provisional measures.

[iv] English Arbitration Act

The English Arbitration Act, 1996, provides that, absent contrary agreement, an arbitral tribunal may issue orders concerning the preservation, detention, inspection, or sampling of "property which is the subject matter of the dispute," [73] and concerning the preservation of evidence. [74] For other types of provisional measures, the Arbitration Act provides that "the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award." [75]

The result of these provisions is that, absent evidence of an agreement that an English-seated arbitral tribunal shall have power to grant provisional measures beyond those relating to preservation/inspection of disputed property, no such power exists. (76) Where the parties have so agreed, however, an English-seated tribunal may order any interim relief provided that it is relief the tribunal could grant in its final award. Although there is little English authority on the issue, there would appear to be no reason that an implied agreement regarding the arbitral tribunal's authority to grant provisional relief – consistent with the overwhelming weight of international authority (77) and the expectations of reasonable commercial parties (78) – would not satisfy the requirements of the English Arbitration Act.

P 2618
The comparatively restrictive approach under the English Arbitration Act is less desirable than that of the UNCITRAL Model Law and FAA, both of which assume that parties intend to grant the arbitral tribunal broad powers to grant interim measures (subject, of course, to contrary agreement). For the reasons outlined above, this latter approach accords better with the likely expectations of most commercial parties and is, in practice, more likely to achieve fair and efficient results than the more limited English statutory provision. (79)

[v] Other Jurisdictions

Most developed jurisdictions have taken approaches to provisional relief similar to that under the Model Law and FAA, generally reflecting an evolution towards increasingly broad, presumptive arbitral authority to grant provisional relief.

Until 2011, the French Code of Civil Procedure was silent on the subject of provisional measures. Nonetheless, French courts and commentators held that arbitrators in French-seated international arbitrations were empowered to grant provisional relief. (80) This position was codified by the 2011 revisions of the French Code of Civil Procedure, which now provides in Article 1468 that "[t]he arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order." (81)

A similar trend was followed in other countries, including in Model Law jurisdictions, such as Germany, Austria, Canada, Japan, India, Singapore, New Zealand and Australia, (82) and non-Model Law jurisdictions, such as Sweden and Brazil. (83) Among other things, Argentina and Austria recently repealed legislation that had previously denied arbitral tribunals authority to grant provisional measures. (84) In all these cases, national arbitration statutes now expressly provide authority, or rest on the premise that arbitrators possess inherent authority, to grant provisional measures and that an express agreement to the contrary is required to withdraw such power.

Of course, under all national arbitration legislation, the parties are free to withhold or limit the arbitrators' power to grant provisional relief. Such limitations are unusual, but if parties
P 2619
wish to channel all requests for provisional measures into national courts, or a particular national court, they are free to agree to do so. Alternatively, as discussed in greater detail below, the parties may agree to arbitrate pursuant to institutional rules, which sometimes limit the arbitrators' power to grant provisional relief. (85)

[c] Contemporary Legislation Prohibiting Arbitral Tribunal from Ordering Provisional Relief

Although historic limitations on arbitrators' power have been removed in almost all states, some nations continue to impose mandatory prohibitions that forbid arbitrators from ordering provisional relief. That remains the case, for example, in Italy, China, and Thailand, where local legislation still provides that the granting of provisional measures is reserved exclusively to local courts, which are authorized to issue provisional relief in aid of arbitration. (86) A few other national arbitration statutes appear to provide that arbitrators may only order provisional measures where expressly authorized by the parties' arbitration agreement to do so. (87)

[4] Institutional Arbitration Rules

Many leading institutional arbitration rules address the power of the arbitrators to grant provisional measures. For the most part, these rules specifically provide arbitrators power to grant provisional measures, usually in relatively broad terms. (88) Like national arbitration legislation, most institutional rules have been progressively revised to grant arbitral tribunals, more explicitly and expansively, authority to order provisional measures. Among other things, many institutional rules have been revised in recent years to include provisions for "emergency arbitrators," capable of granting urgent interim relief prior to the constitution of the arbitral tribunal.
P 2620

[a] UNCITRAL Rules

The UNCITRAL Rules are representative of many contemporary institutional arbitration regimes. Article 26 of the original 1976 version of the Rules grants an arbitral tribunal the power to issue "interim measures" which it deems "necessary in respect of the subject matter of the dispute,

including measures for the conservation of the goods forming the subject matter of the dispute." (89) This provision is properly understood as granting arbitrators broad powers to order provisional measures which they deem necessary, imposing only the relatively modest limitations that such measures be "necessary" and "in respect of the subject matter of the dispute." (90)

As with Article 17 of the UNCITRAL Model Law, (91) this latter limitation should not be interpreted to restrict a tribunal to orders for the preservation, detention, or inspection of disputed goods or property. Rather, the UNCITRAL Rules are correctly understood as granting a tribunal the authority to issue any measures against a party that it deems necessary for protective or conservatory purposes, provided only that these measures have some connection to the contract, contractual or legal rights, property, requested relief, or other issues in dispute. (92)

In 2010, the text of the UNCITRAL Rules addressing provisional measures was significantly amended. The revised text of Article 26(1) of the 2010 (and the 2013) version of the Rules now grants an arbitral tribunal the power to issue "interim measures" at the request of a party, (93) while Article 26(2) lists four categories of interim measures, as illustrative, but non-exclusive, examples:

> "(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." (94)

P 2621
These provisions remove any doubt as to the scope of the provisional measures that a tribunal may order, as contrasted with former Article 26 of the 1976 UNCITRAL Rules, which arguably limited provisional measures to relief "in respect of the subject matter of the dispute."

In addition, the revised text of Article 26 also introduced a set of standards for granting interim relief which were not present in the 1976 UNCITRAL Rules. As discussed in greater detail below, the revised text of Article 26(2) requires a showing that the harm likely to result if a requested provisional measure is not ordered will not be adequately reparable by an award of damages and that this harm substantially outweighs the harm likely to result if the measure is granted. (95) Additionally, Article 26(3) now requires that an applicant for provisional relief demonstrate a reasonable possibility of success on the merits. (96)

The revised version of Article 26 also now expressly provides that interim measures can be modified, suspended, or terminated upon application of any party, or in exceptional circumstances, *sua sponte* by the tribunal with prior notice to the parties. (97) Additionally, Articles 26(6) and 26(8) of the revised UNCITRAL Rules provide that a tribunal can require posting of appropriate security related to an interim measure (98) and that the party requesting an interim measure may be liable for any costs and damages caused by the measure if the tribunal determines that, "in the circumstances then prevailing, the measure should not have been granted." (99)

[b] ICC Rules

Like the revised UNCITRAL Rules, Article 28 of the 2017 ICC Rules grants the arbitral tribunal authority to order "any interim or conservatory measures it deems appropriate," absent contrary agreement by the parties. (100) Article 28 of the 2017 (and 2012) ICC Rules, like Article 23 of the 1998 ICC Rules, extends beyond the authority contained in Article 8(5) of the 1988 version of the ICC Rules and expressly grants ICC arbitrators the power to award provisional relief. (101)

P 2622
In addition to Article 28, the revised 2012 ICC Rules also introduced an "Emergency Arbitrator" provision, which was augmented in the 2017 ICC Rules. Under Article 29 of the 2017 ICC Rules, a "party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal … may make an application for such measures." (102) The appointment of an emergency arbitrator and the ensuing emergency arbitral proceedings take place on a highly expedited basis (*i.e.*, in a matter of days (or hours)). (103) The decision of the emergency arbitrator is issued in the form of an order (rather than an award), with which the parties are obliged to comply, but which the arbitral tribunal, once constituted, "may modify, terminate or annul." (104)

[c] SIAC Rules

Like the 2017 ICC Rules, the 2016 SIAC Rules allow a SIAC tribunal to issue interim relief "as it deems appropriate" and to "order the party requesting interim relief to provide appropriate security in connection with the relief sought." (105) Articles 27 identifies (in a non-exhaustive list) some of the

types of interim relief that a tribunal may grant; [106] this relief includes orders for the "preservation, storage, sale or disposal of any property or item which is or forms part of the subject matter of the dispute," [107] orders directing "any party to take or refrain from taking actions to ensure that any Award which may be made in the arbitration is not rendered ineffectual by the dissipation of assets by a party or otherwise," [108] and orders for any party to provide security for "legal or other costs in any manner the Tribunal thinks fit" [109] or for "all or part of any amount in dispute in the arbitration." [110]

The 2016 SIAC Rules also provide an emergency arbitrator procedure. Pursuant to Article 30(2), if a party wishes to seek emergency interim relief prior to the constitution of the tribunal, it may do so in accordance with Schedule 1 of the Rules, which set out an expedited procedure for obtaining emergency relief, including appointment of an emergency arbitrator in one (calendar) day and a requirement that an interim order or award be rendered within 14 days. [111] In practice, a SIAC emergency arbitrator usually takes some eight to ten days to render
P 2623
a decision, and it is not uncommon for an award to be issued in as little as two days. [112]

A SIAC emergency arbitrator may award any interim relief deemed necessary, including the making of preliminary orders pending any hearing or submissions by the parties. [113] Consistent with the ICC Rules, the emergency arbitrator will no longer have any power to act after the tribunal is constituted; once constituted, the arbitral tribunal may "reconsider, modify or vacate" any interim order or award made by the emergency arbitrator, and will not be bound by the reasons given by the emergency arbitrator. [114] The emergency arbitrator provisions of the SIAC Rules have been widely used. [115] In a substantial majority of cases, parties to SIAC arbitrations have reportedly complied with emergency arbitrator decisions voluntarily or settled disputes soon thereafter. [116]

[d] LCIA Rules

Article 25 of the 2020 LCIA Rules is broadly similar to the revised UNCITRAL and ICC Rules. Article 25(1) authorizes an LCIA tribunal to order specified types of provisional measures (including security for claims, preservation or sale of disputed property, and any other relief which could be made in a final award), subject to contrary agreement by the parties. [117] Like the 2010 UNCITRAL Rules, the LCIA Rules specifically grant the arbitrators authority to order security for costs. [118]

Again, like the revised 2017 and 2012 ICC Rules, the 2020 LCIA Rules now also include an emergency arbitrator provision. Pursuant to Article 9B, "any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the 'Emergency Arbitrator')." [119] Any order or award of the Emergency Arbitrator must be made no later than 14 days after appointment and must contain reasons, with the arbitral tribunal, once constituted, retaining authority to "confirm, vary, discharge or revoke" any interim decision of the Emergency Arbitrator. [120]

[e] Other Institutional Arbitration Rules

P 2624
Many other leading institutional arbitration rules have also been progressively revised in recent years to provide arbitrators with the power to grant provisional relief. In some instances, emergency arbitrator mechanisms have also been introduced. [121]

Thus, although the AAA Commercial Rules historically did not authorize tribunal-ordered provisional relief, [122] they have been revised to provide an express grant of authority to order provisional relief. [123] Indeed, the ICDR was among the first arbitral institutions establishing an "emergency arbitrator" mechanism, designed to make interim relief available through the arbitral process, rather than a national court, prior to constitution of the arbitral tribunal. [124]

Similarly, the Stockholm Arbitration Institute's Rules historically provided only for the ordering of specific performance, [125] but were revised in 2007 (and again in 2010 and 2017) to authorize the arbitral tribunal to "grant any interim measures it deems appropriate." [126] The SCC Rules were also revised to include an emergency arbitrator provision which permits a party to "apply for an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal" and gives the Emergency Arbitrator power to "grant any interim measures it deems appropriate." [127]

Other institutional rules followed a similar evolution. The 1995 and 2005 CIETAC Rules provided that an arbitral tribunal could not order provisional measures, but this provision was revised in 2012 (and retained in 2015 CIETAC Rules and 2017 CIETAC Investment Rules)
P 2625
to authorize tribunals to "order or award any interim measure it deems necessary or proper." [128] The ICDR, WIPO, Swiss, JCAA, HKIAC and Milan Rules have all also been revised to introduce provisions authorizing arbitrators to order provisional measures. [129]

Even where institutional rules do not expressly provide arbitral tribunals the power to grant provisional measures, national courts and/or arbitral tribunals have sometimes interpreted them to

authorize such action. [130] For example, under the 1988 ICC Rules, which did not expressly authorize tribunal-ordered provisional measures, [131] arbitral tribunals frequently concluded that they possessed the authority to grant provisional relief. [132]

In contrast, some early national court decisions refused to imply a power to order provisional measures into institutional rules that did not expressly address the subject. [133] As discussed above, however, the decisive trend, among more modern decisions, is to permit arbitral tribunals the authority to order provisional measures absent contrary agreement by the parties. [134]

Most institutional rules provide little, if any, guidance to arbitrators concerning the circumstances in which provisional measures should be granted. In contrast to the 2010 UNCITRAL Rules (discussed above), [135] most institutional rules do not prescribe standards for the grant of interim relief (*e.g.*, requirements for irreparable harm, balance of hardships). Instead, institutional rules almost uniformly leave the formulation of standards for interim relief to the arbitral tribunal and applicable law. [136]

[5] Limitations on Arbitral Tribunal's Power to Order Provisional Relief

Although most jurisdictions now recognize the power of international arbitral tribunals to order provisional measures, there are several significant limitations on this power. These limitations arise in part from the inherent nature of the arbitral process, which is a contractual
P 2626
mechanism between particular parties, and which requires constitution of a tribunal for each dispute that arises; these limitations also arise in part from the terms of some national arbitration statutes.

[a] Arbitral Tribunal Lacks Power to Order Provisional Relief Against Third Parties

First, an arbitral tribunal's (and emergency arbitrator's) powers are virtually always limited to the parties to the arbitration and the arbitration agreement. [137] In the words of one commentary, "an arbitral tribunal's jurisdiction encompasses only the parties before it [and] interim measures may not be directed to non-parties." [138] As a consequence, an arbitrator generally can (and will) order provisional measures only against the parties to the arbitration. He or she will not have the power to order, for example, attachment or preservation of property held by a third party. [139] Moreover, if an arbitral tribunal (or emergency arbitrator) orders provisional measures against a third party, national courts will ordinarily deny recognition and enforcement of such relief. [140]

This limitation is evident in some national arbitration legislation, including the UNCITRAL Model Law, which authorizes an arbitral tribunal to "order *any party* to take such interim measures of protection" deemed necessary. [141] This is also made explicit by the Belgian Judicial Code, which provides that "[w]ithout prejudice to the powers accorded to the courts and tribunals by virtue of article 1683, and unless otherwise agreed by the parties, the arbitral tribunal may order any interim or conservatory measures it deems necessary. However, the arbitral tribunal *may not authorise attachment orders*." [142]

Even where no such express statutory limit on the arbitrators' authority with respect to third parties exists, the contractual nature of the arbitral process implies that the tribunal's
P 2627
authority is limited to the parties to the arbitration. [143] Among other things, a tribunal may not order the attachment of assets in the custody and control of a non-party. [144]

Despite the foregoing, an arbitral tribunal would have the power to order a party to take steps vis-à-vis third parties to prevent or accomplish specified actions. For example, a corporate entity could be ordered to direct its subsidiary to take certain steps (*e.g.*, return or preserve specified property, deliver or safeguard funds). Such orders test the limits of arbitral powers, but, in appropriate cases, where necessary to accomplish justice, a tribunal has the authority to issue them and national courts have the obligation to recognize and enforce them.

[b] Arbitral Tribunal Lacks Power to Directly Enforce Provisional Relief

Second, it is also clear that an arbitral tribunal ordinarily lacks the authority to directly enforce its provisional measures. Rather, such enforcement is the responsibility of national courts, at the application of one or more of the parties.

As with final relief, an arbitral tribunal generally lacks direct coercive power to compel compliance with its awards or orders of provisional measures. This is evident, for example, in the language of the Swiss Law on Private International Law, which provides that "[i]f the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge; the judge shall apply his own law." [145]

Even absent this type of statutory provision, however, it is clear under virtually all national arbitration regimes that an arbitral tribunal cannot itself ordinarily apply direct coercive enforcement measures to obtain compliance with its provisional orders. [146] This is merely a specific application of the more general rule, discussed below, [147] that an arbitral tribunal lacks
P 2628

the legal and practical power to impose direct coercive measures to enforce its own final awards. (148)

Despite the foregoing, the line between "direct coercive measures of enforcement," and other actions by an arbitral tribunal, is sometimes less clear than assumed. A tribunal may, for example, order a party to deliver property or funds to it or a custodian, for safekeeping during the course of arbitral proceedings. Once such an order is complied with, the tribunal does, in almost all practical senses, exercise direct coercive authority to enforce its awards (*i.e.*, it controls disposition of the disputed property or funds). Although the tribunal lacks the coercive authority to force a transfer of the disputed funds or property in the first instance, once this occurs, it exercises powers very close to a direct enforcement authority.

Nevertheless, the better way of considering such powers is that they arise only in rare instances, where the parties have granted a tribunal a type of self-executing authority, which any private party could exercise in a contractual manner (*e.g.*, an escrow agent). This sort of power is not strictly equivalent to direct coercive authority, such as imposing criminal sanctions, which remains the sole prerogative of national courts.

It is also true that an arbitral tribunal may have the authority to order financial penalties of a contractual nature, in order to compel a party to comply with the tribunal's provisional measures. (149) As discussed above, national court decisions in some jurisdictions uphold such authority on the part of arbitral tribunals. (150) Moreover, a few national arbitration statutes expressly provide arbitrators with the power to impose sanctions on a party for failing to comply with their interim orders. (151) On the other hand, a tribunal's imposition of penalties raises enforceability issues under at least some national laws. (152)

It is also sometimes said that an arbitral tribunal can indirectly procure compliance with its provisional measures through the express or implied threat of adverse inferences against a non-compliant party. In one commentator's view:

> "the fact that arbitral tribunals can draw adverse conclusions from failure to comply with their decisions concerning [provisional] measures encourages voluntary compliance with such orders." (153)

P 2629
This overstates somewhat the practical consequences of a tribunal's order and, more importantly, fails to identify the limitations on an arbitral tribunal's "informal" powers of encouraging compliance with its provisional measures. As for practical effects, parties often adduce reasons of local law, changed circumstances, acts of third parties, or other issues that at least partially excuse or blur their noncompliance with a tribunal's order. Equally important, parties may well be willing to sacrifice some measure of their appearance as "good citizens" in the arbitral process if noncompliance with provisional measures brings them significant benefits. (154)

As for legal consequences, it bears emphasis that a tribunal is obligated to resolve the parties' dispute on the merits. Even if a party has not behaved as a "good citizen," the tribunal remains obliged to decide the parties' claims in accordance with the law and evidentiary record. If an arbitral tribunal were to draw adverse inferences from a parties' refusal to comply with provisional measures (other than disclosure-related orders), it might very well depart from its arbitral mandate and obligation to resolve the dispute impartially. (155)

[c] Limitation of Provisional Relief to "Subject Matter of Dispute"

Third, national arbitration legislation or institutional arbitration rules also sometimes limit the scope of the arbitral tribunal's power to grant provisional measures. That is arguably true under the original text of Article 17 of the UNCITRAL Model Law, and Article 26 of the 1976 UNCITRAL Rules, as well as other national arbitration statutes and institutional rules.

As discussed above, the original text of the 1985 UNCITRAL Model Law grants arbitral tribunals the power to issue provisional measures which they "consider necessary *in respect of the subject matter of the dispute*." (156) It is sometimes said that this language imposes significant limits on the arbitrators' authority to grant provisional measures. Thus, it has been suggested that Article 17 limits an arbitral tribunal to ordering measures related "to preserve the status quo or to prevent the disappearance of assets." (157) This "narrow interpretation" of Article 17's reference to the subject matter of the dispute is justified on the grounds that "a broad interpretation of the subject matter could lead to a slippery slope whereby the tribunal will define the all-encompassing term to include anything and everything." (158)

There is a measure of general support for this restrictive interpretation of Article 17 in the Model Law's drafting history. (159) The better view, however, is that the drafting history is

P 2630
ambiguous, [160] and that such interpretations are inconsistent with the Model Law's objectives and the expectations of commercial parties. [161]

The requirement that provisional measures be issued "in respect of the subject matter of the dispute" ought not to limit a tribunal's power to particular items whose ownership is in dispute in an arbitration. Instead, Article 17 can readily and properly be interpreted as extending to the preservation of contractual rights or of the equilibrium between the parties (*e.g.*, the maintenance of a contractual relationship for licensing intellectual property or purchase/sale of goods). Where the parties' dispute concerns the continued existence or nature of their contractual or corporate relationship, then provisional measures preserving all aspects of that relationship are properly regarded as being "in respect of the subject matter of the dispute."

The same analysis can be extended to the preservation of assets sufficient to satisfy a party's claims (*e.g.*, security for costs or damages). Such relief is properly considered as being "in respect" of the subject matter of the parties' dispute, because it is "necessary" in order that the parties' dispute can be resolved fairly at all. Indeed, in the majority of arbitrations, the "subject matter of the dispute" is not specific property, and it makes little sense to limit Article 17's reach solely to relatively atypical circumstances. [162]

As discussed above, the text of Article 17 of the UNCITRAL Model Law was revised in 2006. Among other things, Article 17(1) was amended to omit the requirement that provisional measures be "in respect of the subject-matter of the dispute." [163] This amendment streamlined (this aspect of) the Model Law, confirming the arbitral tribunal's broad authority to grant provisional measures. [164] Properly understood, the 2006 amendment to Article 17
P 2631
clarified the existing substance of the Model Law rather than expanding previously-limited powers.

Other arbitration legislation imposes limits on the scope of the arbitrators' powers to order provisional measures. As noted above, the English Arbitration Act provides that an arbitral tribunal has the power to grant provisional measures "in relation to any property which is the subject of the proceedings or as to which a question arises in the proceedings." [165] Although it expands on earlier English legislation, the scope of this provision is uncertain and potentially fairly limited, [166] although the Act also permits parties by agreement to grant the arbitrators broader power to order provisional measures. [167] Some other national arbitration statutes have other limitations. [168]

[d] Arbitral Tribunal Lacks Power to Order Provisional Relief Until It Is Constituted

Fourth, an arbitral tribunal obviously cannot issue provisional measures until it has been constituted. This is implied by arbitration legislation limiting the power to grant provisional measures to "arbitral tribunals." [169] Institutional arbitration rules impose similar [170] (or more demanding [171]) requirements. In any case, until an arbitral tribunal has been legally-constituted, it has no powers and can neither act nor issue provisional measures.

Although self-evident, this limitation can have substantial practical importance. The most critical time for seeking provisional measures is often at the outset of the parties' dispute: one party may seek to dispose of disputed property or evidence, to alter the contractual or commercial *status quo ante* (by terminating an agreement or commercial relationship), or to take other steps to preempt or position itself for the arbitration. The absence of any arbitral tribunal to which requests for provisional relief may be directed in the initial weeks or months of a dispute may effectively prevent the tribunal from granting meaningful interim measures (or, potentially, an award that has practical effect). [172]

P 2632
As discussed below, this is one of the reasons that, under most legal systems and institutional rules, national courts are accorded concurrent jurisdiction to grant provisional measures. [173] It is also one of the reasons that arbitral institutions have increasingly sought to develop alternative mechanisms for providing emergency interim relief (including emergency arbitrator mechanisms), at the outset of a case (as discussed in the following section).

[6] Specialized Institutional Rules for Expedited Provisional Relief: Pre-Arbitral Referees and Emergency Arbitrators

As noted above, a number of arbitral institutions have adopted specialized rules that seek to provide a non-judicial mechanism for obtaining urgently-needed provisional relief at the outset of arbitral proceedings. [174] The ICC Rules for a Pre-Arbitral Referee Procedure were an early example of such efforts. These rules provided a specialized procedure for provisional measures, issued by what was denominated a "referee," appointed solely for the purpose of issuing emergency relief prior to constitution of the arbitral tribunal.

The ICC's Pre-Arbitral Referee Procedure Rules have been in force since 1990 but have been used

only very rarely (less than a dozen instances). (175) That is because, under the Rules for Pre-Arbitral Referee Procedures, parties must agree in writing to the use of this specialized procedure and, given the realities of litigation, this cannot often be expected to occur after a dispute has arisen. Moreover, at earlier stages, when the underlying contract and arbitration agreement are being negotiated, parties are generally not sufficiently focused on the procedural intricacies of future disputes to make provision for specialized issues, such as provisional relief. The ICC Pre-Arbitral Referee Rules also remained relatively unknown, particularly among non-specialized counsel with the result that they were virtually never used.

P 2633
One of the first arbitral institutions to improve on the ICC approach was the ICDR, which adopted a so-called "emergency arbitrator" procedure as a part of its institutional rules in 2006. (176) This procedure prescribed a different, more ambitious approach to the problem of interim relief at the outset of an arbitration, providing that, absent contrary agreement, a party could seek appointment of an "emergency arbitrator" prior to constitution of the arbitral tribunal. The emergency arbitrator was appointed and served for the sole purpose of ordering (or denying) emergency interim relief at the outset of the arbitration, which would subsequently be subject to revision by the arbitral tribunal, after its constitution. (177)

The ICC Rules subsequently adopted a similar approach. Like the ICDR Rules, the 2012 and 2017 versions of the ICC Rules provide for appointment of an emergency arbitrator, to whom a party can apply if it "needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal." (178) The emergency arbitrator mechanism is meant to provide a temporary solution: although the parties are required to "comply with any order made by the emergency arbitrator," the emergency arbitrator's order is not binding on the arbitral tribunal once it is constituted and the tribunal is free to vacate or modify the emergency arbitrator's order. (179)

In contrast to the Pre-Arbitral Referee Procedure Rules, and like the ICDR model, the ICC's emergency arbitrator provisions are in principle applicable whenever parties agree to arbitrate under the ICC Rules. The new provisions adopt an "opt-out" approach and apply in ICC arbitrations unless the parties specifically agree otherwise. (180)

A similar approach to that in the ICDR and ICC Rules is taken by the current versions of the SIAC, LCIA, HKIAC, Swiss, SCC and ACICA Rules. (181) Each of these sets of institutional rules provides for the appointment, in cases of urgency, of a sole "emergency arbitrator" to
P 2634
consider requests for provisional measures prior to constitution of the full arbitral tribunal. As soon as the full tribunal is constituted, any emergency arbitrator who has been appointed to consider an initial request for provisional measures ceases to play any further role in the arbitral proceedings. (182) Most institutional rules provide that an emergency arbitrator may not be part of the "real" arbitral tribunal in the same arbitration. (183)

The emergency arbitrator's rulings are temporary and subject to withdrawal or modification by the arbitral tribunal once constituted. (184) Virtually all emergency arbitrator mechanisms include a short deadline for an emergency arbitrator's decision (ranging from five to fifteen days). (185) An emergency arbitrator's rulings may be issued, under most institutional rules, as either an order or an award. (186) An emergency arbitrator may modify his or her initial ruling at the request of a party. (187)

Because the ICC, SIAC, LCIA, HKIAC, SCC, Swiss and ICDR Rules do not require a separate agreement by the parties to this mechanism, (188) they have enjoyed greater usage than previous efforts (particularly the ICC Pre-Arbitral Referee Rules) and are likely to continue to grow in popularity. (189) At the same time, these Rules all require very prompt and professional action by the arbitral institution and emergency arbitrator, which imposes burdens and risks on the institution, as well as the parties and their counsel. Despite this, these approaches have functioned effectively in practice and are widely regarded as sensible steps towards improving the arbitral process.

A supplementary approach to obtaining expeditious tribunal-ordered provisional measures is included in the LCIA Rules. (190) The LCIA Rules provide for expedited constitution of arbitral tribunals in appropriate cases, thereby enabling a tribunal to be formed and be in a position to consider requests for provisional measures in a matter of days or weeks. Although not directly addressing the need for rapid mechanisms for tribunal-ordered provisional
P 2635
measures, this appointment procedure is a sensible and practical means for making tribunal-ordered provisional relief a realistic possibility in some cases.

Finally, ICSID, while not providing a mechanism for either emergency arbitrators or the expedited constitution of the tribunal, does provide for briefing on provisional measures prior to the constitution of the tribunal. Specifically, if a party requests provisional measures "before the constitution of the

Tribunal, the Secretary General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered promptly upon its constitution." (191)

Another institutional approach to immediate interim relief is provided by the Court of Arbitration for Sport and the Italian Arbitration Association. Both institutions' rules provided that the arbitral institution itself, rather than an arbitral tribunal, may grant interim relief prior to constitution of the arbitral tribunal. (192) This (potentially) permits extremely rapid action on requests for provisional relief, although it is unclear what status a decision by an arbitral institution on a matter of substance, such as interim relief, possesses and whether national courts would recognize such decisions, either as "awards" or otherwise. (193)

[B] Arbitral Tribunal's Implied Authority to Order Provisional Relief

The ultimate source of the arbitrator's authority to order provisional measures is the parties' agreement to arbitrate. This parallels the arbitration agreement's role in other contexts, including as the source of the arbitrators' authority to resolve the parties' disputes, (194) to select the arbitral procedures, (195) to select the applicable law (196) and to order other forms of relief. (197) That conclusion is supported by the almost universal approach of national arbitration legislation, which is to provide for arbitral tribunals to order provisional relief "unless otherwise agreed," (198) acknowledging the parties' presumptive intention to permit arbitrators to order provisional relief.

More generally, the authority to order provisional relief is an inherent aspect of the power and mandate of an adjudicatory body. In one distinguished commentator's words:

> "There can be no doubt that the procedural power to grant provisional or protective measures reflects a general principle of law, and that principle nowadays is based on the need to prevent the judgment of the court from being prejudiced or frustrated
> P 2636
> by actions of the parties. That general principle of law is reflected in the practice of national courts, administrative bodies, arbitral tribunals, and international courts." (199)

Absent the power to preserve the status quo during the dispute resolution process, an arbitral tribunal lacks a key element of the authority of an adjudicative body; commercial parties cannot reasonably be assumed to have intended to deny arbitral tribunals this authority and, on the contrary, intend them to have that power, unless otherwise agreed. This is confirmed by both the national arbitration legislation (which, as noted above, almost uniformly grants arbitrators presumptive authority to order provisional relief) and institutional arbitration rules (which also uniformly grant arbitrators authority to order provisional relief (200)).

For all these reasons, absent contrary agreement by the parties, an international arbitration agreement impliedly confers the authority to order provisional measures on the arbitral tribunal. That authority is a vital attribute of any adjudicative body and is particularly important in international matters. (201)

[C] Parties' Agreement Excluding Arbitral Tribunal's Power to Order Provisional Relief

As discussed above, almost all contemporary arbitration regimes recognize the inherent authority of arbitral tribunals to order provisional measures, subject to the parties' contrary agreement. (202) Consistent with basic principles of party autonomy, however, nothing precludes parties from agreeing that the arbitral tribunal shall *not* have the power to award provisional relief or that such relief shall be ordered only in specified circumstances or subject to other limitations. (203) Thus, the New York Convention, (204) national arbitration laws (205) and institutional
P 2637
arbitration rules (206) all give effect to agreements withholding the power to grant provisional measures from the arbitral tribunal.

In practice, it is very unusual for international arbitration agreements to exclude the arbitral tribunal from ordering provisional measures. For the reasons detailed above, parties typically want the arbitrators to have the power to grant provisional relief. (207) Nevertheless, it is conceivable that parties in particular circumstances would wish to centralize all provisional measures applications in a single (national court) forum.

It is clear, however, that an agreement to arbitrate does not, without more, constitute an agreement excluding the tribunal's power to order interim measures (by failing to affirmatively grant such authority). On the contrary, as already noted, an agreement to arbitrate should be understood as impliedly including an agreement that the arbitral tribunal will have the power to order provisional measures. (208)

Similarly, an agreement to arbitrate in accordance with institutional rules which do not expressly provide the arbitral tribunal with the power to order provisional relief also should not be treated as an exclusion of such power. (209) Again, an agreement to arbitrate should ordinarily be understood as implying or encompassing the possibility of tribunal-ordered provisional measures, even when such authority is omitted from a listing of the tribunal's powers. (210)

Likewise, the parties' agreement that a particular national court will have the power to order provisional relief should not ordinarily be treated as an agreement denying or withholding similar power from the arbitral tribunal. As discussed elsewhere, it is well-settled that national courts generally possess concurrent jurisdiction to order provisional measures, together with arbitral tribunals. (211) The parties' specification of a particular national court to consider such requests, or their confirmation that provisional measures may be obtained from national courts, should not be considered as an exclusion of concurrent power on the part of the 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 or, less clearly, an *ad hoc* agreement to arbitrate in an arbitral seat that forbids tribunal-ordered relief. (212) Given the likely expectations of reasonable business parties, and the benefits of tribunal-ordered provisional relief in terms of fairness and efficiency, no agreement to exclude the arbitrators' power to order provisional measures should otherwise be presumed or implied.

P 2638
Where parties do expressly exclude the arbitrators' authority to order provisional measures, however, that agreement must be given effect. Nothing in the New York Convention or most national arbitration legislation affirmatively requires that arbitral tribunals possess the authority to order provisional relief, irrespective of the parties' agreement, or forbids parties from denying arbitrators such authority. On the contrary, as discussed above, the Convention and most arbitration legislation affirm the parties' autonomy with respect to the arbitral tribunal's powers. (213)

[D] Agreements Requiring Pre-Arbitration Negotiations or Other Procedural Steps

As discussed above, some arbitration agreements impose pre-arbitration procedural requirements, such as cooling-off periods, requirements to negotiate, or requirements to participate in conciliation. (214) In general, these provisions do not apply to requests for provisional measures (from an emergency arbitrator or an arbitral tribunal) and instead are limited to the pursuit of substantive claims in an arbitration. (215) Only specific contractual language, subjecting requests for interim relief to pre-arbitration procedural requirements, should suffice to produce this result. A contrary interpretation would deny parties access to vitally-important remedies and could result in a denial of justice.

[E] Arbitral Tribunal's Authority to Order Provisional Relief Is Not Exclusive: Concurrent Jurisdiction of National Courts to Grant Provisional Relief

Although most contemporary national arbitration regimes recognize the power of international arbitral tribunals to order provisional relief, this authority is generally not exclusive. Rather, absent contrary agreement, virtually all arbitration regimes contemplate concurrent authority of the arbitral tribunal and national courts to order provisional relief. (216) That is, a
P 2639
request for provisional measures in connection with a dispute which is subject to international arbitration may generally be directed to a national court, as well as to an arbitral tribunal. (217)

This overlapping jurisdiction of national courts and arbitral tribunals to order provisional measures is unusual (in that, in virtually all other respects, an agreement to arbitrate divests national courts of any competence over the parties' dispute). (218) This overlapping competence also has the potential for costly or duplicative parallel proceedings, inconsistent or conflicting results and judicial interference in the arbitral process. (219) Nonetheless, it is deeply-engrained in the contemporary framework for international arbitration and is often necessary as a practical matter. (220) The power of national courts to issue provisional measures in connection with international arbitrations is addressed in detail below. (221)

[F] Choice of Law Applicable to Arbitral Tribunal's Power to Grant Provisional Relief

Relatively little attention has been devoted to the question of what law applies to determine an arbitral tribunal's power to grant provisional measures in an international arbitration. Preliminarily, the law governing the tribunal's power to grant provisional measures is to be distinguished from the law governing the standards applicable to a grant of provisional measures (which is discussed separately below). (222) Although the same legal system may apply to both sets of issues, this is not necessarily or inevitably the case.

In many cases, the law applicable to the arbitral tribunal's power to grant provisional measures will be the procedural law of the arbitration, typically the arbitration legislation of the arbitral seat. (223) Most awards look to the law of the arbitral seat as defining the arbitrators' power to grant provisional relief, (224) as does most national court authority (225) and commentary. (226)

P 2640

Likewise, national arbitration statutes that address the tribunal's power to grant provisional measures are generally applicable (and only applicable) to arbitrations seated within national territory. (227)

There is no reason to doubt this choice-of-law approach, although it is important to appreciate what precisely it means. The law governing the arbitral proceedings (almost always that of the arbitral seat (228)) is the most natural legal system governing the powers of an arbitral tribunal. (229) It is the law of the arbitral seat that applies to other issues concerning a tribunal's authority, including competence-competence, disclosure and other taking of evidence issues,

P 2641

remedial powers and corrections or interpretations of awards. (230) Absent express contrary statements, it is the law of the arbitral seat that was most likely intended by the parties to define the powers of the tribunal. In principle, therefore, the law governing the tribunal's power to grant interim relief is that of the arbitral seat. (231)

As noted above, however, there are instances in which the national law of the arbitral seat may deny an arbitral tribunal the power to grant provisional relief (*e.g.*, China, Italy, Thailand). (232) That presents the question of what law should apply when parties (a) agree to arbitrate in such a state, which forbids tribunal-ordered provisional measures, but also (b) expressly agree that the arbitral tribunal has the power to order provisional measures. (As a practical matter, where the law of the arbitral seat forbids arbitrators from ordering provisional measures, arbitrators will ordinarily not do so: (233) "arbitrators invariably rule that if the law of the seat prohibits them to order interim protection … they have no such jurisdiction." (234))

The answer to the foregoing question remains the same – that is, the law of the arbitral seat continues to govern the arbitrators' authority to order provisional measures – but subject to the important qualification that, where the parties have expressly granted the arbitrators power to order provisional measures, the law of the arbitral seat should generally be regarded as violating the New York Convention's requirement that Contracting States recognize international arbitration agreements, including with regard to the arbitral procedure. (235) Moreover, the better view, in these circumstances, is that the parties' agreement regarding the availability of provisional measures is not superseded by their agreement on an arbitral seat where such measures are not available. This is an instance of the specific prevailing over the general, supported by the obvious practical desirability of conferring the power to order provisional measures on the arbitral tribunal. (236)

P 2642

On this analysis, the arbitral tribunal should consider itself competent to order provisional measures in accordance with the parties' agreement notwithstanding the contrary provisions of the law of the arbitral seat. At the same time, national courts outside the arbitral seat should consider themselves free, and generally obligated, to recognize and enforce awards or orders granting such relief. (237)

Conversely, where the parties have agreed to arbitrate in a jurisdiction that denies arbitrators the authority to order provisional measures and have not expressly granted the arbitrators such power (in their arbitration agreement, any applicable institutional rules, or otherwise), their choice of arbitral seat should ordinarily be interpreted as an exclusion of the arbitrators' power in this regard. (238) In these instances, the tribunal would have no authority to order provisional measures.

Of course, in practice, a tribunal will often hesitate to order provisional measures in the face of provisions of the law of the arbitral seat denying the tribunal such authority. Most tribunals will be reluctant to grant provisional measures where local law denies them such power (and many parties will, out of prudence, refrain from seeking relief where the law of the arbitral seat is to this effect).

One practical alternative is for the tribunal to make a precatory or advisory decision, urging (but not ordering) the parties to take specified steps. This may have substantial practical consequences for

the parties, since they and their counsel often will not want to risk the consequences of flouting the tribunal's admonitions. (239) On the other hand, in cases where provisional measures really matter, parties may well be prepared to run such risks because of the countervailing benefits.

Relatively little attention has been devoted to the question whether parties could "contract out" of the law of the arbitral seat with regard to the arbitrator's power to award provisional relief. Some authorities have answered this question in the negative, particularly under the UNCITRAL Model Law, (240) apparently relying on the notion that the arbitration legislation of the arbitral seat is mandatory. As noted above, however, the better view is that agreements to this effect, including agreements incorporating institutional rules, are subject to the New York Convention and entitled to effect notwithstanding contrary national law in the arbitral seat. (241) Moreover, there is no apparent reason that parties ought not have the freedom to contract out of provisions of national arbitration legislation excluding tribunal-ordered provisional measures (as one aspect of the parties' more general procedural autonomy). (242)
P 2643

[G] Arbitral Tribunal's Exercise of Authority to Order Provisional Relief

Assuming that an arbitral tribunal possesses the power to order provisional relief under national law, it is necessary to consider how international arbitrators exercise that authority. The short answer is that arbitrators were historically hesitant to grant provisional relief, even when authorized by national law, but in recent years tribunals have shown much greater willingness to do so. Nonetheless, the circumstances in which international arbitral tribunals will grant provisional relief vary widely, depending on the applicable law(s), relevant contractual terms and the tribunal's assessment of the evidence.

[1] Increased Willingness of Arbitral Tribunals to Grant Provisional Relief

Historically, tribunal-ordered provisional measures were not common. The Secretary General of the ICC Court of Arbitration reported in 1992 that in the previous 15 years (*i.e.*, between 1977 and 1992), only 25 ICC cases had addressed the subject of provisional relief. (243) This statistic reflected an historic reticence on the part of arbitral tribunals to grant (and parties even to request) provisional relief. (244)

This reticence had various causes. Historic prohibitions in some national laws forbidding arbitrators from ordering provisional measures were obviously important. (245) Perceived difficulties in enforcement also contributed to arbitrators' reticence. Similarly, arbitral tribunals were, and continue to be, concerned about prejudging the merits of the parties' dispute or appearing partial to one party at an early stage of the arbitral proceedings. Further, the process of considering whether to order provisional measures can be time-consuming and distracting.
P 2644
For all these reasons, arbitrators were, and to some extent still may be, more hesitant to order compulsory provisional measures than a national court might be.

Nevertheless, arbitrators want to fulfill their mandate of resolving the parties' dispute fairly, efficiently and effectively. There are many circumstances where this can be accomplished only by granting provisional measures, safeguarding the subject matter of the dispute, protecting one party from irreparable or serious harm, or otherwise. Further, doubts about arbitrators' power to grant provisional measures have progressively eroded, while published instances of tribunal-ordered provisional measures have become familiar, and the practical obstacles to such relief have diminished. (246)

For all these reasons, arbitral tribunals have demonstrated an increasing willingness over the past twenty years or so to entertain and grant applications for provisional measures. Thus, in contrast to earlier ICC experience, a review of ICC awards between 1985 and 2000 identified some 75 cases in which some form of provisional measures was requested. (247) Similar experiences are reported at other arbitral institutions. (248) At the same time, *ad hoc* arbitral tribunals have readily granted interim relief in appropriate cases, (249) while investment arbitration tribunals have also issued provisional measures in a significant number of cases. (250)

In sum, it is fair to say that contemporary arbitral tribunals frequently issue orders or awards granting provisional relief in terms little different from decisions of national courts. The essential criteria determining whether such relief will be granted are the factual circumstances of the parties' dispute, the legal standards applied by the arbitral tribunal, the tribunal's assessment of discretionary factors relating to the requested relief and any relevant terms of the parties' contract.

[2] Choice of Law Governing Arbitral Tribunal's Exercise of Authority to Grant Provisional Relief

Assuming that an arbitral tribunal has the power to order provisional measures under applicable law

and the parties' arbitration agreement, [(251)] it is necessary to consider what standards govern its decision whether or not to grant such measures. This is a topic to which limited attention has been devoted. Nonetheless, with the increasing importance of provisional measures in international arbitration practice, this question has considerable practical, as well as theoretical, significance.

P 2645
The choice of the law providing the standards for the granting of provisional measures in international arbitration is distinguishable from the choice of the law governing the arbitral tribunal's power to order provisional measures. As discussed above, the law governing the tribunal's power to order provisional measures is fairly clearly the law of the arbitral seat (or the procedural law of the arbitration, if different). [(252)]

In contrast, the law providing the standards for a tribunal's decision whether to grant provisional measures is at least arguably supplied by a different legal system than that of the arbitral seat. [(253)] In particular, three principal choices are possible for the law governing the granting of provisional measures: (1) the law of the arbitral seat; [(254)] (2) the law governing the parties' underlying contract or relationship; [(255)] or (3) international standards. [(256)]

P 2646
Preliminarily, it is clear under any of these approaches that the rules governing the arbitral tribunal's authority to grant provisional relief, and the standards applicable to the exercise of that authority, are not the rules applied by national courts considering issues of provisional relief, whether national courts in the arbitral seat or otherwise. [(257)] An international arbitral tribunal is not a national court and its powers, and the standards for exercising those powers, are not coterminous with national courts. Rather, the arbitrators' remedial authority, and the standards it should apply in exercising that authority, are defined by *sui generis* sources of law developed for, and applicable to, international arbitration.

First, there is little reason to conclude that the law of the arbitral seat provides the substantive standards for an arbitral tribunal's decision whether to grant provisional measures. Initially, it is noteworthy that no national arbitration statute – other than the 2006 Revisions to the Model Law – provides meaningful standards governing an arbitral tribunal's decision whether to grant provisional measures.

As discussed above, many arbitration statutes merely recognize the arbitral tribunal's power to grant provisional measures, without specifying the standards governing the exercise of such power. [(258)] The most that arbitration statutes have historically done in this regard is to provide, as the original 1985 Model Law and other legislation do, that interim measures may be granted if the tribunal "consider[s]" it "necessary" or "appropriate" to do so. [(259)] These formulations merely acknowledge the tribunal's broad powers with regard to provisional relief, without purporting to provide substantive standards as to how such power is to be exercised.

The absence from national arbitration statutes of any statutory standards for the grant of provisional relief suggests that the law of the arbitral seat does not in fact necessarily provide such standards. If the law of the arbitral seat were the source of such standards, one would expect them to be set forth in the applicable arbitration legislation. Their absence indicates that some other legal source provides the standards determining the circumstances in which provisional measures are to be granted. [(260)]

Moreover, the standards governing the decision to grant provisional measures are not logically connected to the law of the arbitral seat. For example, a dispute over the preservation (or sale) of disputed goods, where the underlying contract between U.S. and French parties is governed by English law, should not be resolved differently in England, France, the United States, or elsewhere, depending on where the arbitration is seated. Consistent with
P 2647
this, practical experience teaches that parties seldom consider that their choice of arbitral seat affects the substantive standards for granting provisional relief.

Second, there is also little reason for concluding that the law governing the parties' agreement or the substance of the parties' underlying dispute provides the standards for granting provisional measures. The fact that the parties have agreed that their contract will be governed by some legal system provides little indication as to their intentions regarding provisional measures.

Further, most national legal systems contain no corpus of law providing standards for international arbitral tribunals to grant provisional measures: rather, national legal systems will set forth standards by which national courts grant provisional measures, but these standards have no decisive importance, or even applicability or precedential value, for international arbitral tribunals. Finally, looking to the law governing the substance of the parties' dispute would produce the unattractive result that requests for provisional measures with regard to different substantive claims in an arbitration (*e.g.*, tort and contract claims, claims under different contracts) might well be governed by

different national laws and standards, where different substantive laws are applied to different underlying claims on the merits.

Given this, the better view is that international sources provide the appropriate standards for granting provisional measures in international arbitration. (261) These sources consist of arbitral awards, where tribunals have considered similar issues, drawing on common principles of law in developed states.

These international sources are consistent with the parties' reasonable expectations, because they ensure that (a) a single, uniform standard will be applied to requests for provisional measures in an arbitration; (b) a single, uniform standard will apply to the same sorts of requests regardless what the seat of the arbitration may be; and (c) the standard for provisional relief will be tailored to international arbitral procedures, rather than to the procedures of a national court system. This approach also reduces the importance of choice-of-law questions and encourages uniform results, both of which are important objectives of the arbitral process. (262)

The foregoing analysis also accords with the limited precedent that exists on the topic. Most arbitral awards and orders concerning provisional measures look to international standards, expressed in earlier awards and commentary, rather than to standards applicable
P 2605
to provisional measures in national courts. (263) It also accords with the treatment of other "procedural" issues in international arbitral proceedings – such as standards for disclosure, evidence-taking and conflicts of interest – which are generally governed by international standards (including pursuant to the IBA Rules on the Taking of Evidence or IBA Guidelines on Conflicts of Interest). (264)

P 2648
The 2006 Revisions to the UNCITRAL Model Law adopt an approach that is in tension with the foregoing analysis. Revised Article 17A provides that a party seeking interim measures must satisfy the tribunal that specified conditions exist (*e.g.*, irreparable or substantial harm, outweighing possible injury to other parties, reasonable possibilities of success on the merits). (265) This revision of Article 17, providing for application of the law of the arbitral seat, has little to recommend it.

Putting aside specific criticism of the particular formula adopted by Article 17A, (266) the basic concept of prescribing substantive standards for interim relief binding on arbitral tribunals seated on local territory is unnecessary and unwise. It is unnecessary, because of the ongoing development of better-formulated, more nuanced international standards by arbitral tribunals, which are tailored to the circumstances of particular categories of cases (as discussed below). (267) Indeed, Article 17A's approach is also affirmatively damaging, because it threatens this ongoing formation of international standards, tailored to the needs of particular cases, with the imposition of national standards that ignore the specifics of particular types of cases.

P 2649
The Model Law's character as a uniform international instrument reduces the adverse consequences arising from its approach to some extent. Considered constructively, if Article 17A is adopted in particular jurisdictions, it should be interpreted in light of international authority from other national courts and arbitral tribunals seated elsewhere, in order to avoid the costs of a purely national approach to this issue and to encourage formation of international principles in this field. (268)

[3] Standards for Provisional Relief in International Arbitration

In practice, arbitral tribunals apply relatively straightforward standards to requests for provisional relief. These standards are designed to provide practical, effective results and to protect parties from serious hardships arising from the pendency and length of arbitral proceedings, without undue formalism or technicality.

[a] Party Autonomy: Contractual Standards and Institutional Rules

Preliminarily, the standards applied by an arbitral tribunal will be determined, or at least heavily influenced, by any contractual standards agreed by the parties. Although it seldom occurs, parties sometimes agree that provisional measures or injunctive orders may be issued upon the claimant making certain showings. (269) When this occurs, there is no reason not to give effect to the parties' agreement (absent some unusual public policy prohibition).

Also preliminarily, where the parties have agreed to institutional arbitration rules, these rules can in principle provide standards or restrictions regarding a tribunal's grant of provisional measures. Where institutional rules do so, their provisions regarding provisional relief will virtually always be given effect by tribunals (and, where relevant, national courts). (270)

In practice, however, institutional rules typically do not provide meaningful standards for the grant of provisional measures. Paralleling national arbitration legislation, most institutional rules provide only

that a tribunal may issue such provisional relief that it "deems necessary" (271) or "appropriate." (272) As noted above, these formulations merely confirm the tribunal's broad authority to grant provisional relief, and do not establish standards for when and how that authority should be exercised.

Equally, however, these formulations do not purport to leave provisional measures entirely to the arbitrators' unguided discretion (in a manner analogous to arbitration *ex aequo et bono*). (273) Rather, they should be understood as contemplating that arbitral tribunals will formulate and apply legal standards specifying when provisional measures will be granted. In practice, that is what arbitral tribunals have done, generally applying fairly careful and structured analysis, detailed below, to the question whether or not to order provisional measures.

P 2650
Finally, some institutional rules do supply a greater measure of guidance regarding the standards for granting provisional relief. The 2013 UNCITRAL Rules are the best example of this approach, providing:

> "The party requesting an interim measure under ¶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 of this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination." (274)

Where these sorts of standards are contained in applicable institutional rules, or are otherwise set forth in the parties' agreement, they are in principle binding, like other provisions of the parties' contract. It is conceivable that applicable national law would prescribe mandatory standards for the grant of provisional relief in an international arbitration, but there appear to be no instances of such an approach being adopted and it is difficult to see what would motivate a legislature to adopt such standards. On the contrary, as noted above, virtually no national arbitration legislation addresses the issue of the standards applicable for a grant of provisional measures by an arbitral tribunal, much less imposes mandatory standards. (275)

[b] Standards for Provisional Relief

Stated generally, most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits, while some tribunals also require the claimant to establish (d) a *prima facie* case on the merits; (e) a *prima facie* case on jurisdiction; and (f) a balance of hardships weighing in its favor. (276) Considered more closely, and as detailed below, most arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury likely to be suffered by each party, in deciding whether to grant such measures. (277) In particular, some provisional measures (*e.g.*, preserving the status quo or ordering performance of a contract or other legal obligation) will typically require strong showings of serious injury, urgency and a *prima facie* case, while other provisional measures (*e.g.*, preservation of evidence, enforcement of confidentiality obligations, security for costs) are unlikely to demand the same showings.

It is also unclear precisely what sort of showing is required for the various elements of a request for provisional measures. The ICJ and some ICSID tribunals have suggested that serious injury must be "likely" to occur before the issuance of a final award, implying a requirement of a 50% or greater likelihood. (278) A similar requirement is arguably implied by
P 2651
formulations in institutional rules requiring that provisional measures be "necessary," rather than merely "appropriate." (279)

It is sometimes held, however, that arbitral tribunals may order provisional measures based simply on a "probability" – in the sense of a substantial risk, rather than a 50% or greater likelihood – that the requirements of serious injury, urgency and a *prima facie* case are satisfied. (280) This standard makes most sense with regard to the related requirements of serious injury and urgency (281) – where relief can often appropriately be granted based upon a material risk that serious harm is imminent if provisional measures are not granted. (282)

[i] Risk of "Irreparable" or "Serious" Injury

First, arbitral tribunals frequently require that the party seeking provisional measures demonstrate that it may suffer either "irreparable," "serious," or "substantial" injury unless provisional relief is granted. (283) In the words of one frequently-cited award, "the Arbitral Tribunal may only order

provisional measures, if the requesting party has substantiated the threat of a not easily reparable prejudice." (284) Or, as formulated by an experienced practitioner, "it is not appropriate
P 2652
to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted." (285)

Some authorities suggest that "irreparable" harm is required for a grant of provisional measures. As the tribunal in a leading ICSID award observed, "a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked.'" (286) In contrast, other authorities appear to require only a showing of "serious" or "substantial" harm, without requiring that the injury be "irreparable" in a literal sense. (287) As one award explained:

> P 2653
> "In particular, the party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable injury. There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of 'irreparable' harm, or whether a demonstration of 'serious' harm will suffice. In the Tribunal's view, the term 'irreparable' harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally 'irreparable' in what is sometimes regarded as the narrow common law sense of the term. The degree of 'gravity' or 'seriousness' of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures." (288)

Most authorities have reasoned that the injury required for provisional measures is not "irreparable" harm in what is perceived to be the Anglo-American sense, but instead only a showing of grave, substantial, or serious injury. Thus, one award required a showing of "'substantial' (but not necessarily 'irreparable' as known in common law doctrine) prejudice for the requesting party." (289) Indeed, as another authority reasoned, "[t]he US definition of 'irreparable harm' is a harm that cannot readily be compensated by an award of damages. If this standard were strictly applied, most commercial disputes arbitrated under the UNCITRAL Rules would not qualify for interim protection under Article 26, since the award of money damages can, at least in theory, rectify nearly all commercial losses." (290)

Most commentary and decisions gloss over the potentially substantial difference between the risks of "irreparable" and "serious" damage. (291) Obviously, it is difficult (and not infrequently impossible) in commercial cases to demonstrate truly "irreparable" harm that cannot be compensated by money damages in a final award; a literal "irreparable harm" requirement would limit provisional measures principally to cases where one party was effectively insolvent or where enforcement of a final award would be impossible. (292) In reality, however, most decisions which state that damage must be "irreparable" do not appear to apply this formula, but instead require that there be a material risk of serious or substantial damage to the applicant. (293)

P 2654
In fact, even this formulation of the requirement for serious prejudice obscures more complex considerations. On close examination, tribunals appear to consider (a) the extent to which the applicant will suffer serious injury during the arbitral proceedings if provisional measures are not ordered; (b) the extent to which such injury appears compensable in a final award; (c) the extent to which the respondent will suffer serious injury if the requested provisional measures are ordered; and (d) the extent to which it is just or fair that the burden or risk of loss during the arbitral proceedings fall on one party or another (including considerations such as whether one party is seeking to alter the existing status quo to its advantage during the arbitral proceeding, the likelihood of success of each party on the merits of its case and the relative hardship to each of the parties if provisional measures are or are not granted).

Some authorities refer to this, accurately, as a "balancing of interests" or a "balancing of hardships." (294) The 2006 Revisions to Article 17 of the UNCITRAL Model Law and the 2010 (and 2013) revisions to Article 26 of the UNCITRAL Rules adopt a similar approach, providing that "[h]arm 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." (295)

For example, where the applicant, asserting a *prima facie* credible claim, appears likely to suffer serious (but not necessarily irreparable) injury as a consequence of steps threatened by the respondent to alter the existing status quo, provisional measures are likely; that is particularly true where the respondent's actions appear designed to make ultimate enforcement of an award more difficult (*e.g.*, transferring disputed property outside the ordinary course of business) and/or the respondent does not appear likely to suffer material harm from a grant of provisional measures. Conversely, where a respondent is merely pursuing business in the ordinary course, its contemplated actions appear unaffected by litigation considerations and it
P 2655
will suffer demonstrable damage from the requested provisional measures, tribunals are more likely to require a showing of truly "irreparable" harm by the applicant.

Some tribunals appear prepared to issue provisional relief designed simply to ensure that the commercial damage resulting from the arbitral process is, insofar as possible, minimized. Thus, there are instances where tribunals will require specified actions (*e.g.*, continued licensing of intellectual property, continued sales of products) even where the requesting party cannot show irreparable or even serious harm, merely because ordering these actions reduces the overall damages to the respondent and claimant in the arbitration. (296) The grant of provisional measures in these circumstances is arguably commercially-sensible, but would ordinarily exceed the limits of existing legal standards which require a genuine showing of grave harm.

It is clear, as noted above, that a party seeking provisional measures need not prove that serious injury is certain to occur. Rather, the appropriate requirement, generally applied by arbitral tribunals, is that the applicant establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted. Thus, "the Arbitral Tribunal may only order provisional measures, if the requesting party has substantiated *the threat of* a not easily reparable prejudice." (297) Somewhat more strictly, Article 17 of the 2006 Revisions of the UNCITRAL Model Law requires a showing that "[h]arm not adequately reparable by an award of damages is *likely* to result." (298)

A similar approach has also been adopted in investment arbitrations, where tribunals have frequently issued interim measures where the threatened harm was "likely" to occur. In the words of one award: "A measure is urgent where 'action prejudicial to the rights of either party is *likely* to be taken before such final decision is given.'" (299) Likewise, the ICJ has ordered interim measures of protection when "prejudice was probable or possible," or where serious harm could "not [be] excluded." (300) On the other hand, it is also settled that "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions." (301)

The better view is that the relevant standard does not require mechanical application of particular levels of probability. Rather, tribunals properly adopt a pragmatic inquiry that subsumes the likelihood of harm, the degree and character of harm, the balance of hardships and other factors. The issue is not so much whether, on a balance of probabilities, serious harm will occur but whether the risks of grave harm are sufficiently substantial to justify the burden (if any) that provisional measures would impose on the respondent.

P 2656
Some forms of measures which are characterized as "provisional relief" do not require showings of serious or irreparable injury. A few authorities treat requests for the preservation of evidence, or the sampling of goods, as requests for provisional relief. (302) Properly characterized, however, these types of requests are not true requests for provisional measures of protection, but rather as requests for disclosure or the taking of evidence.

It also makes little sense to require a showing that "irreparable" harm will occur if disputed goods are not sampled or if relevant evidentiary materials are not produced or secured. (303) Rather, as discussed in greater detail below, applications for these types of measures should be regarded as disclosure requests, handled in accordance with the tribunal's overall responsibility for determining the facts of the case in a fair and efficient manner. In many cases, it will be appropriate to secure, sample, or preserve evidence even if there is no serious risk of irreparable harm. (304) Similarly, as also discussed below, applications for security for legal costs typically do not require showings of an urgent risk of irreparable harm. (305)

Parties sometimes take steps that will, and may be designed to, frustrate the tribunal's jurisdiction and remedial authority. The classic examples of such conduct are disposing of the subject matter of the arbitration (*e.g.*, intellectual property, disputed shares in a company) or fundamentally altering circumstances so that requested relief cannot be granted or would be meaningless or ineffectual (*e.g.*, removing assets from a company whose ownership is in dispute, terminating contractual

relations with other parties in a multi-party context). Tribunals are particularly likely to consider such conduct as causing sufficient harm to warrant the issuance of provisional measures. (306)

Consistent with this, an Iran–U.S. claims tribunal award held that a "Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that the Tribunal's jurisdiction and authority are made fully effective." (307) Similarly, an investment award concluded that "parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, … or render its resolution more difficult." (308) These formulations are more generally applicable in commercial arbitration
P 2657
settings, where tribunals readily grant interim relief to preserve their jurisdiction and ability to resolve disputes that have been submitted to them.

[ii] Urgency

Second, and related to the requirement of serious/irreparable damage, many arbitral awards and commentators have concluded that an award of interim relief requires a showing of "urgency." (309) That is, the tribunal must be persuaded that immediate, or at least prompt, interlocutory action is necessary in order to prevent serious or irreparable damage to the applicant.

This requirement has been formulated as follows: "urgency is necessary … in order to make a provisional decision as quickly as possible without awaiting a final decision." (310) Or, alternatively, as one ICSID award put it, "provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits." (311)

In contrast, and unwisely, the 2006 Revisions to the UNCITRAL Model Law appear to omit any express reference to urgency. (312) The better view, however, is that an urgency requirement should nonetheless be implicit in the Model Law's requirement for serious injury;
P 2658
indeed, the very concept of interim or provisional relief necessarily requires a showing of some measure of urgency.

As already noted, the "urgency" requirement is closely-related to the "serious harm" requirement: just as relief prior to a final award is generally not ordered, save to prevent serious damage from occurring during the course of the arbitral proceedings, so pre-award relief is generally not ordered until such time as it is necessary to prevent such serious damage from taking place. The exact degree of "urgency" which is required varies and can be affected by practical considerations.

Most authorities consider whether there is a risk that serious injury will occur prior to the issuance of the tribunal's final award: "The degree of 'urgency' which is required … may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure *before the issuance of an award*." (313)

A few authorities suggest a higher degree of imminence, considering whether the threatened harm will occur within a time frame that makes it reasonable, in the circumstances, to delay ordering relief until closer to the threatened event. (314) In general, however, where there is a material risk of grave harm, tribunals do not attempt to draw fine lines in the timing of orders of provisional relief. In particular, tribunals typically do not delay granting provisional measures until dire consequences are only days away, but rather take a realistic commercial view of the likelihood that serious damage will occur prior to the end of the arbitral proceedings. (315)

As with the requirement of "irreparable" harm, the "urgency" requirement is not interpreted literally or mechanically, but instead based upon pragmatic assessments of likelihood
P 2659
and risks. As one award explained, "[a] measure is urgent where action prejudicial to the rights of either party is *likely* to be taken before such final decision is taken." (316)

If the risk of severe harm is conditional on other circumstances occurring (*e.g.*, the outcome of third party negotiations, court decisions, etc.), tribunals will base decisions on their assessment of the possibility that the relevant circumstances will materialize and their own ability to grant effective relief in the future if the relevant circumstances do materialize. (317) Where failure to issue provisional measures creates a material risk of impairing a material right, "the safest course at [an] early stage of the proceedings is to ensure that no adverse step is taken to the same." (318)

[iii] No Prejudgment of Merits

Third, it is often said that provisional measures must not "prejudge the merits" of the parties' underlying dispute. (319) That is, "an arbitral tribunal must refrain from prejudging the merits of the case." (320)

It is unclear precisely what this requirement means: in particular, does it argue against the tribunal making a decision that might prejudice or bias its final decision on the merits, or does it argue

against the tribunal granting, as a provisional measure, the same relief that is requested in the final award on the merits of the parties' dispute?

As to the former, it is very unclear why any decision on provisional measures ever need to "prejudge the merits." (321) As a provisional decision, subject to alteration at any time and to revocation in the final award, the outcome of a provisional measures application should not as a technical matter prejudge or predetermine the final award. (322) Even in cases where a tribunal
P 2660
considers the likelihood that the claimant's case will succeed on the merits, (323) that consideration is only preliminary and not a final determination on the merits; it in no way constitutes *res judicata* for the purposes of the final award and, properly applied, should in no way prejudge the merits of the tribunal's final decision.

As to the argument that provisional measures should not grant the relief sought in the final award, (324) this too is overstated. There may well be cases where the requested interim measures seek – on a provisional basis during the pendency of the arbitration – precisely the same relief requested in the final award (*e.g.*, continuation of a long-term contract, notwithstanding a purported termination; preservation of ownership/control rights in property). Whether termed "preservation of the status quo" or otherwise, this sort of relief can well grant one party, on a provisional basis during the pendency of the arbitration, almost exactly what it seeks in the final award. This should not, however, prevent the granting of provisional measures.

Properly analyzed, the "no prejudgment" requirement stands for the fairly basic, but nonetheless important, propositions that (a) a grant of provisional measures may not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases (*e.g.*, provisional measures should not prevent nor make it more difficult for the tribunal to render a decision in favor of one party or the other); (b) provisional measures have no *res judicata* or similar preclusive effect with regard to a decision on the merits; (c) a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, prejudge the outcome of the arbitration or even partially close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings; and (d) the same relief that is sought as final relief may ordinarily be issued on a provisional basis, subject to later revision (although that relief might in some cases also be issued as partial final relief prior to a final award). (325)

As noted above, the "no prejudgment" requirement does *not* mean that a tribunal may not consider and decide upon the likely prospects of a claim (*e.g.*, whether the claimant has presented a *prima facie* case or which party preliminarily appears more likely to prevail). Rather, a tribunal is entirely free to take such matters into account, provided that the arbitrators do not in any way close their minds to the parties' subsequent submissions nor accord the provisional measures decision any preclusive effect.

[iv] Prima Facie Case or Probability of Success on Merits

Fourth, some tribunals and commentators have held that the party requesting provisional measures must demonstrate a *prima facie* case on the merits of its claim (or, in other formulations, a probability of prevailing on its claim). (326) As formulated by one award:

> P 2661
> "The present Arbitral Tribunal is not a referee jurisdiction, but a jurisdiction of the merits seized of provisional measures. … The powers of the merits ruling provisionally are not limited like those of the referee judge and a serious dispute does not prevent a broader appreciation, although on a provisional basis, of the respective arguments of the parties." (327)

At the same time, other awards and commentators have refused to consider whether one party (or both parties) have stated a *prima facie* case, (328) sometimes saying that this conflicts with the requirement that provisional measures not prejudge the merits of the tribunal's final award. (329) According to one such authority, "if a tribunal cannot grant an interim or
P 2662
conservatory measure without examining the merits of the case, it may refrain from doing so, in order not to prejudge on the merits." (330)

The better view is to the contrary, providing that an arbitral tribunal should consider the *prima facie* strength of the parties' respective claims and defenses in deciding whether to grant provisional measures. As already discussed, an assessment of the existence of a *prima facie* case does not prejudge the merits of the case: it is a purely provisional assessment based upon incomplete submissions and evidence, without preclusive effects. (331)

At the same time, it is essential for a tribunal to assess the existence of a *prima facie* case in order to make rational and commercially-sensible decisions regarding provisional measures. For example, if a claimant licensee has failed to present a *prima facie* case of wrongful termination of a license agreement, while the respondent licensor has presented a comprehensive defense as to why it was contractually entitled to terminate, then a tribunal should be quite hesitant to order the respondent licensor to continue to permit use of licensed property and to supply updates and similar assistance on a provisional basis during the pendency of the arbitration.

In such circumstances, it would only be a rare case, involving very strong showings of an urgent risk of grave and irreparable damage to the applicant, that provisional measures should be ordered. Conversely, if the claimant licensee has advanced a very thorough case as to wrongful termination, countered by no serious argument or evidence from the respondent licensor, provisional measures should be much more readily granted.

In both the foregoing cases, the tribunal's decision on provisional measures may quite properly consider the legal sufficiency and strength of the parties' respective cases. This is the approach to provisional measures in domestic judicial proceedings in many developed legal systems. (332) It is also a commercially-sensible basis for issuing provisional measures. It makes very little sense to "protect" one party, by requiring the adverse party to continue providing goods, services, or licensed property during the pendency of the arbitration, if there appears to be little prospect that the "protected" party will prevail in a final award: in fact, a grant of provisional measures in these circumstances does not amount to "protection," but rather an unjustified windfall that damages an innocent party.

Furthermore, in cases where a party seeking provisional measures has made a credible, but no stronger, case of serious harm, during the course of the arbitral proceedings, then consideration of the merits of the case appears both appropriate and sensible. In such circumstances, the real issue is how interim damage arising during the arbitral proceedings (and the risks of such damage) should be allocated pending a final decision in the arbitration that will determine the parties' rights. This allocation of interim damage is necessary precisely because the
P 2663
tribunal's final determination is not yet known; if the final determination were known, then the proper allocation of interim damage could be made.

Given this, it is entirely appropriate for a tribunal to consider – recognizing that it is not making a decision, but instead a preliminary assessment based on partial submissions – the possible outcomes of a final award. (333) Indeed, it would in many respects be both irrational and unjust not to do so: it would result in parties that have conducted themselves entirely appropriately, and that have thoroughly rebutted implausible, defective and/or unsupported claims, being required to act, prior to any arbitral award, as if they had no defense to claims against them.

It bears emphasis, however, that an inquiry into the merits of the parties' claims and defenses is solely on a *prima facie* basis, without any detailed or binding assessment of the evidence or the merits of the parties' legal arguments. At the stage of a request for provisional measures, parties frequently have not submitted their complete (or, often, even partial) cases, either evidentiary or legal. It would be premature and inappropriate for a tribunal to attempt to make binding or comprehensive assessments of the relative merits of the parties' claims and defenses at this stage of the proceedings.

Consistent with this, all authorities that permit consideration of the merits of the parties' claims in connection with a request for provisional measures emphasize that this is a very limited and *prima facie* inquiry. "[I]t is at the merits that one sees 'whether there really has been a breach,'" (334) and not at the stage of a request for provisional measures. (335) Indeed, only in rare cases, where a claimant has failed to advance any plausible basis for its claims will tribunals deny provisional relief based on a *prima facie* view of the merits.

[v] Prima Facie Jurisdiction

It is also sometimes said that a showing of the tribunal's jurisdiction, at least on a *prima facie* basis, is a requirement for provisional measures. (336) In the words of one tribunal, "[w]hile the
P 2664
Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established." (337)

Statements regarding *prima facie* jurisdiction requirements require elaboration. In fact, a tribunal is able to issue provisional measures notwithstanding the existence of a jurisdictional challenge and notwithstanding the fact that the tribunal has not ruled on this challenge. (338) Simply put, the fact that the tribunal may ultimately lack jurisdiction over the underlying dispute does not prevent it from properly issuing provisional measures.

Thus, arbitral tribunals have not infrequently ordered
P 2665
provisional relief notwithstanding the existence of an unresolved, and therefore possibly well-founded, jurisdictional challenge. One commentary cited "the well-settled position in international adjudication … that an international tribunal may decide on provisional measures prior to establishing its jurisdiction over the dispute if it appears that there is, *prima facie*, a basis for asserting such jurisdiction." (339) Indeed, some arbitral tribunals have refused to address the question of jurisdiction *at all* during the provisional measures phase, holding that a tribunal may grant interim relief notwithstanding the existence of a jurisdictional challenge. (340) Other tribunals have ordered provisional relief notwithstanding the existence of unresolved jurisdictional objections (which were subsequently upheld, resulting in dismissal of the applicant's claims). (341)

Many arbitral awards have considered whether there is a *prima facie* jurisdictional basis before ordering provisional measures. (342) These tribunals have generally declined to grant interim relief in the absence of a *prima facie* showing of jurisdiction, with a representative award refusing to issue provisional measures because "the Tribunal is not at present satisfied that it appears, *prima facie*, that there exists a basis on which it can exercise jurisdiction." (343)

Commentary is to the same effect, (344) as are decisions by the ICJ and other international courts. As the ICJ has concluded:

> "[o]n a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded." (345)

Importantly, the jurisdictional analysis in a request for provisional measures is limited to a *prima facie* inquiry. (346) The arbitral tribunal does not make a final jurisdictional ruling, but
P 2666
instead considers only whether there is a *prima facie* (or plausible) argument that jurisdiction exists. The point is that if there is little or no chance that a tribunal will have jurisdiction, it would serve little purpose, and be inequitable, for it to grant provisional measures. However, given the urgency associated with the need for provisional measures, a tribunal should not delay a provisional measures decision by undertaking a full jurisdictional analysis which, by definition, cannot occur on a time scale consistent with appropriately dealing with a request for interim relief. (347)

Of course, if a tribunal subsequently concludes that a jurisdictional challenge is well-grounded, then it will lack any authority to maintain its previous provisional measures. Until such a determination, however, the tribunal's provisional measures are entitled to the same force as its directions regarding the procedural conduct of the arbitration.

[c] Emergency Arbitration: Standards for Relief

In general, the same standards for relief that apply to other types of provisional measures also apply to requests for relief from an emergency arbitrator. Institutional rules typically provide only for the possibility of "urgent" (348) or "necessary" (349) provisional relief from an emergency arbitrator; the same requirements are inherent in the concept of "emergency" arbitration. Nonetheless, this does not materially alter the generally applicable requirement for "urgency" (discussed above). In most cases, it is unlikely that the focus of an application for emergency relief will be on urgency and serious injury, given the limited opportunities for detailed inquiry in a fast-track emergency arbitration into issues of *prima facie* jurisdiction or likelihood of success. The principal issue in most emergency arbitrations will instead be whether it is necessary and appropriate to preserve the status quo, or otherwise provide interim relief, until the "full" arbitral tribunal is able to consider a request for provisional measures; again, this is inherent in the concept of "emergency" arbitration. (350)

[4] Categories of Provisional Measures

In practice, a wide variety of different types of provisional measures are commonly encountered in international arbitration. For the most part, and as detailed below, developed national legal systems and institutional arbitration rules provide for the same general categories of provisional measures. (351)

P 2667
In principle, the forms of provisional relief available in international arbitration are very broad, constrained only by the requirements that provisional measures be directed towards parties to the arbitration (not nonparties) (352) and not exceed any mandatory limits in applicable national law (353)

or the parties' arbitration agreement. (354) Subject to these limits, the types of provisional relief that may be ordered by an international arbitral tribunal generally extend to any measures which serve to preserve or protect one of the parties' rights, the tribunal's jurisdiction, or the subject matter of the arbitration, pending the ultimate resolution of the dispute. (355) Any relief that is calculated to serve such ends is, presumptively, within a tribunal's power to order. (356) This is confirmed, among other things, by the 2006 Revisions to the UNCITRAL Model Law, providing a lengthy list of provisional measures that may be ordered under Article 17. (357) This codification reflects existing understandings and expectations regarding types of provisional measures that an international arbitral tribunal is presumptively empowered to order.

Preliminarily, the standards discussed in the preceding section for granting provisional relief should be considered separately in the context of each of these specific types of provisional measures. Both in practice and analytically, the type of provisional relief that is at issue can significantly affect the precise showing required for granting provisional relief. Indeed, it is important to avoid mechanically transposing standards adopted for one form of provisional measures to other types of relief.

P 2668

[a] Orders Preserving Status Quo

One common form of provisional relief is an order preserving the status quo between the parties (or, alternatively, preserving specified contractual or legal relations or factual circumstances). (358) For example, a party may be ordered not to take certain steps – terminating an agreement, disclosing trade secrets, calling a letter of credit, continuing to pursue related litigation, or using disputed intellectual property – pending a decision on the merits. (359) Alternatively, a tribunal may order the parties generally not to take steps that alter the contractual status quo. (360)

P 2669

According to some authorities, the prime examples of interim protection are "measures that serve to *preserve the status quo until the final decision on the merits is rendered (preservation order)*." (361) In one classic formulation, "[p]rovisional measures, as a rule, aim at avoiding or preventing a modification of the state of facts or law of the subject matter of the dispute which could render more difficult or impossible later performance." (362) This principle has been applied with particular force in the context of ICSID and bilateral investment arbitrations, although the same analysis applies in other contexts. (363) Thus, one frequently-cited award concluded that "[a] provisional measure could be ordered to … preserve the status quo of the property, thus preserving the rights of the party in the property." (364)

In some cases, a party may seek restoration of a *status quo ante*, to the state of affairs immediately preceding notice of the parties' dispute or the commencement of the arbitration. (365) Thus, the revisions to both the UNCITRAL Model Law and the UNCITRAL Rules expressly empower tribunals to order interim measures *restoring* the status quo. (366)

P 2670

Orders preserving the status quo can be issued either to protect one party from harm during the arbitral proceedings or to preserve the tribunal's jurisdiction. One commentator refers to "[p]rotective orders maintaining the status quo: Their purpose is to prevent factual changes that would undermine the enforceability of the eventual award." (367) Or, as one arbitral award concludes, "interim measures … were required to protect the subject matter of the dispute and to regulate the conduct of and the relations between the parties as partners in disagreement, pending resolution of their dispute." (368) Other tribunals have emphasized that provisional measures preserving the status quo are appropriate to protect a party from serious harm arising during the course of the proceedings. (369)

Arbitral tribunals have been particularly willing to issue provisional measures maintaining the status quo in order to protect the subject matter of the dispute (*e.g.*, preservation of disputed property, deposit of property with custodian for safekeeping, inspection, or sampling). (370) This

P 2671

reflects the language of the original UNCITRAL Model Law and UNCITRAL Rules which, as discussed above, focused on these forms of interim relief. (371) Thus, one ICSID award reasoned:

> "[A]n example of an existing right [justifying provisional measures] would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property." (372)

Few decisions or commentators carefully consider the question of what it means to preserve the "status quo." In one exception, the term "status quo" was interpreted to mean "the last peaceable state between the parties which preceded the present controversy." (373)

Most importantly, questions arise as to whether the "status quo" refers to the status quo prevailing at the time (a) provisional relief is granted, (b) provisional relief is requested, (c) the arbitration is commenced, (374) or (d) the parties' dispute arises. (375) Obviously, there can be substantial differences in the results of preserving the "status quo," depending on which of these dates is selected. For example, a dispute may arise over a contract, leading to threats of termination, followed by commencement of an arbitration, and in turn followed by notice of termination and, eventually, a request for interim relief: in these circumstances, what "status quo" should the tribunal then preserve? Arbitral awards seldom address the issue.

The appropriate analysis is not to attach decisive importance to the state of affairs at the time of either a request for arbitration or a request for interim relief. Rather, tribunals should look more pragmatically to the relative injury that is likely to be suffered by both parties, respectively, during the course of the arbitral proceedings, as well as the existence of

P 2672

prima facie claims and defenses on the part of each of the parties. If one party has a strong *prima facie* case on the merits and faces serious injury during the course of the proceedings, while the other party has not demonstrated a *prima facie* defense, the tribunal should be fully prepared to order restoration of the status quo prevailing when the parties' dispute arose. Doing so accomplishes justice between the parties and is entirely consistent with the tribunal's jurisdictional authority. (376)

The generally-applicable standards for issuance of provisional measures apply with few exceptions to requests for preservation of the status quo. In considering such requests, tribunals usually consider the risk of serious or irreparable harm, urgency or need for prompt action, lack of prejudgment and (sometimes) existence of a *prima facie* case. (377)

[b] Orders Prohibiting Aggravation of Parties' Dispute

One type of provisional measure preserving the status quo is an order prohibiting actions that would aggravate or exacerbate the parties' dispute. (378) Such orders may be directed towards forbidding public statements (in breach of confidentiality obligations (379) or otherwise likely to aggravate the parties' dispute), interference with contractual performance or property rights, or exacerbating the parties' dispute through actions that result in increased or more extensive damage to a counter-party.

The principle that an arbitral tribunal may take steps to prohibit aggravation of a dispute is well-described in the order of one arbitral tribunal: "As held by several ICC awards, provisional measures may be ordered not only in order to prevent irreparable damage but also to avoid aggravation of the dispute submitted to arbitration." (380) The principle has also been formulated by an ICSID tribunal as follows, "[t]he parties to a dispute over which ICSID has jurisdiction *must … refrain from any action of any kind which might aggravate or extend the dispute*." (381)

P 2673

Arbitral tribunals have not infrequently issued orders forbidding aggravation of the parties' dispute. In *Amco v. Indonesia*, the tribunal referred to "the good and fair practical rule, according to which both parties to a legal dispute should refrain … to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult." (382) Another award in a commercial arbitration prohibited the parties from "commit[ting] any act of whatever nature, that might aggravate or extend the dispute." (383)

P 2674

When orders of this nature (aimed at preventing aggravation of the parties' dispute) are concerned, tribunals typically do not require the same showings of serious harm and urgency that apply in other contexts. Rather, tribunals appear to base their decisions more generally on the commercial desirability of stopping (or inhibiting) unilateral steps by the parties to improve their respective positions in the dispute. Thus:

> "[t]here is a tendency on the part of many arbitral tribunals, … consistent with the view that they often have of their mandate, to construe the requirement of urgency sufficiently broadly to justify interim measures designed not so much to prevent irreparable harm as to avoid the 'aggravation' of the dispute that is the subject matter of the arbitration." (384)

The standards applicable to orders forbidding aggravation of the status quo cannot necessarily be transposed to other contexts: such orders derive as much from a tribunal's general authority to

manage the dispute resolution process and prevent unnecessary damage to the parties and any disputed property, (385) as from considerations about safeguarding a party from specific damage.

The ICJ and other international courts have also historically issued interim relief aimed at preventing aggravation of the parties' dispute. (386) In a recent decision, however, a majority of the Court suggested that the Court could not adopt provisional measures "directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement … in the absence of the conditions to indicate [the availability of provisional measures to prevent irreparable harm]." (387) That qualification was the subject of a well-reasoned dissenting opinion by Judge Buergenthal, who urged a standard that:

> P 2675
> "would not be whether there is an imminent threat of irreparable harm to the subject-matter of the dispute, but whether the challenged actions are having a serious adverse effect on the ability of the party seeking the provisional measures to fully protect its rights in the judicial proceedings." (388)

In any event, it is very doubtful that the ICJ's apparent qualification will find application outside the specific context of proceedings before the Court, particularly in the settings of international commercial and investment arbitration where agreements to arbitrate impose significant affirmative duties of cooperation on the parties. (389) That has, correctly, been the conclusion of the weight of arbitral authority that has considered the issue. (390)

[c] Orders Requiring Specific Performance of Contractual or Other Obligations

Arbitral tribunals frequently order what common law practitioners refer to as "specific performance," requiring a party to perform specified acts pursuant to a preexisting contractual or other legal obligation. In some institutional rules, such orders qualify as ordering "on a provisional basis … any relief which the Arbitral Tribunal would have power to grant in an award." (391) For example, a party may be ordered to continue to perform contractual obligations (*e.g.*, shipping products, permitting use of intellectual property) or to ensure the claimant's enjoyment of its rights (*e.g.*, voting shares in compliance with a shareholders agreement). (392)

One commentator describes such orders as entailing "interim specific performance of the contract (as when, for example, in a dispute relating to the termination of a charter party, the
P 2676
court prohibits any use of the vessel not in accordance with the charter)." (393) Similarly, a leading European author concludes that: "If it is justified by the protection of the interest in issue, the arbitrator may even order *the provisional performance of the parties' obligations until the matter has been decided*." (394)

Exercising such authority, one ICC tribunal held that "it is essential, until the final award on all the claims and counterclaims, that the contractual provisions agreed between the parties keep producing all their effects." (395) An ICSID award granted similar relief, ordering the parties "to abstain from all measures incompatible with the maintenance of the contract and to assure that measures already taken in the future have no effects contrary to this maintenance." (396) Commentary questioning the legitimacy of orders granting specific performance (discussed below) is ill-considered; (397) such relief is a vital remedial device in international commercial arbitration.

[d] Orders Requiring Security for Underlying Claims

One type of frequently-ordered provisional relief is for a party to provide security for the counter-party's underlying claims. This sort of order is designed to ensure that a claimant's substantive claim is, although well-founded, not rendered nugatory because of deterioration in the financial condition of the respondent or by deliberate diversion or dissipation of assets, which would make effective enforcement of an award against the respondent impossible. As noted above, one type of provisional relief aimed at securing property or funds that is typically not available from an arbitral tribunal is an "attachment," denominating an order that a third-party refrain from transferring disputed property. (398)

A number of arbitration statutes, particularly in common law jurisdictions, expressly grant arbitrators authority to order security, (399) including the revised UNCITRAL Model Law's authorization for arbitrators to order measures that "provide a means of preserving assets
P 2677
out of which a subsequent award may be satisfied." (400) Similarly, arbitral tribunals have not infrequently issued orders or awards requiring the provision of security for a counter-party's claim, (401) and national courts have considered (and usually upheld) such orders in a limited number of cases. (402) In one court's words:

> "The [arbitral tribunal], in the absence of language in the arbitration agreement expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security. … Otherwise, an [arbitral tribunal] with a well-founded concern that a party was financially unable to satisfy an eventual award would have no recourse to protect itself against the risk that its significant expenditures of time and effort would be for naught." (403)

Despite this, some national laws have been interpreted as denying arbitral tribunals the authority to issue security orders. (404) Moreover, tribunals have generally been reluctant to grant provisional measures securing the claimant's underlying claim:

> P 2678
> "[T]he creditor's normal impatience to see his claim satisfied or at least secured, or the normal risk that the debtor's ability to pay his debts might deteriorate in the course of the proceedings, are not sufficient to justify provisional payment or security measures. In the absence of factual circumstances which call for an urgent remedy against the foreseeable risk of an aggravation of the situation, provisional payments and providing security in view of the final award fall outside the scope of provisional and protective measures." (405)

These views require caution. Requests for security involve one of the purest applications of provisional measures to allocate the risks of the delay of arbitral proceedings. Essentially, the issue in such matters is who should bear the risk (and the financial cost of mitigating such risk) that a party will be unable to satisfy the financial obligations of the final award.

In these circumstances, it is important to recall that parties agree to arbitration in part to obtain a speedy, efficient resolution of their dispute. (406) With this background, it is inappropriate to be excessively demanding with regard to evidence of a party's precarious or unsatisfactory financial condition: so long as there are reasonable grounds for believing that a party's financial condition is inadequate or will deteriorate during the course of the arbitral proceedings, putting its ability to satisfy a final award into jeopardy, a tribunal is justified in concluding that there is a sufficient risk of severe harm.

It remains the case, however, that all creditors of commercial parties are exposed to the risk that a counter-party will become insolvent or be unable to satisfy its obligations. It is not clear why parties to arbitration agreements, much less any particular arbitration agreement, are necessarily entitled to protection against such risks merely as a consequence of commencing arbitral proceedings against the debtor: the risk that a counter-party will encounter commercial difficulties and become insolvent is one of the risks that any contracting party assumes. (407) Indeed, there may be instances in which restrictions against "preferences" imposed by national bankruptcy legislation would be implicated by arbitral orders granting one creditor security from a financially-distressed counter-party. (408)

Nonetheless, where there is evidence that a party has begun to, or appears likely to, engage in conduct that goes beyond the ordinary course of business, by attempting to dissipate assets, encumber property, or grant preferential security to insiders, then provisional measures will ordinarily be appropriate, assuming that the other requirements for interim relief, including urgency, *prima facie* jurisdiction and balance of hardships, are satisfied. As discussed above, it is appropriate, in exercising such authority, for a tribunal to take into account the parties'
P 2679
respective cases, and to order security more liberally with regard to claims that appear (provisionally) well-grounded. (409)

[e] Orders Requiring Security for Legal Costs

A related form of provisional relief involves orders for security for legal costs, often termed "security for costs," which is distinguished from security for underlying substantive claims. These orders require one party (or both parties) to post security to cover the likely amounts that would be awarded to the counter-party in the event that it prevails in the arbitration and is entitled to recover its legal costs. (410)

Courts in some UNCITRAL Model Law jurisdictions have held that Article 17 does not grant the arbitral tribunal authority to order security for costs. (411) It is unclear what the basis for this view is, apart from a fairly-clearly mistaken (412) interpretation of Article 17 of the original 1985 Model Law,

and it should be rejected.

Security for costs is a common form of interim relief in arbitrations with their seat in England or Commonwealth jurisdictions, where this type of relief is a routine aspect of domestic litigation. Security for costs is also expressly provided for by the 1996 English Arbitration Act [(413)] and some other common law arbitration legislation, [(414)] as well as in the LCIA Rules, [(415)] and a few other common law-oriented institutional rules. [(416)] Express provisions for security for costs are much less common in jurisdictions and arbitral institutions with civil law orientations.

Historically, tribunals without English or Commonwealth orientations were skeptical of both their authority to order security for costs and of the wisdom of doing so (sometimes on the basis that orders requiring security for costs may effectively deprive the party against
P 2680
whom they are directed of the ability to pursue its claim). [(417)] In the words of one authority, "providing security for costs involve costs of its own; a claimant should not be required to pay a fee for the right to submit a claim (in addition to the filing fees and advance payments); and a claimant's financial distress may be caused by the respondent's actions that are the subject of the dispute, etc." [(418)]

More recently, however, many international tribunals have been willing, at least in principle, to consider requests for security for costs. One Swiss-seated arbitral decision summarized this historical reticence, as well as more recent views, as follows:

> "The traditional view in Switzerland was that, lacking the parties' explicit agreement to the contrary, a Swiss Arbitral Tribunal had no authority to order security for a party's legal costs. … [T]he modern view expressed in Swiss legal doctrine and arbitral practice is that the authority granted to the arbitrators by Article 183 [of the Swiss Law on Private International Law] also extends to orders requesting a party to provide security for the opposing party's legal costs." [(419)]

Nonetheless, outside of English and some Commonwealth jurisdictions, arbitral tribunals have generally been hesitant to make security for costs orders. [(420)] As noted above, tribunals not infrequently conclude that the burden imposed by a security for costs order on a party may interfere unduly with its opportunity to be heard, particularly in instances where the party lacks the financial means to both post the required security, and fund presentation of its own case. Alternatively, tribunals may conclude, where the facts justify it, that the party seeking security is, at least in part, responsible for its counter-party's financial condition and is therefore not entitled to protection against that condition.

Where security for costs may be ordered, tribunals typically consider a variety of factors, including the ability and willingness of the party from whom security is requested to pay an eventual costs award against it, the reasons for any inability to pay a costs award, the extent to which third parties are funding that party's participation in the arbitration (while arguably remaining insulated from a costs award), the likely difficulties in enforcing a costs award and other factors. [(421)] Where a party appears to lack assets to satisfy a final costs award, but is pursuing
P 2681
claims in an arbitration with the funding of a third party, then a *prima facie* case for security for costs often exists. [(422)] Nonetheless, even in cases involving these circumstances, some tribunals have declined to order security for costs, considering other factors such as the counter-party's asserted responsibility for the applicant's financial condition and the applicant's right to access to justice. [(423)] It is doubtful that the likelihood of a party's success on the merits plays a significant role in determining whether it is appropriate to order security for costs.

It is relatively clear that parties may not, under most modern arbitration legislation, [(424)] apply to national courts (rather than the arbitrators) for orders granting security for costs. Prior to the 1996 English Arbitration Act, English courts would entertain such applications, in very limited circumstances, [(425)] but the Act eliminated this judicial authority. [(426)] Courts in
P 2682
other countries have also, properly, refused to entertain applications for security for costs of an arbitration. [(427)]

[f] Orders Requiring Payment of Advance on Costs or Deposit

Parties sometimes seek provisional measures in the form of an order requiring that a counter-party pay its share of the advance on costs or deposit, covering the tribunal's fees and expenses. [(428)] As discussed elsewhere, tribunals frequently order such payments, [(429)] sometimes in the form of provisional measures. The rationale for such relief is that a party may properly be ordered to pay a

share of the advance on costs which will be subject to reallocation at the conclusion of the arbitration as part of the tribunal's general allocation of costs. (430)

[g] Orders for Preservation or Inspection of Property

Another form of provisional relief involves orders for the preservation or inspection of property, typically for evidentiary purposes. National arbitration legislation sometimes expressly grants the authority to order such measures. (431) Institutional arbitration rules generally grant the same or similar authority. (432)

Orders for the preservation or inspection of property can include the appointment of a neutral third person charged with taking specified actions. For example, an independent expert can be appointed to inspect goods or other property and provide a factual report about its condition or to preserve evidence. (433) Arbitral tribunals have not infrequently issued such relief, (434) holding generally that "the arbitral tribunal may take any interim measures … for the
P 2683
conservation of the goods forming the subject-matter in dispute." (435)

Properly understood, interim relief of this sort often involves little more than a tribunal's general authority to ascertain the facts of the case and oversee the procedural conduct of the arbitration, including disclosure and the taking of evidence. (436) Thus, notwithstanding the (mis)characterization of the 2006 Revisions to the UNCITRAL Model Law, (437) an order requiring preservation or production of materials for evidentiary purposes cannot usefully be understood as "provisional" relief. Such an order does not require one party to take particular action, subject to subsequent revision in a final award, but instead simply gives directions regarding disclosure and evidentiary matters as part of the tribunal's fact-finding process. (438)

With regard to orders for the sampling or preservation of evidence, it makes little sense to consider matters of urgency, irreparable harm, or prejudgment of the merits. (439) Rather, the appropriate inquiries are whether the materials in question appear relevant to the issues that are in dispute and properly (or potentially) subject to disclosure under the parties' arbitration agreement and any applicable procedural rules. (440) A tribunal should be alert to (inappropriate) efforts by one party to attempt unilaterally to preempt an orderly disclosure process, (441) but it need not apply the same standards to requests for preservation or inspection of evidence as it would to requests for continued performance of a contract or posting of security. (442)

A different question is presented where a tribunal is asked to order the sale or detention (for non-evidentiary purposes) of property. (443) In some cases, such requests are made simply to mitigate loss arising from the pendency of the arbitration that would generally fall on both parties – as in the case of the sale of perishable goods, which would otherwise become valueless. In these instances, there is a substantial argument that a tribunal should generally order commercially-reasonable actions, without inquiry into issues of serious harm to one party or into the *prima facie* merits of the parties' claims, in order to minimize the overall losses resulting from the parties' dispute.

In other cases, parties seek the detention of goods because of disputes over their ownership. Here, different standards are appropriate, because the allocation of loss/hardship during the arbitral proceedings is asymmetric (*i.e.*, only one party will be the legitimate owner). In
P 2684
such cases, a tribunal should only intrude into the parties' contractual dealings after inquiring into issues of serious harm to one party and the *prima facie* merits of the parties' claims. (444)

[h] Enforcement of Confidentiality Obligations

It is not uncommon for commercial agreements to include confidentiality provisions, aimed at safeguarding one or both parties' commercial, financial, or other confidences. Moreover, as discussed below, both arbitration agreements and national laws frequently impose confidentiality obligations on parties with regard to the materials produced in the arbitration. (445)

Damages are seldom a satisfactory remedy for breach of such confidentiality obligations, because of difficulties in establishing causation and directness. It is therefore appropriate, and generally necessary, for tribunals to issue provisional measures ordering compliance with confidentiality obligations, particularly with regard to obligations to maintain the confidentiality of the arbitral process itself.

[i] Orders for Interim Payment

A largely *sui generis* type of "provisional" measure involves orders or awards for interim payment of amounts claimed or other types of summary dispositions. Provisional measures of this nature differ materially from other types of provisional relief in that they resolve (at least partially) the merits of the parties' dispute, either by granting what amounts to a partial final award for essentially indisputable sums due or otherwise granting requested relief. Indeed, a partial award of amounts that are indisputably due and payable on the dismissal of a claim (or defense) should not, strictly speaking,

be considered a provisional measure; it is instead a partial award of final relief. (446)

Some national arbitration legislation provides arbitral tribunals the authority to grant partial awards of sums that are indisputably owed. That is the case under §39 of the English Arbitration Act, 1996. (447) There would also appear to be no obstacle in principle under the UNCITRAL Model Law, or other legislation lacking specific reference to the possibility of such awards, to an arbitral tribunal granting partial relief following very rapid proceedings addressing a single issue.

Some institutional arbitration rules grant arbitral tribunals the authority to dismiss claims and/or defenses on an expedited, summary basis. (448) These provisions confirm the arbitrator's general procedural authority to conduct the arbitral proceedings efficiently, (449) expressly permitting that authority to be used to dismiss claims and/or defenses prior to a final award and after expedited proceedings. (450) Importantly, these expedited procedure mechanisms do not
P 2685
provide for interim or provisional measures, but instead for expedited final disposition of particular issues. This is not provisional relief, but instead *final* relief, albeit on a fast-track basis.

In a few jurisdictions, local law appears to leave courts with authority to grant orders requiring interim payment of amounts that are undisputed or indisputably due and payable, notwithstanding the existence of an international arbitration agreement. French and Dutch law establish "*référé-provision*" procedures, where local courts may order amounts that are not "seriously disputable" to be paid following a summary procedure. (451) French courts have also held that the parties' agreement to arbitrate does not, without more, exclude resort to French courts for the "*référé-provision*" procedure. Thus, the French Cour de Cassation has reasoned:

> "since the existence of an arbitration agreement does not exclude the jurisdiction of the court, who had in fact established the urgency of the situation, to order a provisional payment in favor of a creditor whose claim was not seriously disputable, the Court of Appeals rightly rejected the argument that the court lacked the jurisdiction to do so." (452)

Despite this, where an international arbitration agreement exists, French courts will only grant relief under the "*référé-provision*" procedure if the arbitral tribunal has not yet been constituted (453) and if there is an urgent need for such relief. (454)

The above principles developed by French courts were confirmed and clarified in the 2011 reform of the French arbitration law. (455) Commentary confirms that the reform consolidated preexisting case law, (456) holding that the French arbitration law reform "integrated, without
P 2686
modifying" the "*référé-provision*" mechanism previously developed by French courts. (457) This rule applies both in domestic and international arbitration proceedings. (458)

Insofar as the "*référé-provision*" procedure were to involve a final judgment or payment order, or a determination of the parties' underlying dispute, it would be contrary to both the parties' arbitration agreement and the New York Convention. That would be because the resolution of the parties' dispute and granting of final relief are, under the agreement to arbitrate, for the arbitrators, not a national court. (459) If the "*référé-provision*" procedure produces only a provisional order, as the French Code of Civil Procedure mandates, subject to arbitral revision, then the mechanism is an entirely acceptable form of provisional relief, although even then, care must be taken not to prejudge the merits of the parties' dispute.

[j] Antisuit Orders

Finally, a particularly delicate form of provisional measure involves so-called "antisuit" orders. As discussed above, this sort of order is typically requested (and ordered) where one party seeks to pursue litigation outside the contractual arbitral forum, in violation of the parties' arbitration agreement. (460) An antisuit injunction is directed against a party to the arbitration, not technically against a national court; the injunction forbids the party from taking steps that would violate its contractual obligations (*e.g.*, pursuing litigation in breach of its agreement to arbitrate or pursuing litigation that would unacceptably affect the *status quo ante* or the subject matter of the dispute). This sort of relief is related to injunctions issued by some national courts, which forbid a litigant from commencing or pursuing specified legal proceedings in another jurisdiction. (461)

Antisuit injunctions are controversial when issued by national courts, because they arguably involve the courts of one nation interfering with the sovereign, judicial processes of another nation. (462) Such relief is at least as controversial in the case of arbitral tribunals, which are constituted by private agreement and lack the sovereign authority of a national court.

P 2687

Some commentators have concluded that arbitral tribunals have, and should be prepared to exercise, the power to order a party not to pursue litigation in breach of its agreement to arbitrate. (463) Consistent with this view, arbitral tribunals have sometimes issued orders forbidding a party from proceeding with or commencing litigation in a national court. (464) As the Iran–U.S. Claims Tribunal has reasoned, an arbitral tribunal has "inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel and duplicative proceedings instituted in other fora have rendered this necessary." (465) There should be little doubt that arbitral tribunals in principle have the power to issue antisuit injunctions. (466) Indeed, according to one commentator:

> P 2688
> "[In ICSID arbitration] [t]he largest group of cases in which tribunals have dealt with requests for provisional measures concerned proceedings before domestic courts. … ICSID tribunals have been asked repeatedly to enjoin parties from seeking relief in domestic courts." (467)

In particular, this sort of relief is appropriate to preserve the arbitral tribunal's jurisdiction – for example, where a party seeks through litigation to dispose of the subject matter of the dispute or to otherwise preempt the tribunal's jurisdiction. Nonetheless, it is for obvious and serious reasons a delicate authority that should be exercised with special care and restraint.

The requirements that typically must be satisfied to obtain an antisuit injunction are discussed above. (468) Among other things, the proceeding which is to be enjoined must ordinarily involve the same, or a materially similar, dispute as the arbitral proceedings, or, less clearly, must be subject to the parties' arbitration agreement. (469) Moreover, the proceeding which is enjoined must involve the same or similar parties as the arbitration (or, less clearly, parties to the arbitration agreement): (470) where parties to national court litigation differ materially from the parties to the arbitration agreement, an antisuit injunction will ordinarily be unavailable. (471) As with requests for antisuit injunctions in national courts, considerations of international comity and judicial restraint should also apply when antisuit orders are requested from an arbitral tribunal. (472)

Alternatively, an antisuit injunction order may also be available, even where the foregoing requirements are not satisfied, if parallel proceedings either aggravate the parties' dispute or threaten the integrity or regularity of the arbitral process. (473) Thus, even if a parallel proceeding involves different parties or a different dispute, an antisuit order may be appropriate while that proceeding nonetheless has sufficiently adverse effects on the arbitration. As one investment tribunal reasoned:

> "It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1)
> P 2689
> harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute." (474)

A number of tribunals have applied this rationale to issue orders restraining parties from pursuing parallel, related, or overlapping proceedings. (475)

[5] Tribunal's Discretion Regarding Provisional Measures

Assuming that the general criteria for granting provisional measures are satisfied, then tribunals often say that they have substantial discretion in selecting and ordering appropriate provisional relief. According to one authority, "[a]n 'interim measure' is a temporary form of relief granted by an arbitral tribunal in its discretion." (476) Or, "[i]n international arbitration, there are no clear guidelines to the types of relief available or when they should be granted." (477)

It is unclear precisely what these statements mean. The granting of provisional measures is not a "discretionary" or arbitrary exercise, but must instead conform to principled standards and the evidentiary record.

Although the standards applicable to the granting of provisional measures continue to develop, it is wrong to treat the subject as a matter of discretion or arbitration *ex aequo et bono*, and not of legal right. The better view is that statements about the arbitrators' "discretion" refer to the tribunal's need to make pragmatic assessments of the degree of risk, the extent of possible harm, the balance of hardships and the merits of the parties' underlying positions in reaching a decision whether or not to issue provisional measures. These assessments are complex and require judgment and care, but they are not matters of pure discretion and must instead proceed in accordance with a principled legal framework and set of standards.

[6] Relevance of Prior Consideration of Provisional Measures by National Courts

As discussed below, national courts also generally have the power to issue provisional measures in connection with a dispute that is subject to arbitration (particularly prior to constitution of the arbitral tribunal). (478) In cases where this occurs, questions arise as to the relevance of national court decisions either granting or denying provisional measures for subsequent arbitral proceedings concerning requests for the same or similar provisional relief. (479)

P 2690
Some arbitral tribunals have concluded that an earlier national court decision granting (or denying) provisional measures is either binding on a tribunal considering the same request or, alternatively, entitled to a high degree of deference. According to one tribunal, it would be "very serious" to order the parties to modify a provisional measure previously ordered by a national court, and the tribunal therefore declined to do so. (480) Another tribunal concluded flatly that it was "not competent to lift such sequestration [of property ordered by a national court] or to order the defendants to renounce it." (481)

In principle, these decisions, or at least their rationales, are misconceived. A national
P 2691
court's decision regarding provisional measures should not be regarded as *res judicata* in subsequent arbitral proceedings: the national court applies its own law, often taking into account the exceptional nature of court-ordered provisional measures in connection with an arbitration, rather than applying international standards. (482) In these circumstances, the national court's provisional decision should not necessarily be considered as binding in an application for the same or similar provisional measures in the parties' contractual arbitration forum.

Nor should a tribunal necessarily give substantial weight to a national court's consideration and resolution of a request for provisional measures. Properly understood, a national court's decision on provisional measures should be regarded as supportive of the arbitral process, available in circumstances where an arbitral tribunal is unable to act, but subject to subsequent decisions of the arbitral tribunal; this accords with the tribunal's authority to conduct the dispute resolution process and finally resolve the parties' dispute. (483)

Of course, an arbitral tribunal should take into account the record and analysis of a national court which, ideally, would reach similar results to those of the tribunal. Equally, an arbitral tribunal may conclude that a party which has chosen to seek interim relief from a national court, and failed, is estopped from seeking the same relief from the tribunal. (484) But, where a tribunal concludes that provisional measures are (or are not) necessary, a contrary national court decision should not prevent the tribunal to issuing relief giving effect to its conclusion. (485)

[7] Form of Provisional Measures: Order or Award

Assuming that a tribunal concludes that provisional measures are appropriate, questions arise as to what form such measures should take. In principle, and absent contrary agreement, (486) provisional measures can be granted as either an order or an award: that conclusion follows from the arbitral tribunal's expansive procedural and remedial authority. (487) Some institutional arbitration rules make this express. (488) Additionally, a tribunal can "invite" or "recommend"
P 2692
that parties comply with specified directions. (489) Although a tribunal generally has discretion in deciding upon the form of its provisional measures, that discretion must be guided by the objective of achieving the ends aimed at by the provisional measures. (490)

Typically, an order can be issued more promptly than an award. An order is ordinarily accompanied by fewer formalities than an award (*e.g.*, a less extensive text and statement of reasons, sometimes signed by only the presiding arbitrator); moreover, in some institutional arbitrations (*e.g.*, ICC and SIAC), an award requires internal scrutiny by the administering institution, while an order does not. (491) For these reasons, an order can usually be issued more promptly than an award and, therefore, if complied promptly with, can have greater prospects for preventing damage, or further damage, to the party seeking relief.

In contrast, provisional measures issued in the form of an interim award may enjoy greater enforceability in national courts, as compared to an order. Thus, some arbitration legislation and national court decisions hold that an order is not an "award" for purposes of the New York Convention (and national arbitration legislation), and therefore does not benefit from the Convention's guarantees regarding the recognition of foreign arbitral awards. (492) On the other hand, other arbitration statutes provide, or judicial decisions hold, either that orders granting provisional measures are enforceable to the same extent as interim awards of provisional measures (493) or that interim "awards" of such measures are enforceable in the same manner as other awards. (494) These statutes and decisions emphasize substance over form in addressing the enforceability of tribunal-ordered interim measures.

P 2693
The Iran–US Claims Tribunal generally issued provisional relief in the form of an award, rather than an order. (495) Other tribunals have issued provisional measures in the form of an order or direction, rather than an award. (496) Some tribunals seek "the best of both worlds," by issuing provisional measures as an order, followed by a subsequent award. (497) This latter approach endeavors to provide immediate relief (via an order), as well as maximally-enforceable relief (via an award). There is no reason in principle that a tribunal may not take this course, particularly where there are concerns regarding compliance with its provisional measures. In any event, the tribunal's grant of provisional measures should ordinarily be addressed to the parties in mandatory, not optional terms, as an order or direction, rather than a recommendation. (498)

[8] Security as Condition for Provisional Relief

The grant of provisional measures is sometimes conditioned upon the posting of security by the applicant requesting such measures, to preserve the adverse party's ability to recover damages resulting from provisional measures that prove to have been wrongfully requested. For example, if a party successfully obtains provisional measures forbidding its counterparty's sales of a product, or use of intellectual property, it may be required to post security sufficient to cover monetary damages claims for lost sales or profits.

Some national arbitration laws expressly provide for the ordering of security by an arbitral tribunal. (499) Leading institutional arbitration rules are generally similar. (500)

P 2694
Even in the absence of such express authorization, an arbitral tribunal's power to order provisional measures clearly subsumes the authority to impose requirements for posting security. (501) An arbitral tribunal's jurisdiction should extend to the consideration of damages claims to be satisfied from any security fund, for losses resulting from conduct required pursuant to an order for provisional measures (including where such order is granted by a national court). (502)

[9] *Sua Sponte* Provisional Measures

Some national arbitration statutes expressly provide that provisional measures are only permitted upon the application of a party to the arbitration (*i.e.*, the arbitral tribunal may not issue provisional measures *ex officio* or *sua sponte*). For example, Article 17 of the UNCITRAL Model Law provides that provisional measures may be issued "at the request of a party," (503) while Article 183(1) of the Swiss Law on Private International Law provides that an arbitral tribunal may order provisional measures "on motion of one party." (504) Institutional arbitration rules are generally similar. (505)

The requirement that a party affirmatively apply for provisional measures implies that such relief is capable of being waived (or subject to defenses such as estoppel). Even where national law or institutional rules do not so provide, it is very unlikely that an arbitral tribunal should (or would) take the extraordinary step of granting provisional measures *sua sponte*; if nothing else, such action would deny the respondent (as well as the claimant) an opportunity to be heard on the issue, while the relief granted might be either unwanted or affirmatively damaging. (506)

[10] *Ex Parte* Provisional Measures

It is not uncommon in national court proceedings for provisional measures to be issued on an *ex parte* basis, without notice to or participation by the party against whom the measures are sought. This type of relief is particularly appropriate where a party could suffer serious damage simply through a single, rapidly-completed action by its counter-party – for example, calling a letter of credit, transferring needed security or property to third parties, or destroying critical evidence.

Despite its arguable practical utility, (507) there is substantial controversy surrounding an arbitral tribunal's *ex parte* consideration of a request for provisional measures. As discussed
P 2696
above, most national arbitration laws and institutional arbitration rules guarantee all parties an opportunity to be heard, as well as equality of treatment (508) – and *ex parte* grants of relief run strongly counter to these requirements. Some institutional rules go further, and appear to expressly forbid *ex parte* provisional relief. (509) Many commentators conclude that *ex parte* provisional relief is beyond the power of arbitral tribunals. (510)

At the same time, some commentators have urged the use of *ex parte* provisional measures in arbitration, (511) and the 2006 Revisions to the UNCITRAL Model Law expressly permit *ex parte* provisional measures in limited circumstances. (512) Thus, the 2006 amendments to Article 17 of the Model Law provide for "preliminary orders" that may be applied for "without notice to any other party." (513) In turn, Article 17B and 17C provide that *ex parte* preliminary orders may be issued where the arbitrators conclude that "prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure." (514)

The 2006 Revisions to the Model Law were controversial. (515) Many authorities have questioned

the wisdom and practicality of the revisions to Article 17, [(516)] and in practice, arbitral tribunals are ordinarily unlikely to consider, much less grant, provisional measures on an *ex parte* basis. To date, only a few jurisdictions have adopted the revised Model Law's provisions for *ex parte* interim relief, [(517)] and there have been virtually no instances of such measures being granted (much less of such measures being effective). [(518)]

Although the subject is controversial, the better view is that the revisions to Article 17, authorizing *ex parte* provisional measures, were ill-considered or, at least, ahead of their time. It is of course correct that a tribunal can in rare cases only truly grant both parties a full and effective opportunity to be heard if it will entertain *ex parte* applications for interim relief. That is because there are circumstances where not issuing relief on an *ex parte* basis may well make such relief ineffective as a practical matter, thus allowing irreparable injury to occur, thereby effectively depriving the applicant of an opportunity to be heard in a meaningful manner.

On the other hand, the most fundamental objection to *ex parte* relief in arbitration is that it can virtually never accomplish any serious purpose under existing regimes for international arbitration. The basic predicate for the extraordinary grant of *ex parte* relief is that one party cannot be trusted to conduct itself in compliance with its obligations, and must be legally compelled to take particular (immediate) actions without any opportunity to evade its obligations. Although this rationale can be given effect with substantial force in domestic litigation contexts (*e.g.*, when funds, which could be transferred abroad, can be frozen), it seldom has any real application in arbitration, where an arbitral tribunal can virtually never issue immediately-effective coercive relief (*e.g.*, attachment or garnishment of bank accounts).

Thus, as discussed above, under existing international arbitration regimes, an arbitral tribunal's orders generally have no direct coercive effects [(519)] and therefore cannot accomplish the basic purpose of *ex parte* relief. One could imagine that an *ex parte* order of provisional measures might, if enforceable and not notified to the respondent, sometimes be capable of effective use on a further *ex parte* basis in a national court enforcement proceeding. Ironically, however, Article 17C specifically prevents that from being possible, by requiring immediate notice of any preliminary decision of the arbitral tribunal to all parties and providing that such decisions are not enforceable. [(520)] As a consequence, the only apparent cases in which it makes any sense for *ex parte* relief to be issued by an arbitral tribunal (*e.g.*, when a party must be given no chance to evade a binding order) are exactly those in which Articles 17B and 17C make it impossible to provide effective relief. At best, therefore, Articles 17B and 17C are a non-functional appendage of the UNCITRAL Model Law; at worst, if ever used, which fortunately is unlikely, they will foster distrust of the arbitral process and cause wasted expense.

If, contrary to the above analysis, provisional measures on an *ex parte* basis are to be available, a tribunal should only grant such measures in cases where they are clearly required in order to prevent immediate and very grave damage that cannot otherwise be avoided. Of course, a tribunal must in these circumstances emphasize the applicant's obligation to
P 2697
fully disclose all matters relevant to its application and must, after issuing any provisional measures, immediately afford the affected party a full opportunity to present its case. [(521)] It is also possible for a tribunal to order immediate temporary restraints, pending its decision on a request for provisional relief where both parties have an opportunity to be heard. [(522)]

§17.03 JUDICIAL RECOGNITION AND ENFORCEMENT OF PROVISIONAL RELIEF ORDERED BY ARBITRATORS

Despite a strong historical tendency towards voluntary compliance with arbitral awards and orders, tribunal-ordered provisional measures are not always complied with. [(523)] As discussed above, arbitrators lack the authority, under virtually all national legal regimes, to coercively enforce their orders. [(524)] Accordingly, judicial enforcement of a tribunal's provisional measures may be essential to effectuating the tribunal's directions (and protecting one party's rights). Unfortunately, the law relating to the enforceability of tribunal-ordered provisional measures is unsettled.

Many national arbitration statutes do not expressly address the judicial enforceability of tribunal-ordered provisional measures, leaving their enforcement to general statutory provisions regarding arbitral awards. That was the case with the original text of the 1985 UNCITRAL Model Law, [(525)] as well as a number of other arbitration statutes. [(526)] Under these provisions, the enforcement of tribunal-ordered provisional relief has given rise to significant uncertainties.

In part because of these issues, some jurisdictions have enacted specialized legislation providing for judicial enforcement of tribunal-ordered provisional measures, including both

P 2698
UNCITRAL Model Law [(527)] and other [(528)] jurisdictions. Relatedly, the Model Law was revised in 2006 to provide a specialized regime for enforcement of "orders" of provisional relief. [(529)]

[A] Are Provisional Measures "Awards"?

A significant question with regard to the enforceability of tribunal-ordered "provisional" or "interim" measures in national courts has been whether such decisions can qualify for recognition and enforcement as an arbitral "award" under the general provisions of national arbitration statutes and international arbitration conventions. This question arose under (older) arbitration legislation which provided only a general enforcement mechanism for arbitral "awards" and it has provoked divergent answers by both national courts and commentators.

[1] Historical Authority Holding That Orders of Provisional Measures Are Not "Awards"

Historically, some (older) authorities held that only "final" arbitral "awards" could be enforced and that "provisional" measures were by definition neither "final" nor "awards." [(530)] In the words of one national court decision:

> P 2699
> "whilst it is true that a valid interlocutory order is in one sense 'binding' on the parties to the arbitration agreement … an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not 'final' and binding on the parties." [(531)]

The same issue has also arisen in connection with interim relief granted by an emergency arbitrator, which require determining whether decisions granting such relief can be recognized and enforced as "awards" in national courts. [(532)]

[2] Orders of Provisional Measures Are "Awards"

In contrast, a number of more recent authorities hold that the grant of provisional measures finally disposes of the request for such measures and that judicial enforcement of such measures is important to the arbitral process. In the United States, the FAA provides no express guidance as to the enforceability of arbitral rulings granting provisional measures, [(533)] but the foregoing reasoning has been adopted by a number of U.S. courts to hold that such rulings are to be treated as "final" awards and subject to recognition and enforcement. [(534)] According to
P 2700
one U.S. decision adopting this view, an order of provisional measures should be confirmed because:

> "[S]uch an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits … [I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made." [(535)]

P 2701
A substantial body of U.S. commentary endorses this approach, [(536)] as do some non-U.S. authorities. [(537)] A number of U.S. decisions have also held that rulings of emergency arbitrators are awards, which may be recognized and enforced like other arbitral awards. [(538)]

[3] Orders of Provisional Measures Are Not "Awards"

Despite this, a number of other authorities hold that the recognition provisions of the New York Convention and national arbitration legislation apply only to awards that finally determine claims submitted to arbitration, and therefore not to orders of provisional relief, which assertedly are neither "awards" nor "final." [(539)] As one court put it, "the New York Convention
P 2702
… applies to final and binding awards. Provisional or interim measures are not final." [(540)] Likewise, the Swiss Federal Tribunal has held that an arbitrator's decision (denominated an "interim award"), which required one party to transfer inventory to the other party during the pendency of the arbitration, was not an award subject to annulment. The Court concluded:

> "[s]ince the appeal is directed not against an award, but against a decision on provisional measures as defined in Art. 183 PILA, this matter is consequently not

> capable of appeal." (541)

The UNCITRAL Secretariat reported a similar view in other states, at least as of 1999: "[c]ourts have found that only those decisions made by arbitrators that determine all or some aspects of the dispute, including jurisdiction, in a final and binding manner, can be considered 'arbitral awards' within the meaning of the New York Convention." (542) There is also a substantial body of commentary concluding that provisional measures are not recognizable or enforceable as "final" arbitral "awards" under either the New York Convention or national arbitration legislation. (543)
P 2703

[4] Future Directions: Orders of Provisional Measures Are "Awards"

The better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards in the New York Convention and most national arbitration regimes. Provisional measures are "final" in the sense that they dispose of a request for relief pending the conclusion of the arbitration, which should be sufficient to justify treating such measures as "awards." (544)

Orders granting provisional relief are meant to be complied with, and to be enforceable, outside the arbitral process; they are in this respect different from interlocutory arbitral decisions that merely decide certain subsidiary legal issues (*e.g.*, choice of law, liability) or prescribe procedural directives (such as timetables or hearing logistics), which are ordinarily neither "final" nor "awards." (545) It is also highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be able, and significantly more willing, to refuse to comply with orders of provisional relief, resulting in precisely the serious harm that provisional measures were meant to foreclose.

In contrast, there is no sound policy reason for withholding judicial enforcement mechanisms for tribunal-ordered provisional measures. The most serious concern would appear to be that national courts would be required repeatedly to enforce, and then possibly readjust their enforcement measures, if an arbitral tribunal altered the provisional relief it ordered. In reality, these sorts of alterations seldom occur and, if judicial enforcement were available, parties would almost invariably comply with tribunal-ordered provisional relief without the need for judicial enforcement. The adoption in a number of states, and in the 2006 Revisions to the Model Law, of specialized mechanisms for recognition (and challenge) of orders of provisional measures (546) confirms both the practical utility and workability of treating such orders as awards (subject to recognition like other awards). In any event, a measure of judicial involvement in enforcement proceedings is generally a modest cost to pay to ensure the efficacy of the arbitral process, which among other things materially reduces the work-load of national courts. (547)

Textually, it is also very difficult to see why a formal, reasoned decision by an arbitrator (or emergency arbitrator), issued after hearing the parties, and granting provisional relief, cannot be considered an "award" under the Convention and national arbitration legislation. Given
P 2704
the central role of party autonomy in the arbitral process, reliance on formalisms should be minimal in such analysis and, as discussed above, both the needs and efficacy of the arbitral process and the Convention's policies argue strongly for treating grants of provisional measures as awards. In any event, even on purely formal grounds, there is no reason that a written, signed and reasoned decision granting provisional measures that the arbitrators intend, and objective parties would expect, to be enforceable cannot be considered an "award." (548)

Suggestions that some Contracting States did not permit arbitrators to grant provisional measures at the time of ratification of the Convention, and therefore would not have intended the term "award" to include provisional relief, are mistaken. (549) A state's views regarding the authority of locally-seated arbitral tribunals is not decisive as to that state's willingness to undertake obligations to recognize foreign awards. More fundamentally, the constitutional character of the Convention contemplated that Contracting States' legislation might need to evolve, to give full effect to the Convention, and that states' views of nonarbitrability and public policy would also evolve over time; (550) there is no reason that the term "award" should not include reasoned, signed decisions by arbitrators on requests for provisional measures when Contracting States have (now almost universally) recognized the authority of arbitrators to grant such relief.

[B] Specialized National Arbitration Legislation Permitting Recognition and Enforcement of Provisional Relief

Given the uncertainty concerning the enforceability of provisional measures and the practical need for effective enforcement mechanisms for such measures, a number of states, as well as the drafters of the 2006 Revisions to the UNCITRAL Model Law, have adopted legislative provisions

that authorize judicial enforcement (and review) of tribunal-ordered provisional measures, using specialized mechanisms other than those dealing with final awards. These provisions typically allow for recognition and enforcement of tribunal-ordered provisional measures by national courts in the arbitral seat (as opposed to in other states), in much the same manner as arbitral "awards." These statutory provisions materially enhance the enforceability of provisional measures ordered by arbitral tribunals, but unfortunately do not always deal with enforcement outside the arbitral seat.

One of the first legislative provisions of this character was Article 183(2) of the Swiss Law on Private International Law, which provides that, if a party does not voluntarily comply with tribunal-ordered provisional measures, "the arbitral tribunal may request the assistance of the competent court." (551) This provision contemplates that a Swiss-seated (552) arbitral tribunal (and,
P 2705
apparently, not the parties to an arbitration) may initiate proceedings in Swiss courts to obtain enforcement of an order of provisional measures. (553) Other arbitration statutes, including a number of versions of the UNCITRAL Model Law, (554) provide for the parties to seek judicial enforcement of tribunal-ordered provisional measures, not treating such measures as arbitral "awards," but instead providing a *sui generis* enforcement mechanism.

Similarly, the 2006 Revisions to the Model Law adopted a specialized enforcement regime for provisional measures issued by arbitral tribunals. Article 17H(1) provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court." (555) The section goes on to provide that enforcement may be sought "irrespective of the country in which it was issued," permitting provisional measures to be enforced outside the arbitral seat. (556) The enforceability of provisional measures under Article 17H is subject to exceptions, (557) and in particular those applicable to the recognition and enforcement of awards (under Article 26 of the Model Law). (558)

P 2706
In contrast to some other aspects of the 2006 Revisions, (559) Article 17H is a desirable addition to the Model Law that would enhance the efficacy of the arbitral process. In particular, the provision for enforcement of interim measures outside the arbitral seat is a significant and important advance on prior legislative developments.

Some states have adopted modifications of the Model Law approach in Article 17. For example, §1041(2) of the German implementation of the Model Law provides that "the court may, at the request of a party, permit enforcement of a measure … unless application for a corresponding interim measure has already been made to a court." (560) The German legislation also provides for judicial review and revision of interim measures ordered by a tribunal, as well as judicially-ordered damages for unjustified grants of provisional relief (against the party that requested such relief). (561)

The English Arbitration Act, 1996, adopts an approach comparable to that of the 2006 Revisions to the Model Law. Section 42 of the Act authorizes arbitral tribunals to issue a "peremptory order," which is then subject to enforcement in English courts in a manner analogous to that for awards. (562) Legislation in some other common law (563) and civil law (564) jurisdictions adopts comparable approaches, providing for judicial enforcement of at least some orders of provisional relief by arbitral tribunals.

[C] Recognition and Enforcement of Provisional Measures of A Nature Not Available in Recognition Forum

There may be circumstances in which the arbitral tribunal will issue provisional relief of a character that is not available under the law of the judicial enforcement forum. In these circumstances, national laws either expressly or impliedly provide for the application of the enforcement forum's law, with the result that measures not permitted or available under local law may not be enforceable. (565) Where local law does not provide the same type of relief as that
P 2707
ordered by tribunals, courts are typically empowered to order an analogous or similar form of enforcement. (566)

[D] Scope of Judicial Review in Action to Recognize and Enforce Tribunal-Ordered Provisional Relief

Assuming that judicial recognition and enforcement of tribunal-ordered provisional measures is in principle possible, questions then arise as to whether particular provisional measures granted by an arbitral tribunal should be enforced. The same defenses to recognition and enforcement are generally available with regard to provisional relief as for final awards. (567) That generally includes any grounds provided by local law for annulment of an award and, in foreign courts, any grounds specified in Article V of the New York Convention for nonrecognition of an award. (568)

Where national arbitration legislation provides a specialized enforcement mechanism for tribunal-ordered provisional measures, statutory grounds for resisting recognition will typically be provided. That is the case with Article 17 of the 2006 Revisions to the Model Law, which permits non-recognition: (a) on the grounds set forth in Articles 36(1)(a)(i), (ii), (iii) or (iv) of the Model Law; (b) if the arbitral tribunal's order regarding security has not been complied with; (c) the provisional measures have been terminated or suspended by the arbitral tribunal (or a court in the arbitral seat); (d) on the grounds set forth in Articles 36(1)(b)(i) or (ii); and (e) the interim relief is incompatible with the authority possessed by the recognition court. (569)

The 2006 Revisions to Article 17 of the Model Law provide additional grounds for non-enforcement of provisional measures, beyond those in Article 36 of the Model Law. In particular, Article 17I provides for refusing recognition and enforcement of the order if the party seeking enforcement failed to comply with any order for security on which provisional measures were conditioned, (570) or if the provisional measures were terminated or suspended by the arbitral tribunal. (571) Article 17I(1)(a)(iii) goes on to permit, but not require, non-enforcement where provisional measures have been terminated or suspended by a court in "the State in which the arbitration takes place or under the law of which that interim measure was granted," but only where the court was "so empowered." (572)

This text is not ideally-drafted. It roughly parallels Article 36(1)(a)(v), which is itself a source of possible confusion because of uncertainty about the recognition of annulled awards. (573) In addition, however, Article 17I(1)(a)(iii) introduces two additional sources of
P 2708
uncertainty: the ill-explained reference to a court that is "so empowered," and the reference to the state where "the arbitration takes place." The latter reference contrasts with that in Article 36(1)(a)(v) (referring to the place where an arbitral award is made), thereby introducing an additional and unnecessary source of confusion. The better view is that the arbitration "takes place" in the arbitral seat, regardless where hearings are held. (574)

Where provisional measures are "incompatible with the powers conferred upon the [enforcement] court," Article 17I(1)(b)(i) provides that the enforcement court is authorized to "reformulate the interim measures to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance." (575) As discussed above, this parallels more general practice involving judicial enforcement of provisional measures. (576)

A comparable regime for recognition and enforcement exists in jurisdictions where provisional measures are categorized as "awards." In these cases, decisions granting provisional measures will be subject to non-recognition on all the grounds applicable to other arbitral awards (under Article V of the New York Convention and Article 36 of the UNCITRAL Model Law). In principle, the same grounds and standards of non-recognition should apply to provisional measures as to arbitral awards, although some courts appear to have held that interim awards or orders will be subject to less rigorous review than a final award. (577)

A particularly common ground for resisting recognition of arbitral decisions granting interim relief is that the tribunal exceeded its authority. As noted above, most decisions that have permitted judicial enforcement of tribunal-ordered provisional measures have dismissed challenges based on an excess of authority, and have permitted arbitrators broad discretion to fashion appropriate remedies. (578) Other judicial decisions have considered what amounts to substantive objections to the merits of the arbitrators' order of provisional relief, only entertaining such objections in a minority of (older) cases. (579)
P 2709

[E] Availability and Scope of Judicial Review in Action to Recognize and Enforce Provisional Relief Ordered by Emergency Arbitrator

Recognition and enforcement of interim measures ordered by an emergency arbitrator (as provided for under some institutional arbitration rules (580)) raises additional issues under the New York Convention and national arbitration laws, many of which are relatively unexplored. In particular, it is unclear whether an "emergency arbitrator" is, in fact, an "arbitrator," and whether an "emergency arbitration," is, in fact, an "arbitration."

In a few jurisdictions, national arbitration legislation has been amended to either provide specialized mechanisms of enforcement for emergency arbitrators' orders, (581) or to include emergency arbitrators within the statutory definition of "arbitrators" or "arbitral tribunals." (582) In these jurisdictions, the status of emergency arbitrators and their decisions is relatively clear. (583)

In the absence of statutory direction, as discussed above, the better view is that emergency arbitrators should be treated like other arbitrators. The general definition of "arbitration" (584) should

be satisfied by an "emergency arbitration," [585] and an emergency arbitrator's award should be capable of recognition and enforcement in the same manner as other awards (or, in some jurisdictions, orders of provisional relief). At the same time, an emergency arbitrator's "award" of provisional relief would also be subject to the same recognition defenses as other awards. [586] Thus, as noted above, U.S. courts have generally held that decisions of emergency
P 2710
arbitrators are in principle subject to recognition and enforcement, in the same manner as final awards, and subject to the same minimal judicial review as awards by full arbitral tribunals. [587]

[F] Annulment of Tribunal-Ordered Provisional Measures

Judicial review of tribunal-ordered provisional measures can also (potentially) occur in an action to annul or set aside the tribunal's ruling. The availability of judicial review in an annulment action depends on the arbitration legislation in the seat of the arbitration (as it does for arbitral awards [588]).

The 2006 Revisions to the Model Law do not provide for the annulment or setting aside of tribunal-ordered provisional measures. Nothing in Article 17 provides any mechanism for annulling or setting aside orders of provisional measures; likewise, if tribunal-ordered provisional measures are not "awards," then Article 34 provides no grounds for setting them aside. [589] Thus, although the revised Model Law provides for recognition and enforcement of tribunal-ordered provisional measures (in Article 17), it does not provide for the annulment of such measures.

In contrast, if tribunal-ordered provisional measures are "awards," then they are potentially subject to annulment under Article 34 of the Model Law and parallel provisions of other national arbitration legislation. That is the presumptive consequence of categorizing provisional measures as awards, which are then subject to annulment like other awards. Nonetheless, some courts have held that a decision of an emergency arbitrator granting provisional measures is not subject to judicial review in a vacatur action, apparently on the basis that the arbitral tribunal (instead of a national court) has authority to review the decision. [590] This analysis is arguably more broadly applicable, to all provisional measures ordered by arbitral tribunals: just as an arbitral tribunal can revise an emergency arbitrator's ruling, it can also reconsider and revise its own grant of provisional measures.

This analysis is appropriate in an annulment setting; the arbitral tribunal's review authority can be considered as the appropriate forum for an unsuccessful respondent to challenge an emergency arbitrator's decision. It is difficult, however, to accept this analysis if the successful
P 2711
claimant seeks to confirm or recognize the emergency arbitrator's decision. In those circumstances, the fact that an arbitral tribunal may review the emergency arbitrator's decision does not mean that a court cannot do so when requested to enforce the decision; indeed, doing so would arguably abdicate the recognition court's responsibilities under local law.

[G] Forum Selection Issues in Judicial Recognition and Enforcement of Provisional Relief

As with the recognition and enforcement of final awards, [591] the judicial enforcement of tribunal-ordered provisional measures raises forum selection issues. In principle, parties may seek to enforce provisional measures in a variety of jurisdictions, including in the courts of the arbitral seat, the courts of the place where disputed property is located, or the courts where disputed actions occur.

As discussed above, the 2006 Revisions to the Model Law provide expressly for enforcement of interim measures outside the arbitral seat. [592] Alternatively, if a decision granting provisional measures is regarded as an "award," as it should be, then the measure will be subject to recognition and enforcement outside the arbitral seat under the New York Convention. [593]

§17.04 PROVISIONAL RELIEF ORDERED BY NATIONAL COURTS IN AID OF INTERNATIONAL ARBITRATION [594]

The arbitral tribunal is not necessarily the only source of provisional relief in connection with an international arbitration: in addition, as outlined above, national courts generally possess concurrent authority to grant provisional measures in connection with arbitral proceedings. [595]
P 2712
This section examines the circumstances in which court-ordered provisional measures can be obtained in aid of an international arbitration.

[A] Introduction

As noted above, until the arbitral tribunal (or an emergency arbitrator) is in place, there is no prospect of obtaining provisional relief through the arbitral process. (596) Efforts by a number of arbitral institutions to provide pre-arbitral mechanisms for non-judicial emergency relief have begun to address this (as discussed above (597)), but numerous *ad hoc* and other arbitrations continue not to offer such avenues for interim relief in the arbitral process. And, where attachments and other provisional measures binding third parties are concerned, arbitrators can virtually never provide effective relief. (598)

As a consequence, parties to international arbitration agreements who require urgent provisional relief at the outset of a dispute, or who require interim relief against a third party, must often seek the assistance of national courts. (599) Like other issues relating to judicial assistance for an international arbitration, three sources of authority bear on a national court's decision whether to grant provisional measures in aid of an international arbitration: (a) the New York Convention and other applicable international conventions; (b) applicable national arbitration legislation; and (c) any applicable institutional arbitration rules, together with other relevant provisions of the parties' arbitration agreement. As detailed below, these sources of authority generally provide national courts with concurrent power to order provisional measures in aid of an international arbitration (absent agreement to the contrary by the parties).

Preliminarily, and as noted above, the existence of concurrent jurisdiction, shared by arbitral tribunals and national courts, is an exception to the general principles of arbitral exclusivity and judicial non-interference in the arbitral process. (600) Concurrent jurisdiction in this field is nonetheless well-recognized by both national and international authorities and contributes to the efficacy of the arbitral process. Equally fundamental is the fact that court-ordered provisional measures serve, and may only serve, to support the arbitral process and arbitral tribunal's jurisdiction: "The purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective
P 2713
the decision at which the arbitrators will ultimately arrive on the substance of the dispute." (601) Reconciling these two principles – concurrent jurisdiction and the presumptive primacy of the arbitral process – produces difficult issues of jurisdiction and forum selection.

[B] Authority of National Courts to Grant Provisional Relief in Aid of International Arbitrations Under International Arbitration Conventions

International arbitration conventions address the question of court-ordered provisional measures in different ways. Some conventions expressly permit such measures, while others appear either to ignore or to forbid them. This lack of uniformity accounts in part for historic uncertainty in national legal systems and arbitral practice with regard to provisional measures in aid of international arbitrations. (602)

[1] Court-Ordered Provisional Relief Under European Convention

Under the European Convention, the concurrent jurisdiction of national courts and arbitral tribunals to issue provisional measures is all but explicit. As noted above, Article VI(4) of the European Convention provides that "[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement." (603) The obvious contemplation of this provision is that parties may seek provisional relief both in national courts and in arbitration (pursuant to their agreement to arbitrate (604)), without thereby violating their arbitration agreement. Although there is only limited authority, national courts have interpreted Article VI(4) in accordance with its obvious meaning and have been prepared to grant provisional measures in aid of arbitration. (605)

[2] Court-Ordered Provisional Relief Under New York Convention

In contrast to the European Convention, the New York Convention does not contain any provision dealing expressly with provisional relief, whether granted by an arbitral tribunal or a
P 2714
national court. (606) This silence has contributed to divergent interpretations of the Convention, as it affects court-ordered provisional measures in connection with arbitral proceedings, by different national courts.

As discussed below, a few U.S. courts have interpreted Article II(3) of the New York Convention as forbidding national courts from ordering attachments or other provisional measures in connection with an international arbitration. (607) Other U.S. judicial decisions have expressly refused to adopt that reading of Article II(3), (608) as have almost all non-U.S. decisions and academic commentary.

(609)

These divergent conclusions warrant close attention. As discussed below, it is clearly wrong to interpret the Convention as generally prohibiting any court-ordered provisional measures, as some U.S. courts have done. Nonetheless, it is equally wrong to interpret the Convention as permitting all court-ordered provisional measures. There are circumstances in which applications for court-ordered provisional measures constitute an effort to evade or frustrate a party's obligation to arbitrate, contrary to both its arbitration agreement and Article II(3) of the Convention. At least some of the (better-reasoned) U.S. decisions adopt this latter interpretation of the Convention, which gives proper effect to the terms of Article II(3).

[a] McCreary and Cooper: Judicial Decisions Holding That Article II(3) Forbids Court-Ordered Provisional Relief

The decision which is generally cited for the proposition that U.S. courts regard Article II(3) as forbidding court-ordered provisional relief in aid of arbitration is *McCreary Tire & Rubber Co. v. CEAT, SpA*. (610) That interpretation of Article II(3) has been widely, and correctly, criticized. (611) In reality, however, a careful reading of the *McCreary* decision indicates a more limited, and more cogent, analysis, which is less readily subject to criticism.
P 2715

The *McCreary* case arose from an international distribution agreement which went awry, triggering disputes which fell within a provision calling for ICC arbitration in Belgium. The U.S. party (McCreary) then commenced litigation, on the merits, in U.S. district court in Massachusetts; the district court stayed the action and ordered arbitration. (612) Undeterred, McCreary next commenced a new action in a different U.S. district court, in Pennsylvania, reasserting its underlying breach of contract claims against CEAT and, in addition, seeking to attach sums owed to CEAT by a Pittsburgh bank. (613) On appeal, the Third Circuit held that no attachment could properly be granted and that arbitration would be compelled. (614)

The *McCreary* court rested its decision on both Article II(3) of the Convention (615) and the court's understanding of the parties' arbitration agreement as applied to McCreary's litigation tactics:

> "What is *plainly there to see is that [McCreary's federal court action] is a violation of McCreary's agreement to submit the underlying disputes to arbitration*. … Quite possibly, foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. *It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention*. … The Convention forbids the courts of a Contracting State from entertaining a suit which violates an agreement to arbitrate. … Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with [the] purpose [of the New York Convention]." (616)

In short, the *McCreary* court concluded, for understandable reasons, that McCreary's U.S. judicial action for provisional relief was in fact designed to frustrate ("bypass") the parties' arbitration agreement and the arbitral process that it had agreed to and, therefore, that the New York Convention precluded the suit and the request for attachment. (617) This conclusion
P 2716
is not inconsistent with a general principle of concurrent jurisdiction in both national courts and arbitral tribunals to grant provisional measures in connection with arbitral proceedings. (618) Instead, *McCreary's* conclusion, and reasoning, (619) are best understood as standing simply for the proposition that national courts have the power and responsibility to prevent their concurrent jurisdiction to order provisional measures from being abused such that it interferes with the parties' arbitration agreement and the arbitral process.

McCreary was followed, and its holding and principal rationale were substantially extended (or distorted), in a few subsequent U.S. lower court decisions. Thus, the New York Court of Appeals held in *Cooper v. Ateliers de la Motobecane, SA*, (620) that the Convention foreclosed an attachment action that was apparently part of an effort to circumvent arbitration. Again, this was an acceptable, and largely welcome, approach to provisional measures by a national court.

Unlike *McCreary*, however, the New York Court of Appeals' opinion in *Cooper* went further and declared in (unnecessary and ill-considered) *dicta* that Article II(3) of the Convention forbid *any* court-ordered provisional measures in connection with an international arbitration:

> "The essence of arbitration is resolving disputes without the interference of the

> judicial process and its strictures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The [New York] Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made. *The purpose and policy of the [New York] Convention will be best carried out by restricting prearbitration judicial action to determining whether arbitration should be compelled.*" (621)

A few subsequent U.S. lower court decisions seized on this language and went substantially beyond the *McCreary/Cooper* factual circumstances, refusing to permit court-ordered provisional measures even when they were fairly clearly in aid of a pending arbitration, rather than in circumvention of it. (622)

For example, in *Drexel Burnham Lambert Inc. v. Ruebsamen*, (623) a securities brokerage firm sought to attach the assets of two individuals prior to arbitral proceedings. According to the brokerage firm, it was entitled to recover a liquidated debit balance of approximately $230,000 maintained by the two respondents. (624) The brokerage firm, which agreed with the respondents that the underlying dispute should be resolved by arbitration, sought to attach a separate brokerage account maintained by the respondents prior to arbitration. The firm's basis for this request was that the two respondents were not U.S. citizens and had suffered significant financial losses, which meant that the firm might not be able to recover from them if their assets were not attached before the arbitral proceedings commenced. The court rejected this request, citing *Cooper* for the proposition that "this court is constrained … to find that pre-arbitration attachment is not available to Drexel." (625)

P 2717
Note that the foregoing U.S. decisions all involve *pre-award* provisional measures. It is clear, even under the most extreme variant of the *McCreary/Cooper* analysis, that if an arbitration goes forward and produces a final award, which then requires enforcement in national courts, the Convention does not interpose any obstacle to court-ordered attachment or other measures in aid of execution. (626)

[b] Uranex and Progeny: Judicial Decisions Holding That Article II(3) Does Not Forbid Court-Ordered Provisional Relief in Aid of Arbitration

Other lower U.S. courts have refused to follow the broad rationale stated in *Cooper*. Instead, they have concluded that Article II(3) of the Convention does not forbid court-ordered provisional relief in aid of arbitration. In *Carolina Power & Light Co. v. Uranex*, (627) for example, the district court declared that:

> "This court … does not find the reasoning of *McCreary* convincing. As mentioned above, nothing in the text of the New York Convention itself suggests that it precludes prejudgment attachment. The [Federal Arbitration Act] … which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending
> P 2718
> arbitration. … There is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded." (628)

The decisive weight of
P 2719
other U.S. lower court authority follows the analysis in *Uranex* and rejects *Cooper's* apparent interpretation of the Convention. (629) Indeed, some U.S. decisions bluntly, but correctly, describe the more extreme *Cooper* interpretation of Article II(3) as "facially absurd." (630)

Other U.S. judicial decisions have sought to narrow the *McCreary/Cooper* results, without specifically rejecting their holdings. Some decisions have distinguished between "traditional" maritime provisional remedies (such as vessel arrests or maritime attachments) and other provisional measures, refusing to apply the *McCreary/Cooper* interpretation of Article II(3) to "traditional" maritime remedies. (631) In similar fashion, other U.S. courts have limited *Cooper* and *McCreary* to attachments: these courts have concluded that, whatever the rule with respect to prejudgment attachments, other forms of provisional relief, such as preliminary injunctions, are available in aid of arbitration. (632)

U.S. lower courts have also held that the *McCreary* rationale is limited to cases under the New York

Convention (although, if adopted, the rule's rationale would extend with equal force to the Inter-American Convention [(633)]). Thus, the New York Appellate Division has held that *Cooper* was not applicable, and that an attachment in aid of arbitration could be granted, where the party against whom the attachment was sought was based in a State that was not a signatory to the New York Convention. [(634)] The Court reasoned:

> "*[Cooper]* involved a dispute between American and French parties, both of whose Nations were signatories to the [New York] Convention. However, the countries in which the parties to the agreements here in dispute reside and do business are not signatories to the [New York] Convention. So far as appears, there is nothing in the [New York] Convention which precludes attachment, although it requires that Nations which are signatories provide for enforcement of arbitration awards by the respective countries. The rationale of *Cooper* is that the signatory Nation will appropriately
> P 2721
> provide for security for such enforcement, without prejudgment attachment. Whatever the effect of those provisions, they cannot be binding in this case. If [the party seeking attachment] is successful [on the merits], it will have to sue to enforce the arbitration award in Argentina, a nonsignatory State. Intermar will not have the benefit of the Convention's enforcement provisions." [(635)]

The reasoning in the foregoing excerpt is flawed, but its result is sensible. The Convention's applicability does not depend on the parties' nationality, but instead on the character of the parties' arbitration agreement and the arbitral seat. [(636)] Nonetheless, the *Intermar Overseas* court does suggest a relevant consideration for the exercise of a court's discretion to grant pre-award provisional measures – namely, to what extent does it appear that the ultimate award will be difficult to enforce.

[c] Amendment of §7502 of New York Civil Practice Law and Rules

As a consequence of widespread criticism of the apparent holding in *Cooper*, [(637)] §7502 of the New York Civil Practice Law and Rules was amended, adding a new subparagraph (c). Subparagraph (c) permits New York state courts to grant attachments and preliminary injunctive relief "in connection with an arbitrable controversy," provided that an arbitral award "may be rendered ineffectual without such provisional relief." [(638)]

Importantly, the generally-applicable substantive requirements under New York law for an attachment (in N.Y. C.P.L.R. §6201) need not be satisfied in order to obtain relief under §7502(c). [(639)] Under §6201, an attachment is ordinarily available only if one of four grounds is satisfied: (a) the defendant is a foreign corporation not qualified to do business in New York; (b) the defendant cannot, despite diligent efforts, be personally served with process; (c) the defendant, with the intent to frustrate the award, has disposed of or removed his property from the state; or (d) the action is to enforce another court's judgment. In addition, the plaintiff must show that it has a cause of action, on which it will likely succeed, and that the amount sought exceeds all known counterclaims. Even if these requirements are satisfied, an attachment under §6201 is a discretionary remedy, not a matter of right. [(640)]

Section 7502(c) significantly relaxes the requirements of N.Y. C.P.L.R. §6201, permitting an attachment based solely on a showing that the arbitral award "may be rendered ineffectual without such provisional relief." [(641)] Applying §7502, a number of New York decisions have granted provisional measures in aid of arbitration. [(642)]

Commentators observed that the amendment to §7502 did not (and could not) have the effect of altering the interpretation of the New York Convention adopted by the New York courts (which in turn has the effect of prescribing a rule of federal law which supersedes or preempts state law, including new §7502(c)). [(643)] Some courts therefore applied §7502 only in domestic arbitrations, [(644)] although other New York courts applied the provision to actions for provisional measures in aid of arbitrations subject to the New York Convention. [(645)]

In an effort to address these concerns, §7502(c) was further amended in October 2005 in a legislative effort to override the rule apparently adopted in *Cooper*. The amended provision provides (with the new text in emphasis):

> P 2722
> "[t]he supreme court … may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or

> that is to be commenced inside or outside this state, *whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*." (646)

Following this amendment, New York courts have appeared to abandon the rule adopted in *Cooper*. In one decision, a New York state court relied on §7502(c) as the basis for an attachment of assets in New York in aid of an arbitration subject to the New York Convention. (647) It remains unclear whether the attempted legislative overruling of *Cooper*, and its misinterpretation of the Convention, will be effective; as noted above, there is a serious argument that state legislation cannot override the interpretation of a federal treaty, including an interpretation by a state court. Nonetheless, it remains open to New York (and other) courts to reject the interpretation of the Convention adopted in *Cooper*, which would (properly) resolve the issue.

[d] Non-U.S. Judicial Decisions Holding That Article II(3) Does Not Forbid Court-Ordered Provisional Relief in Aid of Arbitration

Judicial decisions from all developed jurisdictions other than the United States reject the notion, apparently adopted in *McCreary* and *Cooper*, that Article II of the New York Convention imposes a blanket prohibition on court-ordered provisional measures in aid of international arbitration. (648) As one distinguished international commentator concludes:

> P 2723
> "[t]here … seems to be no doubt as to the possibility of a pre-award attachment, that is to say an attachment before or during the arbitration, in order to secure the subject matter in dispute or the payment under the award if rendered in favor of the party who has applied for the attachment." (649)

Or, as Lord Mustill put it, writing in the House of Lords:

> "I am unable to agree with those decisions in the United States (there has been no citation of authority on this point from any other foreign source) which form one side of a division of authority as yet unresolved by the [U.S.] Supreme Court. These decisions are to the effect that interim measures must necessarily be in conflict with the obligations assumed by the subscribing nations to the New York Convention, because they 'bypass the agreed upon method of settling disputes': *see McCreary Tire & Rubber Co. v. CEAT SpA*. … I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it." (650)

There appears to be no reported decision outside the United States adopting the *McCreary/Cooper* interpretation of Article II of the Convention. (651)

[3] Future Directions: Proper Application of Article II(3) to Court-Ordered Provisional Relief

There is little question but that the broad interpretation of Article II(3) of the New York Convention adopted in *Cooper* and subsequent U.S. lower court decisions is both wrong as a matter of law and misconceived as a matter of sound policy. With regard to the text and intent of Article II(3), there is nothing at all in the provision that categorically forbids court-ordered provisional measures in connection with international arbitration.

On the contrary, where the parties have agreed to the possibility of court-ordered provisional measures in their arbitration agreement (as was the case in both *McCreary* and *Cooper*), (652) Article II of the Convention should be read presumptively to *require* – rather than forbid – such relief. (653) Certainly, there is nothing in the text of Article II or its drafting history to support the broad conclusion that court-ordered provisional measures are never permitted. Instead, at the time the Convention was drafted, many states provided for court-ordered
P 2724
provisional measures and some states *only* provided for court-ordered provisional measures; (654) in these circumstances, reading the Convention to forbid all court-ordered provisional measures in aid of arbitration is untenable.

Likewise, the broad *Cooper* holding makes no sense as a matter of policy and, in fact, is badly misconceived. As discussed above, provisional relief is often necessary in order to ensure that the arbitral process functions and the parties' rights are respected. (655) Nonetheless, arbitrators sometimes simply cannot provide provisional relief (especially where they are not yet in place), they

generally cannot order attachments (or other provisional measures) as to third parties, and their provisional measures are not coercively enforceable. (656) In these cases, court-ordered provisional measures may be the only way of protecting the jurisdiction of the arbitral tribunal and enabling effective, meaningful relief to be granted in a final arbitral award. Given this, the *Cooper* rationale threatens, rather than furthers, the international arbitral process, by denying what is often the only realistic means of preserving the status quo. (657)

Marginally less implausible is the suggestion in *Cooper* that parties should be left to agree specifically to allow national courts to order pre-award security measures. (658) That argument at least properly focuses on the primacy of the parties' agreement and the needs of the arbitral process.

But nothing in *Cooper* or otherwise justifies the court's allocation of the burden of proof and its requirement for an express agreement to permit court-ordered provisional measures. For the reasons set forth above, it is instead very clear that, absent contrary agreement, parties virtually always intend, and justice would be served by, the availability of court-ordered provisional measures that are genuinely in aid of arbitration. (659)

Not surprisingly, as noted above, the weight of U.S. authority rejects the view that Article II(3) of the Convention precludes court-ordered provisional measures in aid of arbitration. (660) As also discussed above, well-reasoned non-U.S. authority from a wide range of jurisdictions uniformly reaches the same conclusion. (661)

P 2725
There is a clear conflict between the (mistaken) interpretation of the Convention in *McCreary/Cooper* and their progeny, on the one hand, and that in *Uranex* and almost all other authority, from the United States and elsewhere, on the other. From a U.S. (and international) perspective, U.S. Supreme Court resolution of this issue would materially assist the international arbitral regime, remove a serious uncertainty that affects the rights of U.S. and other companies engaged in international commerce and hopefully bring the United States into step with other Contracting States to the Convention. The uncertainty resulting from the *Uranex* versus *McCreary/Cooper* split is particularly serious because of the urgency that often attends requests for provisional relief.

Despite the errors of the *McCreary/Cooper* reasoning, it is also important not to overlook the specific results in the two cases. As discussed above, both cases involved very clear efforts by a party to evade or circumvent its obligation to arbitrate, under the parties' arbitration agreement, by seeking provisional measures in U.S. courts. (662) In such circumstances, the results in *Cooper* and *McCreary* are unexceptional – and indeed, both desirable and mandated by Article II(3). It is no more inappropriate to refuse to entertain such a litigation – aimed at circumventing a valid international arbitration agreement – than it would be to refuse to entertain an action on the merits in violation of the parties' arbitration agreement. Indeed, the basic interpretation of Article II(3) adopted by *McCreary* (663) – that Article II(3) forbids actions in national courts in violation of the parties' arbitration agreement – is a sound and noncontroversial interpretation of the Convention.

Consistent with this, evaluation of applications for provisional measures in national courts under the Convention requires a more precise analytical approach to Article II(3) than that hitherto adopted by either national courts or most commentators. A correct resolution of any dispute over the propriety of court-ordered provisional relief in aid of an international arbitration calls for interpreting the parties' arbitration agreement and any institutional rules incorporated by that agreement to answer one fundamental question: do the parties' agreement and any applicable institutional rules permit, or forbid, either some or all court-ordered provisional measures? If the parties' arbitration agreement forbids applications for provisional measures in national courts, then such applications may not ordinarily be pursued (and are, in fact, contrary to Article II(3)). On the other hand, if the parties' agreement provides for the possibility of court-ordered provisional measures, then such applications may ordinarily be pursued in national courts without violating Article II(3) (and are, in fact, arguably safeguarded by Article II). (664)

A recurrent question is what the parties should be presumed to have intended if their arbitration agreement and any applicable institutional arbitration rules provide no express answer to the question whether court-ordered provisional measures are permitted. As discussed in greater detail below, in the absence of express contractual language, the presumption should be that court-ordered provisional relief in aid of arbitration is impliedly permitted by an agreement to arbitrate, but that efforts to circumvent arbitration are contrary to the parties' intentions. (665) This presumption is consistent with the reasonable commercial expectations of
P 2726
parties acting in good faith, and the objectives of the New York Convention, and serves to facilitate the arbitral process. (666)

Applying this approach to the interpretation of arbitration agreements, one must then consider whether a specific application for court-ordered provisional measures requested in a particular case is consistent with, or inconsistent with, the parties' arbitration agreement. (667) This requires examination of the relevant request for court-ordered provisional measures. As discussed below, where a party is seeking court-ordered provisional measures because no arbitral tribunal has been constituted, because measures affecting third parties are desired, or because there are credible doubts as to the enforceability of tribunal-ordered provisional measures, then there is little or no reason to regard an action in national court as inconsistent with the parties' agreement. (668)

On the other hand, if a party seeks relief other than, or in addition to, provisional measures, this should almost always be considered a violation of the parties' arbitration agreement. (669) Similarly, a party's effort to procure substantive findings in national court that have or may have preclusive effect in the arbitral proceedings is contrary to its agreement to arbitrate. Likewise, a party's effort to litigate the same issues that are in dispute in the arbitration against third parties (*e.g.*, corporate affiliates, individual officers and directors) that are related to the parties to the arbitration should be ordinarily considered a presumptive breach of the agreement to arbitrate. (670)

Under this analysis, Article II(3) does not forbid court-ordered pre-award attachments or other provisional measures in aid of arbitration where they are consistent with the terms of the parties' arbitration agreement or applicable institutional rules. Conversely, Article II(3) *does* forbid court-ordered provisional relief and ancillary proceedings that are intended to frustrate or circumvent the arbitral process; that is, Article II(3) forbids relief that is contrary to the parties' agreement to arbitrate. This analysis gives proper weight to both the parties' intentions and the New York Convention's objectives, and permits the use of Article II(3) to ensure enforcement of the parties' agreement to arbitrate.

[4] Court-Ordered Provisional Measures Under Inter-American Convention

Court-ordered provisional measures should be available in cases subject to the Inter-American Convention. Like the New York Convention, there is no provision in the Inter-American Convention itself addressing court-ordered provisional measures; the proper view, therefore,
P 2727
is that, as under the New York Convention, (671) court-ordered provisional measures should be available under the Inter-American Convention.

In addition, absent agreement by the parties on other institutional arbitration rules, Article 3 of the Inter-American Convention provides for default application of the IACAC Rules (672) – Article 23 of which presumptively permits applications for court-ordered provisional measures. (673)

[5] Court-Ordered Provisional Relief Under ICSID Convention

The ICSID Convention adopts a different approach to the autonomy of the international arbitration process than the New York Convention and most other international arbitration conventions; (674) this approach applies in the context of provisional measures, as well as in other settings. Article 26 of the ICSID Convention provides that the parties' consent to ICSID arbitration "shall be deemed consent to such arbitration to the exclusion of any other remedy." (675) Article 26 has repeatedly been interpreted to exclude court-ordered provisional measures, by both the ICSID Centre (676) and some national courts. (677) This is confirmed by the ICSID Arbitration Rules, which provide in Rule 39(6) that parties may seek court-ordered provisional measures only where their arbitration agreement so provides. (678) Some jurisdictions have enacted legislation specifically permitting court-ordered provisional measures in aid of ICSID arbitrations. (679)
P 2728

[C] Authority of National Courts to Grant Provisional Relief in Aid of International Arbitrations Under National Arbitration Legislation

The concurrent jurisdiction of national courts and arbitral tribunals to issue provisional measures is expressly provided for by many national arbitration statutes. Although a few national laws are to the contrary, reserving provisional measures to national courts alone, (680) the overwhelming weight of national arbitration legislation and judicial authority provides that both arbitral tribunals and national courts may (absent contrary agreement) issue provisional measures in connection with an international arbitration. (681)

[1] National Arbitration Legislation Generally Authorizing Court-Ordered Provisional Relief

Most national arbitration legislation expressly grants local courts the authority to order provisional measures in aid of international arbitrations. Even where no statutory authorization exists, national courts have arrived at the same result.

[a] UNCITRAL Model Law

The UNCITRAL Model Law is a prime example of legislation authorizing concurrent judicial and arbitral jurisdiction to grant provisional measures. Article 17 of the 1985 Model Law provides arbitral tribunals the power to order provisional relief (as discussed above), while Article 9 provides that parties do not violate their agreement to arbitrate simply by seeking provisional measures from a national court. (682) The original Model Law thereby plainly contemplates that both arbitral tribunals and national courts will have concurrent power to order provisional measures in connection with international arbitrations (unless the parties have otherwise agreed). (683)

P 2729
Article 17J of the 2006 Revisions to the Model Law goes further, providing expressly that a national court "shall have the same power of issuing an interim measure in relation to arbitration proceedings" as exist "in relation to proceedings in court." (684) The same paragraph also provides that "[t]he court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration." (685) A court's powers under Article 17J are co-extensive with the arbitral tribunal's authority. (686)

National courts in Model Law jurisdictions have frequently granted provisional measures in aid of international arbitrations. Examples include orders freezing property (*e.g.*, *Mareva* injunctions or orders for the arrest of a vessel), (687) orders for the inspection of a property, (688) interlocutory injunctions, (689) orders to grant access to premises (690) and orders to sell goods. (691) Although there are circumstances in which courts applying the Model Law will decline to exercise their authority to issue provisional measures in aid of an international arbitration, (692) there is no doubt as to the power of courts to do so.

[b] Other National Arbitration Legislation

Other national arbitration legislation also grants local courts authority to issue provisional relief in aid of international arbitrations. The Swiss Law on Private International Law recognizes (albeit less expressly than the Model Law) the concurrent powers of national courts
P 2730
and arbitral tribunals to order provisional measures. (693) Legislation in Belgium, (694) the Netherlands, (695) Germany, (696) Austria, (697) France, (698) England (subject to important limitations, discussed below), (699) Japan, (700) Hong Kong, (701) India (702) and elsewhere (703) also expressly grants national courts concurrent jurisdiction to issue provisional relief in connection with international arbitrations, unless the parties have otherwise agreed. Judicial decisions in many jurisdictions also recognize the authority of national courts to grant provisional relief in aid of arbitration. (704)

P 2731
Prior to 2011, the French Code of Civil Procedure contained no express provisions regarding court-ordered provisional measures in aid of an international arbitration. Nonetheless, French courts held that an agreement to arbitrate does not ordinarily preclude courts from ordering provisional measures. According to one court:

> "it is a principle of positive French law that the parties to an agreement with an arbitration clause giving jurisdiction to an arbitral tribunal of the ICC may have recourse to the state courts to obtain conservatory measures having in particular as their objective to preserve the situation, the rights or the evidence *and in particular the existence of an arbitration clause does not preclude action by the judge for urgent matters*." (705)

Other French decisions are similar. (706)

[c] U.S. Federal Arbitration Act

Even in jurisdictions where national legislation does not expressly provide for concurrent jurisdiction to order provisional measures, national courts have reached this result. In the United States, (707) for example, the text of the FAA only grants federal courts the power to order provisional measures with regard to a narrow category of maritime disputes. (708) Nonetheless,
P 2732
outside the context of the New York Convention (discussed above), (709) the overwhelming weight of U.S. judicial authority under the FAA concludes that federal courts possess jurisdiction to issue provisional measures, absent contrary agreement by the parties, to protect the parties and the arbitral process. (710) As one U.S. lower court decision explained, "where a
P 2733
dispute is subject to mandatory arbitration under the [FAA] a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute."

(711) Another decision reasoned that judicial interim relief may be necessary to "preserve the meaningfulness of the arbitral process," which would otherwise be a "hollow formality if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute." (712)

One U.S. court expressed the rationale for court-ordered provisional measures under the domestic FAA in clear terms:

> "The Courts are not limited in their equity powers to the specific function of enforcing arbitration agreements but may exercise those powers required to preserve the status quo of the subject matter in controversy pending the enforcement of the arbitration provision. To rule otherwise would in effect permit a party to take the law into its own hands while the proceeding is carried on as a result of the specific direction of the Court [compelling arbitration]. … It would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for non-performance.'" (713)

A few U.S. decisions are to the contrary, (714) but these are ill-considered and do not reflect the true state of U.S. domestic law.
P 2734

[2] Rationale for Concurrent Judicial Jurisdiction to Grant Provisional Relief in Aid of Arbitration

The existence of concurrent jurisdiction to grant provisional relief, in both national courts and arbitral tribunals, is an exception to one of the key objectives of international arbitration agreements, which is to centralize the resolution of all disputes in a single, neutral forum and to limit the involvement of national courts in dispute resolution (particularly the courts in the home state of one or both parties to the dispute). (715) One may rightly question whether it is wise to permit two separate authorities from which provisional measures may be obtained, which conflicts with the goal of centralizing dispute resolution and which permits a degree of forum-shopping.

On the other hand, provisional measures often call for immediate relief in order to stop potentially irreparable harm (*e.g.*, the destruction of evidence, transfer of funds or property to third parties). In some cases, the inability of a party to stop such actions will effectively decide the parties' dispute (by default), since meaningful relief will no longer be available after the actions in question are taken. Further, in some circumstances, the only realistically effective forum which can provide provisional relief is a local court (where the evidence or property is located). Allowing claimants to seek provisional relief from any available forum can therefore be (exceptionally) justified because of the peculiar character of, and necessity for, such measures.

Moreover, as already discussed, it is also sometimes not possible for arbitral tribunals to grant effective provisional measures. (716) In these circumstances, it is essential that national courts be permitted to grant interim relief in aid of the (future) arbitration. (717) Likewise, in some cases, the only effective provisional measures will involve third parties, who will be beyond the arbitral tribunal's authority. (718)

[3] Parties' Presumptive Right to Seek Provisional Relief from Both Arbitral Tribunal and National Courts

In many jurisdictions, a party is free to seek provisional measures from either the arbitral tribunal or a national court (as a corollary of the principle of concurrent jurisdiction). Most arbitration statutes – including the 1985 UNCITRAL Model Law, the 2006 Revisions to the Model Law, the U.S. FAA and the Swiss Law on Private International Law – simply provide for concurrent jurisdiction without requiring a party to seek provisional measures in one forum, rather than another. Absent contrary agreement, parties arbitrating pursuant to national arbitration legislation of this character are free to seek provisional measures from either the arbitral tribunal or a national court.
P 2735

[4] Limitations on Availability of Court-Ordered Provisional Relief and Preferences for Tribunal-Ordered Provisional Relief

Despite the principle of concurrent jurisdiction, national law in many jurisdictions limit the circumstances in which court-ordered provisional measures may be ordered in connection with a dispute that is subject to arbitration. This effectively prescribes a preference for consideration of requests for provisional measures by the arbitral tribunal, rather than a national court. Nonetheless, there are limits to this principle, which must be applied with care in order to ensure that parties are

not effectively denied access to meaningful justice.

[a] Statutory Limitations on Court-Ordered Provisional Measures

A number of jurisdictions have enacted legislation limiting court-ordered provisional measures in aid of international arbitration. There is little uniformity among such statutory limitations on court-ordered provisional measures. Under §44 of the English Arbitration Act, 1996, an English court is granted the power to order provisional measures in aid of arbitration only in specified circumstances: if (a) urgently required, to preserve evidence or assets; (b) the arbitral tribunal permits it; or (c) the arbitral tribunal lacks the power (at the time) to act effectively. (719) Applying §44, English courts have frequently refused to consider applications for court-ordered provisional relief. (720) In one recent decision, an English court declined to grant interim relief where the applicable LCIA Rules permitted the applicant to seek such relief from an emergency arbitrator. (721)

Alternatively, under the revised French Code of Civil Procedure, a party may apply to a court for provisional or conservatory measures only "insofar as the arbitral tribunal has not yet been constituted." (722) South African arbitration legislation follows a comparable approach, authorizing a court to grant interim measures only: (a) if the tribunal has not yet been constituted and the matter is urgent; (b) if the tribunal is not competent to grant the order; or (c) if the urgency of the matter makes it impractical to seek the relief from the tribunal. (723)

Other arbitration legislation is similar, preferring arbitral tribunals as the forum for applications for provisional measures; that includes legislation in some U.S. states, Singapore, India and elsewhere. (724) For example, §8(b)(2) of the U.S. Revised Uniform Arbitration Act provides:

> P 2736
> "After an arbitrator is appointed and is authorized and able to act: … (2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." (725)

Each of the foregoing statutes grants national courts authority to order provisional measures in aid of an international arbitration, but gives effect to the primacy of the arbitral process by fairly narrowly limiting the circumstances in which court-ordered provisional relief will be available. These statutory limitations can presumably be altered by agreement (either expanding or limiting the availability of court-ordered provisional measures), although there is little authority on the issue. (726)

[b] Judicial Limitations on Court-Ordered Provisional Measures

National arbitration legislation in many jurisdictions is silent with respect to limitations on judicial authority to grant provisional relief in aid of an international arbitration. Neither the UNCITRAL Model Law, the FAA, the Swiss Law on Private International Law nor most other national arbitration statutes establish either a preference for tribunal-ordered provisional measures or impose limitations on court-ordered provisional measures. (727)

Even in the absence of legislation, however, national court decisions have, particularly in recent years, adopted a preference for the arbitral process, rather than litigation in local courts, to decide requests for provisional measures in international arbitration. A number of U.S. judicial decisions have declined to consider applications for provisional measures in aid of arbitration where the arbitral tribunal had the authority to do so. (728) Other U.S. courts have
P 2737
held that court-ordered provisional relief will not be granted unless it is absolutely necessary to protect the arbitral process. (729) Reflecting the same analysis, some U.S. courts have issued provisional measures in aid of arbitration prior to the constitution of the arbitral tribunal – but limited in time until the tribunal has had an opportunity to act. (730)

Alternatively, some U.S. lower courts have considered a blend of traditional equitable standards, implied expectations of the parties and needs of the arbitral process in deciding to grant provisional measures in aid of an arbitration. (731) In one court's words, "the district court must focus on preservation of the integrity of the arbitration process." (732)

Similarly, Hong Kong courts have disfavored requests for court-ordered provisional measures if the arbitral tribunal has been constituted and could provide relief. (733) Adopting this
P 2738
rationale, one Hong Kong court held that judicial authority to issue provisional measures should be exercised "sparingly" and only if there are special reasons to do so. (734) Hong Kong courts have also emphasized that caution should be exercised in granting court-ordered provisional measures in aid of an arbitration against a third party. (735)

Courts in other jurisdictions have adopted the analysis similar to that in the United States and Hong Kong, holding that court-ordered provisional measures in aid of arbitration will be available only exceptionally, typically in order to protect the applicant until a tribunal is constituted. (736) Judicial decisions in Brazil, for example, have ruled that a court may grant provisional measures in aid of arbitration only in "exceptional circumstances," after the arbitral tribunal has been constituted. (737) Relatedly, one Model Law court held that, if a party elects to apply for an interim measure from the arbitral tribunal, it may not also seek the same relief from a court. (738)

The restraints on court-ordered provisional measures in aid of international arbitration are generally well-considered. National courts that are asked to order provisional measures in aid of an international arbitration should exercise particular care to avoid judicial interference with the arbitral process. In particular, courts should accord substantial weight to the availability of provisional measures from the arbitral tribunal and to indications from the arbitral tribunal about the benefits (or costs) of court-ordered provisional measures. Nonetheless, as discussed below, national courts should be prepared to issue court-ordered provisional measures when no arbitral tribunal has been constituted or when an arbitral tribunal cannot provide relief comparable to that of a national court. In particular, if interim measures against third parties are required to protect the applicant, national courts should be prepared to entertain applications for court-ordered provisional relief. Even in these cases, however, courts should exercise restraint to avoid interference with the arbitral process.

[c] Institutional Arbitration Rules with Preference for Tribunal-Ordered Provisional Measures

Many institutional arbitration rules also prefer applications to the arbitral tribunal for provisional measures over applications to national courts. (739) The 2017 ICC Rules provide, for
P 2739
example, that parties may seek provisional measures from a national court either "[b]efore the file is transmitted to the Arbitral Tribunal," or "*in appropriate circumstances* even thereafter." (740) The 2020 LCIA Rules even more explicitly prefer the arbitral tribunal as the forum for provisional measures, providing that parties may seek provisional relief from national courts "(i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, *in exceptional cases and with the Arbitral Tribunal's authorisation*." (741)

These provisions of institutional rules do not impose particularly clear restrictions on applications for court-ordered provisional measures. They nonetheless underscore the fact that the arbitral tribunal is ordinarily the preferred forum for provisional measures applications once the tribunal has been constituted. The provisions of institutional rules restricting the availability of court-ordered provisional measures have generally been interpreted expansively, consistent with the general preference for tribunal-ordered provisional measures. (742)

[d] Future Directions: Preference for Tribunal-Ordered Provisional Measures

The treatment of interim measures in international arbitration has evolved substantially over the past several decades. It is now almost universally accepted that arbitral tribunals and national courts have concurrent authority to grant provisional measures in aid of the arbitral process. Indeed, national arbitration legislation, judicial decisions and institutional arbitration rules have increasingly adopted a preference for tribunal-ordered provisional measures and limitations on court-ordered provisional measures.

Care should be exercised in applying these limitations on the availability of court-ordered provisional measures. Absent clear direction in either national law or the parties' agreement (and institutional rules), courts should be hesitant to conclude that a party must pursue its application for provisional measures exclusively in one forum rather than another. As discussed above, the principle of concurrent jurisdiction is deeply-rooted and sensible. It ensures
P 2740
that parties have access to provisional measures that can be essential to the adjudicative process. If parties are unable to obtain protection against unilateral commercial or political actions by their counter-parties, they may well be denied access to any meaningful adjudicative process. A general preference for tribunal-ordered provisional measures should not be applied to produce this result: courts should impose limitations on parties' freedom to seek effective provisional measures only when necessary to protect the arbitral process and give effect to the parties' agreement. (743)

It is sometimes argued that parties agree to arbitrate in order to centralize dispute resolution and that judicial consideration of applications for provisional measures contradicts this objective. (744) There is force to these observations, but they omit to consider the long-standing acceptance of concurrent jurisdiction to grant provisional measures and the vital importance of access to effective provisional relief. These observations also have little force in cases where arbitral tribunals lack the ability (because they have not yet been constituted) or the power (because of the type of relief sought or the parties involved) to provide effective relief.

It is also argued that judicial consideration of provisional measures applications may interfere with the arbitral process or be inefficient. Where a provisional measures application does interfere with the arbitral process – particularly in connection with efforts to circumvent the parties' arbitration clause – then that application should be held contrary to the agreement to arbitrate. This was the result in decisions such as *McCreary* and *Cooper* (discussed above). (745) As discussed above, such a conclusion is appropriate where parties request relief from national courts in addition to provisional measures, seek to procure substantive decisions from national courts designed to have *res judicata* effect in the arbitration, or take steps that aim to complicate or delay the arbitral proceedings. (746)

Finally, it is essential that interim relief requested from a national court in aid of arbitration actually constitutes a request for interim or provisional measures, and not an attempt to obtain judicial resolution of the merits of the parties' underlying dispute. In the latter case, national law (including Articles 9 and 17 of the Model Law) and the New York Convention (747) do not permit judicial relief. On the contrary, courts have repeatedly held that requests for permanent relief are a violation of the parties' arbitration agreement. (748)
P 2741

[5] Application for Court-Ordered Provisional Relief Does Not Ordinarily Waive Rights to Arbitrate

Most national arbitration legislation makes it clear that an application for court-ordered provisional measures does not ordinarily waive rights under the parties' arbitration agreement. This is best considered as a corollary to the principle of concurrent jurisdiction to grant provisional measures in aid of an international arbitration. (749)

As noted above, Article 9 of the UNCITRAL Model Law provides that, as a general rule, parties do not violate an agreement to arbitrate simply by seeking court-ordered provisional measures. (750) Similar provisions exist in other arbitration statutes. (751)

Judicial precedent generally arrives at the same conclusion. Thus, U.S. courts have generally not construed requests for court-ordered provisional measures as waivers of a right to arbitrate. (752) Courts in other jurisdictions, including Model Law jurisdictions, have reached the same results. (753) As one Spanish court concluded:

> P 2742
> "[w]e cannot deem that a request to the Spanish courts to grant interim protective measures implies a tacit submission to [the jurisdiction of] those courts and consequently a waiver of the referral to arbitration expressly agreed upon." (754)

Likewise, Article VI(4) of the European Convention, (755) provides that a request for court-ordered provisional measures does not independently constitute a waiver of rights under an arbitration agreement. Most institutional arbitration rules are to the same effect. (756)

These various authorities reflect a more general principle, applicable even in the absence of specific provisions in national arbitration legislation or institutional rules: an arbitration agreement does not, by itself, constitute an exclusion or waiver of a party's rights to seek interim relief in aid of arbitration in a national court. In the words of one commentator, "the general rule [is] that by agreeing to arbitrate the parties do not waive any right they may have to resort to a court with jurisdiction to order such relief (or to enforce an order by the arbitral tribunal)." (757) This rule is based on the long-standing history of concurrent jurisdiction over provisional measures and on the parties' expectations in agreeing to arbitrate.

It is important, however, to understand the limits of this statement. It does not mean that *no* request for court-ordered provisional measures can constitute a waiver of a right to arbitrate. Rather, it means that, where the parties have simply agreed to arbitrate, without affirmatively excluding court-ordered provisional measures, an application for court-ordered provisional measures is not necessarily a waiver of the right to arbitrate. (758)

Nonetheless, in some circumstances, an application for provisional measures can constitute such a waiver: if the parties have agreed to exclude court-ordered provisional measures or if a party seeks court-ordered provisional measures in an effort to circumvent an arbitration clause, then the foregoing principle requires qualification. In these circumstances, a party's application for court-ordered provisional measures may well be contrary to its agreement to arbitrate and, under applicable national law, may be deemed a waiver of its arbitration rights. (759)
P 2743

[6] Parties' Autonomy to Exclude Court-Ordered Provisional Relief

As noted above, most jurisdictions authorize court-ordered provisional measures in aid of arbitration, provided that the parties have not agreed otherwise. (760) Although there are exceptions, (761) parties seldom agree to exclude court-ordered provisional relief. Nonetheless, where the parties' agreement excludes court-ordered provisional measures, that agreement must be given effect. For the most part, this conclusion is not dictated by express statutory language, (762) but is the result of judicial decisions giving effect to principles of party autonomy: if parties wish to exclude recourse to national courts for provisional measures, they are generally permitted to do so. (763)

Among other things, parties may exclude court-ordered provisional measures because they wish to centralize all dispute resolution in a single (arbitral) forum, including requests for provisional measures. Although this may inhibit one (or both) parties' access to provisional measures, the desire for efficiency, centralized dispute resolution, confidentiality and neutrality sometimes leads parties to exclude court-ordered provisional measures. (764)

P 2744
There may be circumstances in which a party's agreement not to seek court-ordered provisional measures will be unenforceable. Some national courts (765) and commentators (766) have concluded that agreements not to seek court-ordered provisional measures will not be given effect when no relief is available via the arbitral process. In a few jurisdictions, some authorities hold more broadly that all agreements excluding court-ordered provisional measures are unenforceable. (767)

Despite these views, commercial parties should generally be left free to waive recourse to national courts for provisional measures, if this is in fact what they have chosen to do. Parties are generally free to bargain for, or not to bargain for, security or expedited means of enforcing their rights: a sophisticated commercial party's deliberate decision to forego one avenue for interim measures should, even if ill-advised, be no different.

On the other hand, as an interpretative matter, courts should not lightly conclude that a party has agreed to waive access to court-ordered provisional measures. As discussed above, the principle of concurrent jurisdiction with regard to provisional measures is both deeply-rooted and useful; in the absence of contrary agreement, it should be considered to reflect the parties' mutual expectations. (768) Given the principle of concurrent jurisdiction, an agreement to arbitrate should not (without more) be considered as a waiver of rights to court-ordered provisional measures. Similarly, an agreement incorporating institutional arbitration rules granting an arbitral tribunal (or an emergency arbitrator) the power to order provisional measures should not ordinarily be deemed to waive the right to seek court-ordered provisional measures.

In neither case is such an agreement contrary to the existence of concurrent judicial power to grant provisional measures in aid of arbitration. Consistent with this, courts in most common law (769) and civil law (770) jurisdictions have presumed that the parties intended to permit court-ordered provisional measures, provided that they are genuinely in aid of arbitration.

P 2745
Questions may also arise as to whether an exclusion agreement extends to, or may enforceably extend to, judicial actions to enforce tribunal-ordered provisional measures. The better view is that, save where express and precise language excluding judicial enforcement of provisional measures is used, parties should not be held to have agreed to such a result. That is because this result effectively renders tribunal-ordered provisional measures unenforceable, which is a highly unsatisfactory and uncommercial result. (771)

[7] Choice of Law Applicable to Court-Ordered Provisional Relief

Assuming that a national court has the power to issue provisional measures in connection with an international arbitration, the question arises as to what law will apply to requests for such relief. National courts will virtually always apply their own law to the availability and form of court-ordered provisional measures. In particular, the relief requested in aid of an arbitration must be a category of relief recognized and available under the law of the judicial forum.

The foregoing conclusion is made explicit, albeit by analogy, in Article 183(2) of the Swiss Law on Private International Law, which provides that "[t]he court shall apply its own law" to requests for court-ordered provisional measures. (772) The 2006 Revisions to the UNCITRAL Model Law are essentially identical, (773) as is legislation in a number of non-Model Law
P 2746
jurisdictions. (774) Courts in other jurisdictions take the same approach, typically applying local law to requests for court-ordered provisional relief. (775)

In principle, most national courts apply generally-applicable local standards for prejudgment interim relief to requests for court-ordered provisional measures in aid of arbitration. (776)
P 2747
Nevertheless, some courts have suggested that special requirements apply to requests for court-

ordered provisional measures, taking into account the particular characteristics of international arbitration and the possible availability of relief from the arbitral tribunal. (777) Similarly, some courts have denied applications which purport to seek interim relief where the applicant was in reality seeking to have the merits of its claim adjudicated in judicial proceedings. (778)

[8] Choice of Forum for Court-Ordered Provisional Relief

Assuming that the parties' agreement does not exclude court-ordered provisional measures in aid of an international arbitration, the question arises as to what national court is the appropriate forum to grant such measures. In particular, should jurisdiction to grant provisional measures be limited to the courts of the arbitral seat, or should provisional measures in aid of arbitration also be available in other national courts? There is relatively little authority that addresses this question.

[a] New York Convention Is Silent as to National Court Possessing Jurisdiction to Order Provisional Relief

It is relatively clear that nothing in either the New York Convention or any other international arbitration convention addresses the question of what national court(s) possess(es) jurisdiction to order provisional measures in connection with an international arbitration. No provision of any of these instruments addresses this issue either expressly or impliedly. (779)

[b] Forum Selection Agreements

In some cases, parties agree upon a contractual forum for provisional measures in aid of arbitration. When this occurs, most national laws will give effect to the parties' contractual choice of forum. (780)

It is generally unwise for parties to limit themselves to a single contractual forum for pursuing provisional measures: there may be instances where immediate applications for provisional measures in the place of the expected wrongful actions or in the place of a particular piece of (movable) property are required. (781) Courts will ordinarily (and properly) not inter
P 2748
pret general forum selection clauses as applying to requests for provisional measures. (782)

[c] National Law Permitting Courts in Arbitral Seat to Order Provisional Relief

Whether or not the parties have agreed upon a contractual forum for court-ordered provisional measures, national law will be decisive for determining what forum(s) will or will not issue such relief. Generally-applicable legislation concerning the availability of provisional measures will typically determine whether a national court is competent to issue provisional relief in connection with a particular arbitration. There is relatively little uniformity among different national legislative regimes on this issue.

In most states, national courts have the statutory authority under generally-applicable national law to issue provisional measures in aid of arbitrations with their seat within national territory. That is, if an international arbitration is seated in State A, then the courts of State A will ordinarily have the power under State A's generally-applicable legislation to order provisional measures in relation to the arbitration; national arbitration legislation typically does not, however, address the standards, procedures, or available remedies for court-ordered provisional measures in aid of an international arbitration. This is the case under the original 1985 Model Law and the 2006 Revisions of the Model Law, (783) as well as under most other national arbitration statutes. (784)

[d] National Law Permitting Courts to Order Provisional Relief in Aid of Foreign Arbitration

In some cases, the courts of the state where the arbitration is seated may not be in a position to grant effective provisional relief. Particularly where an attachment or similar measures with respect to property are sought, only the jurisdiction where the defendant's assets are located may be able to grant meaningful provisional relief. That is because security measures often have only territorial effect and, even when they purport to apply extraterritorially, extraterritorial enforcement against foreign assets may be impossible or difficult. (785) In those
P 2749
circumstances, according exclusive jurisdiction to the state where the arbitration is pending may not be warranted.

In part for these reasons, some national courts have concluded that they have the power to order provisional relief in connection with foreign-seated arbitrations. Thus, a number of lower U.S. courts have granted provisional measures in aid of arbitrations being conducted in a foreign country, under the arbitration law of that country, albeit often without analysis. (786) As one court concluded:

> "federal courts have both the jurisdiction and authority to grant injunctions and provisional remedies in the context of pending arbitrations, including international arbitrations." (787)

Prior to the enactment of the English Arbitration Act, 1996, the House of Lords concluded that

English courts had the power to grant provisional measures in connection with a foreign-seated arbitration. (788) That decision was statutorily confirmed by §2(3)(b) of the 1996 Act, providing English courts with discretionary authority to grant provisional measures in aid of foreign-seated arbitrations. (789)

P 2750
Likewise, Hong Kong courts have held that they have both inherent authority and statutory power to issue provisional measures in aid of foreign arbitrations. (790) Singapore's international arbitration legislation was also recently amended to affirm the same authority of Singapore courts. (791) Courts in other jurisdictions have also exercised the power to order provisional measures in aid of foreign-seated arbitrations. (792)

The foregoing results are consistent with Articles 1(2) and 9 of the UNCITRAL Model Law, which provide that an arbitration agreement does not ordinarily preclude a party from applying to "*a* court" for provisional measures, without suggesting that "a" court is only a court in the arbitral seat. (793) Judicial decisions in Model Law jurisdictions affirm this result. (794) The
P 2751
2006 Revisions of the Model Law confirm this result even more explicitly. (795)

In contrast, other arbitration legislation appears to deny national courts the power to grant provisional measures in connection with foreign arbitrations. Indian judicial decisions initially adopted this view, (796) subsequently ruled that interim relief may be granted in aid of a foreign arbitration, (797) and thereafter held, in a decision by the Indian Supreme Court, that the provisions of India's arbitration legislation authorizing court-ordered provisional measures apply only to arbitrations that are seated in India. (798) In turn, that decision was legislatively overruled, (799) with Indian courts now having the authority to issue provisional measures in aid of foreign-seated arbitrations.

[e] Judicial Restraint in Ordering Provisional Relief in Aid of Foreign Arbitration

Even if a national court has the power to issue provisional measures in connection with a foreign arbitration, there are strong reasons for exercising such authority with circumspection. When a court in State A issues provisional measures in connection with an arbitration seated in State B, it runs a double risk, of acting at cross-purposes with (a) the arbitral proceedings, and (b) the (limited) supervisory jurisdiction of the courts in the arbitral seat. In these circumstances, courts have rightly demonstrated caution in granting provisional measures. (800)

A leading example of a national court's caution in this regard was the English House of Lords' decision in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*. (801) The case involved disputes arising from an international consortium of French and English parties, with a complex arbitration clause providing for ICC arbitration in Belgium. After the arbitration clause was invoked, one party sought provisional measures in English courts. After reversing a lower court decision, holding that English courts lacked the power to order injunctive relief, the House of Lords held that although this power existed it would nonetheless be
P 2752
inappropriate for the English courts to exercise their authority to order provisional measures in aid of the Belgian arbitration.

Preliminarily:

> "[T]he court should bear constantly in mind that English law, like French law, is a stranger to this Belgian arbitration, and that the respondents are not before the English court by choice. In such a situation *the court should be very cautious in its approach both to the existence and to the exercise of supervisory and supportive measures, lest it cut across the grain of the chosen curial law*." (802)

The House of Lords went on to observe that the requested "provisional measures" were in fact almost identical to the requested final relief in the arbitration, and that granting this relief would have had a substantial impact on the parties' litigation positions. The House of Lords expressed serious reservations about granting this sort of relief, and then concluded:

> "Any doubts on this score are to my mind resolved by the choice of the English rather than the Belgian courts as the source of interim relief. … [T]he Belgian court must surely be the natural court for the source of interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them to show the reason why, in the same way as a plaintiff who wishes to

> pursue a substantive claim otherwise than in a more convenient foreign court. … They have not done so. Apparently no application for interim relief has been made to the court in Brussels. … Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration." (803)

Subsequent English decisions have exhibited similar caution in granting provisional measures in aid of foreign-seated arbitrations. (804)

A comparable caution is reflected in other national court decisions. In *Borden, Inc. v. Meiji Milk Products Co.*, (805) a U.S. appellate court held that it had the power to grant court-ordered provisional measures in aid of a foreign arbitration, (806) but then relied on a *forum non conveniens* analysis to conclude that Japanese (rather than U.S.) courts would be better-suited to
P 2753
considering an application for court-ordered provisional measures. Relying on the trial court's findings, the U.S. court reasoned:

> "[The trial court] found that only the Japanese market and consumers are affected by the parties' dispute and that all necessary fact witnesses are in Japan. The court found further that an injunction issued in Japan clearly would be enforceable there, whereas one obtained in this country might not be. Examining the public interests at stake, the court found that Japan has a much greater interest in the litigation than does the United States. … Under the circumstances of the instant case, we hold that the court's decision to dismiss [on *forum non conveniens* grounds] was sufficiently justified." (807)

In each of the foregoing English and U.S. cases, the court refused to exercise a concededly-existent judicial power to grant provisional measures in aid of a foreign arbitration. Both courts cited a variety of factors counseling against the exercise of this authority.

In *Channel Tunnel*, the House of Lords considered: (a) the seat of the arbitration; (b) the procedural law of the arbitration; (c) the substantive law governing the parties' underlying dispute; (d) the fortuitous involvement of English courts, merely because the defendants were domiciled there; (e) the fact that the requested "interim" relief in fact would have resolved much of the parties' dispute; (f) the fact that courts should generally be reluctant to grant provisional relief in aid of any arbitration; and (g) the fact that a Belgian court was the "natural court" to consider the issue, since the arbitration had its seat in Belgium. In contrast, the *Borden* court considered: (a) the seat of the arbitration; (b) the location of the conduct giving rise to the parties' underlying dispute; (c) the location of the evidence and witnesses; (d) the respective interests of the possible judicial fora in issuing relief; and (e) the ease of enforcing the court's order.

The basic circumspection displayed by both the English and U.S. courts, when requested to order provisional relief in aid of a foreign arbitration, is appropriate, as is the general approach of considering whether or not to grant such relief on a case-by-case basis. As between the two approaches, however, the factors considered by the *Channel Tunnel* opinion appear, in principle, more directly focused on the appropriateness of granting court-ordered provisional measures in connection with a foreign arbitration.

The *Channel Tunnel* factors more specifically address the extent to which a national court may intrude upon a foreign court's supervisory jurisdiction, or a foreign arbitral tribunal's authority. At the same time, courts considering whether to grant provisional measures should also examine the extent to which an arbitral tribunal has already been constituted and whether
P 2754
it appears capable of issuing the requested provisional relief (*e.g.*, because of territorial limitations). (808) Even where the arbitral tribunal is unable to act, a court outside the arbitral seat must consider with care why it – rather than a court in the arbitral seat – has been requested to provide provisional relief, and whether doing so would inappropriately interfere with the supervisory authority of courts in the arbitral seat.

[9] Recognition of Court-Ordered Provisional Relief in Aid of International Arbitration

If a court, in the arbitral seat or elsewhere, orders provisional measures in aid of an international arbitration, the prevailing party may seek to enforce that order (or judgment) abroad. General principles of private international law, in the relevant jurisdictions, will apply to such enforcement

efforts. (809) In general, it will be difficult to successfully enforce judgments granting provisional measures in aid of arbitral proceedings, because they are not "money" judgments and are arguably not "final" for purposes of many national enforcement regimes. (810)

In Europe, the efficacy of court-ordered provisional measures has been significantly limited by the ECJ, which has restricted the territorial scope of such measures to the territory of the state granting the relief. (811) That has the unfortunate consequence, for both the arbitral process and Community uniformity, of limiting the powers of the court in the arbitral seat (or elsewhere) to grant effective relief in Europe; (812) the efficacy of court-ordered interim relief outside the EU would apparently, if ironically, remain unaffected.
P 2755

[D] Authority of National Courts to Grant Provisional Relief in Aid of International Arbitrations Under Institutional Arbitration Rules

Like most national arbitration legislation, leading institutional arbitration rules confirm the availability of
P 2756
court-ordered provisional measures. (813) Most institutional rules provide expressly that parties remain free, notwithstanding their agreements to arbitrate, to apply to national court(s) for provisional measures (at least in certain circumstances).

For example, Article 26(9) of the 2013 UNCITRAL Rules provides that "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*." (814) The predecessor of this provision was also interpreted, in accordance with its plain language, as permitting parties to apply to national courts for provisional measures without material qualifications (such as, for example, permitting applications for court-ordered provisional measures only before the arbitral tribunal has been formed). (815)

Other institutional rules also permit applications for court-ordered provisional measures, albeit with some restrictions. Most significantly, Article 28(2) of the ICC Rules provides:

> "Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement." (816)

Unlike the UNCITRAL Rules, Article 28(2) imposes express limits on the rights of the parties to seek provisional relief from national courts. The provision attempts to make it clear that, prior to constitution of the arbitral tribunal, requests for court-ordered provisional measures are in principle permitted; after the tribunal is constituted, however, judicial relief is permitted only in "appropriate circumstances." (817) The LCIA Rules are comparable, although limiting court-ordered provisional measures to "exceptional cases," like the pre-1998 ICC Rules. (818) Other institutional rules are similar. (819)

Under both the ICC and LCIA Rules, the expectation is that requests for provisional measures will be presumptively addressed to the arbitral tribunal once it has been constituted, rather than to national courts. After the tribunal has been constituted, requests for provisional measures may be made to national courts only in "exceptional" or "appropriate" circumstances. (820) These provisions reinforce the primacy of the arbitral process as the most appropriate forum for seeking provisional measures in international arbitration (as discussed above (821)). Unsurprisingly, national courts have therefore generally given effect to these types of provisions, frequently dismissing applications for court-ordered provisional measures in favor of the arbitral tribunal or emergency arbitrator. (822)

For the reasons noted above, however, parties will not infrequently have justifiable grounds for seeking court-ordered provisional measures even after an arbitral tribunal has been constituted. A party, for example, may require provisional measures involving third parties, or may reasonably believe that tribunal-ordered provisional measures will not be complied with, or may reasonably believe that *ex parte* action is essential. A party's application for court-ordered provisional measures in any of these circumstances is consistent with the purposes of the ICC and LCIA Rules, and should not ordinarily be considered a breach or waiver of the parties' arbitration agreement. (823)

P 2757

[E] Judicial Assistance in Taking Evidence in International Arbitration

As noted above, some authorities treat the preservation or production of evidence as a form of provisional measures. (824) A Canadian decision involving a request to examine a third party witness concluded that the request fell within Article 9 and suggested that a party seeking a court's assistance in taking evidence could proceed under either Article 27 (where the request must be approved by the arbitral tribunal) or Article 9 (where the arbitral tribunal's authorization is not necessary); among other things, the court referred to a statement in the drafting history of the Model Law that the concept of interim measures of protection includes measures to "secure evidence." (825) In contrast, a Hong Kong court found that a subpoena was not an interim measure of protection and that a party seeking the court's assistance in such a context needed to proceed pursuant to Article 27, and thus with the arbitral tribunal's authorization. (826)

Putting aside the question whether this characterization is useful, some arbitration legislation grants national courts power to order disclosure or discovery in aid of arbitral tribunals. (827) These statutory provisions are discussed in detail above. (828)
P 2757

References
1)

For commentary, *see* Abascal, *The Art of Interim Measures*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 751 (2007); Ali & Kabau, *Article 17A: Conditions for Granting Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 343-72 (2020); Ali & Kabau, *Article 17I: Grounds for Refusing Recognition or Enforcement*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 473-99 (2020); A. Ali *et al*., *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019); Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35 Arb. Int'l 441 (2019); Bantekas *et al., UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* (2020); Bantekas & Ullah, *Article 17J: Court-Ordered Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 500-21 (2020); Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 Arb. Int'l 559 (2016); Becker, *Attachments in Aid of International Arbitration: The American Position*, 1 Arb. Int'l 40 (1985); Bento & Peng, *Interim Measures: Arbitral Tribunals and Courts*, in L. Shore *et al*. (eds.), *International Arbitration in the United States* 239-74 (2017); Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143 (2018); Berger, *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASA Bull. 7 (2010); Besson, *Anti-Suit Injunctions by ICC Emergency Arbitrators,* in A. Carlevaris *et al*. (eds.), *International Arbitration Under Review: Essays in Honor of John Beechey* 69 (2015); S. Besson, *Arbitrage International et Mesures Provisoires* (1998); P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model LawJurisdictions* 278-86 (2019); Bismuth, *Anatomy of the Lawand Practice of Interim Protective Measures in International Investment Arbitration*, 26 J. Int'l Arb. 773 (2009); C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, aus Schweizerischer Sicht, mit Rechtsvergleichenden Aspekten* (2011); Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409 (2010); Boog, *Swiss Rules of International Arbitration: Time to Introduce An Emergency Arbitrator Procedure?*, 28 ASA Bull. 462 (2010); Brody, *An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention*, 18 Cornell Int'l L.J. 99 (1985); Brower & Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6 ICSID Rev. 431 (1991); Brower & Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int'l L. 24 (1986); Burnett & Beess und Chrostin, *Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings,* 30 Md. J. Int'l L. 31 (2015); Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465 (1986); Castello, *Arbitral Ex Parte Interim Relief: The Viewin Favor*, 58 Disp. Resol. J. 60 (2003); Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454 (2016); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275 (2018); Coleman & Innes, *Provisional Measures During Suspension of ICSID Proceedings,* 30 ICSID Rev. 713 (2015); Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9 (1992); J. Commission & R. Moloo, *Procedural Issues in International Investment Arbitration* 30-48 (2018); Costábile, *Early Dismissal of Unmeritorious Claims and Defences in International Arbitration*, in C. González-

Bueno (ed.), *40 Under 40 International Arbitration* 253 (2018); Demirkol, *Ordering Cessation of Court Proceedings to Protect the Integrity of Arbitration Agreements under the Brussels I Regime*, 65 Int'l & Comp. L.Q. 379 (2015); de Planque, *Seven Years Since "Emergency" Was Declared by ICC: Do We Know What A Real Emergency Is?*, Practical L. Arb. Blog (28 Mar. 2019); Derains, *The View Against Arbitral Ex Parte Interim Relief*, 58 Disp. Resol. J. 61 (2003); Donovan, *Powers of the Arbitrators to Issue Procedural Orders, Including Interim Measures of Protection, and the Obligations of Parties to Abide by Such Orders*, 10(1) ICC Ct. Bull. 57 (1999); Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 107 (2018); E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932); Ebb, *Flight of Assets from the Jurisdiction "In the Twinkling of A Telex": Pre- and Post-Award Conservatory Relief in International Commercial Arbitration*, 7(1) J. Int'l Arb. 9 (1990); Edmondson & Ziegler, *The Complications of Attaching Assets in the US in Aid of An Arbitral Award*, 10 Disp. Resol. Int'l 71 (2016); J. Elking, *Interim Protection: A Functional Approach* (1981); Foster & Elsberg, *Two New Initiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Principles*, 3(5) Transnat'l Disp. Mgt (2006); Friedland, *Provisional Measures and ICSID Arbitration*, 2 Arb. Int'l 335 (1986); Fry, *Interim Measures of Protection: Recent Developments and the Way Ahead*, 2003 Int'l Arb. L. Rev. 153; Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1 (2005); Garimella & Sooksripaisarnkit, *Emergency Arbitrator Awards: Addressing Enforceability Concerns Through National Law and the New York Convention,* in K. Fach Gómez & A. López-Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges* 67 (2019); Ghaffari & Walters, *The Emergency Arbitrator: The Dawn of a New Age*, 30 Arb. Int'l 153 (2014); D. Goldberg, Y. Kryvoi & I. Philippov, *Empirical Study: Provisional Measures in Investor-State Arbitration* (2019); Goldstein, *A Glance into History for the Emergency Arbitrator*, 40 Fordham Int'l L.J. 779 (2017); Gómez, *Article 17C: Specific Regime for Preliminary Orders*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 381-98 (2020); Gómez, *Article 17H: Recognition and Enforcement*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 453-72 (2020); Gonzáles, *Interim Measures in Arbitration: Towards A Better Injury Standard*, in A. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* 260 (2015); Hamama & Sendetska, *Interim Measures in Support of Arbitration in Ukraine: Lessons from* JKX Oil & Gas et al. v. Ukraine *and the Recent Reform of Ukrainian Legislation,* 34 Arb. Int'l 307 (2018); Hanessian & Dosman, *Songs of Innocence & Experience: Ten Years of Emergency Arbitration*, 27 Am. Rev. Int'l Arb. 215 (2016); Hausmaninger, *The ICC Rules for A Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration*, 7 ICSID Rev. 82 (1992); Hill, *Is An Interim Measure of Protection Ordered by An Arbitral Tribunal An Arbitral Award?*, 9(4) J. Int'l Disp. Sett. 593 (2018); Hobér, *Courts or Tribunals?,* in F. Fortese *et al.* (eds.), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* 205 (2019); Hobér, *Interim Measures by Arbitrators*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 721 (2007); Hoellering, *The Practices and Experience of the American Arbitration Association*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 31 (1993); Hoellering, *Interim Measures and Arbitration: The Situation in the United States*, 46 Arb. J. 22 (1991); Hoellering, *Interim Relief in Aid of Commercial Arbitration*, 1 Wisc. Int'l L.J. 1 (1984); Hunter & Torres Peres, *Interim Measures in International Commercial Arbitration*, in N. Ziadé (ed.), *Liber Amicorum Samir Saleh: Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 69 (2019); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181 (2005); ICC, *Conservatory and Provisional Measures in International Arbitration* (1993); Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to Be Introduced by A Revision of the Convention?*, 6(1) J. Int'l Arb. 171 (1989); Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149 (2016); Kalderimis, *The Authority of Investment Treaty Tribunals to Issue Orders Restraining Domestic Court Proceedings,* 31 ICSID Rev. 549 (2016); Kim & Satish, *Legal Criteria for Granting Relief in Emergency Arbitrator Proceedings: Where Are We Now and Where Do We Go from Here?,* in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 175 (2018); Kaplan, *Interim Measures: A Practical Experience*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 768 (2007); Kaplan, *Interim Measures Ordering Performance: Procedural Implementation*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 313 (2011); Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. Chi. L. Rev. 1373 (1987); Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less*

Theory, Please, in A. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* 101 (2001); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87 (2015); Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief*, 18 J. Int'l Arb. 511 (2001); Le Bars & Shiroor, *Provisional Measures in Investment Arbitration: Wading Through the Murky Waters of Enforcement*, 6(1) Indian J. Arb. L. 124 (2017); Lahlou, Sado & Walters, *Pre-Judgment/Pre-Award Attachment,* in A. Frischknecht *et al.* (eds.), *Enforcement of Foreign Arbitral Awards and Judgments in New York* 253 (2018); Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23 (2000); Luttrell, *ICSID Provisional Measures "In the Round*," 31 Arb. Int'l 393 (2015); MacDonald, *Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights*, 52 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 703 (1992); Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 Am. Rev. Int'l Arb. 123 (2000); G. Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law*(2017); Markert, *Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors*, 11(2) Contemp. Asia Arb. J. 217 (2018); Markert & Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37 J. Int'l Arb. 131 (2020); McDonnell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 Colum. J. Transnat'l L. 273 (1983-84); C. Miles, *Provisional Measures Before International Courts and Tribunals* (2017); Mills, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 Ford. Int'l L.J. 604 (1989); Muller & Pearson, *Waving the Green Flag to Emergency Arbitration Under the Swiss Rules: The* Sauber *Saga*, 33 ASA Bull. 810 (2015); Nader, *Provisional Measures in International Arbitration as Applied by Lebanese Courts,* in N. Ziadé (ed.), *Liber Amicorum Samir Saleh: Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 199 (2019); Naimark & Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief*, *Global Center for Dispute Resolution Research*, in C. Drahozal & R. Naimark (eds.), *Towards A Science of International Arbitration: Collected Empirical Research* 129 (2005); Oellers-Frahm, *The ICJ and the CAS Expanding the Competence to Issue Provision Measures: Strengthening the International Judicial Function*, 12 German L.J. 1279 (2011); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 314 (2020); Ortolani, *Article 17B: Applications for Preliminary Orders and Conditions for Granting Preliminary Orders*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 373-80 (2020); Paraguacuto-Mahéo & Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field – The French Perspective*, 40 Fordham Int'l L.J. 749 (2017); Petrochilos, *Interim Measures Under the Revised UNCITRAL Arbitration Rules*, 28 ASA Bull. 878 (2010); Pew & Jarvis, *Pre-Award Attachment in International Arbitration: The Law in New York*, 7(3) J. Int'l Arb. 31 (1990); Polasek & Salinas Quero, *Security for Costs: Overview of ICSID Case Law,* in F. Fortese *et al.* (eds.), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* 387 (2019); Polkinghorne & Larbaoui, *Article 17D: Modification, Suspension, Termination*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 399-411 (2020); Rau, *Provisional Relief in Arbitration: How Things Stand in the United States*, 22 J. Int'l Arb. 1 (2005); Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 Tex. Int'l L.J. 72 (1995); Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397 (2016); Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 Int'l Tax & Bus. L. 368 (1986); Reiner, *Les Mesures Provisoires et Conservatoires et l'Arbitrage International, Notamment l'Arbitrage CCI*, 125 J.D.I. (Clunet) 853 (1998); Reymond, *Security for Costs in International Arbitration*, 110 L.Q. Rev. 501 (1994); Robin, *Conservatory and Provisional Measures in International Arbitration: The Role of State Courts*, Int'l Bus. L.J. 319 (2008); S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (2005); Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 Am. Rev. Int'l Arb. 306 (2000); Ryan & Dharmananda, *Summary Disposal in Arbitration: Still Fair or Agreed to Be Fair*, 35 J. Int'l Arb. 31 (2018); Sanchez, *Applying the Model Law's Standard for Interim Measures in International Arbitration*, 37 J. Int'l Arb. 49 (2020); Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering An Enforceable Decision?*, 31 Arb. Int'l 283 (2015); Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 E.J.C.L. (1998); Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004); Shaughnessy, *Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 J. Int'l Arb. 337 (2010); Shelton, *Form, Function, and the Powers of International Courts*, 9 Chi. J. Int'l L. 537 (2009); D. Shenton & W. Kühn, *Interim Court Remedies in Support of Arbitration* (1987); Stalev, *Interim Measures of Protection in the*

Context of Arbitration, in A. van den Berg (ed.), *International Arbitration in A Changing World* 111 (1994); Szewczyk, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, 105 Am. J. Int'l L. 747 (2011); J. Sztucki, *Interim Measures in the Hague Court* (1983); Tan & Seetoh, *Security for Costs in International Arbitration,* Int'l Arb. Asia (2017); Thomas, *Reviewof Emergency Arbitral Relief: Recent Developments in US Case Law*, in C. González-Bueno (ed.), *40 Under 40 International Arbitration* 349 (2018); Toll, *Romania: National Courts Take A Conservative Position Towards Emergency Arbitrator Orders*, 20(1) ICC Ct. Bull. 24 (2020); Uilenbroek, *The Power of Investment Tribunals to Enjoin Domestic Criminal Proceedings*, 36 Arb. Int'l 323 (2020); van Houtte, *Ten Reasons Against A Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arb. Int'l 85 (2004); von Segesser, *Vorsorgliche Massnahmen im Internationalen Schiedsprozess*, 25 ASA Bull. 476 (2007); Voser, *Interim Relief in International Arbitration: The Tendency Towards A More Business-Oriented Approach*, 1 Disp. Resol. Int'l 171 (2007); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31 (2000); Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11(1) ICC Ct. Bull. 31 (2000); D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* (2015).

2)

Opinion of Advocate General Tesauro, *The Queen v. Secretary of State for Transp., ex parte Factortame Ltd*, Case No. C-213/89, [1990] E.C.R. I-02433, ¶18 (E.C.J.).

3)

It has long been recognized that tribunals in state-to-state arbitrations and judicial proceedings possess the power to grant provisional relief. *See* ILC, *Memorandum on Arbitral Procedure, Prepared by the Secretariat*, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 167 (1950); ILC, *Draft on Arbitral Procedure Prepared by the International LawCommission at its Fourth Session*, *1952*, U.N. Doc. A/CN.4/59, II Y.B. I.L.C. 60, 64, Art. 17 (1952) ("The tribunal, or in the case of urgency its president subject to confirmation by the tribunal, shall have power to prescribe, if it considers that circumstances so require, any protective measures to be taken for the protection of the respective interests of the parties"); E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932); S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Lawof the Sea* 220-30 (2005). International tribunals have frequently ordered provisional measures. *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Provisional Measures Order of 23 January 2020,* [2020] General List No. 178 (I.C.J.); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures Order of 14 June 2019,* [2019] General List No. 172 (I.C.J.); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, (Iran v. U.S.A.), Provisional Measures Order of 3 October 2018,* [2018] General List No. 175 (I.C.J.); *Jadhav Case (India v. Pakistan), Provisional Measures Order of 18 May 2017,* [2017] I.C.J. Rep. 2017 (I.C.J.); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia), Provisional Measures Order of 19 April 2017*, [2017] I.C.J. Rep. 2017 (I.C.J.).

4)

See §17.02[A][3][a].

5)

See §17.02[A][3][b]; §17.02[G][1].

6)

Reichert v. Dresdner Bank, Case No. C-261/90, [1992] E.C.R. I-20149, ¶34 (E.C.J.). *See also Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1-1(t) (2019) ("Ordinarily, interim measures are issued to preserve the status quo, to help secure satisfaction of an eventual award, or otherwise to promote the efficacy or fairness of the arbitral process."); *Van Uden Maritime BV v. KommanditgesellSchaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.); *Judgment of 13 April 2010*, DFT 4A_582/2009, ¶2.3.2 (Swiss Fed. Trib.) ("Provisional or interlocutory measures are measures that a party may request to protect its rights on a provisional basis throughout the length of the proceeding on the merits and, in some cases, even before such proceeding begins"); Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9, 19-24 (1992).

7)

UNCITRAL Model Law, 2006 Revisions, Art. 17(2). The 1985 Model Law did not address the definition of interim relief. UNCITRAL, *Digest of Case Lawon the Model Lawon International Commercial Arbitration* 53 (2012) ("The concept of an interim measure of protection is not defined in the 1985 version of the Model Law").
The *travaux préparatoires* for the Model Law nonetheless indicate that the "range of measures covered by the provision [is] a wide one." UNCITRAL, *Official Records of the General Assembly*, *Fortieth Session*, *Supplement No. 17*, U.N. Doc. A/40/17, Annex I, ¶96. The drafting history also makes clear that interim relief includes pre-award attachments, measures relating to the protection of trade secrets and proprietary information, measures relating to the protection of the subject-matter of the dispute and measures intended to secure evidence. UNCITRAL, *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 9, ¶4 (1985). *See also* Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 326-42 (2020).

8)

See §17.02[G][4].
9)

See, e.g., UNCITRAL Model Law, Art. 9 ("interim measures" and "interim measure of protection"); Swiss Law on Private International Law, Art. 183 ("provisional or conservatory measures"); 2017 ICC Rules, Art. 28(2) ("interim or conservatory measures"); 2014 ICDR Rules, Art. 24 ("interim measures"); 2020 LCIA Rules, Art. 25 ("interim and conservatory measures"); 2018 HKIAC Rules, Art. 23 ("interim measures of protection and emergency relief"); 2006 ICSID Rules, Rule 39 ("provisional measures for the preservation of [a party's] rights"). *See also Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1.1(mm) (2019) ("'Provisional relief' is a grant of temporary relief by a court to preserve the status quo, help ensure the satisfaction of an eventual arbitral award, or otherwise protect the rights of one or more parties and promote the efficacy of an arbitration and the resulting award.").
10)

Examples of provisional or interim decisions include grants of interim protective measures aimed at preserving the status quo or interim determinations (such as permitting a party to remain in possession of property or to exercise contract rights) during the pendency of a proceeding.
See §17.02[G][4].
11)

Examples of "protective" measures include provisional or final orders prohibiting a party from engaging in particular conduct (*e.g.*, using intellectual property rights or other property).
12)

Both types of relief are to be distinguished from "partial" relief or awards, which finally resolve one part of the parties' substantive dispute, while leaving other issues for subsequent (final) resolution.
See §§23.01[A] & [D].
13)

See §§17.02[A] *et seq*.
14)

See §17.02[G].
15)

The arbitral tribunal's authority to order provisional measures is often related to its more general power to grant injunctive relief. *See* §§23.07[A] *et seq*.
16)

Some commentators suggest that "it is now beyond question that arbitrators have the power to grant interim and conservatory measures." Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 30 (2000). *See also* F. Schwarz & C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* 555-56 (2009) ("Arbitration practice has moved a long way in recent years. It is now beyond question that arbitrators have the power to grant interim and conservatory measures"). As discussed below, this generalization is overbroad: although most national arbitration laws and institutional arbitration rules grant arbitral tribunals the power to issue provisional measures, there remain important exceptions (including, for example, China, Italy and Thailand). *See* §17.02[A][3][c]. Moreover, arbitrators only have the power to grant provisional relief insofar as the parties have not excluded that power.
See §17.02[C].

17)

See also Brody, *An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention*, 18 Cornell Int'l L.J. 99, 106 n.36 (1985) (conference adopting New York Convention never addressed issue of provisional measures); Garimella & Sooksripaisarnkit, *Emergency Arbitrator Awards: Addressing Enforceability Concerns Through National Law and the New York Convention,* in K. Fach Gómez & A. López-Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges* 67 (2019).

18)

As discussed in detail below, some U.S. courts have (incorrectly) interpreted Article II of the New York Convention as forbidding the courts of Contracting States from ordering prejudgment attachment. *See* §17.04[B][2][a]. Those courts have not expressly held that the Convention addresses the availability of provisional relief from arbitrators, although the necessary implication of their analysis is that arbitral tribunals generally do enjoy the authority to order preliminary relief. An alternative result would produce the unacceptable situation in which provisional relief was available neither from a court nor an arbitrator.

19)

See European Convention, Art. VI(4).

20)

This aspect of the European Convention, and parallel provisions of many national laws, is discussed below. *See* §17.02_[E]; §17.04.

21)

ICSID Convention, Art. 47. *See also* 2006 ICSID Rules, Rule 39 ("provisional measures for the preservation of its rights"); ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).

22)

See C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶¶15 *et seq*. (2d ed. 2009); Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004).

23)

See, e.g., *Valle Verde v. Venezuela*, *Decision on Provisional Measures in ICSID Case No. ARB/12/18 of 25 January 2016*, ¶75 ("Although the two provisions [Articles 39 and 47] indicate that the tribunal may only 'recommend' the adoption of provisional measures, it is well settled among ICSID tribunals that decisions recommending such measures are binding"); *RSM Prod. Corp. v. Grenada*, *Award in ICSID Case No. ARB/10/6 of 14 October 2010*; *Occidental Petroleum Corp. v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/06/11 of 17 August 2007*, ¶58 ("The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word 'recommend,' the Tribunal is, in fact, empowered to order provisional measures. This has been recognized by numerous international tribunals."). *See also* Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 107, 111 (2018); ICSID, *Proposals for Amendment of the ICSID Rules* 219-26 (Working Paper Vol. 3 2018) ("[T]aking into consideration the contentious debates during the drafting of the Convention and the objection of some States to binding provisional measures, the WP does not propose a new provision in this regard. At the same time, Tribunals remain free to draw inferences from the failure of a party to follow a recommendation for provisional measures."); C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶¶15 *et seq*. (2d ed. 2009).

24)

See §§17.02[A][3] *et seq*.; §17.02[G][1].

25)

As discussed below, a few U.S. lower courts have at least impliedly adopted this view of the Convention. *See* §17.04[B][2][b]. *See also* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 419 (2010) (New York Convention precludes Contracting State from denying effect to arbitration agreements granting arbitrators authority to order interim relief). *Compare* Bento & Peng, *Interim Measures: Arbitral Tribunals and Courts*, in L. Shore *et al*. (eds.), *International Arbitration in the United States* 239 (2017) (New York Convention is "silent on interim measures altogether").

26)

See §2.01[A][1][a]; §5.01_[B][2]; §5.04[D][1][a]; §11.03_[C]; §12.01_[B][2]; §14.03_[A]; §15.02_[A]; §15.04[A][1].

27)

A Contracting State that was the arbitral seat might seek to characterize requests for provisional measures as nonarbitrable, but it is doubtful that such a rule would comply with the Convention's general requirements that nonarbitrability rules be exceptional escape devices that are consistent with state practice among Contracting States. As discussed above, the Convention should be construed to impose limitations on a Contracting State's treatment of particular categories of disputes or claims as nonarbitrable, requiring that such categories be carefully-tailored to achieve specific, articulated public policies and be non-idiosyncratic. *See* §4.05[C][5]. A general prohibition against the arbitration of any request for provisional measures would contradict both of these principles, particularly in light of the progressive abandonment of prohibitions against tribunal-ordered provisional measures over the past several decades. The evolution of these rules can properly be seen as a classic example of the Convention's constitutional development. *See* §1.04[A][1][f]; §4.04[A][1][b][i].

28)

See §17.02[A][3][a].

29)

See §1.04[A][1][f]; §4.04[A][1][b][i]; §4.05[C][5].

30)

The same rule would apply under Article 1 of the Inter-American Convention. *See* §1.04[A][3].

31)

It is conceivable that a state might, consistent with the Convention, refuse to recognize particular categories of agreements granting arbitrators power to issue provisional measures, but it is very difficult to see what the reasons for such a rule might be.

32)

Choice-of-law issues concerning provisional measures are discussed below. *See* §17.02_[F]; §17.02[G][2].

33)

In principle, if the arbitration agreement granted the arbitrators the power to order provisional relief, legislation in the arbitral seat (or elsewhere) which denied effect to that agreement would be generally contrary to the New York Convention. *See* §17.02[A][2]. In those circumstances, an arbitral tribunal would be free, and indeed obliged, to give effect to the parties' agreement.

34)

As discussed below, issues also arise as to the enforceability of tribunal-ordered provisional measures in national courts. *See* §17.03.

35)

See N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶7.16 (6th ed. 2015) ("antique domestic legislation").

36)

Swiss Cantonal Concordat, Arts. 26(1)-(2) ("However, the parties may voluntarily submit to provisional orders proposed by the arbitral tribunal") (repealed). For an award giving effect to Article 26 of the Concordat, *seePartial Award in ICC Case No. 4998*, 113 J.D.I. (Clunet) 1139 (1986).

37)

See German ZPO, §1036 (in force prior to 1998 adoption of UNCITRAL Model Law); Austrian ZPO, §593 (in force prior to adoption of UNCITRAL Model Law) ("[the arbitrators] may not use enforcement measures or set fines against the parties or other persons"); Greek Code of Civil Procedure, Art. 685 (in force prior to 1999). *See also* Hausmaninger, in H. Fasching (ed.), *Zivilprozessgesetze* §593, ¶6 (2d ed. 2007); M. Rubino-Sammartano, *International Arbitration Law* 345-65 (1990).

38)

It is sometimes suggested that "public policy" considerations were the basis for the prohibition against tribunal-ordered provisional measures. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 24 (2000). There is little evidence suggesting some sort of general public policy against tribunal-ordered provisional relief, which would in any event be very difficult to sustain (*i.e.*, if a tribunal is competent to decide an issue finally, with binding effect, why should it not be competent to decide the same issue provisionally?).

39)

See §§1.02[B][1] *et seq*.

40)

Nor is there reason to think that disputes over provisional relief involve issues that are not suited for the arbitral process. On the contrary, requests for provisional measures involve the same sorts of factual and legal issues that the parties' underlying disputes concern. There is no basis for concluding that arbitrators are ill-suited to resolve such disputes.

41)

See §1.02[B][5].

42)

See §1.02_[B]; §8.03[B][1].
43)

See §17.02[A][3][b]; §17.02[A][5].
44)

See §17.02[A][3][b]; §17.02[B].
45)

See §1.01[C].
46)

See §15.06.
47)

See §17.02[C].
48)

UNCITRAL Model Law, Art. 17. *See* H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 530-33 (1989); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 69 (2005); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 326 (2020).
49)

These limits are discussed below. *See* §17.02[A][5][c].
50)

See §17.02[A][5][c]; Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 315 (2020).
51)

See §17.02[A][5][c]; §§17.02[G][2] *et seq*.
52)

UNCITRAL Model Law, 2006 Revisions, Art. 17(1). *See* Foster & Elsberg, *Two NewInitiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Lawon International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Principles*, 3(5) Transnat'l Disp. Mgt (2006); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 318-19 (2020); Sanchez, *Applying the Model Law's Standard for Interim Measures in International Arbitration*, 37 J. Int'l Arb. 49 (2020).
53)

See §17.02[A][3][b][i]; §17.02[A][5][c].
54)

UNCITRAL Model Law, 1985, Art. 17; UNCITRAL Model Law, 2006 Revisions, Art. 17. *See alsoKastner v. Jazon* [2004] EWCA Civ 1599 (English Ct. App.); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 530 (1989).
55)

Biwater Gauff (Tanzania) Ltd v. Tanzania, *Procedural Order No. 3 in ICSID Case No. ARB/05/22 of 29 September 2006*, ¶135. *See alsoNova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶226 (Article 47 of ICSID Convention is express grant by states to arbitral tribunals of authority to issue recommendations to sovereign states).
56)

See, e.g., Baker & Davis, *Arbitral Proceedings Under the UNCITRAL Rules: The Experience of the Iran–United States Claims Tribunal*, 23 Geo. Wash. J. Int'l L. Econ. 267, 335-36 (1989); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 530 (1989); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 72 (2005) ("The language of Article 17 itself recognizes that it is a non-mandatory provision, and therefore the parties may choose to modify the power of the tribunal to grant interim measures through an agreement, but this status does not allow the parties to expand the tribunal's authority"); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 321 (2020); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 58 n.42 (1993) ("in the absence of a relevant provision of national law to the contrary, arbitrators have an inherent or implied power, as arbitrators, to grant interim relief").
57)

See §1.02[B].

58)

See §17.02[A][3][a], for a discussion of the Concordat and its text.

59)

Swiss Law on Private International Law, Art. 183. *See* Berti, in S. Berti *et al*. (eds.), *International Arbitration in Switzerland* Art. 183 (2000); C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, aus Schweizerischer Sicht, mit Rechtsvergleichenden Aspekten* (2011); Habscheid, *Einstweiliger Rechtsschutz durch Schiedsgerichte nach dem Schweizerischen Gesetz über das Internationale Privatrecht (IPRG)*, IPRax 134 *et seq.* (1989); Sangiorgio, *Der Vorsorgliche Rechtsschutz in der Internationalen Schiedsgerichtsbarkeit nach* Art. 183 (1996).

60)

See B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶¶1241 *et seq*. (3d ed. 2015); Berti, in S. Berti *et al*. (eds.), *International Arbitration in Switzerland* Art. 183, ¶¶1 *et seq*. (2000).

61)

See Swiss Federal Council, *Modification de la Loi Fédérale sur le Droit International Privé (Arbitrage International): Rapport sur les Résultats de la Procédure de Consultation* 11 (2018).

62)

SeeSwift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1134 (3d Cir. 1972) (parties' agreement did not authorize tribunal to award provisional relief). *See alsoCharles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (AAA Rules held not to permit tribunal-ordered provisional measures); *Recyclers Ins. Group Ltd v. Ins. Co. of Am.*, 1992 WL 150662 (E.D. Pa.) (construing arbitration clause as not granting authority to order interim relief).

63)

See, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015) ("The benefit of having the arbitrator's decision is particularly important given that arbitrators are generally afforded greater flexibility in fashioning remedies than are courts. 'Where an arbitration clause is broad,' as it is here, 'arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself.' '[I]t is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting them from fashioning awards or remedies to ensure a meaningful final award.'"); *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975 (9th Cir. 2010); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F.App'x 39, 44 (4th Cir. 2006) ("arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction"); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (absent contrary provision in state law or parties' agreement, tribunal may award interim injunctive relief); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, 306 (2d Cir. 1982) ("Under New York law arbitrators have power to fashion relief that a court might not properly grant"); *Bank Leumi, USA v. Miramax Distrib. Serv., LLC*, 2018 WL 7568361, at *9 (C.D. Cal.) ("Nevertheless, since the arbitrator is vested with the authority to issue interim relief measures and interpret the scope of his or her jurisdiction, the Court must abstain from making such determinations about interim relief before the arbitrator accepts control over the parties' dispute"); *Jiaxing Super Lighting Elec. Appliance Co. v. Lunera Lighting, Inc.*, 2018 WL 6199681, at *1 (N.D. Cal.) ("'District courts within the Ninth Circuit have consistently followed [*Simula*'s] holding' that 'once a court determines that all disputes are subject to arbitration pursuant to a binding arbitration clause, it is improper for a district court to grant preliminary relief where provisional relief is available from an arbitral tribunal'"); *Commodities & Minerals Enter. Ltd v. CVG Ferrominera Orinoco, CA,* 2018 WL 4583484, at *4 (S.D. Fla.); *Sharp Corp. v. Hisense USA Corp.*, 292 F.Supp.3d 157, 182 (D.D.C. 2017); *Johnson v Dentsply Sirona Inc.*, 2017 WL 4295420, at *4 (N.D. Okla.); *Grigsby v. DC 4400,LLC*, 2016 WL 7115903, at *6 (C.D. Cal.); *Bowers v. N. Two Cayes Co. Ltd*, 2016 WL 3647339, at *2 (W.D.N.C.) ("An arbitrator has the power to grant preliminary injunctive relief, and district courts have the power to confirm and enforce such awards of equitable relief"); *Ecopetrol SA v. Offshore Exploration & Prod. LLC*, 46 F.Supp.3d 327, 343 (S.D.N.Y. 2014) ("The arbitral panel was well within the scope of its authority when it concluded that the broad, mandatory arbitration clause contained in the Stock Purchase Agreement gave the panel jurisdiction to issue the Supplemental Interim Award, which resolved an issue implicating several provisions of the Stock Purchase Agreement"); *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F.Supp.2d 926, 937 (N.D. Cal. 2003) ("There is no question that an arbitration panel has the authority to require escrow to serve as security for an ultimate answer [which] may be either derived explicitly from the arbitration agreement or implicitly from the panel's power to ensure the parties receive the benefit of their bargain"); *Meadows Indem. Co. Ltd v. Arkwright Mut. Ins. Co.*, 1996 WL 557513 (E.D. Pa.); *Konkar Maritime Enters., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267, 271 (S.D.N.Y. 1987); *Compania Chilena de Navegacion Interoceanica SA v. Norton*, *Lilly & Co.*, 652 F.Supp. 1512, 1517 (S.D.N.Y. 1987); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro*, 577 F.Supp. 616, 625 (W.D. Mo. 1983). *See also J. Brooks Sec., Inc. v. Vanderbilt Sec., Inc.*, 484 N.Y.S.2d 472, 474 (N.Y. Sup. Ct. 1985); *Shay v. 746 Broadway Corp.*, 409 N.Y.S.2d 69, 70 (N.Y. Sup. Ct. 1978).

64)

Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (1st Cir. 2010).

65)

Pac. Reins. Mgt Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1022-23 (9th Cir. 1991).

66)

See §1.04[B][1][e]; §2.01_[A][2]; §5.01[C][2].

67)

See Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (1st Cir. 2010); *Toyo Tire Holdings of Am. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975 (9th Cir. 2010); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F.App'x 39, 44 (4th Cir. 2006); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Johnson v. Dentsply Sirona Inc.*, 2017 WL 4295420, at *4 (N.D. Okla.); *Ecopetrol SA v. Offshore Exploration & Prod. LLC*, 46 F.Supp.3d 327 (S.D.N.Y. 2014) (arbitral tribunal had power to grant supplemental relief pursuant to ICDR Rules); *Yahoo! Inc. v. Microsoft Corp.*, 983 F.Supp.2d 310 (S.D.N.Y. 2013); *Konkar Maritime Enter., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267 (S.D.N.Y. 1987); *Compania Chilena de Navegacion Interoceanica SA v. Norton, Lilly & Co.*, 652 F.Supp. 1512 (S.D.N.Y. 1987); *S. Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692 (S.D.N.Y. 1985).

68)

Charles Constr. Co. v. Derderian, 586 N.E.2d 992 (Mass. 1992). *See alsoGilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (U.S. S.Ct. 1991); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003). *CompareSwift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972); *Kingstown Corp. v. Black Cat Cranberry Corp.*, 65 Mass.App.Ct. 154, 156 (Mass. App. Ct. 2005).

69)

See, e.g., Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 Tulane L. Rev. 1519, 1535-36 (1991) ("By expressly consenting to the arbitration of their dispute, the parties implicitly accord to the arbitrators a general grant of power to exercise any authority necessary to reach a determination on the merits of the dispute"); Hoellering, *The Practices and Experience of the American Arbitration Association*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 31 (1993) ("The authority of arbitrators to grant conservatory and provisional measures stems from their inherent powers to conduct the arbitral proceedings and, more specifically, any additional authority granted to them in the contract between the parties").

70)

See §17.03[D].

71)

See, e.g., California Code of Civil Procedure §§1297.91 *et seq.*, 1297.171; Texas Civil Practice & Remedies Code Annotated §172.083(1).

72)

U.S. Revised Uniform Arbitration Act, §8(b) (2000).

73)

English Arbitration Act, 1996, §38(4). *See* R. Merkin, *Arbitration Law*¶¶14.57 *et seq*. (1991 & Update March 2019).

74)

See English Arbitration Act, 1996, §38(6). The Arbitration Act also grants arbitral tribunals seated in England the power to order security for costs. *See id.* at §38(3); §17.02[G][4][e].

75)

English Arbitration Act, 1996, §§38(1) *et seq*. *See also id.* at §48.

76)

See R. Merkin, *Arbitration Law*¶¶14.46 *et seq*., 14.63 (1991 & Update October 2015). *See alsoCetelem SA v. Roust Holdings Ltd* [2005] EWCA Civ 618 (English Ct. App.); *Co. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.); *GigSky APS v. Vodafone Roaming Serv. Sarl* [2015] EWHC 4047 (Comm) (English High Ct.); *Euroil Ltd v. Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm) (English High Ct.); *Krasner v. Jason* [2004] EWHC 592 (Ch) (English High Ct.).

77)

See §17.01; §17.02_[A][1]; §17.02_[A][4]; §17.02[B].

78)

See §17.02[B].

79)

See §§17.02[A][3][b][i]*et seq*.

80)

SeeJudgment of 7 October 2004, *Otor Participations v. Carlyle Holdings*, 2005 Rev. Arb. 737 (Paris Cour d'Appel) (arbitrators had authority to decide request for provisional measures); *Judgment of 8 October 1998, Akzo Nobel Co. v. SA Elf Atochem,* 1999 Rev. Arb. 58 (Versailles Cour d'Appel) (arbitrators have authority to order provisional measures once tribunal is constituted); *Judgment of 14 May 1986, Industrial Phosphoric Acid & Fertilizer Co. v. Indus. Fertilizer Trade,* 1986 Rev. Arb. 55 (Paris Cour d'Appel) (provisional measures issued by arbitrator are compatible with arbitral proceedings); *Judgment of 7 May 1986, Saint-Wandrille Fertilizer Co. v. Trans Agric. Inv. Co.,* 1986 Rev. Arb. 565 (Rouen Cour d'Appel).

81)

French Code of Civil Procedure, Art. 1468.

82)

See German ZPO, §1041 (superseding prior German ZPO, §1036); Austrian ZPO, §593(1); Singapore International Arbitration Act, §12(1); Australian International Arbitration Act, Schedule 2, Art. 17; Canadian Commercial Arbitration Act, Art. 17; Japan Arbitration Law, §22B; Indian Arbitration and Conciliation Act, §17(1); New Zealand Arbitration Act, Schedule 1, Art. 17 *et seq*.

83)

See Netherlands Code of Civil Procedure, Art. 1043b; Swedish Arbitration Act, §25(4) ("Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the other party must undertake a certain interim measure to secure the claim which is to be tried by the arbitrators"); Brazilian Arbitration Act, §22B ("If arbitration proceedings have already been commenced, the request for the injunctive and urgent relief will be directly addressed to the arbitrators"); Indonesian Law on Arbitration and Alternative Dispute Resolution, Art. 32.

84)

See Argentine Civil and Commercial Code, Arts. 21, 38-39 (repealing Argentine National Code of Civil and Commercial Procedure, Art. 75); Austrian ZPO, §593(1).
85)

See §17.02[A][4].
86)

See Chinese Arbitration Law, Art. 68; Italian Code of Civil Procedure, Art. 818 ("The arbitrators may not grant attachment or other interim measures of protection"); Thai Arbitration Act, §16 (arbitrators lack authority to order interim relief). *See alsoHemofarm DD v. Jinan Yongning Pharm. Co.*, [2008] Minsi Tazi 11 (Chinese S.Ct.) (award that dealt with property preservation interim measure applications which only court has jurisdiction to hear under Chinese law violated public policy because it impinged on judicial sovereignty of Chinese courts); *Judgment of 25 July 2019*, Case No. 76 (Bucharest Ct. App.) (annulling emergency arbitrator decision for asserted violation of mandatory Romanian law providing for exclusive jurisdiction of national courts to grant interim measures before registration of arbitration).
A Québec decision, *EkincilerDemir Ve Celik San, AS v. Bank of N.Y.*, [2007] QCCS 1615 (Québec Super. Ct.), questioned whether Québec law, and particularly Article 940(4) of the Québec Code of Civil Procedure, precludes arbitrators from granting interim measures. *CompareMines Inc. v. Canadian Royalties Inc.*, [2012] QCCA 385 (Québec Cour d'Appel) (suggesting that arbitrators do possess power to grant orders for injunctive relief when doing so is not contrary to Québec Code of Civil Procedure). *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 88-90 (2015).
87)

See, e.g., Egyptian Law Concerning Arbitration in Civil and Commercial Matters, Art. 24(1) (arbitral tribunal may order interim measures only if power is expressly conferred by parties).
88)

See, e.g., 2013 UNCITRAL Rules, Art. 26; 1976 UNCITRAL Rules, Art. 26; 2017 ICC Rules, Art. 28; 2012 ICC Rules, Art. 28; 1998 ICC Rules, Art. 23; 1988 ICC Rules, Art. 8(5); 2016 SIAC Rules, Art. 30; 2013 AAA Rules, Rule 37; 2020 LCIA Rules, Art. 25; 2018 HKIAC Rules, Art. 23; 2006 ICSID Rules, Rule 39; 2019 JCAA Rules, Art. 26; 2017 SCC Rules, Art. 37(1).
89)

1976 UNCITRAL Rules, Art. 26(1). *See* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 455-60 (2016); Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 Am. Rev. Int'l Arb. 123, 128 (2000).
90)

1976 UNCITRAL Rules, Art. 26(1).
91)

See §17.02[A][3][b][i].
92)

Article 26(1) of the UNCITRAL Rules provides merely that an order for the conservation of goods which are in dispute is one example of permissible provisional relief, not suggesting that this is the only form of permissible relief. On the contrary, Article 26(1), as well as sensible commercial practice, permits the arbitral tribunal to take any measures "it deems necessary" regarding the subject matter of the dispute. Hence, if the subject matter of the dispute is a claim for money damages, a tribunal may take steps to secure that claim, including preventing dissipation of assets, just as a tribunal may order preservation or restoration of a contractual status quo if the subject matter of the arbitration is a contract or rights under a contract. For differing suggestions, *see* Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 Am. Rev. Int'l Arb. 123, 128 (2000); Redfern, *Arbitration and the Courts: Interim Measures of Protection: Is the Tide About to Turn?*, 30 Tex. Int'l L.J. 72, 80 (1995).
93)

2013 UNCITRAL Rules, Art. 26(1).
94)

Id. at Art. 26(2). *See* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463-65 (2016).
95)

See 2013 UNCITRAL Rules, Art. 26(3). *See* §17.02[G][3][b][i].
96)

See 2013 UNCITRAL Rules, Art. 26(3). *See* §17.02[G][3][b][iv]. With respect to measures to preserve evidence, the tribunal has discretion whether to consider these additional factors. 2013 UNCITRAL Rules, Art. 26(4).

97)

See id. at Art. 26(5).
98)

See id. at Art. 26(6).
99)

See id. at Art. 26(8).
100)

2017 ICC Rules, Art. 28. *See also* 2012 ICC Rules, Art. 28. As one commentary explains, "[t]he expression 'interim or conservatory measures' has not been defined, thus permitting the Arbitral Tribunal to construe those words as broadly as may be appropriate in each case." *See* Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 296 (2d ed. 2005).
101)

Compare 2017 ICC Rules, Art. 28, 2012 ICC Rules, Art. 28 *and* 1998 ICC Rules, Art. 23 *with* 1988 ICC Rules, Art. 8(5). *See* Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 24 (2000); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 46 (1993) ("arbitrators themselves are not expressly authorized to issue [provisional] measures"). Ironically, the 1922 version of the ICC Rules contained an express grant of authority to impose provisional measures, which was omitted in later versions. *See* 1922 ICC Rules, Art. XVIII ("In all cases, the arbitrators, at the request of either of the interested parties, shall have the right to render a provisional decision, providing for such measures of preservation as may be indispensable …"). The original ICC approach was derived from then-prevailing U.S. and Argentine institutional rules. Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 45 n.1 (1993).

102)

2017 ICC Rules, Art. 29. As of 30 June 2020, there have been 117 applications for "Emergency Measures" under the ICC Rules since the ICC Emergency Arbitrator provisions were introduced in 2012, with 23 of these applications being filed in 2019. *See* ICC, *ICC Celebrates Case Milestone, Announces Record Figures for 2019*, ICC News (9 Jan. 2019).
103)

See 2017 ICC Rules, Appendix V, Arts. 1, 5.
104)

Id. at Art. 29. *See also* Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149 (2016); Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering An Enforceable Decision?*, 31 Arb. Int'l 283 (2015).
105)

This has been interpreted broadly, and SIAC tribunals have issued (whether as emergency interim relief or otherwise) anti-suit orders, injunctions prohibiting parties from selling shares in a company, calling on a bond, calling on a bank guarantee, orders to make an interim payment, orders to permit the sale of deteriorating goods, and orders directing release of a vessel. J. Choong, M. Mangan & N. Lingard, *A Guide to the SIAC Arbitration Rules* ¶13.06 (2d ed. 2018); P. Sandosham *et al.* (eds.), *A Practical Guide to the SIAC Rules* 258 (2018).
106)

P. Sandosham *et al.* (eds.), *A Practical Guide to the SIAC Rules* 257 (2018).
107)

2016 SIAC Rules, Art. 27(e).
108)

Id. at Art. 27(h).
109)

Id. at Art. 27(j).
110)

Id. at Art. 27(k).
111)

Id. at Schedule 1, ¶¶3 *et seq*. After an application is made, the President of the SIAC Court decides whether to accept the application. If accepted, the Emergency Arbitrator must be appointed within a day of the acceptance of the application and payment of administrative fees and deposits. Challenges to the appointment of the Emergency Arbitrator shall be made within two days of the communication of the appointment to the parties. The Emergency Arbitrator must establish a schedule for the application to be heard within two days from the appointment, and should make his or her interim order within 14 days from the date of appointment.
112)

J. Choong, M. Mangan & N. Lingard, *A Guide to the SIAC Arbitration Rules* ¶13.21 (2d ed. 2018); P. Sandosham *et al.* (eds.), *A Practical Guide to the SIAC Rules* 265 (2018).

113)

2016 SIAC Rules, Schedule 1, ¶8.
114)

Id. at Schedule 1, ¶10.
115)

SIAC, *Annual Report* (2019) (94 emergency arbitrator applications have been made since provision was introduced in 2010, including 10 applications in 2019).
116)

J. Choong, M. Mangan & N. Lingard, *A Guide to the SIAC Arbitration Rules* ¶13.20 (2d ed. 2018).
117)

See 2020 LCIA Rules, Arts. 25(1)(a)-(c) ("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: (a) to order any Respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute … ; (b) to order the preservation, storage, sale or other disposal of any moneys, documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and (c) 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").
118)

Id. at Art. 25(2).
119)

Id. at Art. 9(4). Once appointed, the emergency arbitrator "may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances." *Id.* at Art. 9(7).
120)

Id. at Arts. 9(8), (11).
121)

See Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 276-86 (2018); Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149 (2016); Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering An Enforceable Decision?*, 31 Arb. Int'l 283 (2015).
122)

Early versions of the AAA Rules and other AAA rules omitted reference to interim relief. *SeeCharles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992).
123)

See 2013 AAA Rules, Rule 37(a) ("whatever interim measures he or she deems necessary").
124)

See 2014 ICDR Rules, Art. 6(4) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property"). *See alsoOpenTLD, BV v. ICANN, Emergency Award in ICDR Case No. 01-15-0004-1379 of 24 August 2015*.
125)

See 1999 SCC Rules, Arts. 31(1)-(2) ("(1) Unless the parties have agreed otherwise, the Arbitral Tribunal may, during the course of the proceedings and at the request of a party, order a specific performance by the opposing party for the purpose of securing the claim which is to be tried by the Arbitral Tribunal. The Arbitral Tribunal may order the requesting party to provide reasonable security for damage which may be inflicted on the opposing party as a result of the specific performance in question. (2) A request addressed by a party to a judicial authority for interim measures shall not be deemed to be incompatible with the arbitration agreement or these Rules.").
126)

2007 SCC Rules, Art. 32(1). The 2017 SCC Rules provide for interim measures in the same manner. 2017 SCC Rules, Art. 37.

127)

2017 SCC Rules, Appendix II, Art. 1. The SCC's emergency arbitrator provision was reportedly used eight times between the time it was adopted in 2010 and 2012. In 2019, emergency arbitrators were appointed eight times by the SCC, in comparison to four appointments in 2018, three appointments in 2017 and 13 appointments in 2016. *See* SCC Statistics, available at www.sccinstitute.com. *See* J. Lundstedt, *SCC Practice: Emergency Arbitrator, Decisions Rendered in 2010*. *See alsoMohammed Munshi v. Mongolia*, *Award on Emergency Measures in SCC Case No. 2018-007 of 5 February 2018*, ¶39 ("This appears to be a broad rule requiring a broad construction. Had the SCC Rules intended to limit the interim measures to a specific subset, the SCC Rules would have set out a list of specific interim measures that a tribunal or emergency arbitrator could grant. Instead, the SCC Rules uses the word 'any.' The intention of the SCC Rules is therefore to give an arbitral tribunal or emergency arbitrator a broad discretion to grant interim measures if warranted by the issues presented in the case.").
128)

2017 CIETAC Investment Rules, Art. 23. The 2005 version of the CIETAC Rules provided in its Article 17 and 18 application to interim measures only by national courts in the cases of preservation of property and protection of evidence.
129)

See 2014 ICDR Rules, Art. 24; 2012 Swiss Rules, Art. 26; 2018 HKIAC Rules, Art. 23(2); 2019 JCAA Rules, Art. 26(1); 2019 Milan Rules, Art. 26(2); 2020 WIPO Rules, Art. 48.
130)

See, e.g., *Interim Award in ICC Case No. 7544,* 11(1) ICC Ct. Bull. 56 (2000) ("Article 8.5 of the Rules does not prevent a party from applying to the arbitrators for an interim payment on account"); *Rockwell Int'l Sys., Inc. v. Iran*, *Award in IUSCT Case No. ITM 20-430-1 of 6 June 1983*, 2 Iran–US CTR 369, 371 (1983) ("[T]he tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the parties and to ensure its jurisdiction and authority are made fully effective. … This inherent power is in no way restricted by the language in Article 26 of the Tribunal Rules.").
131)

See §17.02[A][4][b].
132)

See, e.g., *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81 (2000); *Final Award in ICC Case No. 8118,* 11(1) ICC Ct. Bull. 69 (2000); *Partial Award in ICC Case No. 8113,* 11(1) ICC Ct. Bull. 65 (2000); *Interim Award in ICC Case No. 7692,* 11(1) ICC Ct. Bull. 62 (2000); *Award in ICC Case No. 7589*, 11(1) ICC Ct. Bull. 60, 61 (2000); *Final Award in ICC Case No. 7536,* 11(1) ICC Ct. Bull. 52 (2000); *Final Award in ICC Case No. 7210*, 11(1) ICC Ct. Bull. 49, 50 (2000).
133)

See, e.g., *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972); *Charles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (former AAA Construction Arbitration Rules do not grant power to order provisional relief).
134)

See §17.02[A][3][b]; §17.02[C].
135)

See §17.02[A][4][a].
136)

The proposed amendments to the ICSID Rules adopt a different approach. Proposed Rule 46 sets out the circumstances and procedure under which provisional measures may be granted by a tribunal. *See* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).
137)

See Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 86 (2005) (arbitral tribunal has authority only under Article 17 of Model Law to issue provisional measures against parties to arbitration); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 338 (2020); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993).
138)

D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 517 (2d ed. 2013).

139)

See, e.g., *Final Award in ICC Case No. 7828*, cited in Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 25 (2000).
In litigation, as distinguished from arbitration, parties may seek attachment of funds owned by adverse parties, or debts owed to them. An attachment is intended to preserve sums necessary to satisfy a final judgment (of damages or legal costs) against the owner of the property and, in particular, to prevent the owner or others from removing the property from the territory of the forum court. Unlike most other provisional measures, an attachment is usually directed against third parties – such as banks or securities brokers, holding the defendants' property – or persons owing debts to the defendant. *See, e.g.*, *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977).

140)

See New York Convention, Arts. V(1)(a), (d); UNCITRAL Model Law, Arts. 34(2)(a)(i), (iii).
141)

UNCITRAL Model Law, Art. 17 (emphasis added). *See* Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 338 (2020); Sanchez, *Applying the Model Law's Standard for Interim Measures in International Arbitration*, 37 J. Int'l Arb. 49 (2020). *See also* Austrian ZPO, §593(1) ("against another *party*") (emphasis added); Swedish Arbitration Act, 1999, §25(4) ("other *party* must undertake") (emphasis added); Greek International Commercial Arbitration Law, Art. 17(1) ("order any *party*") (emphasis added).
142)

Belgian Judicial Code, Art. 1691 (emphasis added). *See also* French Code of Civil Procedure, Art. 1468.
143)

See §10.01[A]. It is theoretically possible that national law could confer the power to order provisional relief against third parties to the arbitral process. Compare, for example, the authority of tribunals seated in the United States under the FAA to issue subpoenas to third parties. *See* §16.02[B][2]. No state appears to have taken such a step, which would require either mechanisms for third parties to be heard by the arbitral process (which would raise grave issues of practicality) or ignoring the submissions of third parties. Neither possibility is likely.
144)

See, e.g., French Code of Civil Procedure, Arts. 1468-1469; Belgian Judicial Code, Art. 1691; McDonnell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 Colum. J. Transnat'l L. 273, 283 n.56 (1983-84). *CompareCo. A v. Co. B,* [2018] HKCU 3575, ¶41 (H.K. Ct. First Inst.) (court has power to grant provisional measures in aid of arbitration against third parties (not subject to arbitration agreement)).
145)

Swiss Law on Private International Law, Art. 183(2). *See also* Berti, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 183, ¶16 (2000) ("arbitral tribunal has no possibilities to sanction its enforcement"); von Segesser, in G. von Segesser *et al*. (eds.), *International Arbitration in Switzerland*§6.05[B] (2d ed. 2013) ("a party should be entitled to apply to the courts for enforcement assistance, subject to prior approval by the arbitral tribunal").
146)

See, e.g., Bhasin, *The Grant of Interim Relief Under the Indian Arbitration Act of 1996*, in A. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* 93, 96 (2000) ("arbitral tribunal does not have the power to enforce its orders"); Esko, *The Arbitral Proceedings*, in M. Savola (ed.), *Lawand Practice of Arbitration in Finland* 43-44 (2004) (arbitrator may recommend provisional measures but may not impose penalty to require compliance); Gómez, *Article 17H: Recognition and Enforcement*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 453-72 (2020); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993) ("The most important and obvious such difference [between court-ordered and tribunal-ordered provisional measures] is that orders given by arbitrators are not self-executing, like those of courts, and must generally take the form of directions to the parties to perform or refrain from performing certain acts").
147)

See §22.01_[B]; §24.02.

148)

The Indian Arbitration and Conciliation (Amendment) Act, 2015, provides arbitral tribunals seated in India with the same powers as Indian civil courts to grant interim relief. The legislation, which amends §17 of the original 1996 Act, provides that interim orders made by an arbitral tribunal seated in India are directly enforceable as orders of the principal civil courts (which includes the Indian High Court). This power was not extended to foreign-seated arbitrations, where any provisional measures ordered by a foreign-seated tribunal must be enforced by an Indian court under §9 of the 1996 Act. *See* Indian Arbitration and Conciliation Act, 1996, §§9, 17 and Indian Arbitration and Conciliation Act (Amendment) Act, 2015, §10. *See alsoRaffles Design Int'l India Pvt Ltd v. Educomp Prof. Ed. Ltd*, OMP(I)(Comm) 23/2015 (Delhi High Ct. 2016); *Aircon Beibars FZE v. Heligo Charters Pvt Ltd*, Comm. Arb. Pet. 269/2017 (Bombay High Ct. 2017).
149)

See Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993).
150)

See §15.10.
151)

See id.
152)

See id.; §17.03[B].
153)

Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 24 (2000). *See also* Schwartz, *Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993) ("Ultimately, of course, the arbitrators' greatest source of coercive powers relies in their position as arbiters of the merits of the dispute between the parties. Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims.").
154)

For example, if a dispute concerns ownership of disputed property, which cannot easily be reclaimed once transferred to third parties, a litigant may well be prepared to purport effectively to resolve the parties' dispute by proceeding with a forbidden transfer.
155)

See §1.02_[B][1]; §§13.04[A][1] *et seq.*; §25.02; §§25.04[B] *et seq*. *See also* Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please*, in A. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* 101, 103 (2001).
156)

UNCITRAL Model Law, Art. 17 (emphasis added). *See also* Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 314-18 (2020); §17.02[A][3][b][i].
157)

N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶7.14 (6th ed. 2015); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 314-18 (2020) ("tribunals should frame the interim measures they grant as temporary in nature and aimed at maintaining or restoring the status quo or protecting the arbitral process, assets or evidence, in accordance with the Model Law limitations").
158)

Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 78 (2005).
159)

See id. at 77 (2005) (narrower version of Article 17 prevailed in drafting, and "Model Law should only authorise a tribunal to issue a measure related to the subject matter of the dispute"); Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 333 (2020) ("The best view is that, when the law of the seat mirrors the contents of article 17 of the Model Law, the tribunal is not at freedom to issue a measure which cannot reasonably be associated with any of the items comprising the list under ¶2 [of Article 17], even if the applicable arbitration rules envisage this possibility"); UNCITRAL, *Report on the Work of Its Eighteenth Session*, U.N. Doc. A/40/17, ¶168, XVI Y.B. UNCITRAL 3 (1985); UNCITRAL, *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 9, ¶4 (1985) ("range of interim measures of protection covered by article 9 of the Model Law [available from national courts] is considerably wider than that under article [17, from arbitral tribunals]").

160)

The drafting history refers generally to the range of measures available for provisional relief, which can readily be understood as a reference to the inherent limitation of the arbitral process to provide relief directed towards the parties to the arbitration, not towards third parties. H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 332-33 (1989) ("Article 9 is not limited to any particular kind of interim measures. Thus it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets; measures required from third parties; and enforcement of any interim measures ordered.").
161)

Katran Shipping Co. v. Kenven Transp. Ltd, [1992] 1 HKC 538 (H.K. Ct. First Inst.) (interim relief issued by court need not be limited to preserving subject matter of dispute).
162)

See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 517-18 (2d ed. 2013) (drafters left out phrase "in respect of the subject-matter of the dispute" from 2010 UNCITRAL Rules because "it was thought that a focus on the 'subject matter' of the dispute [was] overly restrictive, and that the purpose of interim measures has a broader focus than just the arbitral process"; provisional measures listed are only examples and do not limit arbitral tribunal's power to order other measures that would be appropriate in light of particular circumstances).
163)

UNCITRAL Model Law, Art. 17(1). *See also* Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures,* in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 328-29 (2020).
164)

See UNCITRAL, *Report on the Work of Its Thirty-Ninth Session*, U.N. Doc. A/61/17, ¶93 (2006).
165)

English Arbitration Act, 1996, §38(4).
166)

See R. Merkin, *Arbitration Law*¶14.58 (1991 & Update March 2019); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶4-085, 5-074 *et seq.* (24th ed. 2015).
167)

See English Arbitration Act, 1996, §25(4). This includes agreements incorporating institutional arbitration rules, which in turn grant arbitrators authority to order provisional measures. *See* §17.02[A][3][b][iv].
168)

See, e.g., Swedish Arbitration Act, 1999, §25(4) ("interim measures to secure the claim"); Indian Arbitration and Conciliation Act, Art. 17(1) (same); Japanese Arbitration Law, Art. 24(1) ("necessary *in respect of the subject matter of the dispute*") (emphasis added); Indonesian Arbitration Law, Art. 32 (arbitral tribunals not authorized to order security for costs). *See also* French Code of Civil Procedure, Art. 1468 (only courts may order conservatory attachments and judicial security); Netherlands Code of Civil Procedure, Art. 1043b (arbitral tribunal cannot order attachment of assets).
169)

See, e.g., UNCITRAL Model Law, Art. 17; English Arbitration Act, 1996, §25; Swiss Law on Private International Law, Arts. 183, 184; Japanese Arbitration Law, Art. 24.
170)

See, e.g., 2013 UNCITRAL Rules, Art. 26(1); 2014 ICDR Rules, Art. 24; 2020 LCIA Rules, Art. 25.
171)

See, e.g., 2017 ICC Rules, Art. 28(1) (no provisional measures from arbitral tribunal until file has been transmitted to tribunal, following payment of advances on costs). *See also* Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 296-99 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *Secretariat's Guide to ICC Arbitration* ¶3-1034 (2012); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 62-63 (1993).

172)

See U.S. Revised Uniform Arbitration Act, §8 comment 2 (2000) ("interim judicial remedies … can preempt the arbitrator's authority to decide a case and cause delay, cost, complexity and formality through intervening litigation process, but without such protection an arbitrator's award may be useless").
As discussed above, constitution of an arbitral tribunal may take weeks or months, particularly if one party is obstructive. *See also* §12.03; *Judgment of 25 July 2019*, Case No. 76 (Bucharest Ct. App.) (annulling emergency arbitrator decision for asserted violation of mandatory Romanian law and public policy that provides for exclusive jurisdiction of national court to grant interim measures before registration of arbitration); *Judgment of 7 June 2018*, Case No. 47 (Bucharest Ct. App.) (annulling emergency arbitrator decision for violation of arbitration agreement requirement of three-person tribunal, effectively requiring parties to opt-in to emergency arbitrator provisions despite no such requirement under applicable institutional rules).

173)

See §17.02_[E]; §17.04.

174)

See §17.02[A][4]. *See also* Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35 Arb. Int'l 441 (2019); Boog, *Swiss Rules of International Arbitration: Time to Introduce An Emergency Arbitrator Procedure?*, 28 ASA Bull. 462 (2010); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 276-86 (2018); Hanessian & Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, 27 Am. Rev. Int'l Arb. 215 (2016); Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149, 150-51 (2016); Muller & Pearson, *Waving the Green Flag to Emergency Arbitration Under the Swiss Rules: The* Sauber *Saga*, 33 ASA Bull. 810 (2015); Paraguacuto-Mahéo & Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field – The French Perspective*, 40 Fordham Int'l L.J. 749 (2017); Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering An Enforceable Decision?*, 31 Arb. Int'l 283 (2015); Shaughnessy, *Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 J. Int'l Arb. 337 (2010); Toll, *Romania: National Courts Take a Conservative Position Towards Emergency Arbitrator Orders*, 20(1) ICC Ct. Bull. 24 (2020).

175)

See Gaillard & Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experience*, 20 Arb. Int'l 13 (2004); Hausmaninger, *The ICC Rules for A Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration*, 7 ICSID Rev. 82 (1992); Paulsson, *A Better Mousetrap: 1990 ICC Rules for A Pre-Arbitral Referee Procedure*, 18 Int'l Bus. L. 214 (1990).
Between 1990 and 2010, the ICC registered approximately 10 requests under the pre-arbitral referee rules, the first being in 2001. *See* Toulson, *Van Houtte Acts as Emergency Referee*, Global Arb. Rev. (9 Dec. 2010).

176)

2006 ICDR Rules, Art. 37 ("Emergency Measures of Protection," involving appointment of special "emergency arbitrator"). *See also* 2014 ICDR Rules, Art. 6; Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 Arb. Int'l 559, 560-63 (2016); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 276-86 (2018); Goldstein, *A Glance into History for the Emergency Arbitrator*, 40 Fordham Int'l L.J. 779 (2017).

177)

See Dunning *et al.*, *Using Article 37 of the ICDR International Arbitration Rules: Obtaining Emergency Relief*, 62 Disp. Resol. J. 68 (2007); M. Gusy, J. Hosking & F. Schwarz, *A Guide to the ICDR International Arbitration Rules* 304-11 (2011); Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149, 150 (2016); Lemenez & Quigley, *The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data*, 63 Disp. Resol. J. 60 (2008); Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63 Disp. Resol. J. 56 (2008); Sheppard & Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, 61 Disp. Resol. J. 75 (2006).

178)

2012 ICC Rules, Art. 29(1). *See also* 2017 ICC Rules, Art. 29. *See* Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 276-86 (2018); de Planque, *Seven Years Since "Emergency" Was Declared by ICC: Do We Know What A Real Emergency Is?*, Practical L. Arb. Blog (28 Mar. 2019).

179)

The Emergency Arbitrator provisions are incorporated into the parties' arbitration agreement by virtue of their incorporation of the relevant institutional rules. If the parties wish to exclude recourse to the Emergency Arbitrator provisions they must expressly opt out. 2017 ICC Rules, Standard ICC Arbitration Clause Without Emergency Arbitrator ("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.").
180)

2017 ICC Rules, Art. 29(6)(b).
181)

2016 SIAC Rules, Art. 30(2) & Schedule 1; 2020 LCIA Rules, Art. 9B; 2012 Swiss Rules, Art. 43; 2018 HKIAC Rules, Art. 23, Schedule 4 ("Emergency decisions on interim measures" involving appointment of special "emergency arbitrator"); 2016 ACICA Rules, Art. 33(1); 2017 SCC Rules, Appendix II, Art. 8.
182)

2014 ICDR Rules, Art. 6(5); 2020 LCIA Rules, Art. 9B; 2017 SCC Rules, Appendix II, Art. 1(2). *See* Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149, 150-51 (2016).
183)

See, e.g., 2017 ICC Rules, App'x V, Art. 2(6) ("An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application"); 2016 SIAC Rules, Schedule 1, ¶6 ("An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties"); 2017 SCC Rules, App'x II, Art. 4(4) ("An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties").
184)

2014 ICDR Rules, Art. 6(5); 2016 SIAC Rules, Schedule 1, Art. 1(10); 2020 LCIA Rules, Art. 9B; 2018 HKIAC Rules, Art. 23(5); 2012 Swiss Rules, Art. 43; 2016 ACICA Rules, Art. 33(1); 2017 SCC Rules, Appendix II, Art. 9. *See also* Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 276-86 (2018).
185)

See 2017 ICC Rules, App'x V, Art. 6(4) (15 days); 2016 SIAC Rules, Schedule I, ¶9 (14 days); 2017 SCC Rules, App'x II, Art. 8(1) (five days). *Compare* 2014 ICDR Rules (no deadline).
186)

See, e.g., 2016 SIAC Rules, Schedule I, ¶8; 2017 SCC Rules, App'x II, Art. 1(2). *Compare* 2017 ICC Rules, Appendix V, Art. 6(1) (only as "order").
187)

See, e.g., 2017 ICC Rules, App'x V, Art. 6(8); 2017 SCC Rules, App'x II, Art. 9(2).
188)

The parties are free to exclude application of emergency arbitrator provisions. In practice, this seldom occurs.
189)

As noted above, there have been 117 applications for "Emergency Measures" under the ICC Rules since the ICC Emergency Arbitrator provisions were introduced in 2012, with 23 of these applications being filed in 2019. *See* ICC, *ICC Celebrates Case Milestone*, Announces Record Figures for 2019, ICC News (9 Jan. 2019). *See also* Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 Arb. Int'l 559, 560 (2016).
190)

2020 LCIA Rules, Art. 9A.
191)

2006 ICSID Rules, Rule 39(5). Despite the trend in international commercial arbitration towards emergency arbitrator mechanisms, ICSID has not proposed such a mechanism in its revised rules, assertedly because of "due process issues." *See* ICSID, *Proposals for Amendment of the ICSID Rules* 226 (Working Paper Vol. 3 2018).
192)

2017 CAS Rules, Rule 37; 2016 Italian Arbitration Association Rules, Art. 8.
193)

The institutional decision is clearly not an arbitral award (because the institution is not an arbitrator) nor a procedural order of an arbitral tribunal (for the same reason). It is unclear what the proper characterization of such an institutional decision would have, although it appears to be analogous in many respects to an expert determination. *See* §23.01.
194)

See §13.04[A].

195)

See §15.03.
196)

See §4.04_[B]; §11.05.
197)

See §23.07[A].
198)

See §17.02[A][3][b]; UNCITRAL Model Law, 1985, Art. 17; UNCITRAL Model Law, 2006 Revisions, Art. 17; Swiss Law on Private International Law, Art. 183.
199)

Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9, 234 (1992). *See alsoTeinver SA v. Argentina, Decision on Provisional Measures in ICSID Case No. ARB/09/1 of 8 April 2016*, ¶186 ("The Tribunal has the inherent jurisdiction and powers required to preserve the integrity of its own process and the duty to ensure that the Parties comply with their obligation to arbitrate fairly and in good faith"); *Commerce Group Corp. v. El Salvador*, *Decision on El Salvador's Application for Security for Costs in ICSID CaseNo. ARB/09/17 of 20 September 2012*, ¶45 (ICSID annulment committee "may, in the appropriate situation, use its inherent powers to order security for costs"); *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.*, [2012] QCCA 385 (Québec Cour d'Appel) ("It would be hard to believe that arbitrators would need specific authorization from the parties to grant provisional remedies. First, it would seem that the legislature could have explicitly excluded that power if it so desired. Second, §17 of the UN Model Law specifically allows for such measures."). *Compare* Egyptian Law Concerning Arbitration in Civil and Commercial Matters, Art. 24(1) (arbitral tribunal may order interim measures only if expressly authorized by parties).
200)

See §17.02[A][4].
201)

Compare Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 413 (2010) ("not convinced by the implied power theory").
202)

See §§17.02[A][1] *et seq*.
203)

According to the *travaux préparatoires*, Article 9 should neither "be read as precluding such exclusion agreements, [nor] be read as positively giving effect to any such exclusion." UNCITRAL, *Official Records of the General Assembly*, *Fortieth Session*, *Supplement No. 17*, U.N. Doc. A/40/17, Annex I, ¶97.
204)

New York Convention, Art. II(1); §17.02[A][2].
205)

See §17.02[A][3][b]; UNCITRAL Model Law, Art. 17 ("*Unless otherwise agreed* by the parties …") (emphasis added); English Arbitration Act, 1996, §38(1) ("*The parties are free to agree* on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings") (emphasis added); Swiss Law on Private International Law, Art. 183(1) ("*Unless the parties have agreed otherwise* …") (emphasis added); Indian Arbitration and Conciliation Act, Art. 17(1) ("*Unless otherwise agreed* by the parties …") (emphasis added); Japanese Arbitration Law, Art. 24(1) ("*unless otherwise agreed* by the parties") (emphasis added).
206)

See §17.02_[A][4]; 2017 ICC Rules, Art. 28(1) ("*Unless the parties have otherwise agreed* …") (emphasis added). *Compare* 2013 UNCITRAL Rules, Art. 26(9) ("A request … by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate …").
207)

See §17.02[A][3][b][i]; §17.02[C].
208)

See §17.02[A][3][b]; §17.02[B].
209)

The same analysis applies to the parties' agreement to arbitrate in a jurisdiction that does not expressly grant the arbitral tribunal the power to order provisional measures. As discussed above, a different conclusion applies where parties agree to arbitrate in a jurisdiction that denies arbitrators the power to order provisional measures; there, such a choice of the arbitral seat can be considered an exclusion of the arbitrators' power to order provisional relief. *See* §17.02[A][3][c]; §17.02[F].

210)

See §17.02[A][3][b]; §17.02[B]. A few early U.S. judicial decisions concluded that agreement to the AAA Rules, which at the time did not expressly grant the power to order provisional measures, excluded such power. *See, e.g.*, *Charles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992). This analysis is misconceived, for the reasons discussed above, and has not subsequently been followed.
211)

See §17.02[E].
212)

See §17.02[A][3][b]; §§17.02[B] *et seq*.
213)

See §17.02_[A][2]; §17.02[A][3][b]. *Compare* Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 32 (2000) ("whether agreed or not between the parties, the arbitral tribunal has competence to order interim measures").
214)

See §2.02[C][2][f]; §5.08[B].
215)

See alsoJudgment of 23 May 2001, *SCM Port-Royal v. Pebay*, 2003 Rev. Arb. 405 (Paris Cour d'Appel) (request for interim relief to *juge des référés*, or emergency judge, is not subject to mandatory conciliation clause).
216)

For examples of concurrent exercises of authority to order provisional measures, by both an arbitral tribunal and a court, *see* §17.04[B][2][b]; §§17.04[C][1] *et seq*.; *Partial Award in ICC Case No. 6709*, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Arbitral Awards 1991-1995* 435 (1997); *Award in ICC Case No. 4156*, 111 J.D.I. (Clunet) 937 (1984); *Nagos Compania Maritima v. Del Bene, SACIF*, *Award in SMA Case No. 2533 of 30 November 1988*, 4 Soc. Mar. Arb. 297 (1988); *Palm Shipping v. Imbar Maritima, SA*, *Award in SMA Case No. 2546 of 12 September 1988*, 5 Soc. Mar. Arb. 191 (1988); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Judgment of 10 March 1998*, 1999 Rev. Arb. 56 (French Cour de Cassation Com.); *Judgment of 25 November 1986*, 1987 Rev. Arb. 321 (French Cour de Cassation Civ. 1); *Judgment of 18 November 1986, Atlantic Triton v. Guinée*, 1987 Rev. Arb. 315 (French Cour de Cassation Civ. 1); *Judgment of 7 June 2001, SA Hellafranca v. SA Natalys*, 2001 Rev. Arb. 605 (Paris Cour d'Appel). *See also* Bantekas & Ullah, *Article 17J: Court-Ordered Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 500-21 (2020); Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 445 (2010) ("generally accepted in international arbitration that national courts have concurrent jurisdiction to grant interim relief"); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87 (2015).
217)

A few U.S. decisions have considered (and rejected) claims that an arbitral tribunal may not order provisional relief because a foreign court enjoys the exclusive power to do so. *SeeWarth Line, Ltd v. Merinda Marine Co.*, 778 F.Supp. 158 (S.D.N.Y. 1991); *In re Noble Navigation Corp.*, 1984 WL 432 (S.D.N.Y.).
218)

See §§8.03[A] *et seq*.; §9.04. This overlapping competence also has the potential to conflict with the general principle of judicial non-intervention in the arbitral process. *See* §15.06.
219)

See §9.02[D][6]. As discussed below, principles of preclusion and *lis pendens* reduce the scope for such interference. *See* §27.02_[C]; §27.03[C].
220)

Arbitrations under the ICSID Convention and ICSID Rules are exceptions because these instruments permit recourse to national courts for provisional measures only if the parties "have so stipulated in the agreement recording their consent." 2006 ICSID Rules, Rule 39(6).
221)

See §17.04.
222)

See §17.02_[F]; §17.02[G][2]. As also noted below, some commentary does not clearly address this distinction.
223)

See §17.02[F]. As discussed above, the law of the arbitral seat will ordinarily provide the procedural law governing the arbitration. *See* §11.01_[B][1]; §11.03[D]. In rare cases, the parties will agree that a foreign law, other than that of the place of the arbitration will govern the arbitration. *See* §11.01_[C]; §11.05[B][2].

224)

See, e.g., *Procedural Order of December 2012 in ICC Case No. 18563,* in ICC, *Procedural Decisions in ICC Arbitration* 89 (2015) (tribunal seated in Switzerland held that Article 183 of Swiss Law on Private International Law empowered it to issue anti-suit injunction); *Interim Award in ICC Case No. 17191,* XLII Y.B. Comm. Arb. 82 (2017) (tribunal seated in Luxembourg looked to ICC Rules, UNCITRAL Model Law and Luxembourg law in granting interim relief); *Procedural Decision of February 2009 in ICC Case No. 15634*, in ICC, *Procedural Decisions in ICC Arbitration* 58 (2015) (tribunal relied on ICC Rules and Cyprus International Commercial Arbitration Law to grant interim measure); *Procedural Order of October 2008 in ICC Case No. 14433*, in *id.* at 73 (tribunal seated in London referred, *inter alia*, to UK Civil Procedure Rules which, even if not applicable in arbitration, provided for granting of security for costs); *Procedural Order of May 2006 in ICC Case 13620*, in *id.* at 65 (tribunal seated in London relied on §38 of 1996 English Arbitration Act); *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84, 89 (2000) (ICC tribunal seated in Toronto relied on Ontario law, as well as law governing substance of parties' claims); *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81, 83-84 (2000) (ICC tribunal seated in Switzerland relied on Article 183 of Swiss Law on Private International Law); *Decision in Geneva Chamber of Commerce of 25 September 1997*, 19 ASA Bull. 745 (2001) (in deciding whether to grant application for security for costs, considering whether anything forbade such relief, first in law of arbitral seat, and then in international practice); *Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999*, XXVI Y.B. Comm. Arb. 198 (2001); *Interim Award in NAI Case No. 1694 of 12 December 1996*, XXIII Y.B. Comm. Arb. 97 (1998) (applying law of arbitral seat to arbitral tribunal's power to grant provisional measures). *See also* Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 58 (1993) ("Provisional or conservatory measures are generally regarded as matters governed by laws of procedure.").

225)

National court decisions considering the power of an arbitral tribunal typically arise in the courts of the arbitral seat and typically apply the law of the arbitral seat without significant discussion. *See, e.g.*, *Schatt v. Aventura Limo. & Transp. Serv., Inc.*, 603 F.App'x 881, 887 (11th Cir. 2015); *Pac. Reins. Mgt Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1022-23 (9th Cir. 1991); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, 306 (2d Cir. 1982); *Thrivest Specialty Funding, LLC v. White*, 2019 WL 6124955, at *1 (E.D. Pa.); *Al Raha Group for Tech. Serv. v. PKL Serv., Inc.*, 2019 WL 4267765, at *2 (N.D. Ga.); *Commodities & Minerals Enter. Ltd v. CVG Ferrominera Orinoco*, 2018 WL 4583484, at *5 (S.D. Fla.); *Johnson v. Dentsply Sirona Inc.*, 2017 WL 4295420, at *4 (N.D. Okla.); *Bowers v. N. Two Cayes Co. Ltd*, 2016 WL 3647339, at *2 (W.D.N.C.); *Ecopetrol SA v. Offshore Exploration & Prod. LLC*, 46 F.Supp.3d 327 (S.D.N.Y. 2014); *Konkar Maritime Enter., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267, 271 (S.D.N.Y. 1987); *Charles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992); *Konkola Copper Mines plc v. U&M Mining Zambia Ltd* [2014] EWHC 3250 (QB) (English High Ct.); *Ecuador v. Occidental Exploration & Prod. Co.* [2006] EWHC 345 (QB) (English High Ct.); *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Op.*, [2015] SGCA 30 (Singapore Ct. App.); *Judgment of 3 August 2004*, 1HK O 1181/04/1 (Landgericht Regensburg).

226)

See, e.g., S. Besson, *Arbitrage International et Mesures Provisoires* 92 (1998); Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 419 (2010) ("Where the arbitration agreement is silent on the question of interim relief and the parties have not entered into any other agreement in this regard, international arbitral tribunals looking to determine whether and to what extent they are competent to order interim measures will naturally turn to the law governing the arbitration, *i.e.*, the *lex arbitri*"); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* 588 (2003); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 88-90 (2015).

227)

See, e.g., UNCITRAL Model Law, Arts. 1(2), 17; English Arbitration Act, 1996, §§2(1), 38(3)-(4); Swiss Law on Private International Law, Arts. 176(1), 183; Japanese Arbitration Law, Arts. 1, 24.

228)

See §11.01_[B]; §11.05.

229)

There is no persuasive argument that the law governing the tribunal's authority to order provisional measures should be the law governing the underlying dispute (which among other things, could lead to different positions regarding the arbitral tribunal's authority on different claims in the same arbitration). *See also* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 423 (2010) ("it appears to be more correct not to consider the *lex causae* in determining the arbitral tribunal's power to grant interim relief").

230)

See §11.01_[B][1]; §11.05[C].

231)

Some commentary suggests that tribunals typically do not look to national law (of the arbitral seat or otherwise) in considering whether they possess power to order provisional measures. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 26 (2000) (citing *Awards in ICC Case Nos. 7210 and 7589*). This approach conflates the law governing the standards for exercising power to grant provisional measures with the law governing the existence of any such power at all. The two issues are separate, and most arbitral authority does not apply international standards to the question whether a tribunal has the authority to issue interim relief.

232)

See §17.02[A][3][c]. *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 88-90 (2015).

233)

See, e.g., *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84 (2000); *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65 (2000); *Final Award in ICC Case No. 7895*, 11(1) ICC Ct. Bull. 64 (2000).

234)

G. Petrochilos, *Procedural Law in International Arbitration* 209 (2004).

235)

See §17.02_[A][2]; *Award in Unidentified ICC Case*, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 58 n.44 (1993) (tribunal concluded it is entitled to order provisional measures notwithstanding Swiss Cantonal Concordat). *Compare* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 419 (2010); Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 25 (2000) ("If the [parties' incorporated institutional] rules empower the tribunal to grant the interim relief requested, it can do so subject *always to the mandatory law of the place of arbitration*") (emphasis added).

236)

See §17.01; §17.02[A][1]. *See also Preston v. Ferrer*, 552 U.S. 346, 363 (U.S. S.Ct. 2008) ("'best way to harmonize' the parties' adoption of the AAA rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's 'special rules limiting the authority of arbitrators'"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-63 (U.S. S.Ct. 1995) (choice-of-law clause "encompass[es] substantive principle that New York courts would apply, but [does not] include arbitration law").

237)

The recognition and enforcement of awards and orders of interim relief raise complex issues. *See* §17.03. Assuming that such measures are, in a particular circumstance and jurisdiction, otherwise enforceable, then the fact that the law of the arbitral seat forbid relief provided for by the parties' arbitration agreement should not preclude recognition; on the contrary, there is a substantial argument that recognition would be required. *See* New York Convention, Art. V(1)(d) (procedures not in accordance with parties' agreement); §11.03_[C]; §26.05[C].

238)

See §17.02[C]. *Compare* §18.02[B][3].

239)

See N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶7.29 (6th ed. 2015).

240)

SeeDermajaya Props. Sdn Bhd v. Premium Props. Sdn Bhd, [2002] 2 SLR 164 (Singapore High Ct.) (parties may not agree to institutional arbitration rules that alter tribunal's powers to award interim measures under Singapore's then current version of UNCITRAL Model Law); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 72 (2005) ("parties are not free to indirectly alter the authority of a tribunal to require interim measures under Article 17 [of the Model Law] simply by agreeing to inconsistent arbitral rules").

241)

See §17.02[A][2].

242)

See §17.02[A][3][b].

243)

See Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 47 (1993).

244)

For published examples of awards reflecting this reticence, *seeFinal Award in ICC Case No. 5650*, XVI Y.B. Comm. Arb. 855 (1991); *Award in ICC Case No. 5103*, 115 J.D.I. (Clunet) 1206 (1988); *Partial Award in ICC Case No. 4998*, 113 J.D.I. (Clunet) 1139 (1986); *Award in ICC Case No. 4415*, 111 J.D.I. (Clunet) 952 (1984); *Award in ICC Case No. 4156*, 111 J.D.I. (Clunet) 937 (1984); *Partial Award in ICC Case No. 4126*, in S. Jarvin & Y. Derain (eds.), *Collection of ICC Arbitral Awards1974-1985* 511 (1990); *Partial Award in ICC Case No.* 3896, 110 J.D.I. (Clunet) 914 (1983); *Award in ICC Case No. 3540*, in S. Jarvin & Y. Derains (eds.), *Collection of ICC Arbitral Awards1974-1985* 105 (1990); *Award in ICC Case No. 2444*, 104 J.D.I. (Clunet) 932 (1977).

245)

See §17.02[A][3][a].

246)

Advances in telecommunications have made it feasible for the parties to serve submissions, and for the tribunal to deliberate, essentially instantaneously, thereby making it much more practicable for even geographically-dispersed tribunals to entertain provisional measures applications. Further, as the size and contentiousness of arbitral disputes has increased, parties have increasingly been willing to take steps designed to preempt the arbitral process and, conversely, to seek provisional measures preventing such steps.

247)

Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 23 (2000). As noted above, provisional measures were requested in only 25 cases between 1977 and 1992. *See* §17.02[G][1]. The three-fold increase in requests for provisional measures in the 15 years following 1985 almost certainly increased substantially following 2000. *See also* Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Lawin International Arbitration: Liber Amicorum Michael Pryles* 107 (2018).

248)

Schneider, *London Court of International Arbitration*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 32, 159-78 (2011) (describing "impressive variety of interim measures being ordered by LCIA tribunals"). In 2019, the LCIA reported 64 applications for interim and conservatory measures under Article 25 of the LCIA Rules. *See* LCIA, *Annual Casework Report* 21 (2019).

249)

See, e.g., *Pugachev v. Russia*, *UNCITRAL, Interim Award of 7 July 2017* (interim award granting requested interim relief); *Paushok v. Mongolia*, *Ad Hoc Order on Interim Measures of 2 September 2008*; *Partial Ad Hoc Award of 2008*, XXXIV Y.B. Comm. Arb. 15 (2009) (interim award directing respondent to reimburse advance payments).

250)

See L. Reed, J. Paulsson & N. Blackaby, *Guide to ICSID Arbitration* 146 (2d ed. 2011) (as of January 2010, requests for provisional measures had been made in 58 registered cases and granted in 16). Interim measures have also been granted in non-ICSID investment cases. *See, e.g.*, *Mohammed Munshi v. Mongolia, Award on Emergency Measures in SCC Case No. 2018-007 of 5 February 2018;Boyko v. Ukraine, Procedural Order No. 3 on Claimant's Application for Emergency Relief in PCA Case No. 2017-23 of 3 December 2017*; *Kompozit LLC v. Moldova, Emergency Award on Interim Measures in SCC Case No. 2016-095 of 14 June 2016*; *Evrobalt LLC v. Moldova, Award on Emergency Measures in SCC Case No. 2016-082 of 30 May 2016*; *Merck Sharpe & Dohme (I.A.) Co. v. Ecuador, Decision on Interim Measures in PCA Case No. 2012-10 of 7 March 2016 and 6 September 2016*; *MOL Hungarian Oil and Gas Co. Plc v. Croatia, Decision on the Claimant's Application for Interim Measures in PCA Case No. 2014-15of 16 August 2014*; *Chevron Corp. v. Ecuador [II]*, *Fourth Interim Award on Interim Measures in PCA Case No. 2009-23 of 7 February 2013*; *Chevron Corp. v. Ecuador [II]*, *Second Interim Award on Interim Measures in PCA Case No. 2009-23 of 16 February 2012*; *Paushok v. Mongolia*, *Ad Hoc Order on Interim Measures of 2 September 2008*.

251)

See §§17.02[A] *et seq*.

252)

See §17.02[F].

253)

Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 424 (2010) ("A question distinct from the law governing the arbitral tribunal's power to grant interim measures concerns the law that shall determine the prerequisite for ordering such interim relief"; "[a]ssorted positions have been taken by arbitral tribunals and various opinions have been expressed in legal commentary" regarding the law applicable to the standards for ordering interim measures). *See alsoCE Int'l Res. Holdings v. SA Mineral Ltd P'ship*, 2010 WL 2595340 (S.D.N.Y.).

254)

For awards adopting this approach, *seeProcedural Order of July 2008 in ICC Case No. 15218*, in ICC, *Procedural Decisions in ICC Arbitration* 79 (2015) (tribunal applied Swiss *lex arbitri*); *Procedural Order of December 2007 in ICC Case No. 14993*, in *id.* at 77 (tribunal seated in Vienna referred to Austrian procedural rules when granting security for costs); *Procedural Order of June 2007 in ICC Case No. 14581*, in *id.* at 86 (tribunal seated in Geneva applied Swiss law in denying anti-suit order); *Procedural Order of December 2006 in ICC Case No. 14020*, in *id.* at 67 (tribunal seated in London relied on 1996 English Arbitration Act); *Procedural Order of May 2006 in ICC Case No. 13620*, in *id.* at 65 (tribunal seated in London relied on 1996 English Arbitration Act); *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84 (2000) (relying on *lex contractus* and *lex fori*); *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81, 82 (2000) (referring to Article 183 of Swiss Law on Private International Law as basis for provisional and protective measures); *Interim Award in ICC Case No. 7544*, 11(1) ICC Ct. Bull. 56 (2000) (considering French domestic standards as "helpful as a pointer"); *Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999*, XXVI Y.B. Comm. Arb. 198 (2001) (considering Dutch domestic standards); *Interim Award in NAI Case No. 1694 of 12 December 1996*, XXIII Y.B. Comm. Arb. 97 (1998) (considering Dutch domestic standards). *See also* R. Schütze, *Schiedsgericht und Schiedsverfahren* ¶257 (4th ed. 2007) (under German version of UNCITRAL Model Law, domestic standards for provisional measures applicable to tribunal's consideration of such measures).

255)

For awards adopting this approach, *seeInterim Award in ICC Case No. 17191,* XLII Y.B. Comm. Arb. 82 (2017) ("An interim measure must also comply with the mandatory provisions of the applicable law: here, Luxembourg law"); *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84, 89 (2000) ("both the laws of Ontario (*lex fori*) and Mexico (*lex contractus*) expressly grant arbitrators that authority in substantially the same terms as Article 17 of the UNCITRAL Model Law"); *Award in NAI Summary Arbitral Proceedings*, *Case No. 2212 of 28 July 1999*, XXVI Y.B. Comm. Arb. 198 (2001) (considering Dutch domestic standards).

256)

For decisions adopting this approach, *seeProcedural Order of December 2012 in ICC Case No. 18563,* in ICC, *Procedural Decisions in ICC Arbitration* 89 (2015) (tribunal recognized different standards for measures related to merits and to procedure; regarding latter, an anti-suit injunction requires breach of arbitration agreement which potentially aggravates dispute); *Procedural Decision of February 2009 in ICC Case No. 15634*, in *id.* at 58 (tribunal relied on international commentary to define standard for granting interim measures); *Procedural Order of September 2008 in ICC Case No. 15219*, in *id.* at 56 (requiring *prima facie* case on merits and urgency); *Procedural Order of December 2006 in ICC Case No. 14661*, in *id.* at 76 (applying international standard for security for costs); *Procedural Order of October 2008 in ICC Case No. 14433*, in *id.* at 73 (tribunal relied on factors identified by international commentary to assess request for security for costs); *Procedural Order of January 2007 in ICC Case No. 14355*, in *id.* at 70 (referring to international commentary); *Procedural Order of March 2006 in ICC Case No. 13856*, in *id.* at 46 (tribunal referred to "growing body of scholarly writing and arbitral decisions" after determination that *lex arbitri*, ICC Rules and applicable substantive law were silent); *Procedural Order of February 2006 in ICC Case No. 13359*, in *id.* at 63 (rejecting application of *lex arbitri*; referring to international commentary instead); *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65 (2000) (considering requirements of urgency, irreparable harm and no prejudgment of dispute without reference to national laws); *Decision of Geneva Chamber of Commerce of 25 September 1997*, 19 ASA Bull. 745 (2001) (considering international practice as to whether request for provisional measures should be granted).
For decisions granting provisional measures without reference to a national law, *see, e.g.*, *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94 (2000). The law applicable to a request for provisional measures in national courts, in connection with a pending or future arbitration, will be governed by different legal standards. *See* §17.04[C][7].

257)

Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 441 (2010) ("tribunal is not bound by the rules governing court proceedings at the place of the arbitral seat").
258)

See §17.02[A][3][b]; English Arbitration Act, 1996, §38; French Code of Civil Procedure, Art. 1468; Swiss Law on Private International Law, Art. 183(1); Belgian Judicial Code, Art. 1691.
259)

See UNCITRAL Model Law, Art. 17. *See also* authorities cited §17.02[A][3][b].
260)

The 1985 version of the Model Law contained no provisions regarding the availability of tribunal-ordered provisional measures. UNCITRAL, *Digest of Case Lawon the Model Lawon International Commercial Arbitration* 52 (2012) ("The fact that none of these issues was addressed in the 1985 version of the Model Law entails that they were, at that time, intended to be governed by domestic law").
261)

See N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶¶5.31 *et seq.* (6th ed. 2015) ("[W]hilst most arbitration rules and laws of arbitration permit interim measures to be granted at the tribunal's discretion, they provide little guidance as to how that discretion should be exercised. Traditionally, arbitrators have looked to concepts common to most legal systems in the granting of such measures."); Kim & Satish, *Legal Criteria for Granting Relief in Emergency Arbitrator Proceedings: Where Are We Nowand Where Do We Go from Here?,* in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Lawin International Arbitration: Liber Amicorum Michael Pryles* 175–92 (2018).
For an alternative approach, *see* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 427 (2010) ("standards for granting interim relief in international arbitration are to be determined pursuant to the following cascade: (i) mandatory provisions of law; (ii) the law chosen by the parties; (iii) international arbitration standards; and (iv) in exceptional cases, the *lex causae* to the extent that it specifies standards for granting interim relief").

262)

See §1.02_[B]; §1.04[A][1][d]; §19.01. The conclusion outlined in text also fosters the development of a body of international authority that provides efficient means of resolving disputes regarding provisional measures. Arbitration is selected in part so that experienced decision-makers will be in a position to resolve disputes in commercially-sensible and effective ways. *See* §1.02[B][4]. Permitting arbitrators to develop authoritative standards for granting provisional measures furthers this objective.

263)

See, e.g., *Procedural Order of December 2012 in ICC Case No. 18563,* in ICC, *Procedural Decisions in ICC Arbitration* 89 (2015) (tribunal recognized standards for measures related to merits and to procedure); *Procedural Decision of February 2009 in ICC Case No. 15634*, in *id.* at 58 (tribunal relied on international commentary to define standard for granting interim measures); *Procedural Order of September 2008 in ICC Case No. 15219*, in *id.* at 56 (requiring *prima facie* case on merits and urgency); *Procedural Order of December 2006 in ICC Case No. 14661*, in *id.* at 76 (applying international standard for security for costs); *Procedural Order of October 2008 in ICC Case No. 14433*, in *id.* at 73 (tribunal relied on international commentary in deciding request for security for costs); *Procedural Order of January 2007 in ICC Case No. 14355*, in *id.* at 70 (referring to international commentary); *Procedural Order of March 2006 in ICC Case No. 13856*, in *id.* at 46 (tribunal referred to "growing body of scholarly writing and arbitral decisions"); *Procedural Order of February 2006 in ICC Case No. 13359*, in *id.* at 63 (rejecting application of *lex arbitri*; referring to international commentary); *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94 (2000); *Final Award in ICC Case No. 7589*, 11(1) ICC Ct. Bull. 60 (2000); *Final Award in ICC Case No. 7210*, 11(1) ICC Ct. Bull. 49 (2000); *Decision in Geneva Chamber of Commerce of 25 September 1997*, 19 ASA Bull. 745 (2001) (in deciding whether to grant application for security for costs, considering whether anything forbade such relief, first in law of arbitral seat, and then in international practice). *See also* Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 27 (2000) (noting that a "second approach – *i.e.*, determining the issue of whether to grant relief without reference to any national law – would appear to be more common"); J.-F. Poudret & S. Besson, *Comparative Lawof International Arbitration* ¶625 (2d ed. 2007) ("these difficulties [of the conflict-of-law method in the area of provisional matters] explain why the large majority of judgments and awards have not dwelt on the determination of the applicable law").
264)

See §16.02[E][4].
265)

UNCITRAL Model Law, 2006 Revisions, Art. 17A.
266)

Article 17A's formula is lacking in a number of respects. Among other things, Article 17A apparently makes no provision for parties' agreements on the standard of proof, omits any reference to urgency, unduly focuses "irreparable" harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for differing types of interim relief and omits reference to security for costs. *See* §17.02[G][3] for further discussion of the appropriate standards for granting provisional measures. *See also* Ali & Kabau, *Article 17A: Conditions for Granting Interim Measures,* in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 350-67 (2020).
267)

See §17.02[G][3].
268)

Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 429 (2010) (Article 17A of Model Law "aims at reflecting a uniform international arbitration practice regarding the prerequisites for ordering interim relief").
269)

This occurs most frequently in contracts dealing with intellectual property, which often contain provisions expressly authorizing provisional measures. *See, e.g.*, G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 95-97 (5th ed. 2016).
270)

This is consistent with general principles of party autonomy. *See* §1.02_[B][6]; §15.02.
271)

2014 ICDR Rules, Art. 24(1); 1976 UNCITRAL Rules, Art. 26(1); 2020 WIPO Rules, Art. 48.
272)

2017 ICC Rules, Art. 28(1). *See also* 2016 SIAC Rules, Art. 30(1); 2020 LCIA Rules, Art. 25(1)(a) ("considers appropriate"); 2018 HKIAC Rules, Art. 23.2 ("deems necessary or appropriate"); 2017 SCC Rules, Art. 37(1).
273)

This would be contrary to the expectations of the parties, except where they have agreed to arbitration *ex aequo et bono*, and to the adjudicatory character of arbitration. *See* §1.02_[B]; §2.02[C][4].
274)

2013 UNCITRAL Rules, Art. 26(3).

275)

See §17.02[A][3][b]; §17.02[G][2]. The 2006 Revisions of the UNCITRAL Model Law contain standards for the grant of provisional measures in international arbitration, but they are not, by their terms, mandatory.
276)

See §§17.02[G][3][b][i]*et seq. See also* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 151-64 (2018); ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020); Le Bars & Shiroor, *Provisional Measures in Investment Arbitration: Wading Through the Murky Waters of Enforcement,* 6(1) Indian J. Arb. L. 124 (2017).
277)

See §§17.02[G][3][b][i]*et seq*.
278)

See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, (Iran v. U.S.A.), Provisional Measures Order of 3 October 2018, [2018] General List No. 175, ¶77 (I.C.J.) (ICJ "has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings"); *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, *Order of Provisional Measures of 29 July 1991*, [1991] I.C.J. Rep. 12, ¶23 (I.C.J.) (provisional measures are justified when "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given"); *Burlington Res. Inc. v. Ecuador*, *Procedural Order No. 1 in ICSID Case No. ARB/08/5 of 29 June 2009*, ¶72 (provisional measures are justified when "actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute"); *Perenco Ecuador Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/08/6 of 8 May 2009*. *See also* C. Miles, *Provisional Measures Before International Courts and Tribunals* 257 (2017) ("it has nonetheless become clear through the ICSID jurisprudence that provisional measures will be awarded only where a substantial threat to a right *pendente lite* can be established (referred to occasionally as the requirement of 'necessity')").
279)

1976 UNCITRAL Rules, Art. 26(1); 2014 ICDR Rules, Art. 24(1); 2020 WIPO Rules, Art. 48 ("deems necessary"). *See also* D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 536 (2006) (1976 UNCITRAL Rules "provide that interim measures should be '*necessary*' – not just 'desirable' or 'recommendable'") (emphasis in original). *Compare* 2017 ICC Rules, Art. 28 ("appropriate"); 2020 LCIA Rules, Art. 25(1) ("considers appropriate"); 2017 SCC Rules, Art. 37(1).
280)

See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 542 (2d ed. 2013) ("Given the exceptional urgency involved and the very provisional nature of the measure, however, the arbitral tribunal should be very sympathetic to the applicant in borderline cases in applying both the *prima facie* and grave/substantial damage (or 'irreparable' harm) tests").
281)

See §17.02[G][3][b][i].
282)

It is more difficult to justify this reduced standard of proof with regard to prohibitions against prejudgment.
283)

See, e.g., Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 156-62 (2018); K. P. Berger, *International Economic Arbitration* 336 (1993) ("substantial (but not necessarily 'irreparable' as known in common law doctrine)"); W. Craig, W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* 137 (1998) ("enjoin conduct likely to cause irreparable harm concerning the subject matter of the dispute (such as, for instance, the calling of bank guarantees provided for in a construction contract where the call would be contrary to the provisions of the contact)"); Gonzáles, *Interim Measures in Arbitration: Towards A Better Injury Standard*, in A. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* 260 (2015); Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23 (2000); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 60 (1993) ("grave and irreparable harm usually required by arbitral tribunals can take many forms"). *See also* UNCITRAL Model Law, 2006 Revisions, Art. 17A(1)(a) ("harm not adequately reparable by an award of damages is likely to result if the measure is not ordered").

284)

Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 83-84 (2000). *See alsoInterim Award in ICC Case No. 17191,* XLII Y.B. Comm. Arb. 82 (2017) (denying request; tribunal not convinced that continued use of licensed trademarks cause irreparable harm that could not be remedied by compensatory damages); *Procedural Decision of February 2009 in ICC Case No. 15634*, in ICC, *Procedural Decisions in ICC Arbitration* 58 (2015); *Procedural Order of March 2006 in ICC Case No. 13856,* in *id.* at 46; *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94, 97 (2000); *Iran v. U.S.A.*, *Decision Nos. DEC 116-A15(IV) & A24-FT of 18 May 1993*, 29 Iran–US CTR 214 (1993).

285)

Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 28 (2000).

286)

Tokios Tokelés v. Ukraine, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8. *See alsoHela Schwarz GmbH v. China, Procedural Order No. 2 on Provisional Measures in ICSID Case No. ARB/17/19 of 10 August 2018*, ¶110 (exceptional nature of provisional measures warrants consideration whether rights to be preserved are at real and imminent risk of irreparable harm); *Rizzani de Eccher SpA v. Kuwait*, *Decision on Provisional Measures in ICSID Case No. ARB/17/8 of 23 November 2017*, ¶103; *Plama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶38 (provisional measures appropriate "to avoid the occurrence of irreparable harm or damage"); *Iran v. U.S.A.*, *Award in IUSCT Case No. ITL 33-A-4/A-15(III)-2 of 1 February 1983*, 5 Iran–US CTR 131, 133 (1984) (ordering United States not to sell "Iran's diplomatic and consular properties in the United States which possess important historical, cultural or other unique factors and which, by their nature, are irreplaceable"; "injury that can be made whole by monetary relief does not constitute irreparable harm"); ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020). The Permanent Court of International Justice held that injury is irreparable where it "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form." *Denunciation of the Treaty of 2 November 1865 Between China and Belgium*, PCIJ Series A/B, No. 8, 7 (P.C.I.J. 1927).

287)

See, e.g., *Interlocutory Award in ICC Case No. 10596*, XXX Y.B. Comm. Arb. 66 (2005); *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81, 83 (2000); *Behring Int'l, Inc. v. Iran*, *Interim and Interlocutory Award in IUSCT Case No. ITM/ITL 52382-3 of 21 June 1985*, 8 Iran–US CTR 238 n.42 (1985) (concept of irreparable prejudice in international law is broader than Anglo-American law concept of irreparable injury and does not necessarily require showing that "injury complained of is not remediable by an award of damages (*i.e.*, where there is no certain pecuniary standard for the measure of damages …)"). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 522 (2d ed. 2013) (2010 UNCITRAL Rules adopted "harm not adequately reparable by an award of damages" due to concerns that "irreparable harm might present too high a threshold"); Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463-65 (2016); Frutos-Peterson & Ziyaeva, *Provisional Measures in ICSID Arbitration: The Irreparable Harm Requirement*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 209 (2015); Gonzáles, *Interim Measures in Arbitration: Towards A Better Injury Standard*, in A. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* 260 (2015); Laycock, *Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶23-65 (2003) ("irreparable" must be understood in economic, not literal sense); C. Miles, *Provisional Measures Before International Courts and Tribunals* 259 (2017); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 60 (1993) ("ICC arbitral tribunals have sometimes construed the risk of financial loss itself to constitute irreparable harm").

288)

PNG Sustainable Dev. Program Ltd v. Papua NewGuinea, *Decision on Provisional Measures in ICSID Case No. ARB/13/13 of 21 January 2015*, ¶109 (citing G. Born, *International Commercial Arbitration* 2511-40, 3387-90 (2d ed. 2014)).

289)

Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 83 (2000).

290)

S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal* 139-40 (1992). *See also* Gonzáles, *Interim Measures in Arbitration: Towards A Better Injury Standard*, in A. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* 260 (2015).

291)

See authorities cited §17.02[G][3][b][i].
Some commentary is ambivalent. *See, e.g.*, Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 37-38 (2000) ("detriment resulting if no relief is granted could not easily be remedied (exposure to 'irreparable' harm)").

292)

See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 521 n.45 (2d ed. 2013) (2010 UNCITRAL Rules' drafters believed "'irreparable harm' would occur, for example, in situations such as a business becoming insolvent, essential evidence being lost, an essential business opportunity (such as the conclusion of a large contract) being lost, or harm being caused to the reputation of a business as a result of a trademark infringement"). *See also* C. Miles, *Provisional Measures Before International Courts and Tribunals* 263-66 (2017).

293)

See authorities cited §17.02[G][3][b][i]; §17.02[G][3][b][ii] (for related concept of urgency). On the other hand, some investment and state-to-state authorities suggest an irreparable harm standard, in the literal sense. *See, e.g.*, *Hela Schwarz GmbH v. China, Procedural Order No. 2 on Provisional Measures in ICSID Case No. ARB/17/19 of 10 August 2018*, ¶110; *Rizzani de Eccher SpA v. Kuwait*, *Decision on Provisional Measures in ICSID Case No. ARB/17/8 of 23 November 2017*, ¶103; *Nova Group Inv. BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017,* ¶¶239 *et seq.*; *Plama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶46 ("harm is not irreparable if it can be compensated for by damages"); *Casado v. Chile*, *Decision on Provisional Measures in ICSID Case No. ARB/98/2 of 25 September 2001* (claimant had not shown irreparable harm where assets in dispute could be returned or compensated for by damages); *Denunciation of the Treaty of 2 November 1865 Between China and Belgium*, PCIJ Series A/B No. 8, 7 (P.C.I.J. 1927) (injury is irreparable if it "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form"); *Iran v. U.S.A.*, *Decision in IUSCT Case No. DEC 85-B1-FT (Claim 4)of 18 May 1989*, 1989 WL 663856, ¶10 ("Injury that can be made whole by monetary relief does not constitute irreparable harm"); *Boeing Co. v. Iran*, *Interim Award in IUSCT Case No. ITM 34-222-1 of 17 February 1984*, 5 Iran–US CTR 152, 154 (1985) (same).

294)

Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999, XXVI Y.B. Comm. Arb. 198 (2001) (applying Dutch civil procedure rules to request for provisional relief, including substantive requirements for *prima facie* case, urgency and "a balancing of interest"). *See alsoProcedural Order of March 2006 in ICC Case No. 13856*, in ICC, *Procedural Decisions in ICC Arbitration* 46 (2015); Committee on International Civil and Commercial Litigation, *Principles on Provisional and Protective Measures in International Litigation*, in ILA, *Report of the Sixty-Seventh Conference, Helsinki* 202, ¶4 (1996) (provisional measures should be available on showing "a case on the merits" and "potential injury to the plaintiff outweighs the potential injury to the defendant"); Gonzales, *Interim Measures in Arbitration: Towards A Better Injury Standard*, in A. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* 260 (2015); Ortolani, *Article 17B: Applications for Preliminary Orders and Conditions for Granting Preliminary Orders*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 378 (2020).

295)

UNCITRAL Model Law, 2006 Revisions, Art. 17A(1)(a); 2010 UNCITRAL Rules, Rule 26(3)(a). *SeePaushok v. Mongolia*, *Ad Hoc Order on Interim Measuresof 2 September 2008*, ¶69.

296)

For example, in a case involving a dispute over termination of a patent license, a tribunal may order that the patent continue to be licensed to the disputed licensee, rather than remaining unlicensed, so that any potential damages are mitigated, even if the respondent would prefer, for litigation reasons or otherwise, to cease the license arrangement immediately.

297)

Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 83-84 (2000) (emphasis added).

298)

UNCITRAL Model Law, 2006 Revisions, Art. 17A(1)(a) (emphasis added).

299)

Occidental Petroleum Corp. v. Ecuador, *Decision on Provisional Measures in ICSID Case No. ARB/06/11 of 7 August 2007*, ¶59 (quoting *Passage Through the Great Belt (Finland v. Denmark)*, *Order of Provisional Measures of 29 July 1991*, [1991] I.C.J. Rep. 12, ¶17 (I.C.J.)). *See also* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).

300)

J. Sztucki, *Interim Measures in the Hague Court* 105 (1983). *See, e.g.*, *CaseConcerning Avena & Other Mexican Nationals (Mexico v. USA)*, *Order of 5 February 2003,* [2003] I.C.J. Rep. 77, 91 (I.C.J.) (Mexican nationals were "at risk of execution [which] would cause irreparable prejudice"); *Nuclear Tests Case (N.Z. v. France)*, *Order of 22 June 1973*, [2003] I.C.J. Rep. 135, 144 (I.C.J.) ("information submitted to the Court … [did] not exclude the possibility" of irreparable harm).
301)

Occidental Petroleum Corp. v. Ecuador, *Decision on Provisional Measures inICSID Case No. ARB/06/11of 17 August 2007*, ¶89.
302)

See, e.g., UNCITRAL Model Law, 2006 Revisions, Art. 17(2); N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶7.37 (6th ed. 2015).
303)

See UNCITRAL Model Law, 2006 Revisions, Art. 17A(2) (excluding preservation of evidence orders from automatic application of Article 17A(1)).
304)

See §16.02[E][3][f]. Similarly, as noted below, it makes little sense to consider whether requests for production, inspection, or preservation of evidence "prejudge the outcome" of the case, since these procedural decisions obviously do not. *See* §17.02[G][3][b][iii].
305)

See §17.02[G][4][e].
306)

See, e.g., *Iran v. U.S.A.*, *Decision No. DEC 116-A15(IV) & A24-FT of 18 May 1993*, 29 Iran–US CTR 214 (1993) ("interim relief can be granted only if it is necessary to protect a party from irreparable harm or to *avoid prejudice to the jurisdiction of the Tribunal*") (emphasis added); *Boeing Co. v. Iran*, *Interim Award in IUSCT Case No. ITM 34-222-1 of 17 February 1984*, 5 Iran–US CTR 152, 154 (1985); *E-Sys., Inc. v. Iran*, *Interim Award in IUSCT Case No. 13-388-FT of 4 February 1983*, 2 Iran–US CTR 51, 57 (1983); *Plama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶¶38 *et seq*. (provisional measures appropriate "to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might … render its resolution more difficult").
307)

RCA Global Commc'ns Disc, Inc. v. Iran, *Award in IUSCT Case No. ITM 30-160-1 of 31 October 1983*, 4 Iran–US CTR 9, 11-12 (1983).
308)

Tokios Tokelés v. Ukraine, *Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003*, ¶38. *See also* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).
309)

García Armas v. Venezuela, Procedural Order No. 9 in PCA Case No. 2016-08 of 20 June 2018, ¶191; *Boyko v. Ukraine, Procedural Order No. 3 in UNCITRAL Case No. 2017-23 of 3 December 2017*, ¶3.2; *EuroGas Inc. v. Slovakia, Procedural Order No. 7 in ICSID Case No. ARB/14/14 of 5 September 2016*, ¶28 ("It is common understanding that provisional measures should only be granted in situations of necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost"); *Biwater Gauff (Tanzania) Ltd v. Tanzania*, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶75 ("Urgency [is a] requirement [] that must be satisfied for the recommendation of provisional measures"); *Tokios Tokelés v. Ukraine*, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8 (same); *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶¶5(iv), 18 (same). *See also* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 163-64 (2018); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law,* 740 PLI/Lit. 1181, 75 (2005) ("referring to Article 17 of Model Law, implicit within the term 'necessary' is the notion that the party requesting a measure faces a harm to the rights it is pursuing in the arbitration and that harm is so imminent that the requesting party cannot await the tribunal's final decision on the merits"); Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 27 (2000); C. Miles, *Provisional Measures Before International Courts and Tribunals* 266-72 (2017); Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11(1) ICC Ct. Bull. 31, 34 (2000) (need for "urgent" or "prompt" relief).

310)

Partial Award in Unidentified ICC Case, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 60 (1993).
Another tribunal required "a risk of serious and irreparable harm, present or future … that would render indispensable the taking of an immediate decision such as to eliminate, avoid or reduce such harm." *Id.* at 60 (1993). *See also id.* ("situation has an urgent character when it requires that measures be taken in order to avoid that the legitimate rights of a party are not placed in peril"); *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94, 97 (2000); *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65 (2000); *Tokios Tokelés v. Ukraine*, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8; *United Tech. Int'l v. Iran*, *Decision No. DEC 53-114-3 of 10 December 1986*, 13 Iran–US CTR 254, ¶17 (1986).

311)

R.R. Dev. Corp. v. Guatemala, *Decision on Provisional Measures in ICSID Case No. ARB/07/23 of 15 October 2008*, ¶34 (quoting C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47 (2001)); ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020) ("current or imminent harm" and "urgent and necessary").

312)

See UNCITRAL Model Law, 2006 Revisions, Art. 17A. The apparent rationale is that the requirement of urgency is subsumed within the related requirement of irreparable harm. This is unconvincing as an explanation for the statute's text. An express urgency requirement is important to underscore the exceptional nature of provisional measures – which affect the parties' rights before they have had an opportunity to present their cases. It also is necessary to define the timing of when provisional relief may properly be granted.

313)

Biwater Gauff (Tanzania) Ltd v. Tanzania, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶16 (emphasis added). *See alsoHela Schwarz GmbH v. China, Procedural Order No. 2 on Provisional Measures in ICSID Case No. ARB/17/19 of 10 August 2018*, ¶110; *Rizzani de Eccher SpA v. Kuwait, Decision on Provisional Measures in ICSID Case ARB/17/8 of 23 November 2017*, ¶104; *PNG Sustainable Dev. Program Ltd v. Papua NewGuinea, Decision on Claimant's Request for Provisional Measures in ICSID Case No. ARB/13/33 of 21 January 2015*, ¶113; *Quiborax SA v. Bolivia*, *Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶150; *Tokios Tokelés v. Ukraine*, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8; *Chevron Corp. v. Ecuador*, *Second Interim Award on Interim Measures in PCA Case No. 2009-23 of 16 February 2012*, ¶2. *See also* S. Baker & M. David, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal* 139 (1992) ("party requesting the measure is facing harm … so imminent that it cannot await the tribunal's decision on the merits"); S. Rosenne, *Provisional Measures in International Law*135 (2005) (central factor "relevant to the determination of the urgency of the matter" is "estimated period likely to elapse before the decision of the court or tribunal on the principal claim," because urgency exists where requested measure is "something that cannot wait until the final decision in the case").

314)

SeeAvco Corp. v. Iran Aircraft Indus., *Order in IUSCT Case No. 261 of 27 January 1984*, reprinted in D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 548 (2006) (no urgency because "Claimant asserts that no sale of any of the goods in question is planned to take place before 1 January 1985").

315)

Avco Corp. v. Iran Aircraft Indus., *Order in IUSCT Case No. 261 of 27 January 1984*, reprinted in D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 548 (2006). *See alsoInterlocutory Award in ICC Case No. 10596*, XXX Y.B. Comm. Arb. 66 (2005) ("it being understood that urgency is broadly interpreted"); *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65, 67 (2000); *Rizzani v. Kuwait, Decision on Provisional Measures in ICSID Case ARB/17/8 of 23 November 2017*, ¶104 (harm must imminent); *PNG Sustainable Dev. Program Ltd v. NewGuinea, Decision on Claimant Request for Provisional Measures in ICSID Case No. ARB/13/33 of 21 January 2015*, ¶116 ("precise degree of urgency required in each case will again depend on the balance of harms that would result if the risk of harm were to materialize"); *Occidental Petroleum Corp. v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/06/11 of 17 August 2007*, ¶91 (no realistic likelihood of harm). *See also* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).

316)

Tokios Tokelés v. Ukraine, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8 (emphasis added).

317)

See, e.g., *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶18 (declining to find urgency where claimant failed to provide supporting evidence that threatened harm "may" take place, "or at least [will] so in the foreseeable future"); *Československa Obchodní Banka AS v. Slovakia*, *Procedural Order No. 3 in ICSID Case No. ARB/97/4 of 5 November 1998*, ¶1 (refusing to impose provisional measures because Tribunal "ha[d] no reason to assume that" threatened harm might take place).

318)

Biwater Gauff (Tanzania) Ltd v. Tanzania, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶86.

319)

See, e.g., *Interim Award in ICC Case No. 17191,* XLII Y.B. Comm. Arb. 82 (2017); *Procedural Decision of February 2009 in ICC Case No. 15634*, in ICC, *Procedural Decisions in ICC Arbitration* 58 (2015); *Procedural Order of March 2006 in ICC Case No. 13856*, in *id.* at 46; *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65 (2000) ("granting of the measure requested by Claimant implies a pre-judgment of the dispute"); *Maffezini v. Spain*, *Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, ¶21 ("It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature"). *See also* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 154-56 (2018); C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶2 (2d ed. 2009) (tribunal must "strike a careful balance between the urgency of a request for provisional measures and the need not to prejudge the merits of the case"); J. Simpson & H. Fox, *International Arbitration: Law and Practice* 162 (1959) ("capable of prejudicing the execution of any decision, which may be given by the tribunal").

320)

Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 27 (2000).

321)

This is usefully made express by the 2006 Revisions to the UNCITRAL Model Law. UNCITRAL Model Law, 2006 Revisions, Art. 17(A)(1)(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. …").

322)

See §17.02[G][3][b][iv].

323)

See id.

324)

For an example, *see* Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 27 (2000) (citing *Award in ICC Case No. 8115* for proposition that "if the request for relief is made on both an interim and a permanent basis, only the latter will, in principle, be granted").

325)

There will be circumstances where one party seeks an immediate partial award as to part, but not all, of its claim, either because the issue of liability is not disputed or because (in its submission) the evidence/law is unequivocal. It may be appropriate to grant such relief (subject to applicable law and ensuring that the parties have had an adequate opportunity to be heard). This is not provisional relief, but instead an expedited final award on part of the parties' dispute by way of a partial final award. *See* §23.01[B].

326)

See UNCITRAL Model Law, 2006 Revisions, Art. 17A(1)(b). It is, of course, obvious that a party need not prove that it will ultimately prevail on its claims in order to obtain interim measures. *See, e.g.*, *United Utilities BV v. Estonia*, *Decision on Respondent's Application for Provisional Measures in ICSID Case No. ARB/14/24 of 12 May 2016*, ¶78 ("Although formulated in different ways by different tribunals – and by the parties themselves here – five criteria apply: i. *prima facie* jurisdiction of the tribunal; ii. *prima facie* existence of a right susceptible of protection/*prima facie* case on the merits; iii. necessity of the measure requested; iv. urgency of the measure requested; v. proportionality of the measure requested (balance of inconvenience))." *See also* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 154-56 (2018); Castello, *Interim Measures: The Slow Evolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463-65 (2016) ("reasonable possibility of success"); C. Miles, *Provisional Measures Before International Courts and Tribunals* 266-72 (2017); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 37-38 (2000) ("reasonable probability" that requesting party is entitled to prevail on underlying claim; "*prima facie* case").

327)

Partial Award in Unidentified ICC Case, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 60 (1993). *See also* Blessing, *State Arbitrations: Predictably Unpredictable Solutions?*, 22 J. Int'l Arb. 435 (2005) ("Basically, the party seeking interim relief will have to demonstrate the following: … a likelihood of success on the merits, or as per the 'softer' wording of the UNCITRAL draft, 'a reasonable possibility that the requesting party will succeed on the merits'"); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 523 (2d ed. 2013) ("party whose case is clearly without merit should not be granted a request for interim measures"); Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11(1) ICC Ct. Bull. 31, 34 (2000) ("*prima facie* test [*i.e.*, for establishment of a case on the merits] is gain[ing] substantial recognition").

328)

See, e.g., *Travis Coal Restructured Holdings LLC v. Essar Global Ltd, Final Award in ICC Case No. 18724 of 7 March 2014*; *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94 (2000); *Partial Award in ICC Case No.3896*, 110 J.D.I. (Clunet) 914 (1983); *Hela Schwarz GmbH v. China, Procedural Order No. 2, in ICSID Case No. ARB/17/19 of 10 August 2018,* ¶110; *Biwater Gauff (Tanzania) Ltd v. Tanzania*, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶95 (tailoring order regarding preservation of documents to those "located" in offices the ownership of which was subject of dispute to avoid prejudging merits); *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶6 (declining to address merits; instead "only address[ing] jurisdiction, nature of request, and circumstances justifying request"); *Merck Sharp & Dohme (I.A.) LLC v. Ecuador, Decision on Interim Measures in PCA Case No. 2012-10 of 7 March 2016,* ¶69; *S. Am. Silver Ltd v. Bolivia, Order on Interim Measures in PCA Case No. 2013/15 of 11 January 2016,* ¶62 ("The tribunal shares the view of *Rurelec v. Bolivia*, in which it was stated that '[i]t is also unwise to risk even the most minor prejudgment of the case'"); *Bear Creek Mining Co. v. Peru, Procedural Order No. 2 in ICSID Case No. ARB/14/21 of 19 April 2015,* ¶45; *Guaracachi Am., Inc. v. Bolivia, Procedural Order No. 14 in PCA Case No. 2011/17 of 11 March 2013,* ¶8. *See also* J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶23-62 (2003) ("requirement of a good arguable case on the merits … has received mixed reactions … due to the fact that unlike court proceedings, where the judge granting interim relief will frequently be different from the judge dealing with the merits of the case, in arbitration the same tribunal will deal with both issues"); Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 Int'l & Comp. L.Q. 90, 114 (1995) (discussing ICJ's rejection of "likelihood of success on the merits" element for provisional measures under international law).

329)

See, e.g., J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶¶23 *et seq.* (2003) ("To avoid any appearance of prejudgment arbitrators are invariably reluctant to express their views on the merits before they have considered at least a significant amount of the evidence presented by the parties. For this reason the merits of the case rarely play any direct role in determining whether or not interim relief is granted.").

330)

Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11(1) ICC Ct. Bull. 31, 34 (2000).

331)

See §17.02[G][3][b][iii]. *See also* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 465 (2016).

332)

See, e.g., 42 Am.Jur.2d *Injunctions* (2004), §16 (in U.S. federal courts, plaintiff seeking preliminary injunction must show likelihood of success on merits); Baker & de Fontbressin, *The French Référé Procedure: A Legal Miracle?*, 2 U. Miami Y.B. Int'l L. 1 (1992-93); R. Frank, G. Straeuli & H. Messmer, *Kommentar zur Zürcherischen Zivilprozessordnung* §222, ¶¶15 *et seq.* (3d ed. 1997); Hory, *Mesures d'Instruction in Futurum et Arbitrage*, 1996 Rev. Arb. 191; Main, *Court Ordered Interim Relief: Developments in English Arbitration Law*, 22 J. Int'l Arb. 505 (2005).

333)

The law applicable to the parties' respective claims in considering the likelihood of success is of course the law governing those claims on the merits. *See* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 431 (2010) (law applicable to merits of parties' dispute applicable to determine whether claimant has reasonable possibility of success: "applying any other law than the law applicable to the merits of the case would appear to be an exercise in vain").

334)

Oil Platforms (Iran v. U.S.A.), *Judgment of 12 December 1996*, [1996] I.C.J. Rep. 803, 856-57 (Higgins, J.) (citing *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2 (P.C.I.J. 1924)). *See alsoPaushok v. Mongolia*, *Ad HocOrder on Interim Measures of 2 September 2008*, ¶55; *Maffezini v. Spain*, *Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, ¶21.

335)

See, e.g., *Interocean Oil Dev. Co. v. Nigeria*, *Procedural Order No. 6 Decision on the Respondent Application for Provisional Measures in ICSID Case No. ARB/13/20 of 1 February 2017*, ¶30; *Maffezini v. Spain*, *Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, ¶¶20 *et seq*. ("The meritoriousness [sic] of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it. A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable."); *Casado v. Chile*, *Decision on Provisional Measures in ICSID Case No. ARB/98/2 of 25 September 2001*, ¶8; *Application on the Convention on the Punishment of the Crime of Genocide*, *Order on Provisional Measures of 13 September 1993*, [1993] I.C.J. Rep. 325, ¶24 (I.C.J.).

336)

See, e.g.,Pugachev v. Russia, *UNCITRAL, Interim Award of 7 July 2017* ("Claimant has the burden of establishing that this Tribunal has *prima facie* jurisdiction over the dispute. As the International Court of Justice asserted in *Nicaragua v. United States* '[a Court] ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the court might be founded.' Thus, Claimant must prove, not only that this Tribunal has *prima facie* jurisdiction over the general dispute, but also that it has *prima facie* jurisdiction for the requested interim measures"); *Nova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶258; *Procedural Order of March 2006 in ICC Case No. 13856*, in ICC, *Procedural Decisions in ICC Arbitration* 46 (2015); *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65, 69 (2000); *Bendone-Derossi Int'l v. Iran*, *Interim Award in IUSCT Case No. ITM 40-375-1of 7 June 1984*, 6 Iran–US CTR 130 (1984) (requiring *prima facie* case on merits). *See also* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 152-54 (2018); Bernhard *et al*., *Court's Power to Give Interim Relief Before Appointment of Arbitrators: Comments on* Cetelem SA v. Roust Holdings Ltd, 24 ASA Bull. 143 (2006); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 522 (2d ed. 2013) ("The implicit requirement that the tribunal have jurisdiction over the parties before ordering interim measures is a question which has generated considerable legal writing and caused practical problems for various international courts and tribunals"); Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Lawin International Arbitration: Liber Amicorum Michael Pryles* 111-18 (2018) ("it is now uncontroversial that a tribunal can decide an application for provisional measures if there is a *prima facie* basis to assert jurisdiction over the dispute"); J.-F. Poudret & S. Besson, *Comparative Lawof International Arbitration* ¶626 (2d ed. 2007).

337)

Perenco Ecuador Ltd v. Ecuador, *Decision on Provisional Measures in ICSID Case No. ARB/08/6 of 8 May 2009*, ¶39. *See alsoPugachev v. Russia*, *UNCITRAL, Interim Award of 7 July 2017*, ¶234 ("The Tribunal cannot assert, not even *prima facie*, that [certain entities] are synonymous to the Respondent or that the acts of [certain entities] should be attributed to the Respondent. Therefore, the Tribunal cannot assert, *prima facie*, that it has jurisdiction to order the suspension of proceedings where [certain entities] are applicants."); *Quiborax SA v. Bolivia*, *Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶108 ("It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is a *prima facie* basis for jurisdiction.").

338)

As noted above, provisional measures are frequently sought at the outset of an arbitration. *See* §17.02[A][5][d]. This is, of course, the same time that jurisdictional challenges are typically raised (and most likely to be unresolved). It is therefore important as a practical matter that tribunals not be incapacitated from issuing provisional measures, which may be central to a fair resolution of the parties' dispute, because of a jurisdictional challenge (which may well be tactical in nature).

339)

Shihata & Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Rev. 299, 326 (1999).

340)

See, e.g., *Nova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶231; *Italba Corp. v. Uruguay, Decision on Claimant Application for Provisional Measures and Temporary Relief in ICSID Case No. ARB/16/9 of 15 February 2017*, ¶¶111 *et seq.*; *Hydro Srl v. Albania, Order on Provisional Measures in ICSID Case No. ARB/15/28 of 3 March 2016*, ¶¶3.7 *et seq.*; *Valle Verde v. Venezuela, Decision on Provisional Measures in ICSID Case No. ARB/12/18 of 25 January 2016*, ¶77; *Biwater Gauff (Tanzania) Ltd v. Tanzania*, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶70 ("It is also clear … that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction"); *Tokios Tokelés v. Ukraine*, *Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003*, ¶6.
341)

SeePNG Sustainable Dev. Program Ltd v. Papua NewGuinea, *Decision on Provisional Measures in ICSID Case No. ARB/13/13 of 21 January 2015*.
342)

See, e.g., *Pugachev v. Russia*, UNCITRAL, *Interim Award of 17 July 2017*, ¶216; *United Utilities BV v. Estonia*, *Decision on Respondent's Application for Provisional Measures in ICSID Case No. ARB/14/24 of 12 May 2016*, ¶78; *Lao Holdings NV v. Laos*, *Decision on Claimant's Second Application for Provisional Measures in ICSID Case No. ARB(AF)/12/6 of 18 March 2015*, ¶¶16 *et seq.*; *Bendone-Derossi Int'l v. Iran*, *Interim Award in IUSCT Case No. ITM 40-375-1 of 7 June 1984*, 6 Iran–US CTR 130, 131-33 (1984); *U.S.A., on Behalf of and for the Benefit of Tadjer-Cohen Assocs. v. Iran*, *Award in IUSCT Case No. ITM 50-12118-3 of 11 November 1985*, 9 Iran–US CTR 302, 304-05 (1985) ("The Tribunal is satisfied that there is at least a *prima facie* showing that it has jurisdiction over the substantive claim pending before it. Such preliminary determination is, however, without prejudice to the Tribunal's final decision on jurisdiction.").
343)

Bendone-Derossi Int'l v. Iran, *Interim Award in IUSCT Case No. ITM 40-375-1 of 7 June 1984*, 6 Iran–US CTR 130, 131-33 (1984).
344)

See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 523 (2d ed. 2013) ("although the tribunal may not order interim measures in the absence of jurisdiction over the merits of the case, considerations of urgency dictate that a *prima facie* showing of jurisdiction is sufficient at the stage that interim measures are requested"); Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Lawin International Arbitration: Liber Amicorum Michael Pryles* 109 (2018).
345)

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.), *Order of 10 May 1984*, [1984] I.C.J. Rep. 169, 179 (I.C.J.). *See also* Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 Int'l & Comp. L.Q. 90, 92 (1995) (ICJ requires only that applicant's case appears "*prima facie* to afford a basis on which the jurisdiction of the Court might be founded").
346)

If a tribunal's jurisdiction to order provisional measures is challenged, its consideration of that challenge is not on a *prima facie* basis; rather, the tribunal must conclude that it in fact does possess the competence to order the requested provisional relief. This is distinguishable from a challenge to the tribunal's underlying jurisdiction to consider and decide the merits of the parties' dispute.
347)

Donovan *et al*., *Jurisdictional Findings on Provisional Measures in International Arbitration*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Lawin International Arbitration: Liber Amicorum Michael Pryles* 107, 115 (2018).
348)

See, e.g., 2017 ICC Rules, Appendix V, Art. 1(3)(e).
349)

See, e.g., 2016 SIAC Rules, Schedule I, ¶8; 2014 ICDR Rules, Art. 6(4).
350)

See AInaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35 Arb. Int'l 441, 449-52 (2019).

351)

SeeJudgment of 13 April 2010, DFT 4A_582/2009, ¶2.3.2 (Swiss Fed. Trib.) ("Although there are a large number of distinctions and classifications, as a result of the very nature of this legal institution, legal scholarship generally classifies provisional measures into three categories depending on their purpose: conservatory measures (in French, *mesures conservatoires* and in German, *Sicherungsmassnahmen*), which aim to maintain the object of the dispute in its current state throughout the length of the proceedings; regulatory measures (in French, *mesures de réglementation*, and in German, *Regelungsmassnahmen*), which regulate a lasting legal relationship between the parties throughout the proceedings; interlocutory anticipatory enforcement measures (in French, *mesures d'exécution anticipée provisoires*, and in German, *Leistungsmassnahmen*) – these may relate to either monetary benefits or other obligations to do something or to abstain from doing something – which aim to obtain enforcement on an interim basis of all or a portion of the claim on the merits"); Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9, 44-59, 106-20 (1992); Schneider, *London Court of International Arbitration*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 32, 159-78 (2011) (describing "impressive variety of interim measures being ordered by LCIA tribunals").

352)

See §17.02[A][5][a].

353)

See §17.02[A][3][b]; §17.02[A][5][c]. In turn, as discussed above, national law limitations are subject to the New York Convention. *See* §17.02_[A][2]; §17.02[F]. *See also* Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 431 (2010) (considering law applicable to permissible types of interim relief).

354)

See §17.02[C].

355)

See Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 296-97 (2d ed. 2005) ("The variety of conservatory and interim measures encountered in connection with international arbitration proceedings is enormous"); C. Miles, *Provisional Measures Before International Courts and Tribunals* 298-302 (2017).

356)

It is clear that arbitrators have the inherent power to issue a broad range of types of provisional measures, even if applicable law or institutional rules do not specifically identify such categories of relief. D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 518 (2d ed. 2013) ("it must be stressed that [Article 26(1)] explicitly states that [the enumerated] four categories [of interim measures] are intended only as examples, and do not limit the arbitral tribunal's power to order other measures that would be appropriate in light of the particular circumstances"); C. Miles, *Provisional Measures Before International Courts and Tribunals* 298-302 (2017); Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 196 (1977).

357)

See UNCITRAL Model Law, 2006 Revisions, Art. 17(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").

358)

See, e.g., *id.* at Art. 17(2)(a).

359)

International arbitral tribunals have not infrequently issued or accepted the availability of such orders. *See, e.g.*, *Interim Award in ICC Case No. 17191,* XLII Y.B. Comm. Arb. 82 (2017); *Procedural Decision of February 2009 in ICC Case No. 15634*, in ICC, *Procedural Decisions in ICC Arbitration* 58 (2015); *Final Award in ICC Case No. 9324*, cited Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 29 (2000) (party ordered to reimburse amount of letter of credit if such letter of credit were called); *Final Award in ICC Case No. 7895*, 11(1) ICC Ct. Bull. 64, 65 (2000) (party ordered to refrain from selling other party's products); *Plama Consortium Ltd v. Bulgaria*, *Procedural Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶38; *Alghanim v. Jordan, Procedural Order No. 2 on the Application for the Grant of Provisional Measures in ICSID Case No. ARB/13/38 of 24 November 2004*, ¶103 ("the Tribunal by majority (Professor Kohen dissenting) hereby recommends that until the Tribunal's jurisdiction in the present proceedings is finally determined: (1) The Respondent refrain from prosecuting the Jordanian Proceedings against the First and Second Claimants and, jointly with Claimants, request the Jordanian Court to suspend the Jordanian Proceedings against Claimants"); *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶¶5(iii) *et seq*.

National courts have also upheld such orders. *See, e.g.*, *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822 (2d Cir. 1990); *Judgment of 24 November 1999*, 4 Sch 03/99 (Oberlandesgericht Thüringen). *See alsoEspiritu Santo Holdings, LP v. L1bero Partners, LP*, 2019 WL 2240204, at *13 (S.D.N.Y.); *N. Am. Deer Reg., Inc. v. DNA Solutions, Inc.*, 2017 WL 2402579, at *3 (E.D. Tex.); *Johnson v. Dentsply Sirona Inc.*, 2017 WL 4295420, at *6 (N.D. Okla.) (confirming tribunal's preliminary injunction enjoining plaintiff from breaching contractual confidentiality and non-compete provisions); *APR Energy, LLC v. First Inv. Group Corp.,* 88 F.Supp.3d 1300 (M.D. Fla. 2015); *Midmark Corp. v. Janak Healthcare Priv. Ltd*, 2014 WL 2737996, at *6 (S.D. Ohio); *Yahoo! Inc. v. Microsoft Corp.*, 983 F.Supp.2d 310, 319 (S.D.N.Y. 2013) (confirming emergency arbitrator's decision restraining Yahoo from delaying "transitioning" phase in Taiwan agreed with Microsoft); *McHenry Software, Inc. v. ARAS 360 Tech., Inc.*, 2012 WL 13027554, at *3 (E.D.N.C.) (ordering defendant to refrain from use, duplication, or transmission of copyright-protected material owned by claimant); *Huawei Techs. Co. v. Motorola, Inc.*, 2011 WL 589697 (N.D. Ill.) (granting order preventing defendant from disclosing confidential information to preserve status quo pending potential arbitration); *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH*, 2010 WL 2991390 (C.D. Cal.) (granting injunctive relief pending arbitration to "preserve the status quo and the meaningfulness of the arbitration process provided"); *AES Ust Kamenogorsk Hydropower Plant LLP v. Ust Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 (U.K. S.Ct.); *Sabbagh v. Khoury* [2019] EWCA Civ 1219 (English Ct. App.); *AB v. CD* [2014] EWCA Civ 229 (English Ct. App.) (granting interim injunction to restrain defendant from terminating licensing agreement); *PriceWaterhouseCoopers LLP v. Carmichael* [2019] EWHC 824 (Comm) (English High Ct.); *Co. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.); *Palmerston Hotels Resorts BV v. Brocket Hall UK Ltd* [2016] EWHC 2918 (Comm) (English High Ct.); *GigSky APS v. Vodafone Roaming Serv. Sarl* [2015] EWHC 4047 (QB) (English High Ct.); *Seele Middle E. FZE v. Drake & Scull Int'l SA Co.* [2014] EWHC 435 (TCC) (English High Ct.); *Judgment of 19 September 2017*, 2018 Rev. Arb. 632 (Paris Cour d'Appel); *R1 Int'l Pte Ltd v. Lonstroff AG*, [2014] SGCA 56 (Singapore Ct. App.); *Malini Ventura v. Knight Capital Pte Ltd*, [2015] SGHC 225 (Singapore High Ct.); *Duro Felguera Australia Pty Ltd v. Trans Global Projects Pty Ltd*, [2018] WASCA 174 (W. Australia Ct. App.) (granting freezing order preventing defendant from disposing assets).

360)

See authorities cited §17.02[G][4][a]; UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(1) ("maintain or restore the status quo pending determination of the dispute"). *See also* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463 (2016).

361)

K. P. Berger, *International Economic Arbitration* 339 (1993) (emphasis added). Or, as explained by another commentary, interim measures may be designed "*to preserve the status quo pending arbitration*." W. Craig, W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* 137 (1998) (emphasis added). *See also* C. Miles, *Provisional Measures Before International Courts and Tribunals* 174 (2017).

362)

Extract from A Procedural Order in ICC Arbitration No. 12 (1989), 12 ASA Bull. 142, 144 (1994). *See, e.g., id.* at 142 (1994) (ordering that parties abide by terms of contract for specified time limit); UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(a); *Award in Unidentified ICC Case*, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 61 (1993) ("essential, until the final award on all the claims and counterclaims, that the contractual provisions agreed between the parties keep producing all their effects"); *Iran v. U.S.A.*, *Decision No. DEC 116-A15(IV) & A24-FT of 18 May 1993*, 29 Iran–US CTR 214 (1993) (refusing to order provisional measures because they "would not operate so as to maintain the status quo in the continuing proceedings, … but would modify that status quo"); *Component Builders, Inc. v. Iran*, *Order in IUSCT Case No. 395 of 10 January 1985*, XI Y.B. Comm. Arb. 359 (1986) (ordering requested provisional measure and finding that "ability to order temporary restrictions on parties may be vitally necessary to preserve the status quo"); *Elec. Co. of Sofia & Bulgaria*, *Interim Measures of Protection*, PCIJ Series A/B, No. 79, 199 (P.C.I.J. 1939). *See also* Committee on International Civil and Commercial Litigation, *Principles on Provisional and Protective Measures in International Litigation*, reprinted in ILA, *Report of the Sixty-Seventh Conference, Helsinki* 202, ¶1 (1996) (provisional measures "maintain the status quo pending determination of the issues at trial" or "secure assets").

363)

See, e.g., *Transglobal Green Energy, LLC v. Panama*, *Decision on the Respondent's Request for Provisional Measures Relating to Security for Costs in ICSID Case No. ARB/13/28 of 21 January 2016*, ¶28; *EuroGas Inc. v. Slovakia, Decision on the Parties' Request for Provisional Measures in ICSID Case No. ARB/14/14 of 23 June 2015*, ¶119 ("The Tribunal stresses that the provisional measures envisioned in Article 47 of the ICSID Convention are mainly those formulated to preserve the *status quo*"); *Plama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶38 (provisional measures appropriate "to preserve the status quo"); *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶¶5(iii) *et seq*. (tribunal must determine whether provisional measures would "maintain the 'status quo'"). *See also* C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶157 (2d ed. 2009) ("The references in the *travaux préparatoires* [of the ICSID Convention] to the preservation of the *status quo* … are an expression of the principle that in the course of litigation the parties must refrain from taking steps that might affect the rights of the side which are the object of the proceedings on the merits. This is particularly so where … a business is at stake which may be damaged through unilateral action.").

364)

Maffezini v. Spain, *Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, ¶14.

365)

See 1990 ICC Rules for Pre-Arbitral Referee Procedure, Art. 2(1)(a) ("The powers of the Referee are: to order any conservatory measures or any *measures of restoration* …") (emphasis added).

366)

See UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(a) ("Maintain *or restore* the status quo pending determination of the dispute …") (emphasis added); 2013 UNCITRAL Rules, Art. 26(2)(a) (same); 2018 HKIAC Rules, Art. 23(3) (same); Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, The Work of the UNCITRAL and Proposals for Moving Forward* 82-149 (2003).

367)

Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 33 (2000). *See, e.g., Award in ICC Case No. 6632*, discussed in Reiner, *Les Mesures Provisoires et Conservatoires et l'Arbitrage International, Notamment l'Arbitrage CCI*, 125 J.D.I. (Clunet) 853, 890 (1998) (referring to "general principle according to which the parties ought to take such reasonable steps as are necessary to render the arbitration proceedings effective. It also means that the arbitrators can order measures to prevent the breach of this principle"); *Nova Group Inv., BV v. Romania*, *Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶236; *Plama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶40 ("requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out"); *Tokios Tokelés v. Ukraine*, *Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003*, ¶2 ("The parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, … or render its resolution more difficult"); *Extract from A Procedural Order in ICC Arbitration No. 12 of 1989*, 12 ASA Bull. 142, 144 (1994); *Rockwell Int'l Sys., Inc. v. Iran*, *Award in IUSCT Case No. ITM 20-430-1 of 6 June 1983*, 2 Iran–US CTR 369, 371 (1983) ("tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the parties and to ensure its jurisdiction and authority are made fully effective"); *Manuel García Armas v. Venezuela, Procedural Order No. 9 in PCA Case No. 2016-08 of 20 June 2018*, ¶197. *See also* Bond, *The Nature of Conservatory and Provisional Measures*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 8, 9 (1993) (one principal purpose of conservatory and provisional measures; it ensures "*that the very purpose of the litigation is not frustrated while awaiting the pronouncement and enforcement of a final decision on the merits*") (emphasis added); ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968*, 1 ICSID Rep. 63, 99 (1993) (provisional measures were designed in part to allow tribunals, during pendency of arbitration, to prevent parties from "tak[ing] steps that might … prejudice the execution of the award"); C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶¶14 *et seq*. (2d ed. 2009).

368)

Interim Award in ICC Case No. 8879, 11(1) ICC Ct. Bull. 84, 89 (2000).

369)

See, e.g.,EuroGas Inc. v. Slovakia, *Procedural Order No. 3 on Decision on Requests for Provisional Measures in ICSID Case No. ARB/14/14 of 23 June 2015*, ¶89; *Gavrilovic v. Croatia*, *Decision on Provisional Measures in ICSID Case No. ARB/12/39 of 30 April 2015*, ¶192; *Bear Creek Mining Corp. v. Peru*, *Procedural Order No. 2 in ICSID Case No. ARB/14/21 of 19 April 2015*, ¶65; *Tokios Tokelés v. Ukraine*, *Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003*, ¶2; *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶12 (recognizing need for "measures that will prevent the erosion of rights pending final resolution of the dispute"); *Amco Asia Corp. v. Indonesia*, *Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983*, XI Y.B. Comm. Arb. 159, 159-60 (1986) (provisional measures appropriate if challenged action "could … [do] any actual harm … [or] aggravate or exacerbate the legal dispute now put before the tribunal").

370)

See UNCITRAL Model Law, 2006 Revisions, Arts. 17(2)(a), (c); 2020 LCIA Rules, Art. 25(1)(ii) ("order the preservation, storage, sale or other disposal of any monies, documents, goods, samples, property or thing under the control of any party and relating to the subject-matter of the arbitration"); 2019 CPR Rules, Rule 13(1). International arbitral tribunals have not infrequently issued such orders. *See* §16.02[E][3][f]; §17.02[G][4][g].

371)

See §17.02[A][3][b][i]; §17.02[A][4][a].

372)

Maffezini v. Spain, *Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, 16 ICSID Rev. 207, ¶14 (2001). *See* Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325, 332 (2004) (recognizing "restitution of seized property" as paradigm case for provisional measures). *See also* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).

373)

Susanville Indian Rancheria v. Leavitt, 2007 WL 662197, at *7 (E.D. Cal.). *See also**Boardman v. Pac. Seafood Group*, 822 F.3d 1011, 1024 (9th Cir. 2016) ("'Status *quo ante litem*' refers to 'the last uncontested status which preceded the pending controversy'"); *Mediterranean Cuisine Franchising Co., LLC v. Karma Capital, Inc.*, 2019 WL 4308777, at *3 (C.D. Cal.) ("The 'status quo means the last, uncontested status which preceded the pending controversy'").

374)

In one ICC award, the Tribunal held: "In the present case, A requests the Arbitral Tribunal to place the parties again in the position in which, with respect to the guarantees, they were at commencement of the arbitration. The Arbitral Tribunal observed already that B did not comply with the contract in calling the guarantees before the drawing up of the final account, while A was prepared to prolong the guarantees. Ordering that the parties be placed again in the position in which they were at the beginning of the proceedings and that they remain in this position until the final award is a conservatory measure in the wider sense which finds its place among the measures which the arbitrator may order on the basis of Article 183 [of the Swiss Law on Private International Law]. *It is all the more necessary when the contractual equilibrium, as the parties had intended it, must be restored. Limited to the duration of the arbitration, the measure does not prejudge the merits*." *Order in ICC Case No. 7388*, quoted in Reiner, *Les Mesures Provisoires et Conservatoires et l'Arbitrage International, Notamment l'Arbitrage CCI*, 125 J.D.I. (Clunet) 853, 886 (1998) (emphasis added).

375)

*See**Award in ICC Case No. 6503*, 122 J.D.I. (Clunet) 1022 (1995) (ordering parties to continue to perform contract notwithstanding pre-arbitration termination notice).

376)

There is no serious basis for arguing that a tribunal lacks authority to require a party to restore a state of facts that existed prior to the commencement of the arbitration. The date of filing an arbitration in no way restricts a tribunal's authority over actions occurring after that date any more than a tribunal in its final award would be prevented from ordering such a result.

377)

See §17.02[G][3][b]. Other tribunals remark that the existence of a *prima facie* case is irrelevant to the decision whether to grant provisional measures. *See* §17.02[G][3][b][iv].

378)

See UNCITRAL Model Law, Art. 17(2)(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"). *See also* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463-64 (2016).

379)

*See*Chapter 20.

380)

Order in ICC Case No. 7388, in Reiner, *Les Mesures Provisoires et Conservatoires et l'Arbitrage International, Notamment l'Arbitrage CCI*, 125 J.D.I. (Clunet) 853, 889 n.82 (1998).
The 2006 Revisions to the UNCITRAL Model Law do not expressly refer to orders precluding aggravation of the parties' dispute, although providing for an order that a party "[t]ake 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." UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(b).

381)

Tokios Tokelés v. Ukraine, *Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003*, ¶2 (emphasis added). *See alsoGramercy Funds Mgt LLC v. Peru, Procedural Order No. 5 in UNCITRAL Case of 29 August 2018*, ¶60; *Hela Schwarz GmbH v. China, Procedural Order No. 2 in ICSID Case No. ARB/17/19 of 10 August 2018*, ¶115; *Rizzani de Eccher SpA v. Kuwait, Decision of Provisional Measures in ICSID Case No. ARB/17/8 of 23 November 2017*, ¶132; *Nova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶236; *Rawat v. Mauritius, Order Regarding Claimant's and Respondent's Requests for Interim Measures in PCA Case No. 2016-20 of 11 January 2017*, ¶132; *Gabriel Res. Ltd v. Romania, Decision on Claimant's Second Request for Provisional Measures in ICSID Case No. ARB/15/31 of 22 November 2016*, ¶70; *Evrobalt LLC v. Moldova, Award on Emergency Measures in Emergency Arbitration EA 2016/082 of 30 May 2016*, ¶64; *Teinver SA v. Argentina, Decision on Provisional Measures in ICSID Case No. ARB/09/1 of 8 April 2016*, ¶210; *Transglobal Green Energy, LLC v. Panama, Decision on Provisional Measures Relating to Security for Costs in ICSID Case No. ARB/13/28 of 21 January 2016*, ¶28; *EuroGas Inc. v. Slovakia, Decision on Request for Provisional Measures in ICSID Case No. ARB/14/14 of 23 June 2015*, ¶89; *Churchill Mining v. Indonesia, Procedural Order No. 14 in ICSID Case No. ARB/12/12 and 12/40 of 22 December 2014*, ¶¶71 *et seq*.; *Lao Holdings NV v. Laos, Ruling on Motion to Amend the Provisional Measure Order in ICSID Case No. ARB(AF)/12/6 of 30 May 2014*, ¶15.

382)

Amco Asia Corp. v. Indonesia, *Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983*, XI Y.B. Comm. Arb. 159, 161 (1986). In *Amco v. Indonesia* such a risk of aggravation and exacerbation did not exist. However, "[t]he Tribunal's evaluation of the factual situation … and its finding … creates the impression that, given the right circumstances, it would have been prepared to recommend provisional measures against an aggravation of the dispute." C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶139 (2d ed. 2009). Other ICSID authorities are to the same effect. *SeeNova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶234; *Churchill Mining plc v. Indonesia*, *Procedural Order No. 3 on Provisional Measures in ICSID Case No. ARB/12/14 of 4 March 2013*, ¶¶46 *et seq*. ("While the request for provisional measures must be denied, the Tribunal reminds the Parties of their general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration"); *Quiborax SA v. Bolivia*, *Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶117 ("[R]ights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute. … [T]hese latter rights are self-standing rights."); *Burlington Res. Inc. v. Ecuador*, *Procedural Order No. 1 in ICSID Case No. ARB/08/5 of 29 June 2009*, ¶60 ("rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute …, but may extend to procedural rights including the general right to the *status quo* and to the non-aggravation of the dispute … [which] are thus self-standing rights"); *City Oriente Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/06/21 of 19 November 2007*, ¶57 ("pending a decision on this dispute, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails"); *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, *Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999*, ¶12 (recognizing need for "measures that will prevent the erosion of rights pending final resolution of the dispute"). *See also* ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968*, 1 ICSID Rep. 63, 99 (1993) (1968) ("[the right to provisional measures] is based on the principle that once a dispute is submitted to arbitration, the parties should not take steps that might aggravate *or* extend their dispute *or* prejudice the execution of the award") (emphasis added); 1975 ICSID Regulations and Rules, Notes, ICSID/4/Rev. 1, 104 ("Article 47 of the Convention … is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute").

383)

Partial Award in ICC Case No. 3896, 110 J.D.I. (Clunet) 914, 918 (1983) ("Arbitral Tribunal considers that there exists, undeniably, the risk of the dispute before it becoming aggravated or magnified, and that the parties should, in the same spirit of goodwill that they have already demonstrated in signing the Terms of Reference, refrain from any action likely to widen or aggravate the dispute, or to complicate the task of the Tribunal or even to make more difficult, one way or another, the observance of the final arbitral award"); *Partial Award in ICC Case No. 3892*, in S. Jarvin & Y. Derains (eds.), *Collection of ICC Arbitral Awards 1974-1985* 161, 164 (1990).

384)

Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61 (1993). *See alsoPartial Award in Unidentified ICC Case*, in *id*. at 61 (ordering parties to withdraw all related litigation and extend bank guarantees to be payable in accordance with tribunal's final award); *Award in ICC Case No. 3896*, 110 J.D.I. (Clunet) 914 (1983) (to prevent aggravation of parties' dispute, ordering party not to call bank guarantees).

385)

Orders requiring preservation of disputed property are discussed further below. *See* §17.02[G][4][g].

386)

The Permanent Court of International Justice explained in *Electricity Co. of Sofia & Bulgaria* that "parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." *Elec. Co. of Sofia & Bulgaria*, *Interim Measures of Protection*, PCIJ Series A/B, No. 79, 199 (P.C.I.J. 1939). *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Provisional Measures Order of 23 January 2020,* [2020] General List No. 178 (I.C.J.); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures Order of 14 June 2019,* [2019] General List No. 172 (I.C.J.); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, (Iran v. U.S.A.), Provisional Measures Order of 3 October 2018,* [2018] General List No. 175 (I.C.J.); *Jadhav Case (India v. Pakistan), Provisional Measures Order of 18 May 2017,* [2017] I.C.J. Rep. 2017 (I.C.J.); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia), Provisional Measures Order of 19 April 2017*, [2017] I.C.J. Rep. 2017 (I.C.J.); *Frontier Dispute Between Burkina Faso & Mali*, *Order on Provisional Measuresof 10 January 1986*, [1986] I.C.J. Rep. 3, 11 (I.C.J.) (ICJ ordered both states to "ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case"); *Nuclear Tests (Australia v. France)*, [1973] I.C.J. Rep. 99, 104, 106 (I.C.J.) ("no action of any kind is taken which might aggravate or extend the dispute submitted to the Court").

387)

Pulp Mills on the River Uruguay (Argentina v. Uruguay), *Order on Provisional Measures of 23 January 2007*, [2007] I.C.J. Rep. 135, ¶49 (I.C.J.).

388)

Id. at ¶11.

389)

See §8.02.

390)

García Armas v. Venezuela, Procedural Order No. 9 in PCA Case No. 2016-08 of 20 June 2018, ¶201; *Nova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶234; *Gabriel Res. Ltd v. Romania, Decision on Claimants' Second Request for Provisional Measures in ICSID Case No. ARB/15/31 of 22 November 2016*, ¶69; *Teinver SA v. Argentina, Decision on Provisional Measures in ICSID Case No. ARB/09/1 of 8 April 2016*, ¶198; *Valle Verde v. Venezuela, Decision on Provisional Measures in ICSID Case No. ARB/12/18 of 25 January 2016*, ¶88; *Transglobal Green Energy, LLC v. Panama, Decision on Provisional Measures relating to Security for Costs in ICSID Case No. ARB/13/28 of 21 January 2016*, ¶28; *Menzies Middle E. & Africa SA v. Senegal, Procedural Order No. 2 in ICSID Case No. ARB/15/21 of 2 December 2015*, ¶129; *RSM Prod. Corp. v. Saint Lucia, Decision on Saint Lucia's Request for Security for Costs in ICSID Case No. ARB/12/10 of 13 August 2014*, ¶¶65 *et seq.*; *Churchill Mining v. Indonesia, Procedural Order No. 9 in ICSID Case No. ARB/12/14 and 12/40 of 8 July 2014*, ¶90; *Lao Holdings NV v. Laos, Ruling on Motion to Amend the Provisional Measure Order in ICSID Case No. ARB(AF)/12/6 of 30 May 2014*, ¶12; *Quiborax SA v. Bolivia, Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶117; *Burlington Res. Inc. v. Ecuador*, *Procedural Order No. 1 in ICSID Case No. ARB/08/5 of 29 June 2009*, ¶60 ("[T]he rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to *the non-aggravation of the dispute. These latter rights are thus self-standing rights*.") (emphasis added); *Perenco Ecuador Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/08/6 of 8 May 2009*, ¶79; *City Oriente Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/06/21 of 19 November 2007*, ¶¶60 *et seq. ContraCEMEX Caracas Invs. BV v. Venezuela*, *Decision on Provisional Measures in ICSID Case No. ARB/08/15 of 3 March 2010*, ¶¶40 *et seq*. (adopting *Pulp Mills* analysis).
391)

2020 LCIA Rules, Art. 25(1)(iii).
392)

Interim Award in ICC Case No. 8894, 11(1) ICC Ct. Bull. 94, 97-98 (2000) (ordering party to petition administrative authority to cancel license and import permission); *Award in ICC Case No. 6503*, 122 J.D.I. (Clunet) 1022 (1995) (order to continue executing a long-term contract pending award); *Texaco Overseas Petroleum Co. v. Libya*, *Ad Hoc Award of 19 January 1977*, IV Y.B. Comm. Arb. 177 (1979) (ordering party to abide by contract and restore parties to original position).
393)

Bond, *The Nature of Conservatory and Provisional Measures*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 8, 11 (1993).
394)

P. Lalive, J.-F. Poudret & C. Reymond, *Le Droit de l'Arbitrage Interne et International en Suisse* Art. 183, ¶7 (1989) (emphasis added).
395)

Partial Award in Unidentified ICC Case, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61-62 (1993).
396)

Decision in Arbitration No. 22 of 1972, 12 ASA Bull. 148, 152 (1994). *See alsoSL Mining Ltd v. Sierra Leone,Order in ICC No. 24708 (EA) of 8 September 2019*, ¶120; *PNG Sustainable Dev. Program Ltd v. Papua NewGuinea, Decision on the Claimant's Request for Provisional Measures in ICSID Case No. ARB/13/33 of 21 January 2015*, ¶171 (citing G. Born, *International Commercial Arbitration* 2511-40, 3387-90 (2d ed. 2014)); *Perenco Ecuador Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/08/6 of 8 May 2009*, ¶79(4) (ordering "provisional measures restraining the Respondents from unilaterally amending, rescinding, terminating, or repudiating the Participation Contracts or engaging in any other conduct which may directly or indirectly affect or alter the legal situation under the Participation Contracts").
397)

See §23.07[C].
398)

This is because an attachment entails orders against third parties, not subject to the tribunal's jurisdiction. *See* §17.02[A][5][a].

399)

See, e.g., UNCITRAL Model Law, Art. 17(2)(c); English Arbitration Act, 1996, §39; Swedish Arbitration Act, §25(4) ("interim measures to secure the claim"); Singapore International Arbitration Act, Art. 12(1)(a); Australian International Arbitration Act, §23; Canadian Commercial Arbitration Act, Art. 17; Irish Arbitration Act, Art. 19; Indian Arbitration and Conciliation Act, §17; South African International Arbitration Act, Schedule 2, Art. 17(e). *See also* 2020 LCIA Rules, Art. 25(1)(a) ("provide security for all or part of the amount in dispute"); 2020 CEPANI Rules, Art. 28; 2015 NAI Rules, Art. 35(3) ("provision of security").

400)

UNCITRAL Model Law, Art. 17(2)(c).

401)

SeeProcedural Order of July 2008 in ICC Case No. 15218, in ICC, *Procedural Decisions in ICC Arbitration* 79 (2015); *Procedural Order of December 2007 in ICC Case No. 14661*, in *id.* at 76; *Final Award in ICC Case No. 9154*, 11(1) ICC Bull. 98 (2000) (requiring deposit of disputed funds into escrow account); *Interim Awards in ICC Case No. 8670*, 11(1) ICC Ct. Bull. 77 (2000) (ordering provisional payments to one party, on condition that receiving party posts security in amounts of such payments); *Final Award in ICC Case No. 7536*, cited in Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 29 (2000) (requiring deposit of specified amount into escrow); *Interim Award in NAI Case No. 1694 of 12 December 1996*, XXIII Y.B. Comm. Arb. 97 (1998).

402)

See, e.g., *Offshore Exploration & Prod., LLC v. Morgan Stanley*, 626 F.App'x 303 (2d Cir. 2015) (confirming arbitral award ordering Offshore to advance $75 million to counter-party while underlying tax dispute remained pending); *Loral Corp. v. Swiftships, Inc.*, 77 F.3d 420 (11th Cir. 1996) (confirming award requiring defendant to deposit milestone payments received from third party into escrow account); *Nat'l Union Fire Ins. Co. v. Source One Staffing LLC*, 2017 WL 2198160, at *2 (S.D.N.Y.) ("the arbitration panel acted well within its authority to take steps to ensure that any final award would not be rendered meaningless"); *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694, at *2 (N.D. Ill.) (confirming interim award for pre-hearing security); *Companion Prop. v Allied Provident Ins. Inc.*, 2014 WL 4804466, at *3 (S.D.N.Y.); *On Time Staffing, LLC v. Nat'l Union Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 50689 (S.D.N.Y.) (upholding arbitral tribunal's order of security for eventual award: broad arbitration clause provides arbitrators "discretion to order remedies they determine appropriate"); *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F.Supp.2d 926 (N.D. Cal. 2003) (confirming award requiring party to "either make an interim cash payment to the claim or post a Letter of Credit"); *Konkar Maritime Enters., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267, 271 (S.D.N.Y. 1987) (upholding order, prior to conducting hearing, that one party post security for claims against it); *Compania Chilena de Navegacion Interoceanica, SA v. Norton, Lilly & Co.*, 652 F.Supp. 1512, 1516 (S.D.N.Y. 1987); *Sperry Int'l Trade, Inc. v. Israel*, 532 F.Supp. 901, 905 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982). *But seeSwift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972); *Dalian Huarui Heavy Indus. Int'l Co. Ltd v. Clyde & Co Australia* [2020] WASC 132 (W. Australia Sup. Ct.) (enforcing arbitral tribunal's order to secure disputed amount in money trust account).

403)

On Time Staffing, LLC v. Nat'l Union Fire Ins. Co., 784 F.Supp.2d 450 (S.D.N.Y. 2011).

404)

Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 34 (2000) ("[according to a majority of authors] measures for the securing of money claims are a matter entirely governed by the Swiss Debt Enforcement Act"). This is, however, a matter of debate. *Compare* Berti, in S. Berti *et al*. (eds.), *International Arbitration in Switzerland* Art. 183, ¶12 (2000) ("There is no reason why an international arbitral tribunal with a seat in Switzerland should not order a party to refrain from disposing of specific assets").

405)

Partial Award in Unidentified ICC Case, cited in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61 (1993). *See alsoProcedural Order of January 2006 in ICC Case No. 12732*, in ICC, *Procedural Decisions in ICC Arbitration* 62 (2015) (orders for security for costs are "very rarely granted, absent exceptional circumstances").

406)

See §1.02[B][7].

407)

See, e.g., *Procedural Order of January 2007 in ICC Case No. 14355*, in ICC, *Procedural Decisions in ICC Arbitration* 70 (2015) ("International arbitration arises in connection with contracts … which imply greater risks. … Such risks are to be borne by the parties, including … the risk of the other party falling into financial difficulties"); *Fidelity & Deposit Co. v. Commercial Cas. Consultants, Inc.*, 976 F.2d 272, 275 (5th Cir. 1992) (unless he or she is able to show fraud, "contract claimant cannot avoid the risk of insolvency that it originally accepted as part of the bargain"); *Nagel v. ADM Inv. Servs.*, 65 F.Supp.2d 740, 749 (N.D. Ill. 1999) ("Any forward contract has some counterparty credit risks: the farmer may not deliver; the elevator may go bankrupt").

408)

Partial Award in Unidentified ICC Case, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 62 (1993).

409)

See §17.02_[G][1]; §17.02[G][3].

410)

For a discussion of awards of legal costs in international arbitration, *see* §23.08[C]. *See generally* Berger, *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASA Bull. 7 (2010); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 296-97 (2d ed. 2005); Fitzpatrick, *Security for Costs Under the Arbitration Act, 1996*, 1998 Int'l Arb. L. Rev. 139; Hsu, *Orders for Security for Costs and International Arbitration in Singapore*, 2000 Int'l Arb. L. Rev. 108; Markert, *Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors*, 11(2) Contemp. Asia Arb. J. 217 (2018); Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397 (2016); Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 Am. Rev. Int'l Arb. 306 (2000); Soo, *Securing Costs in Hong Kong Arbitration*, 2000 Int'l Arb. L. Rev. 25; Tan & Seetoh, *Security for Costs in International Arbitration,* Int'l Arb. Asia (2017); Živković, *Security for Costs in International Arbitration: What's Missing from the Discussion?*, Kluwer Arb. Blog (9 Nov. 2016).

411)

Lindow v. Barton McGill Marine Ltd, Case No. CP13-SD/02 (Auckland High Ct. 2002) (Article 17 does not grant arbitrator power to order security for costs).

412)

See §17.02[A][3][b][i]; §17.02[A][5][c].

413)

English Arbitration Act, 1996, §38(3). *See also* R. Merkin, *Arbitration Law* ¶¶14.65 *et seq*. (1991 & Update Nov. 2017); Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397, 401 (2016).

414)

See, e.g., Singapore International Arbitration Act, §12(1)(a); Hong Kong Arbitration Ordinance, §56(1)(a); Australian International Arbitration Act, §23K.

415)

2020 LCIA Rules, Art. 25(2) ("provide or procure security for the Legal Costs and Arbitration Costs"); 2018 HKIAC Rules, Art. 23(6).

416)

See, e.g., 2016 SIAC Rules, Arts. 27(j), (k). *See also* Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397, 401 (2016).
ICSID has proposed revised ICSID Arbitration Rules which would grant ICSID tribunals the power to "order" (and not merely "recommend") security for costs. *See* ICSID, *Proposals for Amendment of the ICSID Rules* 58-59 (Working Paper No. 4 2020).

417)

A. Bucher & P.-Y. Tschanz, *International Arbitration in Switzerland* ¶161 (1988).

418)

Orlandini v. Bolivia, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs in PCA Case No. 2018-39 of 9 July 2019, ¶145.

419)

Order No. 4 in Zurich Chamber of Commerce Case No. 415 of 20 November 2001, 20 ASA Bull. 467, 470 (2002). *See alsoProcedural Order in ICC Case No. 12035*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under ICC Rules of Arbitration (2003-04)* 28 (2010); *Interim Awards in ICC Case No. 8670*, 11(1) ICC Ct. Bull. 77 (2000); *Interim Award in ICC Case No. 8223*, 11(1) ICC Ct. Bull. 71 (2000); *Commerce Group Corp. v. El Salvador*, *Decision on El Salvador's Application for Security for Costs in ICSID Case No. ARB/09/17 of 20 September 2012*, ¶45 (ICSID annulment committee "may, in the appropriate situation, use its inherent powers to order security for costs," but this power should be exercised "only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced").

420)

See, e.g., *Procedural Order of December 2007 in ICC Case No. 14993*, in ICC, *Procedural Decisions in ICC Arbitration* 77 (2015); *Procedural Order of January 2007 in ICC Case No. 14355*, in *id.* at 70; *Interim Awards in ICC Case No. 8670*, 11(1) ICC Ct. Bull. 77 (2000); *Interim Award in ICC Case No. 8223*, 11(1) ICC Ct. Bull. 71 (2000); *Order No. 6 in Zurich Chamber of Commerce of 12 November 1991*, 13 ASA Bull. 84, 90 (1995). *CompareAward of 21 December 1998*, 17 ASA Bull. 59, 62 *et seq.* (1999) (potential for non-enforceability of costs award held sufficient grounds for security for costs, at least where party's access to justice was not inhibited and principle of equal treatment was respected).

421)

See, e.g., *Coppee-Lavalin SA/NV v. Ken-Ren Chem. & Fertilizers Ltd* [1994] 2 All ER 449 (House of Lords); *Orlandini v. Bolivia, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs in PCA Case No. 2018-39 of 9 July 2019*, ¶143 (factors that govern tribunal's granting of security for costs are: "(i) a claimant's track record of non-payment of cost awards in prior proceedings; (ii) a claimant's improper behavior in the proceedings at issue, interfering with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) other evidence of a claimant's bad faith or improper behavior").

In principle, the fact that a party is domiciled outside the arbitral seat, or has its assets abroad, should not be grounds for denying security. That is because of the generally liberal international regime for recognition and enforcement of foreign arbitral awards. However, if a party is domiciled or has its assets in a state that is not a party to the New York Convention (or a similar international agreement), then the case for security for costs relief is materially enhanced. *See also* Markert, *Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors*, 11(2) Contemp. Asia Arb. J. 217 (2018); Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397, 409-12 (2016).

422)

See, e.g.,Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, Order on Security for Costs in ICSID Case No. ARB/18/35 of 27 January 2020; *García Armas v. Venezuela, Procedural Order No. 9 in PCA Case No. 2016-08 of 20 June 2018*, ¶250 (claimants' agreement with third-party funders did not cover adverse costs or security judgments and therefore constituted exceptional circumstances that allowed order of security for costs); *RSM Prod. Corp. v. Saint Lucia, Decision on Saint Lucia's Request for Security for Costs in ICSID Case No. ARB/12/10 of 13 August 2014*, ¶83 ("the admitted third party funding further supports the Tribunal's concern that Claimant will not comply with costs award render against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such award"); *Order No. 4 in Zurich Chamber of Commerce Case No. 415of 20 November 2001*, 20 ASA Bull. 467 (2002) (party's insolvency "is a common ground for granting security for costs"; "mere potential risk of non-enforceability of a future cost award [is treated as] insufficient grounds; it rather emphasizes the requirement that an order for security shall not unduly restrict the party's access to arbitral justice"). *See also* Markert, *Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors*, 11(2) Contemp. Asia Arb. J. 217 (2018); Redfern & O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Int'l 397, 405-09 (2016) (discussing ICSID awards on issue).

423)

Orlandini v. Bolivia, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs in PCA Case No. 2018-39 of 9 July 2019, ¶144 ("The Tribunal observes that other factors, such as third-party funding or a claimant's serious and proven financial difficulties, may also play a role in the assessment of whether security for costs should be ordered. However, those factors should be assessed in the context of all other relevant circumstances and would typically not, in and of themselves, constitute a sufficient basis for such an order."); *S. Am. Silver Ltd v. Bolivia, Order on Interim Measures in PCA Case No. 2013/15 of 11 January 2016*, ¶¶61 *et seq*. (lack of assets, impossibility to show available economic resources, or existence of economic risk or difficulties that affect finances of company do not per se warrant security for costs); *Procedural Order of January 2007 in ICC Case No. 14355*, in ICC, *Procedural Decisions in ICC Arbitration* 70 (2015) ("lack of money" is not *per se* sufficient ground for granting security for costs).
424)

Article 5 of the UNCITRAL Model Law forbids judicial intervention in arbitral procedures, which readily should extend to applications for judicial orders of security for the costs of an arbitration. *See* §15.06[B].
425)

Coppee-Lavalin SA/NV v. Ken-Ren Chem. & Fertilizers Ltd [1994] 2 All ER 449 (House of Lords); R. Merkin, *Arbitration Law*¶¶14.66 *et seq*. (1991 & Update Nov. 2017).
426)

English Arbitration Act, 1996, §§38(3), 44. *See* R. Merkin, *Arbitration Law*¶¶14.46 *et seq*. (1991 & Update Nov. 2017); U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996).
427)

Frontier Int'l Shipping Corp. v. Owners & All Others Interested in the Ship "Tavros" [2000] FC 427, 445 (Canadian Fed. Ct.); *Judgment of 19 September 2019*, BGH – I ZB 4/19 (German Bundesgerichtshof) (requests for security for costs are within exclusive jurisdiction of arbitral tribunal).
428)

See §15.08[K].
429)

See §8.02_[B]; §15.08[K].
430)

Secomb, *Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems*, 14(1) ICC Ct. Bull. 59 (2003). *See, e.g.*, *Interim Award in ICC Case No. 17050*, 28 ASA Bull. 634 (2010) (party's agreement to ICC arbitration is contractual agreement to pay advance on costs; tribunal can order specific performance of this obligation while not prejudging any finding on cost allocation); *Partial Ad Hoc Award of 2008*, XXXIV Y.B. Comm. Arb. 15 (2009) (once tribunal requested payment for advance on costs, request was binding on parties; tribunal ordered payment of advance on costs without prejudice to final allocation of costs in award on merits); *Unreported Partial Award in ICC Case of 20 December 2004* (issuing award requiring payment of advance on costs by defaulting respondent; "decision of the Arbitral Tribunal to grant the relief requested, must indeed be issued in the form of an award which deals in a final manner with a separate claim that it is independent and not preliminary to other claims in this arbitration"). *See also* D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 140 (2015).
431)

See, e.g., UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(d) ("Preserve evidence that may be relevant and material to the resolution of the dispute"); English Arbitration Act, 1996, §38(4). *See also* Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 77 (2005) ("most obvious type of authority granted under Article 17 is protective measures directly relating to or dealing with the subject matter of the dispute, [such as] the preservation, custody or sale of goods that are the subject matter of the dispute").
432)

See, e.g., 2013 UNCITRAL Rules, Art. 26(2)(d) ("Preserv[ing] evidence that may be relevant and material to the resolution of the dispute"); 2017 ICC Rules, Art. 25(5); 2020 LCIA Rules, Art. 25(1)(ii).
433)

See, e.g., 2017 ICC Rules, Arts. 25(4), (5); 2020 LCIA Rules, Arts. 22(1)(iv), 25(1)(ii).

434)

See, e.g., *Partial Award in ICC Case No. 10040*, cited Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 29 (2000) (requiring party to deliver customs forms for disputed goods, disclose location of goods and refrain from disposing of goods); *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84, 89 (2000) (requiring deposit of shares into trust); *United Tech. Int'l v. Iran*, *Decision No. DEC 53-114-3 of 10 December 1986*, 13 Iran–US CTR 254, ¶16 (1986); *Behring Int'l, Inc. v. Iran*, *Interim and Interlocutory Award in IUSCT Case No. ITM/ITL 52-382-3 of 21 June 1985*, 8 Iran–US CTR 238 (1985) (provisional measures requiring storage of goods in appropriate facilities).
435)

1976 UNCITRAL Rules, Art. 26(1).
436)

An arbitral tribunal's authority in this regard is discussed in detail above. *See* Chapters §§16 *et seq*. (especially §§16.02[E][3][d] & [f]); §17.04[B].
437)

UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(d).
438)

See §16.02[E][3][f]. *CompareDelphi Petroleum Inc. v. Derin Shipping & Trading Ltd*, 73 FTR 241 (Canadian Fed. Ct. 1993) (court order requiring third party to give evidence characterized as interim measure).
439)

Compare UNCITRAL Model Law, 2006 Revisions, Art. 17A(2).
440)

See §16.02[E][4].
441)

See §15.08_[T]; §16.02_[E][2]; §16.02[E][3][a].
442)

Other authorities expressly note that *no* showing of likelihood of irreparable injury or urgency is necessary for orders regarding the preservation of evidence. *See, e.g.*, *Biwater Gauff (Tanzania) Ltd v. Tanzania*, *Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006*, ¶87 (tribunal's imposition of provisional measures requiring protective measures for evidence "is not based on any finding that [Respondent] … may act adversely in respect of such documents").
443)

See §§17.02[G][4][a]*et seq*.
444)

See §§17.02[G][3][b][i]*et seq*.
445)

*See*Chapter 20 (especially §20.03).
446)

See §23.01_[B]; §23.01[D]. *See also* D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 140 (2015).
447)

English Arbitration Act, 1996, §39. *SeeBMBF (No. 12) Ltd v. Harland & Wolff Shipbuilding & Heavy Indus. Ltd* [2001] EWCA Civ 862 (English Ct. App.); *Pearl Petroleum Co. Ltd v. Kurdistan Regional Gov't of Iraq* [2015] EWHC 3361 (Comm) (English High Ct.). *See also* R. Merkin, *Arbitration Law*¶18.4 (1991 & Update Nov. 2018).
448)

See, *e.g.*, 2016 SIAC Rules, Art. 29; 2006 ICSID Rules, Rule 41. These institutional rules provide for "expedited procedures," typically contemplating a ruling by the tribunal in a matter of months (sometimes on a "documents only" basis).
449)

See, *e.g.*, 2016 SIAC Rules, Art. 19.
450)

Institutional rules typically allow dismissal of claims or defenses that are "manifestly without legal merit," imposing an elevated standard for such summary dismissals. *See* 2016 SIAC Rules, Art. 29 ("manifestly without legal merit"); 2006 ICSID Rules, Rule 41 ("manifestly without legal merit").
451)

French Code of Civil Procedure, Arts. 808-809; Netherlands Code of Civil Procedure, Art. 289. *See* E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1339 *et seq*. (1999).

452)

Judgment of 9 July 1979, 1980 Rev. Arb. 78 (French Cour de Cassation Civ. 3). Parties may agree to exclude the "*référé-provision*" procedure, but neither an arbitration agreement alone nor incorporation of the ICC Rules has been held sufficient to constitute such an exclusion. E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1342 (1999). It is unclear whether this position survives the ICC's introduction of emergency arbitration in its Rules.

453)

Judgment of 18 June 1986, 1986 Rev. Arb. 565, 565 (French Cour de Cassation Civ. 2) ("where a dispute submitted to an arbitral tribunal under an arbitration agreement is also put before a national court, the latter must decline jurisdiction"); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1344 (1999) ("arbitral tribunal must not be constituted").

454)

Requests for interim payments can be supported by claims that a party requires the funds in order to continue operations, avoid bankruptcy or fund participation in the arbitration.

455)

The Decree, dated 13 January 2011, introduced the new Article 1449 of the French Code of Civil Procedure that provides:

> "For as long as the arbitral tribunal is not constituted, the existence of an arbitration agreement does not prevent either party from requesting a state court to order a measure for taking of evidence or an interim or preventive measure. Subject to provisions governing preventive seizures and judicially ordered guarantees, the action is brought before the President of the tribunal de grande instance or tribunal de commerce; the President rules on the measures for taking of evidence pursuant to the conditions set forth in Article 145 and, in case of urgency, on the interim or preventive measures requested by the parties to an arbitration agreement."

French Code of Civil Procedure, Art. 1449(1). *See also* Carducci, *The Arbitration Reform in France: Domestic and International Arbitration Law*, 28 Arb. Int'l 125, 134-35 (2012) ("Provided the arbitral tribunal is not yet constituted, the existence of an arbitration agreement entered into by the parties does not prevent a party to request from a French court certain taking of evidence (*mesure d'instruction*) or an interim or preventive measure (*mesure provisoire ou conservatoire*)").

456)

See Gaillard & de Lapasse, *Commentaire Analytique du Décret du* 13 Janvier 2011 *Portant Réforme du Droit Français de l'Arbitrage*, *2011:*2 Gaz. Pal. 263, ¶24; Jarrosson & Pellerin, *Le Droit Français de l'Arbitrage après le Décret du* 13 Janvier 2011, 2011 Rev. Arb. 5, 14-15.

457)

See Jarrosson & Pellerin, *Le Droit Français de l'Arbitrage après le Décret du* 13 Janvier 2011, 2011 Rev. Arb. 5, 15 ("*Référé-provision*. According to the terms of Article 1449, it is still possible to file an action for a *référé-provision* before the *juge des référés* [emergency judge], subject to two cumulative conditions: where there is urgency and where the arbitral tribunal is not yet constituted. After a long evolution, case law accepted that such action for this preventive measure could be filed before the *juge des référés*, for as long as the arbitral tribunal has not been constituted, but it added the urgency requirement to the language of Article 809(2) where it did not exist in the text."). *But see* J. B. Racine, *Droit de l'Arbitrage* 307 (2016) ("It seems that, in principle, nothing should prevent the parties from filing a request before the [judge responsible for granting interim measures], even after the arbitral tribunal has been constituted. … Some particular urgency, as well as a better suitability in the requested measure being ordered by a domestic court rather than an arbitrator, would be required."). As noted above, this analysis may not survive the introduction of emergency arbitration provisions in most institutional arbitration rules.

458)

See French Code of Civil Procedure, Arts. 1449(1), 1506(1). *See also* Gaillard & de Lapasse, *Commentaire Analytique du Décret du* 13 Janvier 2011 *Portant Réforme du Droit Français de l'Arbitrage*, 2011: 2 Gaz. Pal. 263, ¶103; Jarrosson & Pellerin, *Le Droit Français de l'Arbitrage Après le Décret du* 13 Janvier 2011, 2011 Rev. Arb. 5, 14-15.

459)

See §8.02; §§8.03[B][2] *et seq*.

460)

See §8.03[C][6]. *See also* UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(b).

461)

See §8.03_[C][6]; G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 551-74 (6th ed. 2018).
462)

G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 551-53, 568 (6th ed. 2018).
463)

See, e.g., W. Hau, *Positive Kompetenzkonflikte im Internationalen Zivilprozessrecht* 201 (1996); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 86 (2005) (Article 17 of Model Law authorizes arbitrators to issue antisuit injunctions). *Contra* Ortolani, *Article 17: Power of Arbitral Tribunal to Order Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 314, 336 (2020) ("It is doubtful whether this type of arbitral [antisuit] injunction may be encompassed within the scope of article 17(2)(b), and in any case numerous doubts exist as to its enforceability, even if issued in the form of an award"). This latter view is wrong.
464)

See, e.g., *Boyko v. Ukraine, Procedural Order No. 3 in PCA Case No. 2017-23 of 3 December 2017*, ¶4.3; *Nova Group Inv., BV v. Romania, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures in ICSID Case No. ARB/16/19 of 29 March 2017*, ¶365; *Merck Sharpe & Dohme (I.A.) LLC v. Ecuador, Second Decision on Interim Measures in PCA Case No. 2012-10 of 6 September 2016*, ¶39; *Kompozit LLC v. Moldova, Emergency Award on Interim Measures in SCC Emergency Arbitration No. EA(2016/095) of 14 June 2016*, ¶92; *Hydro Srl v. Albania, Order on Provisional Measures in ICSID Case No. ARB/15/28 of 3 March 2016*, ¶¶3.40 *et seq*.; *Alghanim v. Jordan, Procedural Order No. 2 in ICSID Case No. ARB/13/38 of 24 November 2014*, ¶103; *Chevron Corp. v. Ecuador, Fourth Interim Award on Interim Measures in PCA Case No. 2009-23 of 7 February 2013*, ¶85; *Chevron Corp. v. Ecuador, Second Interim Award on Interim Measures in PCA Case No. 2009-23 of 16 February 2012*, ¶3; *Chevron Corp. v. Ecuador, First Interim Award on Interim Measures in PCA Case No. 2009-23 of 25 January 2012*, ¶16; *Award in Unidentified ICC Case*, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61 (1993) (ordering parties to withdraw all related litigation); *Quiborax SA v. Bolivia*, *Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶¶138 *et seq*. (Bolivian criminal proceedings claiming forgery of corporate records in connection with BIT arbitration were "exacerbat[ing]" parties' dispute and "impairing" claimants' ability to present its case; because these circumstances created a "threat to the procedural integrity at the ICSID proceedings," tribunal directed that criminal proceedings be suspended); *U.S.A., on Behalf of and for the Benefit of Tadjer-Cohen Assocs. v. Iran*, *Award in IUSCT Case No. ITM 50-12118-3 of 11 November 1985*, 9 Iran–US CTR 302, 304-05 (1985) (granting provisional measures in form of antisuit injunction against Iranian judicial proceeding); *Component Builders, Inc. v. Iran*, *Award in IUSCT Case No. ITM/ITL 51-395-3 of 27 May 1985*, 8 Iran–US CTR 216 (1985) (issuing antisuit order because "both actions seek to adjudicate the same issues"); *Ford Aerospace & Commc'ns Corp. v. Iran*, *Interim Award in IUSCT Case No. ITM 16-93-2 of 27 April 1983*, 2 Iran–US CTR 281, 282 (1983) (ordering stay of duplicative proceedings); *Himpurna Cal. Energy Ltd v. Indonesia*, *Ad HocProcedural Order of 7 September 1999*, XXV Y.B. Comm. Arb. 109, 143-46 (2000). *See alsoRCA Global Commc'ns Disc, Inc. v. Iran*, *Order in IUSCT Case No. 160 of 2 June 1983*, 3 Iran–US CTR 8 (1983) (temporary antisuit order). *See also* Uilenbroek, *The Power of Investment Tribunals to Enjoin Domestic Criminal Proceedings*, 36 Arb. Int'l 323, 331 (2020) ("in practice parties have generally relied on three different rights when requesting the tribunal to restrain domestic criminal proceedings: (i) the exclusivity of ICSID proceedings, (ii) the preservation of the status quo and non-aggravation of the dispute and (iii) the integrity of the arbitration proceedings"); Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465, 486 (1986).
465)

Paul Donin de Rosiere v. Iran, *Award in IUSCT Case No. ITM 64-498-1 of 4 December 1986*, 13 Iran–US CTR 193, 194 (1986).
466)

The parties would be free to exclude such authority but generally do not do so.
467)

C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶99 (2d ed. 2009). Similarly, another commentator observes that "[b]y far the most common type of interim protection granted by the [Iran–U.S.] Tribunal has been stays of proceeding before other fora … pending the termination of its own proceedings." C. Brower & J. Brueschke, *The Iran–United States Claims Tribunal* 229 (1998). *See also* Castello, *Interim Measures: The SlowEvolutions of Quick Arbitral Relief*, 10 World Arb. & Med. Rep. 454, 463-64 (2016).

468)

See §8.03[C][6].
469)

See id.
470)

See id.
471)

See, e.g.,RCA Global Commc'ns Disc, Inc. v. Iran, *Award in IUSCT Case No. ITM 30-160-1 of 31 October 1983*, 4 Iran–US CTR 9, 11-12 (1983) (declining to order antisuit injunction, because "proceeding before the domestic courts concerns a dispute arising out of a separate contract, and it involves a Party which is not a Party in the case before the tribunal"); *Paul Donin de Rosiere v. Iran*, *Award in IUSCT Case No. ITM 64-498-1 of 4 December 1986*, 13 Iran–US CTR 193 (1986) (same). *CompareChevron Corp. v. Ecuador [II]*, *Second Interim Award on Interim Measures in PCA Case No. 2009-23 of 16 February 2012* (staying execution of court judgment obtained by third party). *See alsoPlama Consortium Ltd v. Bulgaria*, *Order in ICSID Case No. ARB/03/24 of 6 September 2005*, ¶43 ("Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies").
472)

See §17.02[G][4][j].
473)

Lao Holdings NV v. Laos, Ruling on Motion to Amend the Provisional Measure Order in ICSID Case No. ARB(AF)/12/6 of 30 May 2014, ¶37; *Biwater Gauff (Tanzania) Ltd v. Tanzania*, *Procedural Order No. 3 in ICSID Case No. ARB/05/22 of 29 September 2006*, ¶135; *Casado v. Chile*, *Decision on Provisional Measures in ICSID Case No. ARB/98/2 of 25 September 2001*, ¶8.
474)

Biwater Gauff (Tanzania) Ltd v. Tanzania, *Procedural Order No. 3 in ICSID Case No. ARB/05/22 of 29 September 2006*, ¶135.
475)

Hydro Srl v. Albania, *Order on Provisional Measures in ICSID Case No. ARB/15/28 of 3 March 2016*, ¶3.20; *Quiborax SA v. Bolivia, Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010*, ¶¶118 *et seq*.; *City Oriente Ltd v. Ecuador*, *Decision on Provisional Measures in ICSID Case No. ARB/06/21 of 19 November 2007*, ¶¶61 *et seq*.; *Tokios Tokelés v. Ukraine*, *Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶11.
476)

Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration §1-1(t) (2019). *See also Paushok v. Mongolia*, *Ad HocOrder on Interim Measures of 2 September 2008*, ¶36 (UNCITRAL Rules "leave[] wide[] discretion to the Tribunal in the awarding of provisional measures"); C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 47, ¶76 (2d ed. 2009) ("It is evident that the nature of the measures to be recommended will very much depend on the particular circumstances of the case and on the rights that are to be protected. Therefore, no exhaustive list of provisional measure which may be used by tribunals can be given."); Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11(1) ICC Ct. Bull. 31, 33 (2000) ("arbitral tribunals have very wide discretion in determining the appropriate measure").
477)

Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 26 (2000).
478)

See §17.04.
479)

For a discussion of *res judicata* in the context of provisional measures, *see* §27.02[C]. Section 1041(2) of the German version of the UNCITRAL Model Law provides that "the court may, at the request of a party, permit enforcement of a measure … unless application for a corresponding interim measure has already been made to a court." German ZPO, §1041(2). The provision provides a form of attenuated *res judicata* with regard to unsuccessful efforts to obtain court-ordered provisional measures.
480)

SeePartial Award in ICC Case No. 4998, 113 J.D.I. (Clunet) 1139 (1986).

481)

Award in Unidentified ICC Case, discussed in Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 57 (1993). *See alsoProcedural Order of March 2006 in ICC Case No. 13856*, in ICC, *Procedural Decisions in ICC Arbitration* 46 (2015) (when state court "has rendered a decision, an arbitral tribunal will consider carefully that decision and the reasons given by the court for making it"); *Order No. 5 Regarding Claimant's Request for Interim Relief in ICC Case of 2 April 2002*, 21 ASA Bull. 810, 816 (2003) ("If the state court orders or declines to order a measure, the parties cannot subsequently resort to the arbitral tribunal to obtain a more favorable ruling, and vice versa. Even if the state court was first approached solely for the reason that the arbitral tribunal was not yet properly constituted, the tribunal cannot later on, after its constitution, reverse or modify the measure ordered by the state judge. What if a subsequent request for reversal or modification of an order is based on changed circumstances? Arguably, such a request should be dealt with by the arbitral tribunal once it is constituted."); *Partial Award in ICC Case No. 4126*, in S. Jarvin & Y. Derain (eds.), *Collection of ICC Arbitral Awards 1974-1985* 511, 513-14 (1990) (tribunal refused to order provisional measures on grounds that national court's prior refusal to do so was *res judicata*); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 529-30 (2d ed. 2013); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 43 (2000).

482)

See §17.04_[C][7]; §27.02[C].

Some national courts have expressly qualified grants of provisional measures in aid of arbitration, to make clear that the arbitral tribunal, when constituted, may revisit the issue. *See, e.g.*, *Fairfield County Med. Ass'n v. United Healthcare of NewEngland, Inc.*, 557 F.App'x 53 (2d Cir. 2014) (ordering interim relief only until arbitral tribunal is constituted); *Merrill Lynch v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (issuing provisional measures "only 'until the arbitration panel is able to address whether the [relief] should remain in effect.' Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo."); *Rodenstock GmbH v. NewYork Optical Int'l, Inc.*, 2018 WL 4445108, at *5 (S.D. Fla.) (ordering injunction, to remain in effect until 30 days after arbitrator appointment); *PLD Telekom Inc. v. Commerzbank AG*, unreported decision (QB) (English High Ct.) (2000) (Morison, J.) (arbitrators may reconsider grant of court-ordered provisional measures). *See also* Dominican Republic Commercial Arbitration Law, Art. 13 ("If the national court grants the measure, it shall ask the party who has sought it to present the request before the arbitral tribunal. … In case a decision of the already constituted arbitral tribunal orders the suspension or the lifting of the measure granted by the national court, the decision of the arbitral award shall be recognized and prevail.").

483)

See §8.02; §8.03.

484)

The application of preclusion principles is discussed below. *See* §27.02[C].

485)

See, e.g., *Benihana Inc. v. Benihana of Tokyo LLC*, 784 F.3d 887 (2d Cir. 2015) ("if the court is correct … the arbitrators presumably will not grant such relief; if the arbitrators do grant such relief, they may well explain their reasoning in a manner that will persuade the court that such relief is in fact permissible"); *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 138 (2d Cir. 2014) ("temporary relief enforcing this procedural right may be properly issued even if the defendant ultimately prevails on the merits in arbitration"); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) (upholding arbitral tribunal's power to discontinue court-ordered provisional measures); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985) ("Nor can we accept … that the district court's preliminary injunction will prejudice the arbitrator's subsequent decision on the merits. The arbitrators are sworn to render a decision based solely on the evidence presented to them."); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982) (upholding award granting provisional measures, notwithstanding prior judicial decision refusing to grant such measures: "[W]e expressly declined to state a view [in our decision refusing to grant court-ordered provisional measures] as to such issues as Sperry's likelihood of prevailing on the merits and the seriousness of the dispute as to the merits of Sperry's claim. And the question of what powers the arbitrators might have to interpret the Contract or to rule in any way on the propriety of any certification Israel might make was not before us."). *See also* Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465, 507 (1986) (where "court involved is of a state other than the place of arbitration … then the tribunal quite likely is not subordinated to that court by municipal law and, therefore, is not constrained from considering contrary interim measures"); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 59-60 (1993) (arbitral tribunal may have more extensive familiarity with parties' legal claims and factual evidence).

486)

The parties' arbitration agreement or, more likely, applicable institutional arbitration rules might require that provisional measures be issued in a particular form, although such agreements are unusual. Where they exist, the terms of such an agreement would ordinarily be binding on the tribunal.

487)

See §15.03; §§23.02-23.03.

488)

For example, Article 28(1) of the 2017 ICC Rules permits arbitrators to grant provisional measures either by order or by award. 2017 ICC Rules, Art. 28(1) ("Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate"). *See also* 2017 SCC Rules, Art. 37(3). The differences between orders and awards are discussed below. *See* §§22.02[B][3][d]-[e].

489)

If a tribunal lacks the authority under applicable law to order provisional measures (*see* §17.02[A][3][c]), it will sometimes invite the parties, in a non-binding manner, to adhere to specified admonitions. Such admonitions are not properly regarded as provisional relief or measures, but instead the tribunal's exercise of its supervisory authority to enhance the prospects for cooperation in conducting the arbitral proceedings. Compare the approach in ICSID arbitrations, where a tribunal is authorized to make "recommendations," which are nonetheless considered binding and mandatory. *See* §17.02[A][1].

490)

See Beechey & Kenny, *Howto Control the Impact of Time Running Between the Occurrence of the Damage and Its Full Compensation: Compensatory and Alternative Remedies in Interim Relief Proceedings*, in L. Levy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 115 (2008) ("Many arbitral institutions leave it to the arbitral tribunal to decide whether to grant the interim measure in the form of an order or a partial award. In most instances, interim measures will be granted in the form of an order, thereby allowing for ready amendment or variation of its terms should circumstances change").

491)

See 2017 ICC Rules, Art. 34. *See also* Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 28 (2000); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 63 (1993).
A Working Party of the ICC Commission on International Arbitration, established in the late 1980s, concluded that provisional measures could properly take the form of interim awards, approved under Article 21. ICC, *Final Report on Interim and Partial Awards*, 1(2) ICC Ct. Bull. 26 (1990). The Working Party also concluded, however, that the better practice was only to issue procedural directions, and not an interim award, in order to avoid the delays accompanying ICC scrutiny of awards.

492)

See §17.03_[A]; §§22.02[B][3][d]-[e]. *See also* Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 28 (2000); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 63 (1993); D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 146 (2015) ("national courts that applied the Convention have fairly uniformly concluded that an interim measure is not an 'award' and therefore did not have authority to enforce them under the New York Convention").

493)

See UNCITRAL Model Law, 2006 Revisions, Art. 17H(1); English Arbitration Act, 1996, §42(1); Swiss Law on Private International Law, Art. 183(2). *See also* §17.03[B].

494)

See, e.g., *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F.App'x 39, 41 (4th Cir. 2006) (interim award in form of preliminary injunction confirmed although it did not dispose of all claims: "arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as 'final' in order for the equitable relief to have teeth"); *Publicis Commc'ns v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000) (recognizing and enforcing order of interim relief: "requiring [all remaining] issues to be arbitrated to finality … would defeat the purpose of the tribunal's order to enforce a decision the tribunal called urgent"); *Yasuda Fire & Marine Ins. Co. of Euro. v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (confirming interim order that reinsurer post letter of credit as security); *Pac. Reins. Mgt Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991) (confirming "Interim Final Order" requiring payments into escrow account); *Thrivest Specialty Fund, LLC v. White*, 2019 WL 6124955 (E.D. Pa.); *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694, at *2 (N.D. Ill.); *Bowers v. N. Two Cayes Co. Ltd*, 2016 WL 3647339, at *2 (W.D.N.C.); *Companion Prop. v. Allied Provident Ins. Inc.*, 2014 WL 4804466, at *3 (S.D.N.Y.); *Judgment of 22 May 1957*, 1958 ZZP 427 (German Bundesgerichtshof); *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628 (Queensland Sup. Ct. 1993) (1995). *See also* §17.03[A][2].

495)

D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 541 (2006).

496)

See, e.g., *Paushok v. Mongolia*, *Ad HocOrder on Interim Measures of 2 September 2008*. *See also* ICSID, *Proposals for Amendment of the ICSID Rules* 54-55 (Working Paper No. 4 2020).

497)

See, e.g., *Interim Award in ICC Case No. 8879*, 11(1) ICC Ct. Bull. 84, 88 (2000); *Chevron Corp. v. Ecuador [II]*, *Second Interim Award on Interim Measures in PCA Case No. 2009-23 of 16 February 2012*.

498)

D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 524-25 (2013).

499)

See, e.g., UNCITRAL Model Law, Art. 17 ("The arbitral tribunal may require any party to provide appropriate security in connection with such [provisional] measures"); UNCITRAL Model Law, 2006 Revisions, Arts. 17E(1)-(2) ("(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure. (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so"); Swiss Law on Private International Law, Art. 183(3) (tribunal "may make granting the provisional or conservatory measure subject to appropriate securities"); Japanese Arbitration Law, Art. 24(2). *See also* Ortolani, *Article 17E: Provision of Security*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 412-21 (2020)

500)

See, e.g., 2013 UNCITRAL Rules, Art. 26(6) ("The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure"); 2017 ICC Rules, Art. 28(1) ("The Arbitral Tribunal may make the granting of any such [provisional] measure subject to appropriate security being furnished by the requesting party"); 2016 SIAC Rules, Art. 30(1); 2020 LCIA Rules, Art. 25(2); 2017 SCC Rules, Art. 37(2).
501)

See, e.g., *Warth Line, Ltd v. Merinda Marine Co.*, 778 F.Supp. 158 (S.D.N.Y. 1991) (confirming New York seated arbitral tribunal's award of damages from arrest of vessel by Belgian courts); *In re Noble Navigation Corp.*, 1984 WL 432 (S.D.N.Y.).
502)

See Vischer, in D. Girsberger *et al*. (eds.), *Zürcher Kommentar zum IPRG* Art. 183, ¶18 (2d ed. 2004).
503)

UNCITRAL Model Law, Art. 17; H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 530-33 (1989).
504)

Swiss Law on Private International Law, Art. 183(1). *See also* Swedish Arbitration Act, §25(4) ("at the request of a party"); Japanese Arbitration Law, Art. 24(1) (same); Argentine International Commercial Arbitration Act, Art. 21.
505)

See, e.g., 2013 UNCITRAL Rules, Art. 26(1); 2017 ICC Rules, Art. 28(1); 2016 SIAC Rules, Art. 30(1); 2020 LCIA Rules, Art. 25(1); 2012 Swiss Rules, Art. 26(1); 2017 SCC Rules, Art. 37(1).
506)

See §25.04_[B]; §26.05.
507)

The practical utility of *ex parte* provisional measures ordered by an arbitral tribunal is open to debate. If a party were likely to dissipate or conceal assets, or take other harmful actions, if confronted by a request for provisional relief, it is unclear why similar actions would not be taken after issuance of an *ex parte* order (which requires judicial enforcement to have coercive legal effect). *See* §17.02[A][5][b].
508)

See §15.03_[C]; §15.04; §25.04_[B]; §26.05[C][3].
509)

See 2006 ICSID Rules, Rule 39(4) ("The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations").
510)

See, e.g., D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 543 (2006) ("Before granting interim measures, the arbitral tribunal should provide the party against whom such measures are sought with an opportunity to comment"); Loquin, *JurisClasseur Procédure Civile*., Fasc. 1034, ¶26 (1975); Stalev, *Interim Measures of Protection in the Context of Arbitration*, in A. van den Berg (ed.), *International Arbitration in A Changing World* 111 (1994). *Compare* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 530 (2013) ("It is possible that these measures could be taken *ex parte*, although the extent of present-day communications tend to ensure that the other part is somewhat involved").
511)

See B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1260 (3d ed. 2015) ("After the arbitral tribunal has granted provisional measures *ex parte*, it shall immediately give an opportunity to the other party to present its case at the earliest possible time, and shall decide promptly on any objection to the measure and, as the case may be, modify, suspend or terminate the *ex parte* order."); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 38 (2000) ("In cases of special urgency, in terms of time and nature of the harm threatening to a party's right, the arbitral tribunal may order interim measures in *ex parte* proceedings").
512)

For some of the contentious drafting history, *see* UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Second Session*, U.N. Doc. A/CN.9/573 (2005) (proposals for revisions to Article 17 of Model Law). *See also* Ali & Kabau, *Article 17A: Conditions for Granting Interim Measures,* in I. Bantekas *et al*. (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 346-48 (2020).
513)

UNCITRAL Model Law, 2006 Revisions, Art. 17B(1).
514)

Id. at Art. 17B(2).

515)

See Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 303-06 (2018); van Houtte, *Ten Reasons Against A Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arb. Int'l 85 (2004).
516)

See Castello, *Arbitral Ex Parte Interim Relief: The Viewin Favor*, 58 Disp. Resol. J. 60 (2003); Derains, *The ViewAgainst Arbitral Ex Parte Interim Relief*, 58 Disp. Resol. J. 61 (2003); van Houtte, *Ten Reasons Against A Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arb. Int'l 85 (2004).
517)

See, e.g., Hong Kong Arbitration Ordinance, §§37 *et seq*. *Contra* Australian International Arbitration Act, §18B. *See also* Official Gazette of the Swiss Federal Government (Bundesblatt) 7399 (2006) (*ex parte* interim measures are permissible in arbitral proceedings).
518)

Most institutional rules make no provision for, and arguably exclude, *ex parte* interim relief. *Compare* 2020 LCIA Rules, Art. 9B(7) ("need to afford to each party, *if possible*, an opportunity to be consulted") (emphasis added).
519)

See §17.02[A][5][b].
520)

UNCITRAL Model Law, 2006 Revisions, Arts. 17C(1), (5). *See also Report of the UNCITRAL on the Work of Its Thirty-Ninth Session*, U.N. Doc. A/61/17, ¶114 (2006) ("non-enforceability of preliminary orders was central to the compromise reached").
521)

See UNCITRAL Model Law, 2006 Revisions, Art. 17F(2) ("The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, ¶(1) of this article shall apply.").
In many developed legal systems, parties that seek provisional relief on an *ex parte* basis are subject to heightened obligations of candor. *See, e.g.*, *Four Star Fin. Servs. LLC v. Commonwealth Mgt Assocs.*, 166 F.Supp.2d 805, 810 (S.D.N.Y. 2001) ("Sanctions must be imposed here to make it clear to all who practice in the federal courts that when they come before a judge seeking extraordinary relief *ex parte*, they will be held to the highest standards of candor"); *A v. OOO Ins. Co. Chubb* [2019] EWHC 2729 (Comm) (English High Ct.); *Ritter v. Hoag* [2003] ABQB 978, ¶3 (QB) (English High Ct.) ("high standard of candour fundamental to an *ex parte* application"); *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428, 437 (QB) (English High Ct.) ("A party applying *ex parte* for injunctive relief … must identify the crucial points for and against the application"); *Judgment of 23 October 2001*, 2002 ZR 101 86, 88 (Zurich Handelsgericht) ("failure to disclose facts, of which the applicant knows or should know, and could be disadvantageous to his case, constitutes an abuse of the *ex parte* proceedings").

522)

See Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465, 482-83 (1986).
523)

Compare G. Kaufmann-Kohler & A. Rigozzi, *International Arbitration: Lawand Practice in Switzerland* ¶6.130 (2015); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶23-83 (2003) ("provisional measures ordered by the tribunal are invariably complied with voluntarily").
524)

See §17.02[A][5][b].
525)

Indeed, the drafters of the Model Law omitted a provision, included in early drafts, that would have provided expressly for the recognition and enforcement of tribunal-ordered provisional measures. *See* UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Sixth Session*, U.N. Doc. A/CN.9/245, Art. XIV, ¶72 (1984).
526)

The FAA in the United States and the Code of Civil Procedure in France are prime examples.

527)

Gómez, *Article 17H: Recognition and Enforcement*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 453-72 (2020); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 92-95 (2005) (all states that have adopted Model Law have included language permitting enforcement of provisional measures). *See, e.g.*, German ZPO, §1041(2); Hong Kong Arbitration Ordinance, §61; California Code of Civil Procedure, §1297.92; Indian Arbitration and Conciliation Act, Art. 9; New Zealand Arbitration Act, Schedule 1, Arts. 17(L)-(M); Ontario International Commercial Arbitration Act, §9; Argentine International Commercial Arbitration Act, Art. 56; Dominican Republic Arbitration Law, Art. 21(2).

528)

See English Arbitration Act, 1996, §42; Swiss Law on Private International Law, Art. 183(2); §17.03[B].

529)

See UNCITRAL Model Law, 2006 Revisions, Art. 17H; §17.03[B].

530)

See, e.g., *Michaels v. Mariforum Shipping SA*, 624 F.2d 411, 413-14 (2d Cir. 1980) (confused decision holding, *inter alia*, that arbitrator's decision could not be enforced because it was "interlocutory," "preliminary" and did not "purport to resolve finally the issues submitted to [arbitrators]") (citing *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd*, 43 N.Y.2d 276, 281 (N.Y. 1977) (dicta that "in order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted by them")); *Pilkington Bros. plc v. AFG Indus. Inc.*, 581 F.Supp. 1039 (D. Del. 1984) (provisional injunctive relief issued by English court in aid of international arbitration seated in London is not "award" entitled to recognition under New York Convention or FAA); *Judgment of 12 October 2011*, Case No. 09-72.439 (French Cour de Cassation) (refusing to recognize or enforce order to put sums in escrow; "only a real arbitral award can be subject to annulment proceedings, that is a decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute either on the merits, on jurisdiction or on a procedural issue which terminates the arbitral proceedings"); *Judgment of 13 April 2010*, BGE 136 III 200, ¶2.3 (Swiss Fed. Trib.) ("dangerous" to treat interim measures as awards); *Judgment of 22 May 1957*, 1958 ZZP 427 (German Bundesgerichtshof); *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd*, 2014 SCC Online BOM 102 (Bombay High Ct.) (refusing to enforce order issued by emergency arbitrator, but granting virtually identical relief under Indian Arbitration and Conciliation Act); *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628 (Queensland Sup. Ct. 1993) (1995); *Judgment of 4 February 2000*, Case No. 5-Г00-4 (Russian S. Ct.) (only final arbitral awards are enforceable; refusing to enforce interim award). *See also* Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations,* 3 J. Int'l Arb. 35, 287-93 (2018) ("A few states have side-stepped the debate surrounding the legal status of the emergency arbitrator and his or her decision altogether by passing amendments to their national arbitration laws. … Unlike the above-described countries, courts in some jurisdictions have been less favourable to enforcing emergency arbitrator-ordered measures."); Hill, *Is An Interim Measure of Protection Ordered by An Arbitral Tribunal An Arbitral Award?*, 9(4) J. Int'l Disp. Sett. 593 (2018).

531)

Resort Condominiums Int'l Inc. v. Bolwell, XX Y.B. Comm. Arb. 628 (Queensland Sup. Ct. 1993) (1995).

532)

See Toyo Tire Holdings of Am. Inc. v. Cont'l Tire N. Am., 609 F.3d 975, 980 (9th Cir. 2010); *Thrivest Specialty Funding, LLC v. White*, 2019 WL 6124955, at *1 (E.D. Pa.); *Al Raha Group for Tech. Servs. v. PKL Servs., Inc.*, 2019 WL 4267765, at *3 (N.D. Ga.) ("Though an interim award may at times be considered final, such that a district court may then 'confirm' the award, that is not the case at hand. The decision of the Emergency Arbitrator, titled 'Interim Emergency Award,' is not a final arbitral award, because it did not finally and definitely dispose of any independent claim."); *Draeger Computer Servs., Inc. v. NewHorizon Interlock, Inc.*, 2011 WL 653651 (E.D. Mich.). *See also* Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 Arb. Int'l 559, 563-73 (2016); Boog*, Commentary on the ICC Rules, Article 29,* in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* 2396, 2397 (2d ed. 2018) ("Emergency Measures will not be enforceable under the New York Convention in most jurisdictions, since they do not qualify as an 'award' in terms of Art. I(1) of the Convention. An exception might be perceivable in jurisdictions which expressly treat tribunal-ordered interim measures as awards in terms of the New York Convention, such as the U.S. … which is usually for lack of an alternative means of enforcing such measures."); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 291-300 (2018) ("Some national courts have accepted interim awards by emergency arbitrators to be binding within the meaning of the New York Convention, while others have refused to enforce such decisions on the basis that they are not binding awards"); Jones, *Emergency Arbitrators and Court-Ordered Interim Measures*, in J. Betancourt (ed.), *Defining Issues in International Arbitration* 149, 154-55 (2016).

533)

See U.S. FAA, 9 U.S.C. §16(1) (referring to confirmation of "award or partial award" but not "interim" award); Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1, 39-40 (2005).

534)

See, e.g., *McVay v. Halliburton Energy Servs., Inc.*, 608 F.App'x 222, 225 (5th Cir. 2015) (considering finality standard applied to awards in Second, Third, and Seventh Circuits); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F.App'x 39, 41 (4th Cir. 2006) (interim award in form of preliminary injunction confirmed even though it did not dispose of all claims: "arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as 'final' in order for the equitable relief to have teeth"); *Publicis Commc'ns v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000) (recognizing and enforcing order of interim relief: "requiring [all remaining] issues to be arbitrated to finality … would defeat the purpose of the tribunal's order to enforce a decision the tribunal called urgent"); *Yasuda Fire & Marine Ins. Co. of Euro. v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (confirming interim order that reinsurer post letter of credit as security); *Pac. Reins. Mgt Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991) (confirming "Interim Final Order" requiring payments into escrow account); *Metallgesellschaft AG v. MV Capitan Constante*, 790 F.2d 280, 282-83 (2d Cir. 1986) ("Because the award … finally and conclusively disposed of a separate and independent claim and was subject to neither abatement nor set-off, the district court did not err in confirming it"); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984) (confirming "Interim Order" that required party to continue to perform disputed contract (by accepting shipments) during arbitral proceeding); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Johnson v. Dentsply Sirona Inc.*, 2017 WL 4295420, at *4 (N.D. Okla.) (confirming interim award: "[t]he Ruling 'finally and definitively' disposes of an independent issue in the arbitration; it enjoins plaintiff from breaching the confidentiality and non-compete provisions of the 2007 Agreement for the pendency of the arbitration"); *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694, at *2 (N.D. Ill.) ("A pre-hearing security [order] … is an 'award' for purposes of the FAA."); *Bowers v. N. Two Cayes Co. Ltd*, 2016 WL 3647339, at *2 (W.D.N.C.) ("An arbitrator has the power to grant preliminary injunctive relief, and district courts have the power to confirm and enforce such awards of equitable relief"); *Daum Glob. Holdings Corp. v. Ybrant Digital Ltd*, 2014 WL 896716, at *2 (S.D.N.Y.) (confirming partial final award ordering Respondent to pay its share of advance on costs under ICC Rules); *Companion Prop. v. Allied Provident Ins. Inc.*, 2014 WL 4804466, at *3 (S.D.N.Y.) ("Judicial confirmation of interim security awards is permitted when such confirmation is necessary to ensure the integrity of arbitration"); *Ecopetrol SA v. Offshore Exploration and Prod. LLC,* 46 F.Supp.3d 327 (S.D.N.Y. 2014) (confirming two partial final awards under New York Convention; reasoning that awards were final as they required specific action, and resolved rights of parties without affecting future decisions of arbitrators); *Stone v. Theatrical Inv. Corp.,* 64 F.Supp.3d 527 (S.D.N.Y. 2014) (confirming interim award; recognizing that appointing receiver, like issuing injunction, allows arbitrator to order future action to prevent further disputes between parties); *CE Int'l Res. Holdings LLC v. SA Minerals Ltd*, 2012 U.S. Dist. LEXIS 176158 (S.D.N.Y.) (order freezing respondent's assets as security for claims in arbitration is final award for purposes of confirmation); *Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 2012 WL 104773 (S.D.N.Y.) (interim award is final, and can be recognized, if it definitely disposes of independent claim even though it does not dispose of all claims; interim order of security or preservation of assets are final); *On Time Staffing, LLC v. Nat'l Union Fire Ins.*, 784 F.Supp.2d 450 (S.D.N.Y. 2011) (confirming interim award requiring party to post pre-hearing security); *Draeger Safety Diagnostics, Inc. v. NewHorizon Interlock, Inc.*, 2011 U.S. Dist. LEXIS 14414 (E.D. Mich.) (confirming interim award requiring party to return records and data); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F.Supp.2d 926, 937 (N.D. Cal. 2003) ("this Court has authority under the FAA to review and vacate an arbitration panel's interim order … [a]s noted above, such an order is sufficiently 'final' to permit judicial review"); *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F.Supp.2d 362 (S.D.N.Y. 2002) (arbitrators' disposition of "claim 'separate' and 'independent' from the other claims submitted in the arbitration" is "arbitration award" and entitled to enforcement under Inter-American Convention and FAA, where award was for posting of security), *aff'd*, 344 F.3d 255 (2d Cir. 2003); *Polydefkis Corp. v. Trancont'l Fertiliser Co.*, 1996 WL 683629 (E.D. Pa.) (recognizing interim relief order, requiring payment of funds into escrow account, by London arbitral tribunal); *Fiat SpA v. Ministry of Fin. & Planning*, 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y.); *Konkar Maritime Enters., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267 (S.D.N.Y. 1987) (upholding order to escrow funds); *Zephyros Maritime Agencies, Inc. v. Mexicana de Cobre, SA*, 662 F.Supp. 892 (S.D.N.Y. 1987); *Compania Chilena De Navegacion Interoceanica SA v. Norton, Lilly & Co.*, 652 F.Supp. 1512, 1516 (S.D.N.Y. 1987) (upholding security order); *S. Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692 (S.D.N.Y. 1985). *CompareKerr-McGee Refining Corp. v. MT Triumph*, 924 F.2d 467, 471 (2d Cir. 1991) (award on determining some of damages claims not "final"). *See* §22.02[B][3][e]. *See alsoCE Int'l Res. Holdings LLC v. SA Minerals Ltd*, 2013 WL 324061 (S.D.N.Y.) (award-debtor held in civil contempt for disobeying judgment confirming arbitral award; freezing award-debtor's assets and imposing daily-accruing civil fines and civil commitment order).

535)

S. Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City, 606 F.Supp. 692 (S.D.N.Y. 1985). *See also Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1.1(a) (2019) ("An 'arbitral award' is a decision in writing by an arbitral tribunal that sets forth the final and binding determination of the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire dispute before the tribunal. Such a decision may consist of a grant of interim relief.").

536)

See, e.g., Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 291-300 (2018); Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1 (2005); von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 Yale J. World Pub. Order 343, 362-63 (1983). *See also Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1-1(a) (2019) (defining "award" to include decision on provisional measures).

537)

SeePT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation, [2015] SGCA 30 (Singapore Ct. App.) (confirming final and binding nature of interim award under Singapore International Arbitration Act) (citing G. Born, *International Commercial Arbitration* 3020 (2d ed. 2014)); *Judgment of 7 October 2004*, 2005 Rev. Arb. 737 (Paris Cour d'Appel) (arbitrators' grant of provisional measures was award subject to annulment: "The arbitral tribunal has definitely ruled on the request for conservatory measures … [and has] expressed in an award their power to adjudicate on an emergency request that participates in the resolution of the dispute"); *Dalian Huarui Heavy Indus. Int'l Co. Ltd v. Clyde & Co Australia* [2020] WASC 132 (W. Australia Sup. Ct.) (enforcing arbitral tribunal's order to provide security for disputed amount). *See also* Tan & Coldwell, *Another (Unsuccessful) Challenge to the Finality of Interim Arbitral Awards in Singapore and Enforcing DAB Decisions on International Projects Under FIDIC*, Kluwer Arb. Blog (15 June 2015); Demirkol, *Ordering Cessation of Court Proceedings to Protect the Integrity of Arbitration Agreements under the Brussels I Regime*, 65 Int'l & Comp. L.Q. 379, 391 (2015) ("it is generally accepted that interim awards ordering provisional measures are enforceable under the New York Convention").

538)

See, e.g.,Thrivest Specialty Funding LLC v. White, 2019 WL 6124955 (E.D. Pa.) (confirming interim award as "temporary equitable order" needed to ensure final award is "meaningful"); *Sharp Corp. v. Hisense USA Corp.*, 292 F.Supp.3d 157 (2017) (emergency arbitrator award enforceable under New York Convention); *Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F.Supp.2d 1187, 1206 (D. Mont. 2013) (denying vacatur of emergency arbitrator award); *Yahoo! Inc. v. Microsoft Corp.,* 983 F.Supp.2d 310 (S.D.N.Y. 2013) (emergency arbitrator had power to issue preliminary relief to maintain *status quo*); *Draeger Safety Diagnostics, Inc. v. NewHorizon Interlock, Inc.*, MC 11-50160, 2011 WL 653651, at *6 (E.D. Mich.) (ripeness of claim determined confirmation of emergency arbitration award); *Blue Cross Blue Shield of Mich. v. Medimpact*, 2010 WL 2595340 (E.D. Mich.) (AAA Emergency Arbitrator's grant of interim relief is final award for purposes of confirmation and vacatur); *Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1.1 comment a (2019) ("Temporary measures instituted by an 'emergency' arbitrator are *prima facie* treated the same as interim measures granted by a tribunal; that is, a presumption attaches that they are awards.").

539)

See, e.g., K. P. Berger, *International Economic Arbitration* 345 (1993) (interim awards are not "true partial awards" because they are temporary and do not dispose of claims on the merits); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275, 290-91 (2018); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶23-94 (2003); Pryles, *Interlocutory Orders and Convention Awards: The Case of* Resort Condominiums v. Bolwell, 10 Arb. Int'l 385, 394 (1994) ("it must be doubted whether the drafters of the New York Convention intended to cast their net thus far"); Hill, *Is An Interim Measure of Protection Ordered by An Arbitral Tribunal An Arbitral Award?*, 9(4) J. Int'l Dis. Sett. 593 (2018) ("Although, as will be seen, the relevant legal materials are contradictory and impossible to reconcile, it is clear that the majority of them do not support the view that interim measures of protection are or can be awards"); P. Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* ¶776 (2d ed. 1989); K.-H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* ¶30-12 (7th ed. 2005).

540)

Resort Condominiums Int'l Inc. v. Bolwell, XX Y.B. Comm. Arb. 628 (Queensland Sup. Ct. 1993) (1995). *See alsoAl Raha Group for Tech. Servs. v. PKL Servs., Inc.*, 2019 WL 4267765, at *3 (N.D. Ga.) ("The decision … 'Interim Emergency Award,' is not a final arbitral award, because it did not finally and definitely dispose of any independent claim"); *Sharbat v. Muskat*, 2018 WL 4636969, at *8 (S.D.N.Y.); *Maplebear, Inc. v. Busick*, 26 Cal.App.5th 394 (Cal. Ct. App. 2018); *Judgment of 13 April 2010*, DFT 136 III 200 (Swiss Fed. Trib.) (provisional measures order not "award" under Article 190 of Swiss Law on Private International Law and not subject to annulment); *Judgment of 5 October 2010*, Case No. 6547/10 (Russian S. Arbitrazh Ct.) ("Consequently systematic interpretation of [the Russian Arbitration Law] and Article V(1)(e) of the Convention evidence that subject to enforcement are only those arbitral awards, which relate to the procedural resolution of the dispute on the merits and are issued upon completion of all of the arbitral proceedings. Consequently, the said rules do not apply to provisional arbitral awards, including arbitrators' awards issued on other procedural matters (recovery of costs, determination of competence, provisional measures). Such awards are not to be enforced in the Russian Federation."); *Judgment of 8 May 2001*, Case. No. 83 (Tunisian Cour d'Appel) (award ordering interim measures was not award within meaning of Article 34 of UNCITRAL Model Law and was not subject to annulment).
541)

Judgment of 13 April 2010, DFT 136 III 200, ¶2.3.3 (Swiss Fed. Trib.) ("Characterizing a decision on interlocutory measures as an award is, furthermore, dangerous, because it creates a wholly insecure situation. Thus, the same is true in particular for the characterization of a partial award, which is likely to give the erroneous impression that the arbitral tribunal has definitively ruled a portion of the dispute."). *See alsoJudgment of 6 December 2001*, 2002 Rev. Arb. 697 (French Cour de Cassation Civ. 2) (arbitrators' order appointing expert and granting provisional measures was not award subject to annulment).
542)

See also UNCITRAL, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ¶21 (2016).
543)

See C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, Aus Schweizerischer Sicht, Mit Rechtsvergleichenden Aspekten* ¶379 (2011) (interim measures do not fall within scope of Article I of New York Convention); Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1, 31-33 (2005); G. Kaufmann-Kohler & A. Rigozzi, *International Arbitration: Lawand Practice in Switzerland* ¶6.135 (2015) ("Subject to its — unlikely — characterization as an arbitral award within the meaning of the [New York Convention], an arbitral order on provisional measures can only be enforced if the legislation at the place of enforcement so provides"); J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶2060 (3d ed. 2008); J.-F. Poudret & S. Besson, *Comparative Lawof International Arbitration* ¶633 (2d ed. 2007) (arbitral decisions ordering provisional measures are not final because they do not finally determine all or part of the dispute). *See also* §22.02[B][3][e]; §26.05[C].
544)

Some authorities have suggested that decisions granting interim relief are "partial awards." *See, e.g., Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1.1(t) ("An 'interim measure' is a grant of temporary relief by an arbitral tribunal to preserve the status quo, help ensure the satisfaction of an eventual award, or otherwise protect the rights of one or more parties and promote the efficacy of an arbitration and the resulting award. An interim measure is presumptively treated as a partial award."). That is incorrect. As discussed below, a "partial award" finally resolves one or more, but not all, of the underlying claims for relief in an arbitration. *See* §23.01[B]. A grant of interim relief clearly does not finally resolve one of parties' claims for relief in the arbitration. The correct characterization is that the grant of interim relief is an award of interim measures or an interim award.
545)

See §22.02[B][3][d].
546)

See §17.03[B].
547)

This is confirmed by the legislative decisions of states that have adopted the Model Law (adding provisions for judicial enforcement of tribunal-ordered provisional measures), and the 2006 Revisions to the Model Law, which provided for the enforcement of arbitral decisions granting provisional relief. UNCITRAL Model Law, 2006 Revisions, Art. 17H. *See* §17.03[B].
548)

See §22.02[B][3].

549)

See C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, Aus Schweizerischer Sicht, Mit Rechtsvergleichenden Aspekten* ¶¶354 *et seq*. (2011).
550)

See §1.04[A][1][f]; §5.06_[D][13]; §6.03; §6.04.
551)

Swiss Law on Private International Law, Art. 183(2). *See* S. Besson, *Arbitrage International et Mesures Provisoires* 305 (1998); C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, aus Schweizerischer Sicht, mit Rechtsvergleichenden Aspekten* ¶198 (2011); G. Kaufmann-Kohler & A. Rigozzi, *International Arbitration: Lawand Practice in Switzerland* ¶6.135 (2015); O. Merkt, *Les Mesures Provisoires en Droit International Privé* 196 (1993). It is unclear whether parties to the arbitration, in addition to the tribunal, may seek to enforce a provisional measure.
552)

Article 183(2) applies only to arbitrations that are seated in Switzerland, and in which at least one of the parties had neither its domicile nor its habitual residence in Switzerland at the time the arbitration agreement was concluded. *See* Swiss Law on Private International Law, Art. 176(1). Thus, a non-Swiss-seated tribunal cannot avail itself of Article 183(2). However, an arbitration agreement providing for the seat of the arbitral tribunal abroad does not prevent a Swiss court competent pursuant to Article 10 of the Swiss Law on Private International Law from ordering provisional measures, though such court-ordered provisional measures would be distinct from the tribunal-ordered provisional measures contemplated by Article 183(2). *SeeJudgment of 20 October 1989*, 1991 RSDIE 368 (Zug Kantonsgericht).
553)

It has been suggested that it is inappropriate to limit this right to the arbitrators and that parties should be permitted to seek judicial assistance. This solution would avoid obliging the tribunal to take steps (*i.e.*, initiating litigation against a party) which might create an appearance of partiality. *See* J.-F. Poudret & S. Besson, *Comparative Lawof International Arbitration* ¶637 (2d ed. 2007). Some practitioners suggest that a party may also apply for judicial enforcement of tribunal-ordered provisional measures under Article 183 of the Swiss Law on Private International Law (often citing Article 374(2) of the Swiss Code of Civil Procedure, granting such rights in domestic Swiss arbitrations). *See* Berti, in S. Berti *et al*. (eds.), *International Arbitration in Switzerland* Art. 183, ¶16 (2000); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 39 (2000).

554)

See Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 92-95 (2005) (all states that have adopted Model Law have included language permitting judicial enforcement of provisional measures). *See* English Arbitration Act, 1996, §42(1); German ZPO, §1041(2); Hong Kong Arbitration Ordinance, §61; New Zealand Arbitration Act, Schedule 1, Arts. 17(L)-(M); Argentine International Arbitration Act, Art. 56; Dominican Republic International Arbitration Act, Art. 21(2); Uruguay Arbitration Act, Arts. 17(L), (M).
555)

UNCITRAL Model Law, 2006 Revisions, Art. 17H(1).
556)

Id.
557)

See UNCITRAL Model Law, 2006 Revisions, Art. 17I(1-2) ("(1) Recognition or enforcement of an interim measure may be refused only: (a) At the request of the party against whom it is invoked if the court is satisfied that: (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or (b) If the court finds that: (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure. (2) Any determination made by the court on any ground in ¶(1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.").
558)

See id. at Art. 36.

559)

See §17.02[A][3][b].
560)

German ZPO, §1041(2). The provision continues: "[the enforcing court] may recast such an order if necessary for the purpose of enforcing the measure." In addition, §1063(3) provides for *ex parte* enforcement proceedings of provisional measures in German courts. *Id.* at §1063(3).
561)

See id. at §§1041(3) *et seq*. *See* Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 167-68 (2018); Berger, *The New German Arbitration Law in International Perspective*, 26 Forum Int'l 1, 10-11 (2000); Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 E.J.C.L. 18 (1998).
562)

See English Arbitration Act, 1996, §42(1) ("Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal."). *See also Emmott v. Michael Wilson & Partners* [2009] EWHC 1 (Comm) (English High Ct.); Benz, *Strengthening Interim Measures in International Arbitration*, 50 Geo. J. Int'l L. 143, 168-70 (2018); R. Merkin, *Arbitration Law* ¶16.32 (1991 & Update February 2016).
563)

See 2018 Hong Kong Arbitration Ordinance, §61 ("An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court. … An order or direction referred to in this section includes an interim measure."); New Zealand Arbitration Act, Schedule 1, Art. 17(L)(1) ("An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court, irrespective of the country in which it was granted").
564)

See, e.g., Austrian ZPO, §593(4) (envisioning enforcement of interim measures by Austrian District Court where place of arbitration is outside Austria).
565)

See, e.g., Swiss Law on Private International Law, Art. 183(2); *Order of 19 December 1994*, 1996 ZZPInt 91 (Oberlandesgericht Karlsruhe), Note, Zuckerman & Grunert; Berti, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 183, ¶18 (2000).
566)

See Order of 19 December 1994, 1996 ZZPInt 91, 92 *et seq.* (Oberlandesgericht Karlsruhe), Note, Zuckerman & Grunert. *See also* Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 E.J.C.L. 18 (1998).
567)

See UNCITRAL Model Law, 2006 Revisions, Arts. 17H(1), 17I; §§26.05 *et seq*. That is most obvious in jurisdictions (like the United States) where grants of interim relief are treated as "awards" that are final and capable of enforcement. *See* §17.03[A]. *See also* Ali & Kabau, *Article 17I: Grounds for Refusing Recognition or Enforcement,* in I. Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 473-99 (2020).
568)

See §25.04 *et seq.*; §26.05.
569)

See UNCITRAL Model Law, 2006 Revisions, Art. 17I(a).
570)

Id. at Art. 17I(1)(a)(ii).
571)

Id. at Art. 17I(1)(a)(iii).
572)

Id.
573)

See §26.05[C].
574)

See also §11.04.
575)

UNCITRAL Model Law, 2006 Revisions, Art. 17I(1)(b)(i).
576)

See §17.03[B].

577)

See, e.g., *Pearl Seas Cruises, LLC v. Irving Shipbuilding, Inc.*, 2011 WL 3475469 (D. Conn.) (dismissing application to vacate two interim awards under FAA); *Patley Wood Farm LLP v. Brake* [2013] EWHC 4035 (Ch) (English High Ct.); *Emmott v. Michael Wilson & Partners* [2009] EWHC 1 (Comm) (English High Ct.) (court should not merely "act as a rubber stamp" to peremptory orders made by tribunal under §42(1) of English Arbitration Act, 1996; however, court should not "review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question").

578)

See, e.g., *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F.Supp.2d 926 (N.D. Cal. 2003). *But see Charles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992). *See* §17.02[A][3][b]. For general discussions of excess of authority, *see* §25.04_[F]; §26.05[C][4].

579)

See, e.g., *Indus. Mut. Ass'n, Inc. v. Amalgamated Workers, Local Union No. 383*, 725 F.2d 406, 412 (6th Cir. 1984) ("Since there is no rational basis for cancelling the debts, this portion of the award cannot be enforced"); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972) ("Can a $6 million cash bond award be deemed rational in view of a maximum $1.5 million liability under the [parties' contract]? We think not."); *United Inter-Mountain Tel. Co. v. Commc'ns Workers of Am.*, 662 F.Supp. 82, 83 (E.D. Tenn. 1987) (award vacated because arbitrator based his award on "external preferences").

580)

See §17.02[A][4].

581)

See, e.g., Hong Kong Arbitration Ordinance, §22(b) ("Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court"); Bolivian Conciliation and Arbitration Law, Arts. 67-71.

582)

See, e.g., Singapore International Arbitration Act, §2(1) (definition of "arbitral tribunal" includes "an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization"); New Zealand Arbitration Act, Art. 2(1) ("any emergency arbitrator appointed under (i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organisation that the parties have adopted"); Malaysian Arbitration Act, Art. 2(1); Fijian International Arbitration Act, Art. 2.

583)

Even in these jurisdictions, however, it may remain unclear whether any grant of provisional measures, by either an emergency arbitrator or otherwise, is an "award." *See* §17.03[A][2].

584)

See §2.02[C][1].

585)

An emergency arbitrator is appointed by or for the parties, with their consent, to resolve their dispute applying adjudicatory procedures affording each party the opportunity to present its case. *See* §17.02[A][4]. The fact that an emergency arbitrator does not "finally" resolve the parties' dispute should not require a contrary conclusion: arbitrators are also engaged in arbitration when they consider provisional measures and the fact that an emergency arbitrator is a different individual does not alter this conclusion.

The revised Singapore International Arbitration Act defines "arbitrator" to include "emergency arbitrator," in order to resolve doubts about the issue. *See* Singapore International Arbitration Act, Art. 2(1). *See also* Hong Kong International Arbitration Ordinance, §22B(1) ("Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court").

586)

The parties' opportunity to be heard can raise particular issues in the context of highly-expedited emergency arbitrator proceedings. *See Yahoo!, Inc. v. Microsoft Corp.*, 2013 WL 5708604 (S.D.N.Y.) (recognizing decision by emergency arbitrator as award and applying same standard of review in vacatur action as applicable to other arbitral awards). *See also* Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 Arb. Int'l 559, 570-74 (2016); §17.03.

587)

See, e.g.,Thrivest Specialty Funding LLC v. White, 2019 WL 6124955 (E.D. Pa.) (confirming interim award as "temporary equitable order" needed to ensure final award is "meaningful"); *Yahoo!, Inc. v. Microsoft Corp.*, 2013 WL 5708604 (S.D.N.Y.) (upholding emergency arbitrator's authority to issue provisional measures and recognizing decision by emergency arbitrator as award); *Blue Cross Blue Shield of Mich. v. Medimpact*, 2010 WL 2595340 (E.D. Mich.) (AAA Emergency Arbitrator's grant of interim relief is final award for purposes of confirmation and vacatur); *Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §1.1 comment a (2019).

588)

See §25.04.

589)

See §22.02; §25.04.

590)

SeeAl Raha Group for Tech. Servs. v. PKL Servs., Inc., 2019 WL 4267765, at *3 (N.D. Ga.) (declining review of interim award because emergency arbitrator expressed clear intent to "'prevent the termination … of the contract between the parties pending constitution of the full arbitral tribunal that will be appointed to hear the case on the merits'"); *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, 2011 WL 2135350, at *3 (S.D. Cal.) (declining to review interim award by emergency arbitrator under AAA Rules; full arbitral tribunal, once constituted, had jurisdiction to "reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator"). *See alsoJudgment of 25 July 2019*, Case No. 76 (Bucharest Ct. App.) (annulling emergency arbitrator decision for violation of mandatory law and public policy that supposedly gave national court exclusive jurisdiction to grant interim measures before commencement of arbitration); *Judgment of 7 June 2018,* Case No. 47 (Bucharest Ct. App.) (annulling emergency arbitrator decision for violation of arbitration agreement requirement of three-person tribunal, effectively requiring parties to opt-in to emergency arbitrator provisions despite no such requirement under applicable institutional rules).

591)

See §22.03.

592)

See UNCITRAL Model Law, 2006 Revisions, Art. 17H(1); §17.03[B].

593)

See §1.04[A][1].

594)

For commentary, *see* Bantekas & Ullah, *Article 17J: Court-Ordered Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 500-21 (2020); Becker, *Attachments in Aid of International Arbitration: The American Position*, 1 Arb. Int'l 40 (1985); Brody, *An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention*, 18 Cornell Int'l L.J. 99 (1985); Brower & Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int'l L. 24 (1986); Cavalieros & Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. Int'l Arb. 275 (2018); Hobér, *Courts or Tribunals?,* in F. Fortese *et al.* (eds.), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* 205 (2019); Hoellering, *Interim Measures and Arbitration: The Situation in the United States*, 46 Arb. J. 22 (1991); Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law,* 740 PLI/Lit. 1181 (2005); Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to Be Introduced by A Revision of the Convention?*, 6(1) J. Int'l Arb. 171 (1989); Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law,* 54 U. Chi. L. Rev. 1373 (1987); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87 (2015); Lahlou, Sado & Walters, *Pre-Judgment/Pre-Award Attachment,* in A. Frischknecht *et al.* (eds.), *Enforcement of Foreign Arbitral Awards and Judgments in New York* 253 (2018); McDonnell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 Colum. J. Transnat'l L. 273 (1983-84); Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn*?, 30 Tex. Int'l L.J. 72 (1995); Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 Int'l Tax & Bus. L. 368 (1986); D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 87 (2015).

595)

See §17.02[E]. *See also* D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 104 (2015) ("[T]he whole spectrum has shifted. Historically, the endpoints of the spectrum allocating jurisdiction between courts and arbitrators to award interim measures were: (a) granting exclusive jurisdiction to the national courts and (b) granting some (perhaps limited) concurrent jurisdiction to the arbitrators. Today, the endpoints of that spectrum (at least with respect to the majority of recognized arbitral seats) are: (a) granting fully concurrent jurisdiction to courts and arbitrators and (b) granting primary jurisdiction to the arbitrators and a limited subsidiary role to the national courts.").

596)

See §17.02[A][5][d].

597)

See §17.02[A][6].

598)

See §17.02[A][5][a].

599)

See, e.g., Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465 (1986) ("[I]n municipal legal orders, there ordinarily is a court that is readily available, that has jurisdiction and the ability to deliver an enforceable judgment. Most certainly this is not the case in international arbitration. Indeed, compensation in an international context is often uncertain."); Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to Be Introduced by A Revision of the Convention?*, 6(1) J. Int'l Arb. 171, 180 (1989) ("Intervention by state courts offers the only effective means for implementing conservatory measures during an arbitration"); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 88-94 (2015); Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 197 (1977) (noting possibility that party seeking provisional measure may "prefer to approach the court instead of addressing himself to the arbitral tribunal").

600)

See §8.03_[A]; §9.04; §17.02[E].

601)

NCC Int'l AB v. Alliance Concrete Singapore Pte Ltd, [2008] SGCA 5 (Singapore Ct. App.) (quoting *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334 (House of Lords)). *See alsoCo. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.); *Laker Vent Eng'g Ltd v. Jacobs E&C Ltd* [2014] EWHC 4818 (TCC) (English High Ct.); *R1 Int'l Pte Ltd v. Lonstroff AG*, [2014] SGHC 69 (Singapore High Ct.); *Front Carriers Ltd v. Atl. & Orient Shipping Corp.*, [2006] SGHC 127 (Singapore High Ct.); *The "Lady Muriel" v. Transorient Shipping Ltd*, [1995] HKCA 615 (H.K. Ct. App.); *Co. A v. Co. B*, [2018] HKCU 3575 (H.K. Ct. First Inst.) (Hong Kong courts may order interim measures in aid of international arbitration, but power will be used "sparingly"); *Kuring-gai Council v. Ichor Constr. Pty Ltd*, [2019] NSWCA 2 (N.S.W. Ct. App.); *Kawasaki Heavy Indus., Ltd v. Laing O'Rourke Australia Constr. Pty Ltd*, [2017] NSWCA 291 (N.S.W. Ct. App.) (power to intervene on interim basis should be exercised "very sparingly" and only to protect position of party until arbitral tribunal is constituted); *Sensation Yachts Ltd v. Darby Maritime Ltd*, Case No. CIV 2005‖404‖1908 (Auckland High Ct. 2005) (granting interim measures in support of arbitration in London; purpose of court-ordered interim measures is to complement and facilitate arbitration, not to forestall or substitute for it); *Pathak v. Tourism Transp. Ltd*, [2002] 3 NZLR 681 (Auckland High Ct.).

602)

Neither the Geneva Protocol nor Geneva Convention contained any reference to provisional measures in international arbitration, whether granted by arbitral tribunals or national courts. *See* §17.02[A][1].

603)

European Convention, Art. VI(4). *See* §17.02_[A][1]; §17.04[B][1].

604)

SeeAward in ICC Case No. 4415, 111 J.D.I. (Clunet) 952 (1984); Hascher, *European Convention on International Commercial Arbitration of 1961: Commentary*, XX Y.B. Comm. Arb. 1006 (1995).

605)

See, e.g., *Judgment of 12 June 1991*, *Bahia Indus. SA v. Eintacar-Eimar SA*, XVIII Y.B. Comm. Arb. 616 (Cádiz Audiencia Provincial) (1993).

606)

See §17.02[A][2].

607)

See §17.04[B][2][a]; *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *McCreary Tire & Rubber Co. v. CEAT SpA*, 501 F.2d 1032 (3d Cir. 1974); *Cooper v. Ateliers de la Motobecane, SA*, 442 N.E.2d 1239 (N.Y. 1982).
608)

See §17.04[B][2][b]; *China Nat'l Metal Prod. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174, 1180 (C.D. Cal. 2001) ("The court disagrees with *Apex* and *McCreary* and concludes that Article II(3) of the Convention does not deprive the court of subject matter jurisdiction over this action and particularly to order provisional relief, *e.g.*, a pre-arbitral award writ of attachment pending reference to arbitration and pending the conclusion of the arbitration proceedings"); *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977); *Rhone Mediterranee v. Lauro*, 555 F.Supp. 481 (D.V.I. 1982). *See also Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §3.3 comment b & Reporter's Note b(i) (2019).
609)

See §17.04[B][2][d]. *See also* UNCITRAL, *Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) ("The duty to refer the parties to arbitration does not extend to provisional and conservatory measures, except if the arbitration agreement itself refers to such measures. Most courts exercise jurisdiction to order interim or provisional relief in support of arbitration upon application by a party notwithstanding the presence of an arbitration agreement. … Commentators have confirmed that national courts' jurisdiction to order provisional measures does not breach the New York Convention as it does not prejudice the merits of the dispute.").
610)

See McCreary Tire & Rubber Co. v. CEAT, SpA, 501 F.2d 1032 (3d Cir. 1974). *See* Brower & Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int'l L. 24, 27 (1986); Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. Int'l L. & Com. Reg. 705, 768 (1997).
611)

See, e.g., *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906, 911 (5th Cir. 2019) ("the [New York] Convention grants jurisdiction over Daewoo's request for an attachment"); *Beluga Chartering GmbH v. Korea Logistics Sys. Inc.*, 589 F.Supp.2d 325, 329 (S.D.N.Y. 2008) ("Although the Convention does not explicitly authorize attachment in admiralty cases, 'courts have consistently held that in admiralty cases under the Convention, a party can obtain a writ of attachment'"); *China Nat'l Metal Prod. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174, 1180 (C.D. Cal. 2001); *Filanto SpA v. Chilewich Int'l Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992); *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334 (House of Lords) (rejecting *Cooper* reading of Article II(3)). *See also* Becker, *Attachments in Aid of International Arbitration: The American Position*, 1 Arb. Int'l 40 (1985); Brower & Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int'l L. 24 (1986); Committee on Arbitration and ADR, *The Advisability and Availability of Provisional Remedies in the Arbitration Process*, 39 Record Ass'n Bar City of N.Y. 625, 629 (1984); Ebb, *Flight of Assets from the Jurisdiction "In the Twinkling of A Telex": Pre- and Post-Award Conservatory Relief in International Commercial Arbitration*, 7(1) J. Int'l Arb. 9 (1990); McDonnell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 Colum. J. Transnat'l L. 273 (1983-84); D. Ziyaeva, *Interim and Emergency Relief in International Arbitration* 293 (2015) ("The decision in *McCreary* was much criticized by the international arbitration community for being inimical to the actual purposes of the New York Convention"); §17.04[B][2][b].
612)

See McCreary Tire & Rubber Co. v. CEAT, SpA, 501 F.2d 1032, 1032 (3d Cir. 1974).
613)

Id. at 1034.
614)

Id. at 1038.
615)

As described above, Article II(3) of the Convention requires the courts of Contracting States to enforce arbitration agreements by referring the parties to arbitration. *See* §2.01[A][1][a]; §8.02_[A][1]; §8.03_[A][1]; §8.03[C][1].
616)

McCreary, 501 F.2d at 1038 (emphasis added).

617)

McCreary involved an ICC arbitration, and Article 8(5) of the then-prevailing 1988 ICC Rules was applicable. Article 8(5) of the 1988 ICC Rules provided that "[b]efore the file is transmitted to the arbitrators, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator." *See* §17.02[A][4][b]. Even though the 1988 ICC Rules provided that seeking attachment does not *in principle* violate the parties' arbitration agreement, that does not mean that it *never* does. Where the attachment is plainly part of an effort to substitute litigation for arbitration, Article 8(5) of the 1988 ICC Rules would not permit it. *See* §17.04_[B][3]; §17.04[D].

618)

See §17.02_[E]; §§17.04[C][1] *et seq.*

619)

At the same time, the *McCreary* opinion contained broad language concerning Article II(3), which, if read independently, could be understood as forbidding all court-ordered provisional measures. *SeeMcCreary*, 501 F.2d at 1037.

620)

SeeCooper v. Ateliers de la Motobecane, SA, 442 N.E.2d 1239 (N.Y. 1982).

621)

Id. at 1243 (emphasis added). There were also statements in *Cooper* that questioned the necessity for *any* orders of provisional measures in connection with international arbitration: "It is open to dispute whether attachment is even necessary in the arbitration context. Arbitration, as part of the contracting process, is subject to the same implicit assumptions of good faith and honesty that permeate the entire relationship. Voluntary compliance with arbitral awards may be as high as 85%. Moreover, parties are free to include security clauses (*e.g.*, performance bonds or creating escrow accounts) in their agreements to arbitrate." *Id.* at 1242.

The foregoing rationale reflects a basic misunderstanding of the arbitral process. Although parties agree to international arbitration in an effort to resolve disputes in good faith, once disputes arise, provisional measures such as attachments are no less important than in a domestic litigation context. Indeed, for the reasons discussed above, provisional measures are generally more important in international contexts than in purely domestic ones. *See* §17.01. The Court of Appeals' comments to the contrary in *Cooper* are therefore not serious policy grounds for withholding court-ordered provisional measures in connection with international arbitrations.

622)

See, e.g., *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *McDonnell Douglas Corp. v. Denmark*, 607 F.Supp. 1016 (E.D. Mo. 1985); *Siderius, Inc. v. Compania de Acero del Pacifico, SA*, 453 F.Supp. 22 (S.D.N.Y. 1978); *Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional*, 427 F.Supp. 2 (S.D.N.Y. 1975); *Drexel Burnham Lambert, Inc. v. Ruebsamen*, 531 N.Y.S.2d 547 (N.Y. App. Div. 1988); *Shah v. E. Silk Indus. Ltd*, 493 N.Y.S.2d 150 (N.Y. App. Div. 1985); *Faberge Int'l Inc. v. Di Pino*, 491 N.Y.S.2d 345 (N.Y. App. Div. 1985). *See alsoLafarge Coppee v. Venezolana de Cementos, SACA*, 31 F.3d 70 (2d Cir. 1994) (discussing grant of provisional injunctive relief in aid of arbitration).

While parts of the rationale and the specific results in *Cooper* and *McCreary* can be explained as involving litigation that was designed to frustrate the arbitral process, subsequent decisions following *Cooper* and *McCreary* cannot be explained in this manner. In these cases, Article II(3) was invoked where it was clear that court-ordered provisional measures were not intended to circumvent the arbitral process.

623)

SeeDrexel Burnham Lambert, Inc. v. Ruebsamen, 531 N.Y.S.2d 547 (N.Y. App. Div. 1988).

624)

Id. at 548.

625)

Id. at 551.

626)

See Sanders, *Consolidated Commentary on Court Decision on the New York Convention 1958*, XIV Y.B. Comm. Arb. 528, 570 (1989) ("no court has doubted that an attachment in connection with the enforcement of an arbitral award, in order to secure payment under the award, is compatible with the Convention").

627)

SeeCarolina Power & Light Co. v. Uranex, 451 F.Supp. 1044 (N.D. Cal. 1977). Note that in *Uranex*, in contrast to *McCreary* and *Cooper*, there was no evidence that the pre-award attachment was designed to do anything other than secure the final arbitral award (and hence, aid the arbitral process).

628)

Id. at 1051-52. The *Uranex* court noted that the FAA permits prejudgment attachments. *See, e.g.,The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42, 44-45 (U.S. S.Ct. 1944). *See alsoMurray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944); *Baltazar v. Forever 21 Inc.*, 367 P.3d 6, 14 (Cal. 2016); *La. Extended Care Center LLC v. Bindon*, 180 So.3d 791, 800 (Miss. Ct. App. 2015).

629)

For lower court decisions adopting the *Uranex* analysis of the Convention, *seeStemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 895 F.3d 375, 380 & n.2 (5th Cir. 2018) (finding "subject matter jurisdiction under the Convention [for a federal court] to order state-law provisional remedies"); *Benihana, Inc. v. Benihana of Tokyo, LLC,* 784 F.3d 887, 894-95 (2d Cir. 2015) (upholding district court's preliminary injunction in aid of international arbitration; "[w]here the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration"); *Aggarao v. MOL Ship Mgt Co.*, 675 F.3d 355, 376 (4th Cir. 2012) ("The decision in *McCreary*, however, predates [*Vimar Seguros y Reaseguros, SA v. MV Sky Reefer*, 515 U.S. 528 (1995),]) where the Supreme Court endorsed a district court's retention of jurisdiction over a dispute subject to arbitration under the Convention Act. Because the Supreme Court has rejected the *McCreary* premise, *Podar Bros.* has been effectively overruled by the Court on the jurisdictional point and is not controlling precedent with respect to Aggarao's injunction request."); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003) ("there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction"); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) ("We hold that entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [the Convention]"); *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982); *Deutsche Mexico Holdings Sarl v. Accendo Banco, SA,* 2019 WL 5257995, at *6 (S.D.N.Y.) ("that an arbitration has already begun and the parties have appeared therein does not prevent a court from entertaining a request for interim relief"); *Espiritu Santo Holdings, LP v. L1bero Partners, LP,* 2019 WL 2240204, at *13 (S.D.N.Y.) ("district courts generally agree that the [New York] Convention confers a standalone cause of action to issue provisional remedies in aid of arbitration"); *Leber v. Citigroup, Inc.,* 2019 WL 1331313, at *3 (S.D.N.Y.) ("courts are permitted to issue pre-arbitration injunctive relief in order to aid the arbitration process because arbitration can become a hollow formality if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute"); *Stemcor USA, Inc. v. Am. Metals Trading, LLP*, 199 F.Supp.3d 1102, 1122 (E.D. La. 2016) ("[t]he Court rejects *McCreary* and *Simula* and adopts the Second Circuit's interpretation of jurisdiction under the [New York] Convention."); *Bahrain Telecommc'ns Co. v. Discoverytel, Inc.*, 476 F.Supp.2d 176, 181 (D. Conn. 2007) (agreeing "with those courts that have rejected *McCreary's* reasoning and holding"); *James Assocs. Ltd v. Anhui Mach. & Equip. Imp. & Exp. Corp.*, 171 F.Supp.2d 1146 (D. Colo. 2001); *Signature Mktg Pty Ltd v. Slim Print Int'l LLC*, 2001 U.S. Dist. LEXIS 21222 (D. Conn.); *China Nat'l Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174, 1179 (C.D. Cal. 2001) ("The court disagrees with *Apex* and *McCreary* and concludes that Article II(3) of the Convention does not deprive the court of subject matter jurisdiction over this action and particularly to order provisional relief, *e.g.*, a pre-arbitral award writ of attachment pending reference to arbitration and pending the conclusion of the arbitration proceedings"); *RoadTechs, Inc. v. MJ Highway Tech., Ltd*, 79 F.Supp.2d 637 (E.D. Va. 2000); *Daye Nonferrous Metals Co. v. Trafigura Beheer BV*, 1997 WL 375680 (S.D.N.Y.) (granting injunctive relief against transfers of funds, in aid of arbitration in Paris); *Alvenus Shipping v. Delta Petroleum (USA), Ltd*, 876 F.Supp. 482, 487 (S.D.N.Y. 1994) (granting preliminary injunctive relief in aid of arbitration in New York Convention Contracting State); *Compania de Navegacion y Financiera Bosnia SA v. Nat'l Unity Marine Salvage Corp.*, 457 F.Supp. 1013, 1014 (S.D.N.Y. 1978); *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F.Supp. 861, 863 (S.D.N.Y. 1978); *Andros Compania Maritima SA v. Andre & Cie, SA*, 430 F.Supp. 88 (S.D.N.Y. 1977).

630)

Filanto SpA v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1241 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

631)

See, e.g., *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar,* 927 F.3d 906 (5th Cir. 2019); *E.A.S.T. Inc. of Stamford, Conn. v. MV Alaia*, 876 F.2d 1168 (5th Cir. 1989); *Barclays Bank, SA v. Tsakos*, 543 A.2d 802 (D.C. Cir. 1988); *Jesko v. U.S.*, 713 F.2d 565 (10th Cir. 1983); *Castelan v. MV Mercantil Parati*, 1991 U.S. Dist. LEXIS 6472 (D.N.J.); *Atwood Navigation, Inc. v. MV Rizal*, 1989 WL 16306 (E.D. Pa.) (suggesting *McCreary* is inapplicable to maritime attachment); *Constr. Exp. Enter. v. Nikki Maritime,Ltd*, 558 F.Supp. 1372 (S.D.N.Y. 1983) (relying on Supplemental Rule B(1) and traditional maritime attachment); *Atlas Chartering Servs. Inc. v. World Trade Group, Inc.*, 453 F.Supp. 861, 863 (S.D.N.Y. 1978) (same). *See* Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 Tulane L. Rev. 1519 (1991).
Some lower courts have rejected this result. *Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional*, 427 F.Supp. 2 (S.D.N.Y. 1975). One U.S. lower court has also (correctly) concluded that the Convention does not restrict a court's power to recognize and enforce tribunal-ordered provisional measures. *Fiat SpA v. Ministry of Fin. & Planning*, 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y.).

632)

See, e.g.,Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar, 927 F.3d 906 (5th Cir. 2019); *Aggarao v. MOL Ship Mgt Co., Ltd,* 675 F.3d 355 (4th Cir. 2012); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) ("entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to §20"); *Bahrain Telecommc'ns Co. v. Discoverytel, Inc.,* 476 F.Supp.2d 176 (D. Conn. 2007); *Gerling Global Reins. Corp. v. Sompo Japan Ins. Co.,* 348 F.Supp.2d 102, 105 (S.D.N.Y. 2004); *China Nat'l Metal Products Imp./Exp. Co. v. Apex Digital, Inc.,* 155 F.Supp.2d 1174, 1179 (C.D. Cal. 2001); *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F.Supp. 754, 758 (S.D.N.Y. 1984) ("The fact that this dispute is to be arbitrated does not deprive the Court of its authority to provide provisional remedies"); *Sojitz Corp. v. Prithvi Info. Solutions Ltd,* 891 N.Y.S.2d 622 (N.Y. Sup. Ct. 2009). *See also* Bento & Peng, *Interim Measures: Arbitral Tribunals and Courts*, in L. Shore *et al.* (eds.), *International Arbitration in the United States* 239, 257 (2017) ("Consistent with the Second Circuit's decision in *Borden*, most federal courts that have considered the question have held that Article II(3) of the Convention does not bar courts from granting interim relief in aid of arbitration. Commentators have likewise observed that there seems to be 'virtual consensus' outside the U.S. that 'the Convention does not deprive the courts of each country of the power to issue provisional remedies in support of arbitration.'").
633)

See §1.04[A][3].
634)

Intermar Overseas, Inc. v. Argocean SA, 503 N.Y.S.2d 736 (N.Y. App. Div. 1986).
635)

Id. at 496.
636)

§2.01[B][1]; §2.04_[A]; §11.02[A]. For other decisions holding that the *McCreary/Cooper* interpretation of Article II(3) is not applicable outside the New York Convention context, *seeItel Containers Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro,* 1991 WL 12131 (S.D.N.Y.); *Triton Container Int'l Ltd v. MS ITAITE,* 1991 WL 255613 (S.D.N.Y.); *MCT Shipping Corp. v. Sabet*, 497 F.Supp. 1078, 1086 (S.D.N.Y. 1980); *Coastal States Trading, Inc. v. Zenith Navigation SA*, 446 F.Supp. 330, 341-42 (S.D.N.Y. 1977) (holding (wrongly) that agreement had no "reasonable relation" to foreign state under FAA §202, and therefore that Convention and Article II(3) did not apply).
637)

See Becker, *Attachments and International Arbitration: An Addendum*, 2 Arb. Int'l 365 (1986); Committee on Arbitration and Alternative Dispute Resolution, *The Advisability and Availability of Provisional Remedies in the Arbitration Process*, 39 Record Ass'n Bar City of N.Y. 625 (1984).

638)

New York Civil Practice and Law Rules §7502(c) ("Provisional Remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section."). *See also* J. Carter & J. Fellas, *International Commercial Arbitration in New York* 266 (2010) ("Following extensive criticism, NY CPLR §7502(c) was revised in 2005. It now explicitly permits courts to grant preliminary relief in aid of arbitration, even when subject to the New York Convention …").
639)

SeeMishcon de Reya N.Y. LLP v. Grail Semiconductor, Inc., 2011 WL 6957595, at *3 (S.D.N.Y.) ("Under New York law, to confirm an *ex parte* order of attachment, the petitioner bears the burden of demonstrating that: (1) there is a cause of action; (2) it is probable that the petitioner in the cause of action will succeed on the merits; (3) a ground for attachment under N.Y. C.P.L.R. 6201 exists; and (4) the amount demanded from the respondent exceeds all counterclaims known to the petitioner. Further, as relates specifically to the provisional remedy of attachment as concerns a pending arbitration, the 'sole ground' upon which a court may confirm an order of attachment in aid of arbitration – essentially replacing (3) above – is that 'the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief'").
640)

SeeMerrill Lynch Futures, Inc. v. Kelly, 585 F.Supp. 1245, 1259 (S.D.N.Y. 1984).
641)

New York Civil Practice Law and Rules §7502(c) (2013).
642)

See, e.g., *BSH Hausgerate, GmbH v. Kamhi,* 282 F.Supp.3d 668 (S.D.N.Y. 2017) (confirming attachment order); *Disney Enter., Inc. v. Finanz St. Honore, BV,* 2017 WL 1862211, at *3 (E.D.N.Y.); *Mishcon de Reya N.Y. LLP v. Grail Semiconductor, Inc.*, 2011 WL 6957595 (S.D.N.Y.) (confirming attachment order under §7502(c)); *SG Cowen Sec. Corp. v. Messih*, 2000 U.S. Dist. LEXIS 6697 (S.D.N.Y.) (granting injunctive relief under §7502(c)); *Sojitz Corp. v. Prithvi Info. Solutions Ltd*, 921 N.Y.S.2d 14, 15 (N.Y. App. Div. 2011) (party that intends to commence international arbitration may attach intended respondent's New York assets as security for ultimate award under New York Civil Practice and Law Rules §7502(c)); *Habitations Ltd, Inc. v. BKL Realty Sales Corp.*, 554 N.Y.S.2d 117 (N.Y. App. Div. 1990) (considering only §7502(c) requirements); *Saferstein v. Wendy*, 523 N.Y.S.2d 725 (N.Y. Sup. Ct. 1987) (granting injunction, but holding that §7502(c) "was not designed to make the court a simple rubber stamp," and applying traditional equitable principles).
643)

Oehmke, *Commercial Arbitration* §39:13 (2000 & Update 2013) ("New York rule (providing for prearbitration attachment) is limited to domestic arbitrations").
644)

ContiChem LPG v. Parsons Shipping Co., 229 F.3d 426, 433 (2d Cir. 2000) (New York Civil Practice and Law Rules §7502(c) "applies only to domestic arbitrations").
645)

See, e.g., *Invar Int'l Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, 2010 WL 6983306 (N.Y. Sup. Ct.) (granting temporary restraining order and preliminary injunction in aid of arbitration, seated in Geneva, under §7502(c)); *Sierra USA Commc'ns, Inc. v. Int'l Telephone & Satellite, Corp.,* 824 N.Y.S.2d 560 (N.Y. Sup. Ct. 2006) (§7502(c) "applies to all arbitrations" regardless whether they are seated in New York or elsewhere); *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd*, 804 N.Y.S.2d 549, 566 (N.Y. Sup. Ct. 2005) ("When, as here, parties agree to permit application to a court for pre-arbitration injunctive relief, it would be consistent with the letter and spirit of *Cooper* and its progeny to enforce that agreement. … Therefore there is no basis to preclude parties to an international agreement from enforcing an agreement to seek the same remedies that CPLR §7502(c) provides to domestic arbitrations.").

646)

New York Civil Practice Law and Rules §7502(c) (2013). *See also* E. Edmondson & R. Ziegler, *The Complications of Attaching Assets in the US in Aid of An Arbitral Award* 75 (2016) ("[T]he New York legislature initially amended the CPLR to allow prejudgment attachment in aid of arbitrations seated in New York not subject to the New York Convention. Then, in a subsequent amendment, the New York legislature made clear that New York courts could award prejudgment attachment in support of international arbitrations subject to the New York Convention. That history can be seen in the language of §7502(c) itself, which somewhat awkwardly spells out that it is acceptable to order attachment in aid of arbitrations under the New York Convention.").
647)

SeeDeutsche Mexico Holdings Sarl v. Accendo Banco, SA, 2019 WL 5257995, at *6 (S.D.N.Y.) ("that an arbitration has already begun and the parties have appeared therein does not prevent a court from entertaining a request for interim relief"); *Espiritu Santo Holdings, LP v. L1bero Partners, LP,* 2019 WL 2240204, at *27 (S.D.N.Y.) ("district courts generally agree that the [New York] Convention confers a standalone cause of action to issue provisional remedies in aid of arbitration"); *Leber v. Citigroup, Inc.,* 2019 WL 1331313, at *3 (S.D.N.Y.) ("courts are permitted to issue pre-arbitration injunctive relief in order to aid the arbitration process because arbitration can become a hollow formality if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute"); *Sojitz Corp. v. Prithvi Info. Solutions Ltd*, 891 N.Y.S.2d 622 (N.Y. Sup. Ct. 2011).
648)

See, e.g., *IOT Eng'g Projects Ltd v. Dangote Fertilizer Ltd* [2014] EWCA Civ 1348 (English Ct. App.); *Rena K* [1979] QB 377 (QB) (English High Ct.); *African Mixing Tech. (PTY) v. Canamix Processing Sys. Ltd*, [2014] BCSC S145160 (B.C. Sup. Ct.); *Co. A v. Co. B*, [2018] HKCU 3575 (H.K. Ct. First Inst.); *Crete Maritime Corp. v. Emirates Shipping Line*, [2017] HKCFI 110 (H.K. Ct. First Inst.); *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.,* [1998] FCA 1485 (Australian Fed. Ct.); *Raffles Design Int'l India Pvt Ltd v. Educomp Prof'l Ed. Ltd*, [2016] Nos. 25949/2015 & 2179/2016 (Delhi High Ct.); *Fieldworks-INC v. Erim, SA,* [1996] Case Nos. 96/3603, 96/3703, 96/3998 (Versailles Cour d'Appel); *Judgment of 15 May 2014, N-Allo scrl v. Avaya Belgium sprl,* described in *A Contribution by the ITA Board of Reporters* (Brussels Tribunal de Commerce); *Judgment of 12 May 1977*, *Scherk Enter. AG v. Société des Grandes Marques*, IV Y.B. Comm. Arb. 286 (Italian Corte di Cassazione) (1979); *Judgment of 23 June 2017, Hyundai Eng'g & Constr. v. Constructora OAS SA*, [2017] 5533-2017 (Santiago Corte de Apelaciones); *Judgment of 14 March 2018*, Decision No. 650/2018 (Istanbul Reg. Ct.); *SoftCommodities Trading Co. SA v. Elan Soft LLP*, [2018] 785/1018/18 (Ukraine S.Ct.); *Judgment of 10 August 2017, FTC Cards Processamento e Serviços de Fidelização Ltda v. Cielo SA*, Case No. 1016622-74.2016.8.26.0068 (São Paulo Tribunal de Justiça); *Judgment of 5 September 2016*, [2016] Case No. 410/2016-I (Mexican Tribunal Civil del Séptimo Distrito Federal); *Toyota Servs. Afrique v. Promotion de Représentation Automobiles*, Case No. 97/317 (Côte d'Ivoire S.Ct. 1997).
649)

A. van den Berg, *The New York Arbitration Convention of 1958* 139-40 (1981).
650)

Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd [1993] AC 334, 354 (House of Lords) (rejecting *Cooper* reading of Article II(3)). Notably, Lord Mustill's analysis expressly left open the possibility that, while Article V did not "necessarily" forbid court-ordered applications for interim relief, it might nonetheless forbid applications that did not "*properly use*" concurrent judicial authority to order provisional measures.
651)

Sherwin & Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 Am. Rev. Int'l Arb 317, 333 (2009) ("no court of the United States has found court-ordered interim relief in aid of arbitration to be inconsistent with the New York Convention").
652)

As noted above, both *McCreary* and *Cooper* involved arbitration agreements which incorporated the ICC Rules, which specifically permit court-ordered provisional measures. *See* §17.04[B][2][a].
653)

As discussed elsewhere, Article II requires Contracting States to give effect to all material terms of an agreement to arbitrate. *See* §2.01[A][1][a]; §5.01_[B][2]; §11.03[C][1][c][vi]; §12.01[B][2][a]; §15.02_[A]; §15.04[A][1][a]; §17.02_[A][2]; §23.02_[B][1]; §25.02[B]. This would include an agreement authorizing applications for court-ordered provisional measures in aid of the arbitration.
654)

See §17.02[A][3][a].

655)

See §17.01; §17.02[A][3][b]; §17.04[B][2][c]. Other U.S. authorities recognize this. *See, e.g.*, U.S. Revised Uniform Arbitration Act, §8 comment 5 (2000) ("The case law, commentators, rules of arbitration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief, including interim awards, in order to make a fair determination of an arbitral matter"); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989) (court-ordered provisional measures necessary to "protect the integrity of the applicable dispute resolution process"); *Optum, Inc. v. Smith,* 360 F.Supp.3d 52, 54 (D. Mass. 2019), *appeal dismissed*, 2019 WL 3564709 (1st Cir.) ("At least seven Courts of Appeals, including the First Circuit and the Third Circuit, have held that a district court has the inherent equitable power to issue a preliminary injunction to preserve the status quo pending arbitration in order to protect the ability of the arbitrator to provide meaningful relief if the plaintiff prevails in the arbitration"); *NAVEX Global, Inc. v. Stockwell*, 2019 WL 6312558, at *11 (D. Idaho) ("[T]he purpose of a preliminary injunction here is to maintain the status quo pending arbitration. Granting a preliminary injunction here will preserve the meaningfulness of the arbitration process."); *China Nat'l Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174, 1179 (C.D. Cal. 2001) (Article II(3) does not deprive court of jurisdiction to order provisional relief and such relief in fact complements arbitration agreements by securing assets while arbitration is pending).
656)

See §17.02[A][5].
657)

That position is shared by the vast majority of developed jurisdictions and commentators. *See* §17.04[B][2][d].
658)

Cooper, 442 N.E.2d at 1242 ("parties are free to include security clauses (*e.g.*, performance bonds or creating escrow accounts) in their agreements to arbitrate").
659)

See §17.02_[B]; §17.04[C][3].
660)

See §17.04[B][2][b].
661)

See §17.04[B][2][d].
662)

See §17.04[B][2][a].
663)

See id.
664)

As discussed below, most institutional arbitration rules permit court-ordered provisional measures in aid of arbitration in a substantial range of circumstances. *See* §17.04[D]. Some institutional rules preclude or limit applications for provisional measures in national courts in specified circumstances. *See* §17.04[D].
665)

See §17.04[C][5].
666)

See §17.02_[E]; §17.04_[B][2]; §§17.04[C][1] *et seq*.
667)

As discussed below, most national arbitration statutes provide that a party's request for court-ordered provisional relief is not necessarily contrary to, or a waiver of, the parties' arbitration agreement. *See* §17.04_[C][6]; UNCITRAL Model Law, Art. 9.
668)

See §17.04[C][3]. Unless the arbitration agreement specifically prohibits or restricts court-ordered provisional measures. *See* §17.04[C][5].
669)

See, e.g., *Final Award in ICC Case No. 6998*, XXI Y.B. Comm. Arb. 54 (1996); *Partial Award in ICC Case No. 5896*, 11(1) ICC Ct. Bull. 37 (2000); *China Nat'l Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174, 1179 (C.D. Cal. 2001) ("complaint … seeks to bypass the agreed upon method of settling disputes, [which] is prohibited by the Convention if one party to the agreement objects").

670)

See, e.g., *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 315, 320-21 (4th Cir. 1988) (when charges inherently inseparable, court may refer claims against non-signatory parent to arbitration); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342 (11th Cir. 1984) (same result, reached under theory of equitable estoppel); *Sam Reisfeld & Son Imp. Co. v. SA Eteco*, 530 F.2d 679, 681 (5th Cir. 1976) ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted").
671)

See §17.04[B][2].
672)

Inter-American Convention, Art. 3.
673)

IACAC Rules, Art. 23(3) ("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").
674)

See §17.02[A][1].
675)

ICSID Convention, Art. 26.
676)

See, e.g., C. Schreuer *et al*., *The ICSID Convention: A Commentary* Art. 26, ¶132 (2d ed. 2009) (noting split in authority). *See alsoAlghanim v. Jordan, Procedural Order No. 2 on Application for the Grant of Provisional Measures in ICSID Case No. ARB/13/38 of 24 November 2014*, ¶¶66 *et seq*. (once parties consented to ICSID arbitration, they must refrain from pursuing proceedings in other forum); *Niko Res. (Bangladesh) Ltd v. Bangladesh Petroleum Exploration & Prod. Co. Ltd*, *Decision on the Payment Claim in ICSID Case Nos. ARB/10/11 & ARB/10/18 of 11 September 2014*, ¶286 ("Since the Parties have not availed themselves of the possibility afforded under Rule 39(6) of the ICSID Arbitration Rules to request provisional measures from judicial or other authorities, the Tribunal's exclusive jurisdiction also extends to provisional measures."); *Holiday Inns SA v. Morocco*, *Decision on Provisional Measures in ICSID Case No. ARB/72/1 of 2 July 1972*. *See also* Brower & Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6(2) ICSID Rev. 431 (1991); Friedland, *Provisional Measures and ICSID Arbitration*, 2(4) Arb. Int'l 335 (1986).
677)

See, e.g., *ETI Euro Telecom Int'l NV v. Bolivia* [2008] EWCA Civ 880 (English Ct. App.); *Judgment of 26 October 1984*, *Guinée v. Atlantic Triton*, XI Y.B. Comm. Arb. 215 (Rennes Cour d'Appel) (1986) (Article 26 of ICSID Convention precludes court-ordered provisional measures), *rev'd*, *Judgment of 18 November 1986*, 1987 Rev. Arb. 315 (French Cour de Cassation Civ. 1); *Judgment of 27 September 1985, Guinea v. Maritime Int'l Nominees Establishment*, 25 I.L.M. 1639 (Antwerp Rechtbank) (1985) (Article 26 of ICSID Convention precludes court-ordered provisional measures).
678)

2006 ICSID Rules, Rule 39(6) ("Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests"). *See also* ICSID, *Proposals for Amendment of the ICSID Rules 55* (Working Paper No. 4 2020) ("A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration.").
679)

In England, courts may issue provisional measures in support of an ICSID arbitration if the Lord Chancellor so directs by means of an order pursuant to the Arbitration (International Investment Disputes) Act 1966, as amended in 1996. No such order has yet been made. *See, e.g.*, *Ecuador v. Occidental Exploration & Prod. Co.* [2006] QB 432 (English Ct. App.). The Court of Appeal has ruled that the judicial power to issue measures in connection with arbitral proceedings pending outside of England, pursuant to §25 of the Civil Jurisdiction and Judgments Act 1982, does not extend to ICSID proceedings. *SeeETI Euro Telecom Int'l NV v. Bolivia* [2008] EWCA Civ 880 (English Ct. App.). *See also* Gauci, *The Power of the English Court to Order Interim or Protective Measures in Support of International Arbitration Revisited*, 9 JIBFL 463 (2008).

680)

See §17.02[A][3][c] (Italy, Thailand, China). As discussed above, such legislation is likely contrary to the New York Convention. *See* §17.02_[A][2]; §17.02[F]. *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 88-90 (2015).
681)

See §17.02[E].
682)

UNCITRAL Model Law, Arts. 9, 17. *See* Bantekas & Ullah, *Article 17J: Court-Ordered Interim Measures*, in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 500-02 (2020); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 332-33 (1989); Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 93 (2015).
683)

SeeSilver Standard Res. Inc. v. Geolog, (1998) 168 DLR4th 309 (B.C. Ct. App.) (upholding judicial freezing order in aid of arbitration under Article 9 of Model Law); *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd*, (1994) 113 DLR4th 116 (B.C. Sup. Ct.); *TLC Multimedia Inc. v. Core Curriculum Techs., Inc.*, [1998] BCJ. No. 1656 (B.C. Sup. Ct.) (court has broad discretion to award interim relief in aid of arbitration under Article 9 of Model Law); *Top Gains Minerals Macao Comm. Offshore Ltd v. TL Res. Pte Ltd*, [2015] HCMP 1622 (H.K. Ct. First Inst.); *Katran Shipping Co. Ltd v. Kenven Transp. Ltd*, [1992] 1 HKC 538 (H.K. Ct. First Inst.) (granting injunction in aid of arbitration under Article 9 of Model Law); *Kraft Foods Group Brands LLC v. Bega Cheese Ltd*, [2018] FCA 549 (Australia Fed. Ct.); *ENRC Mktg AG v. OJSC*, [2011] FCA 1371 (Australia Fed. Ct.); *Duro Felguera Australia Pty Ltd v. Trans Global Projects Pty Ltd*, [2018] WASCA 174 (W. Australia Ct. App.); *Bhatia Int'l v. Bulk Trading SA*, [2002] 1 LRI 703 (Indian S.Ct.) (upholding injunction in aid of international arbitration under §9 of India's arbitration statute, which is based on Article 9 of Model Law); *Judgment of 10 August 2017, FTC Cards Processamento e Serviços de Fidelização Ltda v. Cielo SA*, Case No. 1016622-74.2016.8.26.0068 (São Paulo Tribunal de Justiça).
684)

UNCITRAL Model Law, 2006 Revisions, Art. 17J.
685)

Id. at Art. 17J.
686)

See, e.g., *Leviathan Shipping Co. v. Sky Sailing Overseas Co.*, [1998] 4 HKC 347 (H.K. Ct. First Inst.). *See also* Bantekas & Ullah, *Article 17J: Court-Ordered Interim Measures,* in I. Bantekas *et al.* (eds.), *UNCITRAL Model Lawon International Commercial Arbitration: A Commentary* 502-21 (2020).
687)

See, e.g., *Duro Felguera Australia Pty Ltd v. Trans Global Projects Pty Ltd,* [2018] WASCA 174 (W. Australia Ct. App.); *Amican Navigation Inc. v. Densan Shipping Co.*, [1997] CanLII 6263 (Canadian Fed. Ct.); *Silver Standard Res. Inc. v. Geolog*, (1998) 168 DLR4th 309 (B.C. Ct. App.); *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd*, [1994] CanLII 845 (B.C. Sup. Ct.).
688)

See, e.g.,The "Lady Muriel" v. Transorient Shipping Ltd, [1995] HKCA 615 (H.K. Ct. App.).
689)

See, e.g.,Ordina Shipmanagement Ltd v. Unispeed Group Inc., [1998] CanLII 8785 (Canadian Fed. Ct.); *Navi-Mont Inc. v. Rigel Shipping Canada Inc.*, [1997] CanLII 5130 (Canadian Fed. Ct.); *Multimedia Inc. v. Core Curriculum Techs. Inc.*, [1998] CanLII 3901 (B.C. Sup. Ct.); *Osmond Ireland on Farm Business v. McFarland*, [2010] IEHC 295 (Dublin High Ct.); *VE Global UK Ltd v. Charles Allard Jr*, [2017] HKEC 2135 (H.K. Ct. First Inst.); *Top Gains Minerals Macao Commercial Offshore Ltd v. TL Res. Pte Ltd*, [2015] HCMP 1622/2015 (H.K. Ct. First Inst.); *Katran Shipping Co. Ltd v. Kenven Transp. Ltd*, [1992] 1 HKC 538 (H.K. Ct. First Inst.); *Methanex Chile Ltd v. Petrobras Energía SA*, [2014] No. 36715/2014 (Argentine Cámara Nacional de Apelaciones en lo Comercial); *TLC Pan Afric Impex (U) Ltd v. Bank plc*, [2008] UGCommC 18 (Comm) (Kampala High Ct.); *Blue Ltd v. Jaribu Credit Traders Ltd*, Civil Case No. 157/2008 (Milimani Comm) (Nairobi High Ct.); *Santack Enters. Ltd v. Kenya Bldg Soc'y Ltd*, Civil Case No. 298 of 2007 (Nairobi High Ct.).
690)

Roko Constr. Ltd v. Aya Bakery (U) Ltd, [2007] UGHC 31 (Civ) (Kampala High Ct.).
691)

Taxfield Shipping Ltd v. Asiana Marine Inc., [2006] HKCFI 271 (H.K. Ct. First Inst.).

692)

See §17.04[C][4][b].
693)

See Swiss Law on Private International Law, Arts. 183, 185. *See* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1273 *et seq.* (3d ed. 2015); Berti, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 183, ¶5 (2000); S. Besson, *Arbitrage International et Mesures Provisoires* 192 (1998).
694)

See Belgian Judicial Code, Art. 1683 ("It is not incompatible with an arbitration agreement for a request to be made to a court for an interim or conservatory measure before or during arbitral proceedings and for a court to grant such measure, nor shall any such request imply a waiver of the arbitration agreement").
695)

See Netherlands Code of Civil Procedure, Art. 1022(2) ("An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection or from applying to the President of the District Court for a decision in summary proceedings").
696)

See German ZPO, §1033; A. Baumbach & W. Lauterbach *et al.*, *Zivilprozessordnung* §1033, ¶1 *et seq.* (7th ed. 2018); J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶¶2852 *et seq.* (3d ed. 2008); T. Rauscher & W. Krüger, *Münchner Kommentar zur ZPO* §1033, ¶¶1 *et seq.* (5th ed. 2017); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1033, ¶1 *et seq.* (3d ed. 2017); K.-H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* ¶¶17a-1 *et seq.* (7th ed. 2005).
697)

See Austrian ZPO, §585 ("An arbitration agreement does not preclude that a party request, before or during arbitral proceedings, interim or protective measures from a court and for a court to grant such measures").
698)

See French Code of Civil Procedure, Art. 1449(1) ("The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures"). As discussed below, this provision codifies the position under prior French jurisprudence that an agreement to arbitrate did not ordinarily preclude court-ordered provisional measures. *See* §17.04[C][1].
699)

See English Arbitration Act, 1996, §44; §17.04[C][4][a]. *See alsoMarazura Navigation SA v. Oceanus Mut. Underwriting Ass'n (Bermuda) Ltd* [1977] 1 Lloyd's Rep. 283 (QB) (English High Ct.) (seeking security for claims through litigation in foreign court does not necessarily violate arbitration agreement).
700)

See Japanese Arbitration Law, Art. 15.
701)

See Hong Kong Arbitration Ordinance, §60.
702)

See Indian Arbitration and Conciliation Act, §9.
703)

See, e.g., Australian International Arbitration Act, Schedule 2, Art. 17(J); British Columbia International Commercial Arbitration Act, §9; British Virgin Islands Arbitration Act, Art. 9; Canadian Commercial Arbitration Act, Art. 9; Malaysian Arbitration Act, Art. 19(J); New Zealand Arbitration Act, Schedule 1, Art. 9; Ontario International Commercial Arbitration Act, §9; Argentine Arbitration Act, Art. 21; Chilean Arbitration Act, Art. 9; Dominican Republic Arbitration Law, Art. 13; Fijian International Arbitration Act, Art. 33; Hungarian Act on Arbitration, §11(1); Jamaican Arbitration Act, Art. 12; Kenyan Arbitration Act, Art. 7(1); Myanmar Arbitration Act, Art. 11; Peruvian Arbitration Law, Art. 47(4); Slovak Arbitration Act, §2(2); South African International Arbitration Act, Art. 9; Qatari Civil and Commercial Arbitration Law, Art. 9; United Arab Emirates Federal Law on Arbitration, Art. 18; Uruguayan Arbitration Act, Art. 9. *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87 (2015).

704)

See, e.g., *Top Gains Minerals Macao Comm. Offshore Ltd v. TL Res. Pte Ltd*, [2015] HCMP 1622 (H.K. Ct. First Inst.); *Ever Judger Holding Co. Ltd v. Kroman Celik Sanayii Anonim Sirketi,* [2015] HKC 246 (H.K. Ct. First Inst.) (issuing antisuit injunction in aid of arbitration restraining foreign court proceeding); *Judgment of 19 October 2011*, *Kia Motors Corp. v. Wash. Armênio Lopes*, Case No. 1 (2007/0156979-5) (Brazilian Superior Tribunal de Justiça) (rejecting respondents' claim that claimants waived rights under arbitration clause by seeking and obtaining court-ordered interim measures prior to initiation of arbitration); *Judgment of 20 April 2010*, *ProdOpt v. FIRST SA*, Case No. A40-19/09-OT-13 (Russian S. Arbitrazh Ct.) (granting measures freezing assets to ensure enforceability of LCIA award); *Judgment of 3 November 2010*, *Astivenca Astilleros de Venezuela, CA v. Oceanlink Offshore III AS*, Decision No. 1067 (Venezuelan Tribunal Supremo de Justicia) (interim measures can be requested from judicial authority before arbitral tribunal is constituted). *See alsoNCC Int'l AB v. Alliance Concrete Singapore Pte Ltd*, [2008] SGCA 5 (Singapore Ct. App.) (courts have concurrent jurisdiction with arbitral tribunals to order interim measures, but should not usurp function of arbitral tribunals and thus should only order interim relief in order to aid arbitration).
705)

Judgment of 8 October 1998, *Akzo Nobel v. SA Elf Atochem*, 1999 Rev. Arb. 56, 57 (Versailles Cour d'Appel) (emphasis added).
706)

See, e.g.,Judgment of 19 September 2017, 2018 Rev. Arb. 632 (Paris Cour d'Appel); *Judgment of 15 June 2017*, 2018 Rev. Arb. 648 (Paris Cour d'Appel); *Judgment of 12 April 2016*, 2016 Rev. Arb. 1205 (Paris Cour d'Appel); *Judgment of 19 May 2015,* 2015 Rev. Arb. 952 (Paris Cour d'Appel); *Judgment of 18 June 2010*, Case No. 10/101500 (Paris Cour d'Appel); *Judgment of 24 October 2008*, *Cniec Shaanxi Corp. v. Compagnie des Métaux France – Commet France*, Case No. RG 08/05967 (Paris Cour d'Appel); *Judgment of 16 May 2008*, *Carrefour v. Coop. Atlantique*, Case No. RG 07/18210 (Paris Cour d'Appel); *Judgment of 27 October 1995*, 1996 Rev. Arb. 274 (Paris Cour d'Appel); Couchez, *Référé et Arbitrage (Essai de Bilan … Provisoire)*, 1986 Rev. Arb. 155.
707)

For commentary, *see* Bento & Peng, *Interim Measures: Arbitral Tribunals and Courts*, in L. Shore *et al*. (eds.), *International Arbitration in the United States* 239-74 (2017); Edmondson & Ziegler, *The Complications of Attaching Assets in the US in Aid of An Arbitral Award*, 10 Disp. Resol. Int'l 71 (2016); Fiotte, *The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of An Old Statute*, 66 B.U. L. Rev. 1041 (1986); Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1 (2005); Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. Chi. L. Rev. 1373 (1987); Lahlou, Sado & Walters, *Pre-Judgment/Pre-Award Attachment,* in A. Frischknecht *et al.* (eds.), *Enforcement of Foreign Arbitral Awards and Judgments in New York* 253 (2018); Note, *Availability of Provisional Remedies in Arbitration Proceedings*, 17 N.Y.U. L.Q. Rev. 638 (1940); Pike, *The Federal Arbitration Act: A Threat to Injunctive Relief*, 21 Willamette L. Rev. 674 (1985).
708)

See U.S. FAA, 9 U.S.C. §8. Some U.S. state law purports to go further than the FAA and expressly grants authority to local courts to issue provisional measures in connection with an international arbitration. *See* U.S. Revised Uniform Arbitration Act, §8(a) (2000) ("Before an arbitrator is appointed and is authorized and able to act, the court, upon [motion] of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceedings to the same extent and under the same conditions as if the controversy were the subject of a civil action"), §8(b)(2) ("After an arbitrator is appointed and is authorized and able to act: … (2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy"); New York Civil Practice Law and Rules §7502(c); Ohio Revised Code Annotated §2712.36.
709)

See §§17.04[B][2][a]*et seq*.
710)

See, e.g., *Benihana Inc. v. Benihana of Tokyo LLC*, 784 F.3d 887, 894-895 (2d Cir. 2015) ("Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration"); *Dennis Melancon, Inc. v. City of New Orleans,* 703 F.3d 262 (5th Cir. 2012); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) ("'district court can grant injunctive relief in an arbitrable dispute pending arbitration'": "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process") (quoting *Teradyne, Inc. v.*

Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986)); *Toyo Tire Holdings of Am., Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 981 (9th Cir. 2010) ("district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process – provided, of course, that the requirements for granting interim relief are otherwise satisfied"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Am. Express Fin. Advisors v. Thorley*, 147 F.3d 229 (2d Cir. 1998); *Performance Unlimited v. Questar Publ'rs*, 52 F.3d 1373, 1380 (6th Cir. 1995) ("in a dispute subject to mandatory arbitration under the [FAA], a district court has subject matter jurisdiction under §3 of the Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four criteria which are prerequisites to the grant of such relief"); *Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46 (8th Cir. 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993) ("weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately resolved by an arbitration panel"); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052-54 (2d Cir. 1990); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) ("a district court has the authority to grant injunctive relief in an arbitrable dispute"); *PMS Distrib. Co. v. Huber & Suhner, AG*, 863 F.2d 639, 641-42 (9th Cir. 1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985) ("Section 3 does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration"); *Rose-Lino Beverage Distrib. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984) ("fact that a dispute is to be arbitrated … does not absolve the court of its obligation to consider the merits of a requested preliminary injunction"); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Optum, Inc. v. Smith*, 360 F.Supp.3d 52, 54 (D. Mass. 2019), *appeal dismissed*, 2019 WL 3564709 (1st Cir.) ("a district court has the inherent equitable power to issue a preliminary injunction to preserve the status quo pending arbitration in order to protect the ability of the arbitrator to provide meaningful relief if the plaintiff prevails in the arbitration"); *NAVEX Glob., Inc. v. Stockwell*, 2019 WL 6312558, at *4 (D. Idaho) ("this Court is able to grant injunctive relief if NAVEX can show that it is necessary to maintain the status quo pending arbitration"); *Melaragno v. Providence Health & Servs.*, 2017 WL 6854283, at *2 (C.D. Cal.) ("authority of district courts 'to issue equitable relief in aid of arbitration.'"); *N. Am. Deer Registry, Inc. v. DNA Solutions, Inc.,* 2017 WL 1486753, at *4 (E.D. Tex.); *A&C Discount Pharm., LLC v. Caremark, LLC,* 2016 WL 3476970 (N.D. Tex.); *WPC III, Inc. v. Benetech, LLC*, 2012 U.S. Dist. LEXIS 110426, at *7 (E.D. La.) ("Court's authority to grant provisional relief is not inconsistent with arbitration, as arbitrators usually do not [sic] have the power to order or enforce provisional remedies, and parties in arbitration have to look to the courts for such orders"); *Blom ASA v. Pictometry Int'l Corp.*, 757 F.Supp.2d 238 (W.D.N.Y. 2010); *Arnold Chase Family, LLC v. UBS AG,* 2008 U.S. Dist. LEXIS 58697, at *5 (D. Conn.) (court has authority to issue provisional measures in aid of arbitration); *Bahrain Telecommc'ns Co. v. DiscoveryTel, Inc.*, 476 F.Supp.2d 176, 180 (D. Conn. 2007) ("federal courts have both the jurisdiction and authority to grant injunctions and provisional remedies in the context of pending arbitrations, including international arbitrations"); *Credit Suisse Sec. (USA) LLC v. Ebling*, 2006 WL 3457693, at *4 (S.D.N.Y.); *Discount Trophy & Co. v. Plastic Dress-Up Co.*, 2004 WL 350477, at *8 (D. Conn.) ("the Court has both the power and duty to entertain a motion for a preliminary injunction pending the results in the arbitration. And this is true even though, as is the case here, the parties are entitled under the rules of the arbitral tribunal they have chosen to seek *pendente lite* relief directly from the arbitrator"); *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.,* 2003 U.S. Dist. LEXIS 24933 (S.D.N.Y.) (injunction in aid of arbitration); *AIM Int'l Trading LLC v. Valcucine SpA,* 2002 U.S. Dist. LEXIS 10373 (S.D.N.Y.) (same); *Venconsul, NV v. TIM Int'l NV,* 2003 U.S. Dist. LEXIS 13594 (S.D.N.Y.) (injunction in aid of arbitration considered but denied); *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F.Supp. 754, 758 (S.D.N.Y. 1984) ("The fact that this dispute is to be arbitrated does not deprive the Court of its authority to provide provisional remedies"); *Lambert v. Super. Ct.*, 279 Cal.Rptr. 32 (Cal. 1991) (mechanic's lien); *Bancamerica Commercial Corp. v. Brown*, 806 P.2d 897 (Ariz. Ct. App. 1990) (attachment); *Hughley v. Rocky Mountain Health Maint. Org. Inc.*, 927 P.2d 1325 (Colo. 1996) (order to maintain status quo); *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §3.3 (2019) ("Unless otherwise agreed, courts may, upon request and in an appropriate case, order provisional relief in support of an international arbitral proceeding.").

711)

Aggarao v. MOL Ship Mgt Co., 675 F.3d 355, 376 (4th Cir. 2012).

712)

Blom ASA v. Pictometry Int'l Corp., 757 F.Supp.2d 238, 242 (W.D.N.Y. 2010).

713)

Albatross S.S. Co. v. Manning Bros., 95 F.Supp. 459, 463 (S.D.N.Y. 1951). *See alsoBlom ASA v. Pictometry Int'l Corp.*, 757 F.Supp.2d 238, 242 (W.D.N.Y. 2010) (court has power to grant interim relief to "preserve the meaningfulness of the arbitral process," which would otherwise be a "hollow formality if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute").
714)

See, e.g., *Manion v. Nagin*, 255 F.3d 535, 539 (8th Cir. 2001); *Peabody Coalsales Co. v. Tampa Elec. Co.,* 36 F.3d 46, 47-48, (8th Cir. 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984) (absent agreement permitting court-ordered provisional measures, "unmistakably clear congressional purpose" to bar such measures); *Jab Indus., Inc. v. Silex SpA*, 601 F.Supp. 971, 979 (S.D.N.Y. 1985); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. DeCaro*, 577 F.Supp. 616, 625 (W.D. Mo. 1983). *CompareContiChem LPG v. Parsons Shipping Co.*, 229 F.3d 426, 430 (2d Cir. 2000) ("because ContiChem did not have a judgment against Parsons, the court had no equitable power to issue a preliminary injunction preventing any entity from disposing of Parsons' assets pending arbitration of the dispute").
715)

See §§1.02[B][1] *et seq.*; §8.03[B].
716)

See §17.02[A][5]. As already discussed, provisional measures are often needed at the outset of the parties' dispute. In some cases, however, no arbitral tribunal will be in place and functioning at the beginning of a dispute; if no provisions for emergency arbitration exist, then even after the request for arbitration has been filed, the process of selecting and confirming the arbitrators can take several weeks or months. *See* §17.02[A][5][d].
717)

Note that, by analogy, forum selection clauses are generally not interpreted as precluding courts other than the contractually-selected forum from granting interim relief. Hague Convention of 30 June 2005 on Choice of Court Agreements, Art. 7 ("Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.").
718)

See §17.02[A][5][a]. *See alsoCo. A v. Co. B,* [2018] HKCU 3575, ¶41 (H.K. High. Ct.).
719)

See English Arbitration Act, 1996, §44. *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 97-102 (2015); R. Merkin, *Arbitration Law*¶¶14.46 *et seq*. (1991 & Update March 2019); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶7 *et seq*. (24th ed. 2015); U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ¶¶214 *et seq*. (1996). *See alsoPetrochemical Logistics Ltd v. PSB Alpha AG* [2020] EWHC 975 (Comm) (English High Ct.) (declining to continue injunction for insufficient risk of dissipation of assets); *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) (English High Ct.).
720)

See, e.g.,Sabbagh v. Khoury [2019] EWCA Civ 1219 (English Ct. App.); *Daelim Corp. v. Bonita Co. Ltd* [2020] EWHC 697 (Comm) (English High Ct.) (overturning previously granted anti-arbitration injunction as unnecessary for preserving assets).
721)

SeeGerald Metals SA v. Timis [2016] EWHC 2327 (Ch) (English High Ct.) (English courts lack power to order provisional measures where emergency arbitration is available under LCIA Rules).
722)

French Code of Civil Procedure, Art. 1449(1). Additionally, the President of the Tribunal de Grande Instance or of the Tribunal de Commerce "shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 145 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement." *Id.* at Art. 1449(2). This provision is subject to the provisions governing conservatory attachments and judicial security. *See* French Code of Civil Procedure, Art. 1468; South African International Arbitration Act, Schedule 1, Art. 17J. *See also* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 94-95 (2015).
723)

See South African International Arbitration Act, Art. 17(J).

724)

See U.S. Revised Uniform Arbitration Act, §8(b)(2) (2000); Ohio Revised Code Annotated §2712.36; Singapore International Arbitration Act, §12A(6) ("In every case, the High Court or a Judge thereof shall make an order under subsection (2) *only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*") (emphasis added); South African International Arbitration Act, Schedule 1, Art. 17J; Indian Arbitration and Conciliation Act, §9. *See alsoLeviathan Shipping Co. Ltd v. Sky Sailing Overseas Co. Ltd*, [1998] 4 HKC 347 (H.K. Ct. First Inst.).

725)

U.S. Revised Uniform Arbitration Act, §8(b) (2000).

726)

See, e.g.,Re Q's Estate [1999] 1 All ER 90 (Comm) (English High Ct.) (jurisdiction under English Arbitration Act, 1996, §44(1) can be excluded).

727)

UNCITRAL Model Law, Arts. 9, 17; UNCITRAL Model Law, 2006 Revisions, Arts. 9, 17; U.S. FAA, §7; Swiss Law on Private International Law, Art. 183.

728)

SeeBank Leumi, USA v. Miramax Distrib. Serv.,LLC, 2018 WL 7568361, at *8 (C.D. Cal.) ("[T]he Ninth Circuit has cautioned that, where the district court concludes that all of a plaintiff's claims are arbitrable and that the arbitrator is authorized to grant interim relief, 'it would [be] inappropriate for the court to grant preliminary injunctive relief.' Courts accordingly decline requests for injunctive relief when the arbitrator has jurisdiction over interim relief measures under a binding arbitration agreement, even if the court has authority to issue such relief on its own."); *DHL Info. Servs. (Ams.), Inc. v. Infinite Software Corp.*, 502 F.Supp.2d 1082 (C.D. Cal. 2007) ("The court declines to rush in where the arbitrator is free to tread. Since under the agreement of the parties, almost all their disputes are going to arbitration where interim relief is authorized, it is best not to carve out interim relief from the issues the arbitrator will decide, even though Rule 34(c) of the AAA Rules would allow this Court to do so.").

729)

See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1053 (4th Cir. 1985) ("where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow formality'") (quoting *Drivers, Chauffeurs v. Akers Motor*, 582 F.2d 1336, 1341 (4th Cir. 1978)); *TK Servs., Inc. v. RWD Consulting, LLC*, 263 F.Supp.3d 64, 71-72 (D.D.C. 2017) (requiring "threat to the arbitration itself" before court-ordering provisional measures are appropriate).

730)

See, e.g.,Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (1st Cir. 2010) ("even where *preliminary* relief is for the arbitrator, a district court retains power to grant an *interim* preliminary injunction, where otherwise justified, for … the period between the time the district court orders arbitration and the time the arbitrator is set up and able to offer interim relief itself"); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) (denying preliminary injunction because provisional relief was available from arbitral tribunal); *Merrill Lynch v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (issuing provisional measures "only until the arbitration panel is able to address whether the [relief] should remain in effect. Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo."); *Merrill Lynch, Pierce, Fenner & Smith*, *Inc. v. Dulton*, 844 F.2d 726, 728 (10th Cir. 1988); *Optum, Inc. v. Smit*, 360 F.Supp.3d 52 (D. Mass. 2019); *Encore Benefit Mgt Inc. v. Phoenix Benefits Mgt LLC,* 2019 WL 5957174, at *7 (D. P.R.); *Bank Leumi, USA v. Miramax Distrib. Serv.*, *LLC*, 2018 WL 7568361, at *8 (C.D. Cal.); *Apindo Corp. of Puerto Rico v. Toschi Vignola SRL*, 2018 WL 718437, at *4 (D.P.R.) ("a district court could grant an interim preliminary injunctive relief for the interval needed to resort to arbitration, but 'where otherwise justified,' and with 'a showing of some short-term emergency that demands attention while the arbitration machinery is being set in motion"); *Jiaxing Super Lighting Elec. Appliance Co. v. Lunera Lighting, Inc.*, 2018 WL 6199681, at *1 (N.D. Cal.) ("In this case, the breach of contract claim underlying Plaintiffs' motion for a writ of attachment is squarely covered by the arbitration clause in the [parties'] contract. … Thus, under *Simula*, the proper authority to adjudicate Plaintiffs' motion for a writ of attachment is the JAMS arbitral tribunal."); *Grigsby v. DC 4400*, *LLC*, 2016 WL 7115903, at *6 (C.D. Cal.).

731)

See, e.g., *Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997) ("courts invoke the phrase 'preservation of the status quo' as a summary explanation of the need to protect the integrity of the applicable dispute resolution process"); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813-14 (3d Cir. 1989) (applying traditional equitable standards); *Conn. Res. Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31, 33-35 (2d Cir. 1983); *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 472 (2d Cir. 1980) (federal court "is empowered to grant specific performance of the agreement to arbitrate"); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); *Sigmapharm Lab., LLC v. Rising Pharm., Inc.,* 2018 WL 8755735 (E.D. Pa.); *Home Buyers Warranty Corp. v. Jones,* 2016 WL 3457006 (D. Del.); *JPMorgan Chase & Co. v. Custer,* 2016 WL 927339 (D.N.J.); *Kraft Power Corp. v. General Elec. Co.,* 2011 WL 6020100 (D.N.J.); *Central Reserve Life Ins. Co. v. Marello,* 2011 WL 41129 (E.D. Pa.).
As noted above, other U.S. courts have held that ordinary standards governing the grant of preliminary injunctive relief are applicable. *See* §17.04[C][7].

732)

Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 813-14 (3d Cir. 1989).
733)

SeeLeviathan Shipping Co. Ltd v. Sky Sailing Overseas Co. Ltd, [1998] 4 HKC 347 (H.K. Ct. First Inst.). The Hong Kong Arbitration Ordinance did not change this result. *Co. A v. Co. B*, [2018] HKCU 3575 (H.K. Ct. First Inst.) (Hong Kong courts may order interim measures in aid of international arbitration, but power will be used "sparingly").
734)

Leviathan Shipping Co., [1998] 4 HKC 347.
735)

SeeCo. A v. Co. B, [2018] HKCU 3575, ¶41) ("It may well be right, that the power of the court to make an order of interim measure against a 3rd party to the arbitration and arbitration agreement should not be exercised lightly. It has to be borne in mind that such a non-party should be brought to proceedings before the court and be subjected to an order against which there is no appeal, only if it can be established on clear evidence, and on strong grounds, that the order should be made in aid of and to facilitate the arbitral proceedings.").
736)

See, e.g., *Daelim Corp. v. Bonita Co. Ltd* [2020] EWHC 697 (Comm) (English High Ct.) ("the intention [of §44 of English Arbitration Act, 1996] is that there be as little interference with the arbitral process as possible"); *Ku-ring-gai Council v. Ichor Constr. Pty Ltd*, [2019] NSWCA 2 (N.S.W. Ct. App.); *Duro Felguera Australia Pty Ltd v. Trans Global Projects Pty Ltd*, [2018] WASCA 174 (W. Australia Ct. App.); *Kawasaki Heavy Indus., Ltd v. Laing O'Rourke Australia Constr. Pty Ltd*, [2017] NSWCA 291 (N.S.W. Ct. App.) (power of court to intervene on interim basis should be exercised "very sparingly" and only to protect position of party until arbitral tribunal is convened).
737)

SeeJudgment of 12 June 2012, *Itarumã Participações SA v. Participações em Complexos Bioenergétios SA*, Case No. 1.297.974 (2011/0240991-9) (Brazilian Superior Tribunal de Justiça); *Judgment of 14 December 2015*, *Petroléo Brasileiro SA Petrobras v. Tractebel Energia SA*, Case No. 144.477 (2015/0306089-7) (Brazilian Superior Tribunal de Justiça).
738)

Sri Kirshan v. Anand, OMP No. 597/2008 (Delhi High Ct. 2009).
739)

The UNCITRAL Rules are an exception, not addressing the subject. *See* Kent & Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, in D. Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* 87, 93 (2015).
740)

2017 ICC Rules, Art. 29(7) (emphasis added). *See* Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 299-302 (2d ed. 2005); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45 (1993); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶¶28 *et seq.* (4th ed. 2018).
As discussed above, the ICC Rules provide for the appointment of emergency arbitrators. *See* §17.02[A][6]. Article 29(7) of the ICC Rules also provides: "The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and *in appropriate circumstances* even thereafter, pursuant to the Rules." 2017 ICC Rules, Art. 29(7) (emphasis added).

741)

2020 LCIA Rules, Art. 25(3) (emphasis added). Article 9(13) of the 2020 LCIA Rules provides that notwithstanding the appointment of an emergency arbitrator "a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and [the appointment of an emergency arbitrator] shall not be treated as an alternative to or substitute for the exercise of such right." *But seeGerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) (English High Ct.) (English courts lack power to order provisional measures because of availability of emergency arbitration under LCIA Rules).
742)

See, e.g., *DHL Info. Servs. (Ams.), Inc. v. Infinite Software Corp.*, 502 F.Supp.2d 1082 (C.D. Cal. 2007) ("The court declines to rush in where the arbitrator is free to tread. Since under the agreement of the parties, almost all their disputes are going to arbitration where interim relief is authorized, it is best not to carve out interim relief from the issues the arbitrator will decide, even though Rule 34(c) of the AAA Rules would allow this Court to do so."); *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) (English High Ct.) (English courts lack power to order provisional measures because of availability of emergency arbitration under LCIA Rules).
743)

See §17.02[E].
744)

See N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶7.28 (6th ed. 2015) ("it is appropriate to apply first to [the arbitral] tribunal or emergency arbitrator for interim measures, unless international enforcement may be required").
745)

See §17.04[B][2][a]; §17.04[B][3].
746)

See §17.04[B][3].
747)

See §8.03_[A][1]; §8.03_[B]; §17.04_[B][3]; *McCreary Tire & Rubber Co. v. CEAT SpA*, 501 F.2d 1032, 1038 (3d Cir. 1974) (Convention precludes court-ordered provisional measures that "bypass" arbitration agreement); *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334, 354 (House of Lords) (Convention may preclude applications for provisional measures that do not "properly use" concurrent judicial authority).
748)

See, e.g., *Worldsource Coil Coating, Inc. v. McGraw Constr. Co., Inc.*, 946 F.2d 473 (6th Cir. 1991) (complainant waived right to compel arbitration, as its damages request went beyond interim relief and raised issues concerning parties' underlying dispute); *Katsoris v. WME IMG, LLC*, 237 F.Supp.3d 92 (S.D.N.Y. 2017); *LG Elecs., Inc. v. Wi-LAN USA, Inc.*, 2015 WL 4578537, at *2 (S.D.N.Y.); *Flame Maritime Ltd v. Hassan Ali Rice Exp. Co.*, 2007 WL 2489680, at *2 (S.D.N.Y.) (reducing attachment "to reflect the maximum award that [plaintiff] can recover in [arbitration proceedings]"); *Shainin II, LLC v. Allen*, 2006 WL 2473495 (W.D. Wash.); *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334, 358 (House of Lords); *Relais Nordik Inc. v. Secunda Marine Servs. Ltd*, 24 FTR 256 (Canadian Fed. Ct. 1988). *See alsoICC Interim Award in ICC Case No. 10973*, XXX Y.B. Comm. Arb. 77, 83 (2005).
749)

See §17.02[E].
750)

See UNCITRAL Model Law, 1985, Arts. 9, 17; UNCITRAL Model Law, 2006 Revisions, Arts. 9, 17J. *See also* Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 465, 507 (1986) ("a party does not lose the right to demand arbitration and does not become subject to suit for breach of its agreement to arbitrate" by seeking provisional measures from court); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* 332-33 (1989); UNCITRAL, *Digest of Case Law on the Model Lawon International Commercial Arbitration* 52 (2012) ("Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law are compatible with an arbitration agreement"); UNCITRAL, *Official Records of the General Assembly*, *Fortieth Session*, *Supplement No. 17*, U.N. Doc. A/40/17, Annex I, ¶96 (Article 9 "expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of 'this State' was compatible with the fact that the parties had agreed to settle their dispute by arbitration"); §17.04[C][1][a].
751)

See, e.g., German ZPO, §1033; Austrian ZPO, §593(1); Netherlands Code of Civil Procedure, Art. 1022(2); Hong Kong Arbitration Ordinance, §21; Japanese Arbitration Law, Art. 14.

752)

See, e.g., *Valero Refining, Inc. v. MT Lauberhorn*, 813 F.2d 60, 65-66 (5th Cir. 1987) (party "sought judicial assistance to *further* the arbitration process when [adverse party] refused to name an arbitrator") (emphasis in original); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 349-50 (7th Cir. 1983); *Duo-Regen Techs., LLC v. 4463251 Canada, Inc.*, 2014 WL 1338117, at *4 (M.D. Fla.) ("By pursuing an injunction to freeze Plaintiff's assets so that the outcome of an arbitration proceeding would not ring hollow, [the Defendant] has not 'substantially invoked the litigation machinery' such that it waived its right to arbitrate"); *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F.Supp. 754, 757-58 (S.D.N.Y. 1984); *United Nuclear Corp. v. Gen. Atomic Corp.*, 597 P.2d 290 (N.M. 1979).
753)

See, e.g., *Judgment of 7 March 2002*, 2002 Rev. Arb. 214 (French Cour de Cassation Civ. 2); *Judgment of 25 October 2006*, 2007 Rev. Arb. 343 (Paris Cour d'Appel); *Judgment of 7 June 2001*, *SA Hellafranca v. SA Natalys*, 2001 Rev. Arb. 605, 616 (Paris Cour d'Appel); *Judgment of 7 July 1994*, *Uzinexport-Imp. Romanian Co. v. Attock Cement Co.*, 1995 Rev. Arb. 107 (Paris Cour d'Appel); *Judgment of 15 May 2014, N-Allo scrl v. Avaya Belgium sprl,* described in *A Contribution by the ITA Board of Reporters* (Brussels Tribunal de Commerce); *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.,* [2012] No. 500-09-021110-101 (Québec Cour d'Appel); *African Mixing Tech. Ltd v. Canamix Processing Sys. Ltd*, [2014] No. 2130 (B.C. Sup. Ct.); *Maldives Airports Co. Ltd v. GMR Malé Int'l Airport Pte Ltd,* [2013] SGCA 16 (Singapore Ct. Ap.); *Swift-Fortune Ltd v. Magnifica Marine SA,* [2006] CA/24/2006 (Singapore Ct. App.); *Five Ocean Corp. v. Cingler Ship Pte Ltd*, [2015] SGHC 311 (Singapore High Ct.); *R1 Int'l Pte Ltd v. Lonstroff AG,* [2014] No. 69 (Singapore High Ct.); *Co. A v. Co. B,* [2018] HKCU 3575 (H.K. Ct. First Inst.); *Bhatia Int'l v. Bulk Trading SA*, [2002] 1 LRI 703 (Indian S.Ct.); *AED Oil Ltd v. Puffin FPSO Ltd (No. 5)*, [2010] VSCA 37 (Victoria Ct. App.); *Pathak v. Tourism Transport Ltd,* [2002] 3 NZLR 681 (Auckland High Ct.); *Judgment of 10 August 2017, FTC Cards Processamento e Serviços de Fidelização Ltda v. Cielo SA*, Case No. 1016622-74.2016.8.26.0068 (São Paulo Tribunal de Justiça); *Judgment of 23 June 2017, Hyundai Eng'g & Constr. v. Constructora OAS SA*, [2017] 5533-2017 (Santiago Corte de Apelaciones); *Judgment of 5 September 2016*, [2016] Case No. 410/2016-I (Mexican Tribunal Civil del Séptimo Distrito Federal); *Transfield Philippines Inc. v. Luzon Hydro Corp.,* [2006] No. 146717 (Philippines S.Ct.); *Judgment of 14 March 2018*, Decision No. 650/2018 (Istanbul Reg. Ct.); *SoftCommodities Trading Co. SA v. Elan Soft LLP*, [2018] 785/1018/18 (Ukraine S.Ct.). *See alsoVan Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.) ("An arbitration agreement shall not preclude a party from applying to the ordinary courts for a protective measure or from making an application to the President of the court for interim relief").
754)

Judgment of 8 October 2002, XXXII Y.B. Comm. Arb. 555, 562 (Spanish Tribunal Supremo) (2007).
755)

See European Convention, Art. VI(4) ("A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court"). *See* §17.02[B][1].
756)

See §17.04_[D]; 2013 UNCITRAL Rules, Art. 26(9); 2017 ICC Rules, Art. 28(2); 2013 AAA Rules, Rule 37(c); 2020 LCIA Rules, Art. 25(3); 2018 AIAC Arbitration Rules, Art. 26(9); 2018 DIS Rules, Art. 25(3); 2017 SCC Rules, Art. 37(5); 2020 WIPO Rules, Art. 48(d). *See also* M. Scherer, L. Richman & R. Gerbay, *Arbitrating Under the 2014 LCIA Rules, A User's Guide* 279 (2015); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 172-73 (2d ed. 2015); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶28-79 (4th ed. 2018).
757)

G. Petrochilos, *Procedural Lawin International Arbitration* 101 (2004).
758)

This is suggested by the text of the Model Law: "It is not incompatible with an arbitration agreement for a party to request … from a court an interim measure of protection." UNCITRAL Model Law, Art. 9.
759)

See §17.04[B][2], discussing New York Convention, and §5.10[G], discussing principles of waiver. *See also* §17.04[C][6], discussing affirmative agreements to exclude court-ordered provisional measures.
760)

See §17.02_[E]; §§17.04[C][1] *et seq*.

761)

See, e.g., 2019 CAS Code, Art. R37(3) ("In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any [provisional and conservatory] measures from state authorities or tribunals").

762)

See, e.g., UNCITRAL Model Law, Art. 9; German ZPO, §1041; Netherlands Code of Civil Procedure, Art. 1022(2) ("an arbitration agreement shall not prevent a party from requesting a court to grant interim measures of protection or from applying to the Provisional Relief Judge of the District Court for a decision in summary proceedings in accordance with the provisions of Article 254. In the latter case the Provisional Relief Judge shall decide the case in accordance with the provisions of Article 1051."); Swiss Law on Private International Law, Art. 183.

763)

See, e.g., *Daniels v. Va. College at Jackson*, 478 F.App'x 892 (5th Cir. 2012) (enforcing agreement that allowed only one party to seek injunctive relief); *Mantovani v. Caparelli SpA* [1980] 1 Lloyd's Rep. 375 (English Ct. App.) (court-ordered provisional measures excluded by clause providing that neither party "shall bring any action or other legal proceeding against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators"); *Re Q's Estate* [1999] 1 All ER 90 (Comm) (English High Ct.) (jurisdiction under English Arbitration Act, 1996, §44(1) can be excluded); *Judgment of 18 November 1986*, *Atlantic Triton v. Guinée*, 1987 Rev. Arb. 315 (French Cour de Cassation Civ. 1). *See also Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §3.3 (2019) ("*Unless otherwise agreed*, courts may, upon request and in an appropriate case, order provisional relief in support of an international arbitral proceeding.") (emphasis added); Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 450 (2010) ("In Switzerland … the prevailing view is that the courts' jurisdiction [to order interim relief in aid of arbitration] can be limited or even excluded, provided that such exclusion is explicit"); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1319 (1999) ("[T]he principle of concurrent jurisdiction is not a matter of public policy. … [I]t is generally accepted that the parties can agree not to apply to the courts for provisional or protective measures during the course of the arbitration."); D. Girsberger & N. Voser, *International Arbitration, Comparative and Swiss Perspectives* 262 (3d ed. 2016); R. Merkin, *Arbitration Law* ¶22.2(k) (1991 & Update August 2013) ("The power of the court, under the Arbitration Act 1996, §44(1), to exercise various default support powers in respect of the arbitration. The section is subject to the contrary agreement of the parties, and accordingly the default powers of the courts can be excluded by agreement."); von Segesser & Kurth, in E. Geisinger & N. Voser (eds.), *International Arbitration in Switzerland* 125 (2013).

764)

See, e.g., Mills, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 Fordham Int'l L.J. 604 (1989-90); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45 (1993).

765)

Anaconda v. Am. Sugar Refining Co., 322 U.S. 42 (U.S. S.Ct. 1944) (agreement excluding court-ordered maritime attachment under §8 of FAA is not enforceable).

766)

See Hausmaninger, *The ICC Rules for A Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration*, 7 ICSID Rev. 82, 97 n.65 (1992) ("Although most legal systems permit individuals to contractually waive judicial protection, they usually allow such waiver only if an adequate substitute is available. … [A]rbitrators are an inadequate substitute when it comes to issuing certain important provisional measures.").

767)

See Judgment of 26 October 2000, 2011 NJW-RR 711 (Oberlandesgericht Celle) ("With regards to the guarantee of effective legal protection there are substantive reasons for why the competence of the courts to order provisional measures cannot be excluded"); Berger, *Die Rechtstellung des Pre-Arbitral Referee*, 2006 SchiedsVZ 176, 181 (exclusion of German court's authority to order interim relief in aid of arbitration is unenforceable); J.-P. Lachmann, *Handbuch der Schiedsgerichtsbarkeit* ¶2853 (3d ed. 2008) (same); I. Saenger, *Zivilprozessordnung: ZPO* §1033, ¶4 (7th ed. 2017); Voit, in H.-J. Musielak (ed.), *Kommentar zur Zivilprozessordnung* §1033, ¶3 (9th ed. 2012). *Compare* T. Rauscher & W. Krüger, *Münchner Kommentar zur ZPO* §1033, ¶18 (5th ed. 2017) ("This provision is mandatory! This is respected by the vast majority of arbitration institutions."); Zöller *et al.*, *Zivilprozessordnung* §1033, ¶6 (32d ed. 2018) ("Pursuant to §1042 III, parties can exclude court-ordered provisional measures and, instead, render this subject to the exclusive competence of the tribunal (§1041)").

768)

See §17.02_[E]; §§17.04[C][3] *et seq.* Indeed, as discussed above, national arbitration legislation often provides expressly that seeking court-ordered provisional measures is not a waiver of right to arbitrate, further confirming the principle of concurrent jurisdiction. *See* §17.04[C][5]. The same general approach applies with regard to forum selection clauses, where an exclusive forum selection clause is not generally interpreted to exclude recourse to other jurisdictions for provisional measures. *See* §17.04[C][8][b].

769)

See, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC,* 784 F.3d 887, 894-95 (2d Cir. 2015) ("Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration"); *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009) (agreement providing that disputes are to be "finally settled" in arbitration does not prohibit granting provisional relief in aid of arbitration); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052-53 (2d Cir. 1990) (rejecting argument that "district court injunctions pending arbitration are available only when the contract expressly so provides"); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) ("arbitration agreement reflects the parties' intention to adhere to an orderly process of alternative dispute resolution … [and] we do not construe such an agreement as constituting a 'waiver' by either party of the right to seek preliminary injunctive relief necessary to prevent one party from unilaterally eviscerating the significance of the agreed-upon procedures"); *Roso-Lino Beverage Dist., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984); *Espiritu Santo Holdings, LP v. L1bero Partners, LP*, 2019 WL 2240204, at *13 (S.D.N.Y.); *N. Am. Deer Registry, Inc. v. DNA Solutions, Inc.,* 2017 WL 1486753, at *4 (E.D. Tex.); *A & C Discount Pharmacy, LLC v. Caremark, LLC*, 2016 WL 3476970, at *4 (N.D. Tex.); *Holyfield v. Julien Entertainment.com, Inc.*, 2012 WL 5878380, at *3 (C.D. Cal.); *Euroil Ltd v. Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm) (English High Ct.) ("An injunction should not usurp the function of the arbitrators"); *Laker Vent Eng'g Ltd v. Jacobs E C Ltd* [2014] EWHC 1058 (TCC) (English High Ct.); *Re Q's Estate* [1999] 1 Lloyd's Rep. 931, 935 (QB) (English High Ct.) (agreement to arbitrate, to exclusion of court proceedings, does not waive right to seek court-ordered provisional relief).

770)

See, e.g., *Judgment of 20 December 1982*, 1986 Rev. Arb. 233 (French Cour de Cassation Civ. 3) (agreement to arbitrate does not preclude application for court-ordered statutory investigation under Article 145 of New Code of Civil Procedure); *Judgment of 7 August 1992*, *No. 9380*, XIX Y.B. Comm. Arb. 680 (Italian Corte di Cassazione) (1994); *Judgment of 22 April 1985*, *Pama Industrie SpA v. Shultz Steel Co.*, XII Y.B. Comm. Arb. 494 (Verona Tribunale) (1987); *Methanex Chile Ltd v. Petrobras Energía SA*, [2014] No. 36715/2014 (Argentine Cámara Nacional de Apelaciones en lo Comercial). *See also* Wessel & North Cohen, *In Tune with* Mantovani*: The "Novel" Case of Damages for Breach of An Arbitration Agreement*, 4(2) Int'l Arb. L. Rev. 65, 68 (2001).

771)

Even where parties enter into such an (express) agreement, questions of enforceability would arise, at least in some cases.

772)

Swiss Law on Private International Law, Art. 183(2). *See* Berti, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 183, ¶18 (2000). Article 183(2) refers, however, to the enforcement of tribunal-ordered provisional measures by a Swiss court (not to court-ordered provisional measures). The same principle should apply by analogy, even more clearly, to court-ordered provisional measures. *See also* D. Girsberger & N. Voser, *International Arbitration, Comparative and Swiss Perspectives* 272 (3d ed. 2016).

773)

UNCITRAL Model Law, 2006 Revisions, Art. 17J.

774)

See, e.g., English Arbitration Act, 1996, §44; French Code of Civil Procedure, Art. 1449.

775)

See, e.g., *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906, 911 (5th Cir. 2019) (Louisiana's attachment statute permits attachment in aid of arbitration); *SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC*, 875 F.3d 609, 620 (11th Cir. 2017) ("[Georgia statute] confirms that a court's grant of interim relief, utilizing existing state remedies, is not inconsistent with submitting a merits determination to an arbitrator"); *Aggarao v. MOL Ship Mgt Co.*, 675 F.3d 355, 376 (4th Cir. 2012); *Ace Am. Ins. Co. v. Wachovia Ins. Agency Inc.*, 306 F.App'x 727 (3d Cir. 2009); *Puerto Rico Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 507 (1st Cir. 2005) ("district court properly applied federal law [to injunction], leaving for the arbitrator the choice-of-law determination"); *Karaha Bodas Co. v. Negara*, 335 F.3d 357 (5th Cir. 2003); *Espiritu Santo Holdings, LP v. L1bero Partners, LP*, 2019 WL 2240204, at *16 (S.D.N.Y.), *aff'd*, 2020 WL 114443 (2d Cir.) (granting injunction in aid of arbitration); *SH Franchising LLC v. Newlands Homecare LLC*, 2019 WL 356658, at *2 (D. Md.); *Leber v. Citigroup, Inc.*, 2019 WL 1331313, at *3 (S.D.N.Y.); *Amtax Holdings 463, LLC v. KDF Communities-Hallmark, LLC*, 2018 WL 4743386, at *4 (C.D. Cal.); *ASUS Computer Int'l v. InterDigital, Inc.*, 2015 WL 5186462, at *7 (N.D. Cal.); *Emirates Int'l Inv. Co. LLC v. ECP Mena Growth Fund LLC*, 2012 WL 2198436, at *6 (S.D.N.Y.); *Bahrain Telecommc'ns Co. v. DiscoveryTel, Inc.*, 476 F.Supp.2d 176 (D. Conn. 2007); *Shah v. Comm. Bank*, 2010 U.S. Dist. LEXIS 19717 (S.D.N.Y.); *SiVault Sys. v. Wondernet, Ltd*, 2005 U.S. Dist. LEXIS 4635 (S.D.N.Y.); *Cetelem SA v. Roust Holdings Ltd* [2005] EWCA Civ 618 (English Ct. App.); *A v. OOO 'Ins. Co. Chubb'* [2019] EWHC 2729 (Comm) (English High Ct.); *Co. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.); *Rafael Advanced Def. Sys. Ltd v. Mectron Engenharia Industria E Comercio SA* [2017] EWHC 597 (Comm) (English High Ct.); *AB Int'l HK Holdings Plc Ltd v. AB Clearing Corp. Ltd* [2015] EWHC 2196 (Comm) (English High Ct.); *Global Maritime Inv. Cyprus Ltd v. Gorgonia di Navigazione Srl* [2014] EWHC 706 (Comm) (English High Ct.); *Judgment of 28 June 1989*, *Eurodif v. Iran*, 1989 Rev. Arb. 653 (French Cour de Cassation Civ. 1); *Judgment of 19 September 2017*, 2018 Rev. Arb. 632 (Paris Cour d'Appel); *Judgment of 15 June 2017*, 2018 Rev. Arb. 648 (Paris Cour d'Appel); *Judgment of 12 April 2016*, 2016 Rev. Arb. 1205 (Paris Cour d'Appel); *Judgment of 19 May 2015,* 2015 Rev. Arb. 952 (Paris Cour d'Appel); *Judgment of 18 June 2010*, Case No. 10/101500 (Paris Cour d'Appel); *Judgment of 27 October 1995*, 1996 Rev. Arb. 274 (Paris Cour d'Appel); *Judgment of 20 January 1988*, 1990 Rev. Arb. 651 (Paris Cour d'Appel). *See also* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶¶1175 *et seq*. (3d ed. 2015); Boog, *The Laws Governing Interim Measures in International Arbitration*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 409, 452 (2010) ("As a general rule … the prerequisites for a national court to order interim measures are determined by its *lex fori*"); Bond, *The Nature of Conservatory and Provisional Measures*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 8 (1993); Kröll, *National Report for Germany (2019)*, in L. Bosman (ed.), *International Handbook on Commercial Arbitration* 34-36 (1984 & Update 2019); Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 40 (2000).

776)

For example, in considering whether to grant interim relief in aid of an arbitration, many U.S. courts apply generally-applicable standards for granting provisional relief in federal courts. *See, e.g.*, *Benihana, Inc. v. Benihana of Tokyo, LLC,* 784 F.3d 887 (2d Cir. 2015); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Roso-Lino Beverage Dist., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Deutsche Mexico Holdings Sarl v. Accendo Banco, SA,* 2019 WL 5257995 (S.D.N.Y.); *Espiritu Santo Holdings, LP v. L1bero Partners, LP,* 2019 WL 2240204 (S.D.N.Y.); *Leber v. Citigroup, Inc.,* 2019 WL 1331313 (S.D.N.Y.); *Citizens Sec., Inc. v. Bender,* 2019 WL 3494397 (N.D.N.Y.); *NCL (Bahamas) Ltd v. O.W. Bunker USA, Inc.,* 2017 WL 5896527 (D. Conn.); *Nat'l R.R. Passenger Corp. v. Neubig,* 2015 WL 13016005 (D. Conn.); *In re Sledziejowski,* 533 B.R. 408 (S.D.N.Y. 2015); *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH*, 2010 WL 2991390 (C.D. Cal.) (granting injunctive relief pending arbitration but only as to claims for which plaintiff demonstrated likelihood of success on merits, possibility of irreparable harm, balance of equities and public interest that favored plaintiff); *Castlewood (US), Inc. v. Nat'l Indem. Co.,* 2006 WL 3026039 (S.D.N.Y.); *AIM Int'l Trading LLC v. Valcucine SpA.,* 188 F.Supp.2d 384 (S.D.N.Y. 2002); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kramer*, 816 F.Supp. 1242 (N.D. Ohio 1992) (granting preliminary injunction forbidding disclosure of trade secrets and solicitation of clients). *Compare* authorities cited in §17.04[C][7].

777)

Compare UNCITRAL Model Law, 2006 Revisions, Art. 17J ("The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration").

778)

Relais Nordik Inc. v. Secunda Marine Servs. Ltd, XIX Y.B. Comm. Arb. 256 (Canadian Fed. Ct. 1988) (1994).

779)

At most, Article II(1) and II(3) of the New York Convention might be interpreted as giving effect to an agreement, contained within an arbitration clause, selecting a court for seeking provisional relief. In fact, however, an agreement on a contractual judicial forum for actions in aid of arbitration probably falls outside the scope of Articles II(1) and II(3), which are best understood as addressed to the material terms of arbitration agreements (not other provisions of the parties' contract). *See* §2.01[A][1][a]; §4.04[A][1][b][i]; §4.04[B][2][b][ii]; §5.01_[B][2]; §5.04[D][1][a].

780)

The choice-of-forum clause will be interpreted and enforced in accordance with generally-applicable private international law rules in the forum. *See generally* G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 461-86 (6th ed. 2018); Clermont, *Governing Lawon Forum-Selection Agreements*, 66 Hastings L.J. 643 (2015); W. Park, *International Forum Selection* 17-51 (1995). *See also* §1.02_[A]; §1.02[B][3].

781)

For example, if a party suspects that its counter-party is about to dissipate funds, transfer the subject matter of the dispute, or destroy essential evidence, an application for court-ordered provisional measures in the place where such dissipation, transfer, or destruction would occur may be the most (and only) effective means of obtaining relief.

782)

See, e.g., *Sea Transp. Contractors, Ltd v. Indus. Chimiques du Senegal*, 411 F.Supp.2d 386, 395 (S.D.N.Y. 2006) ("forum-selection clause providing for a foreign forum does not preclude" attachment); *Toepfer Int1 GmbH v. Societe Cargill France* [1998] 1 Lloyd's Rep. 379 (English Ct. App.) (exclusive jurisdiction clause interpreted as inapplicable to interim relief); *Judgment of 29 June 2000*, 2000 Dalloz 1390 (Versailles Cour d'Appel) (exclusive jurisdiction clause for judicial assistance in aid of arbitration interpreted as inapplicable to interim relief in aid of arbitration); *A v. Eton Props. Ltd*, [2009] 4 HKLRD 254 (H.K. Ct. App.) (court may order interim measures in aid of arbitration notwithstanding fact that parties' choice of CIETAC arbitration in Beijing was analogous to exclusive jurisdiction clause in favor of Beijing courts). *CompareMax India Ltd v. Gen. Binding Corp.*, [2009] INDLHC 2055, ¶12 (Delhi High Ct.) (jurisdiction clause interpreted as applicable to interim relief in aid of arbitration).

783)

See UNCITRAL Model Law, 1985, Arts. 9, 17; UNCITRAL Model Law, 2006 Revisions, Art. 17J. The drafting history of the original 1985 Model Law makes it clear that nothing in the Model Law specified the provisional measures available from a national court. UNCITRAL, *Official Records of the General Assembly*, *Fortieth Session*, *Supplement No. 17*, U.N. Doc. A/40/17, Annex I, ¶96 ("It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of 'this State' was compatible with the fact that the parties had agreed to settle their dispute by arbitration.").

784)

See English Arbitration Act, 1996, §§3, 44; Swiss Law on Private International Law, Arts. 176(1), 183(2).

785)

See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1077-78 (6th ed. 2018).

786)

See, e.g., *Deiulemar Compagnia di Navigazione SpA v. MV Allegra*, 198 F.3d 473 (4th Cir. 1999) (inspection of vessel, located in United States, ordered in aid of arbitration seated in London); *Espiritu Santo Holdings, LP v. L1bero Partners, LP*, 2019 WL 2240204, at *13 (S.D.N.Y.); *Discover Growth Fund v. 6D Global Tech.*, 2015 WL 6619971, at *3 (S.D.N.Y.); *Beluga Chartering GmbH v. Korea Logistics Sys., Inc.*, 589 F.Supp.2d 325 (S.D.N.Y. 2008) (denying motion to vacate attachment pending arbitration in London); *Tampimex Oil Ltd v. Latina Trading Corp.*, 558 F.Supp. 1201 (S.D.N.Y. 1983) (granting attachment of New York bank account in aid of arbitration in London); *Paramount Carriers Corp. v. Cook Indus.*, 465 F.Supp. 599 (S.D.N.Y. 1979) (granting maritime attachment in aid of arbitration pending in London); *Atlas Chartering Servs. Inc. v. World Trade Group, Inc.*, 453 F.Supp. 861, 863 (S.D.N.Y. 1978) (granting attachment of funds in two accounts in New York banks in aid of arbitration in London); *Andros Compania Maritima SA v. Andre & Cie,SA*, 430 F.Supp. 88 (S.D.N.Y. 1977) (granting maritime attachment in aid of arbitration pending in London); *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977). *See alsoCompania de Navegacion y Financiera Bosnia SA v. Nat'l Unity Marine Salvage Corp.*, 457 F.Supp. 1013, 1014 (S.D.N.Y. 1978) ("This Court has the power to order provisional relief pending a foreign arbitration"); *Sojitz Corp. v. Prithvi Info. Solutions Ltd,* 891 N.Y.S.2d 622 (N.Y. Sup. Ct. 2009) (creditor may attach assets in aid of arbitration seated in Singapore). *See also Restatement of the U.S. Lawof International Commercial and Investor-State Arbitration* §3.3 comment b (2019) ("The authority to order provisional relief in support of an international arbitral proceeding is not limited to courts in the arbitral seat"). *ContraContiChem LPG v. Parsons Shipping Co.*, 229 F.3d 426 (2d Cir. 2000) (attachment of U.S. funds in aid of London arbitration denied on grounds that New York rule providing for pre-arbitration attachment is limited to domestic arbitrations).

For an example of this, consider *Castelan v. MV Mercantil Parati*, 1991 U.S. Dist. LEXIS 6472 (D.N.J.), where the parties' agreement provided for arbitration in London, under English law. The district court concluded that, under English law, the plaintiff could not have obtained provisional relief from an English court; nevertheless, because U.S. standards for maritime arrest were satisfied, the court arrested the defendant's vessel in aid of the arbitration.

787)

Bahrain Telecommc'ns Co. v. DiscoveryTel, Inc., 476 F.Supp.2d 176, 180 (D. Conn. 2007).

788)

SeeChannel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd [1993] AC 334 (House of Lords).

789)

See English Arbitration Act, 1996, §2(3)(b) (English courts may exercise power to order provisional measures in aid of foreign-seated arbitration except where "inappropriate"); R. Merkin, *Arbitration Law*¶14.56 (1991 & Update March 2019). *See alsoPetrochemical Logistics Ltd v. PSB Alpha AG* [2020] EWHC 975 (Comm) (English High Ct.) (declining to continue injunction related to Swiss-seated arbitration for insufficient connection to England); *U&M Mining Zambia Ltd v. Konkola Copper Mines plc* [2013] EWHC 260 (Comm) (English High Ct.) (rejecting argument that courts at arbitral seat have exclusive jurisdiction to grant interim measures in aid of arbitration); *Orient Express Lines (Singapore) Pte Ltd v. Peninsular Shipping Serv. Ltd* [2013] EWHC 3855 (Comm) (English High Ct.) (citing G. Born, *International Commercial Arbitration* 2058 (2009)).

790)

SeeChen Hongqing v. Mi Jingtian, [2017] HKCFI 1148 (H.K. Ct. First Inst.); *"Lady Muriel" v. Transorient Shipping Ltd*, [1995] HKCA 615 (H.K. Ct. App.) (granting provisional relief in aid of foreign arbitration based on presence of assets in Hong Kong on basis of inherent authority); *Prema Birkdale Horticulture (Macau) Ltd v. Venetian Orient Ltd*, [2009] HKCFI 657, ¶¶5 *et seq*. (H.K. Ct. First Inst.) (court may grant interim relief in aid of foreign arbitration "but only if the arbitration proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong").

791)

See Singapore International Arbitration Act, §12(A). The amendment reversed *Swift-Fortune Ltd v. Magnifica MarineSA*, (2007) 1 SLR 629 (Singapore Ct. App.) (Singapore court has no power to grant interim measures in aid of foreign-seated arbitration).

792)

SeeJudgment of 20 October 1989, 1991 RSDIE 368 (Zug Kantonsgericht) (Swiss courts can order provisional measures even if arbitral seat is abroad); *Sensation Yachts Ltd v. Darby Maritime Ltd*, Case No. CIV 2005‑404‑1908 (Auckland High Ct. 2005) (granting interim measures in aid of arbitration seated in London); *Judgment of 14 October 2016*, *Civil Procedure Preservation Ruling Regarding Ocean Eleven Shipping Corp. v. Lao Kaiyuan Mining Sole Co. Ltd,* E72 Cai Bao No. 427 (Wuhan Maritime Ct.) (granting pre-award interim measures in aid of foreign-seated arbitration), cited in Shi, *Have PRC Courts Ordered Interim Relief Measures in Support of HKIAC Arbitrations Without An Express Legal Basis: What Lies Ahead*?, Kluwer Arb. Blog (26 Aug. 2018); *Judgment of 20 April 2010*, *Edimax Ltd v. Chigirinsky*, Case No. 17095/09 (Russian S. Arbitrazh Ct.) (Russian courts have authority to issue interim measures in aid of foreign-seated arbitration). *See alsoCo. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.) (Section 44 of English Arbitration Act permits English courts to grant orders preserving assets or evidence for foreign-seated arbitration in case of urgency and where tribunal is unable to act). *CompareEconet Wireless Serv. Ltd v. Vee Networks Ltd* [2006] EWHC 1568 (Comm) (English High Ct.) (denying application for provisional measures in aid for foreign-seated arbitration); *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) (English High Ct.) (same); *Methanex Chile Ltd v. Petrobras Energía SA*, [2014] No. 36715/2014 (Argentine Cámara Nacional de Apelaciones en lo Comercial).

793)

Moreover, Article 1(2) excludes Article 9 from the provisions of the Model Law that apply only where the arbitration is seated in national territory. Article 5 of the Model Law does not directly bear on the issue. *See* G. Petrochilos, *Procedural Lawin International Arbitration* 102 (2004) ("Article 5 does not preclude the courts of the seat of the arbitration from making interim orders in respect of foreign proceedings, but neither does it expressly authorize them to do so").

794)

See, e.g., *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.,* [2012] No. 500-09-021110-101 (Québec Cour d'Appel); *Silver Standard Res. Inc. v. Geolog*, [1998] 168 DLR4th 309 (B.C. Ct. App.) (court has power under Article 9 of Model Law to grant provisional measures in aid of foreign arbitration); *African Mixing Tech. Ltd v. Canamix Processing Sys. Ltd*, [2014] No. 2130 (B.C. Sup. Ct.); *TLC Multimedia Inc. v. Core Curriculum Techs., Inc.*, [1998] BCJ. No. 1656 (B.C. Sup. Ct.) (same); *Judgment of 15 May 2014, N-Allo scrl v. Avaya Belgium sprl,* described in *A Contribution by the ITA Board of Reporters* (Brussels Tribunal de Commerce); *R1 Int'l Pte Ltd v. Lonstroff AG,* [2014] No. 69 (Singapore High Ct.); *Maldives Airports Co. Ltd v. GMR Malé Int'l Airport Pte Ltd,* [2013] SGCA 16 (Singapore Ct. App.); *Swift-Fortune Ltd v. Magnifica Marine SA,* [2006] CA/24/2006 (Singapore Ct. App.); *Five Ocean Corp. v. Cingler Ship Pte Ltd*, [2015] SGHC 311 (Singapore High Ct.); *Co. A v. Co. B*, [2018] HKCU 3575, (H.K. High. Ct.); *AED Oil Ltd v. Puffin FPSO Ltd (No. 5)*, [2010] VSCA 37 (Victoria Sup. Ct.); *Pathak v. Tourism Transp. Ltd,* [2002] 3 NZLR 681 (Auckland High Ct.); *Bhatia Int'l v. Bulk Trading SA*, [2002] 1 LRI 703 (Indian S.Ct.); *Judgment of 8 October 2002*, XXXII Y.B. Comm. Arb. 555, 562 (Spanish Tribunal Supremo) (2007); *Judgment of 10 August 2017, FTC Cards Processamento e Serviços de Fidelização Ltda v. Cielo SA*, Case No. 1016622-74.2016.8.26.0068 (São Paulo Tribunal de Justiça); *Judgment of 23 June 2017;Hyundai Eng'g & Constr. v. Constructora OAS SA*, [2017] 5533-2017 (Santiago Corte de Apelaciones); *Judgment of 5 September 2016*, [2016] Case No. 410/2016-I (Mexican Tribunal Civil del Séptimo Distrito Federal); *Transfield Philippines Inc. v. Luzon Hydro Corp.,* [2006] No. 146717 (Philippines S.Ct.); *Judgment of 14 March 2018*, Decision No. 650/2018 (Istanbul Reg. Ct.); *SoftCommodities Trading Co. SA v. Elan Soft LLP,* [2018] 785/1018/18 (Ukraine S.Ct.).

795)

See UNCITRAL Model Law, 2006 Revisions, Art. 17J ("irrespective of whether their place is in the territory of this State").

796)

SeeMarriott Int'l Inc. v. Ansal Hotels Ltd, XXVI Y.B. Comm. Arb. 788, ¶30 (Delhi High Ct. 2000) (2001) (Indian court lacks power to grant provisional measures in aid of arbitration seated in Malaysia: "Court has no jurisdiction to entertain such a petition for grant of interim measures in relation to an arbitration being held outside India"). *See also* Goswami, *Interim Relief: The Role of the Courts*, in A. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* 111, 116 (2001).

797)

See Indian Arbitration and Conciliation Act, §9; *Enercon (India) Ltd v. Enercon GmbH*, [2014] 5 SCC 1 (Indian S.Ct.) (parties' choice of Indian seat and law provides Indian courts exclusive supervisory jurisdiction); *Bhatia Int'l v. Bulk Trading SA*, [2002] 1 LRI 703 (Indian S.Ct.) (Indian courts can provide judicial assistance in aid of arbitration seated outside India).

798)

SeeBharat Aluminium v. Kaiser Aluminium, C.A. No. 7019/2005 (Indian S.Ct. 2012).

799)

See Indian Arbitration and Conciliation (Amendment) Act, 2015; Indian Arbitration and Conciliation Act, §§9, 17.
800)

SeeBorden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822 (2d Cir. 1990); *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334 (House of Lords); *Sabbagh v. Khoury* [2019] EWCA Civ 1219 (English Ct. App.); *Zim Integrated Shipping Serv. Ltd v. Euro. Container KS* [2013] EWHC 3581 (Comm) (English High Ct.); *"Lady Muriel" v. Transorient Shipping Ltd*, [1995] HKCA 615 (H.K. Ct. App.).
801)

SeeChannel Tunnel Group, [1993] AC 334.
802)

Id. at 358 (emphasis added).
803)

Id. at 368.
804)

SeePetrochemical Logistics Ltd v. PSB Alpha AG [2020] EWHC 975 (Comm) (English High Ct.) (declining to continue injunction related to Swiss-seated arbitration for insufficient connection to England); *Co. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.) ("The court has power to refuse to exercise any power granted by §44 if the fact that the seat of the arbitration is outside England and Wales … makes it inappropriate to do so"); *U&M Mining Zambia Ltd v. Konkola Copper Mines plc* [2013] EWHC 260 (QB) (English High Ct.) (court in arbitral seat is natural court for granting interim relief, but English courts may exceptionally grant such relief in connection with foreign-seated arbitration when strictly necessary and does not undermine arbitration agreement); *Goel v. Amega Ltd* [2010] EWHC 2454, ¶22 (TCC) (English High Ct.) ("the policy behind the 1996 Act was to ensure that the courts intervened as little as possible in the arbitration process"); *Chalbury MccOuat Int'l Ltd v. P.G. Foils Ltd* [2010] EWHC 2050, ¶21 (TCC) (English High Ct.) ("the principle is that a party should not generally bring proceedings in relation to an arbitration except in the courts of the jurisdiction of the seat of arbitration"); *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) (English High Ct.); *Econet Wireless Serv. Ltd v. Vee Networks Ltd* [2006] EWHC 1568 (Comm) (English High Ct.).
805)

SeeBorden, Inc. v. Meiji Milk Prods. Co, 919 F.2d 822 (2d Cir. 1990).
806)

In fact, it was unclear in *Borden* whether the arbitral seat would be within or outside the United States. *Id.* at 827.
807)

Id. at 828. For similar U.S. decisions, *seeContiChem LPG v. Parsons Shipping Co.*, 229 F.3d 426 (2d Cir. 2000) (attachment of U.S. funds in aid of London arbitration denied on grounds that New York rule providing for pre-arbitration attachment is limited to domestic arbitrations); *Palmco Corp. v. JSC Techsnabexport*, 448 F.Supp.2d 1194, 1201 (C.D. Cal. 2006) (declining provisional measures in aid of arbitration seated in Sweden: "In accordance with the arbitration clause Tenex and Palmco chose to include in their contracts, each has asserted their claims in the Swedish arbitral tribunal, and therefore both parties must absorb the costs associated with attending the arbitration, presenting their evidence and witnesses, and all of the other inconveniences of resolving the dispute. Everything necessary to resolve this dispute must be presented in Sweden. A second lawsuit here, covering at least some of the same territory and requiring the parties to attend and produce evidence, even if not necessarily requiring direct witness testimony, is highly inefficient and duplicative of the ongoing arbitration. Even though only interim relief is sought here, the parties would need to invest resources in the development of the factual record while concurrently undergoing the same effort in Sweden, and both the arbitral tribunal and this Court would have to make factual and legal findings on matters governed by Swedish law."); *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd*, 804 N.Y.S.2d 549 (N.Y. Sup. Ct. 2005) (court-ordered provisional measures in aid of arbitration not available for foreign arbitration).

808)

One English decision considered the circumstances in which an English court could issue a worldwide freezing order in support of an arbitration seated outside of England. In *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) (English High Ct.), the court set aside a $12 billion worldwide freezing order issued under §44(3) of the English Arbitration Act against assets of PDVSA, wherever such assets were located. The order was in support of imminent arbitral proceedings to be seated in New York. In setting aside the order, the English court emphasized the requirement of proving a link with the jurisdiction where interim relief is sought, such as the presence of substantial assets within that jurisdiction. *See alsoPetrochemical Logistics Ltd v. PSB Alpha AG* [2020] EWHC 975 (Comm) (English High Ct.) (overturning injunction related to Swiss-seated arbitration for insufficient connection to England despite "claimants ha[d] shown a good arguable case of a risk of dissipation" of assets); *Co. 1 v. Co. 2* [2017] EWHC 2319 (QB) (English High Ct.) ("[T]he natural court for granting interim injunctive relief is the court of the country of the seat of arbitration. … The natural corollary to that is that, as a general principle, an application to an alternative court such as this court is inappropriate."); *Econet Wireless Serv. Ltd v. Vee Networks Ltd* [2006] EWHC 1568 (Comm) (English High Ct.) ("This court was not the appropriate forum for an application for an injunction in aid of an arbitration, since the seat of the relevant arbitration was Nigeria and not England").

809)

See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1067 *et seq.* (6th ed. 2018); L. Collins *et al.* (eds.), *Dicey, Morris and Collins on The Conflict of Laws* ¶¶16 *et seq.* (15th ed. & Supp. 2019).

810)

See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1067 *et seq.* (6th ed. 2018); L. Collins *et al.* (eds.), *Dicey, Morris and Collins on The Conflict of Laws* ¶¶16 *et seq.* (15th ed. & Supp. 2019).

For decisions refusing to recognize foreign judicial decisions granting provisional measures in aid of international arbitral proceedings, *seeEmmott v. Michael Wilson & Partners Ltd* [2018] EWCA Civ 51 (English High Ct.); *C v. D* [2015] EWHC 2126 (Comm) (English High Ct.); *Judgment of 8 June 2005*, *City Water Servs. Ltd v. Dar es Salaam Water & Sewerage Auth.*, Misc. Civil Case No. 20/2005 (Tanzania High Ct.) (refusing to recognize English court's provisional measures in aid of English arbitration).

811)

SeeMietz v. Intership Yatching Sneek BV, Case No. C-99/96, [1999] E.C.R. I-2277 (E.C.J.); *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091 (E.C.J.).

812)

See C. Boog, *Die Durchsetzung Einstweiliger Massnahmen in Internationalen Schiedsverfahren, aus Schweizerischer Sicht, mit Rechtsvergleichenden Aspekten* ¶¶748 *et seq.* (2011).

813)

Although it is unusual, some arbitration clauses include provisions expressly permitting resort by the parties to national courts for injunctive relief. *SeeRemy Amérique, Inc. v. Touzet Distrib. Sarl*, 816 F.Supp. 213, 215 (S.D.N.Y. 1993) ("The parties may seek from the Arbitral Tribunal and from any judicial courts of proper jurisdiction equitable relief by way of temporary and permanent injunctions").

814)

2013 UNCITRAL Rules, Art. 26(9) (emphasis added); 1976 UNCITRAL Rules, Art. 26(3). *See* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 529 (2d ed. 2013) ("Article 26(3) [of the UNCITRAL Rules] allows the parties to approach courts both at the place of arbitration and elsewhere").

815)

See S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal* 133-43 (1992); D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 544 (2006).

816)

2017 ICC Rules, Art. 28(2); 1998 ICC Rules, Art. 23(2). *See also* Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 299-302 (2d ed. 2005); Field, *Narrowing the Powers of the National Courts to Grant Interim Measures: A Measure Too Far?*, Kluwer Arb. Blog (27 Aug. 2015); J. Fry, S. Greenberg & F. Mazza, *Secretariat's Guide to ICC Arbitration* 289 (2012); Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61-62 (1993); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 172-73 (2d ed. 2015).

The same principles apply to emergency arbitrators. *See* 2017 ICC Rules, Art. 29(7); 2018 AIAC Rules, Rules 8(2), 26(9).

817)

See also 1998 ICC Rules, Art. 23(2). Article 8(5) of the 1988 version of the ICC Rules permitted court-ordered provisional measures, after the arbitral tribunal had received the file, only in "exceptional circumstances." Schwartz, *The Practices and Experience of the ICC Court*, in ICC, *Conservatory and Provisional Measures in International Arbitration* 45, 61-62 (1993). Even after a tribunal is in place, it may be difficult to convene a meeting of the tribunal on short notice. It is feasible for the parties to make written submissions on extremely short notice, but oral or evidentiary hearings are usually not possible. That may, as a practical matter, make it difficult to obtain provisional relief from the tribunal.
818)

See 2020 LCIA Rules, Art. 25(3) ("A party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award"). *See also* Field, *Narrowing the Powers of the National Courts to Grant Interim Measures: A Measure Too Far?*, Kluwer Arb. Blog (27 Aug. 2015).
819)

2017 ICC Rules, Art. 28(2); 2016 SIAC Rules, Art. 30(3).
820)

See also M. Scherer, L. Richman & R. Gerbay, *Arbitrating Under the 2014 LCIA Rules, A User's Guide* 280-81 (2015); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶28-72 (4th ed. 2018) ("[that after constitution of the Tribunal, a request for interim measures should be made to the Tribunal except in 'appropriate circumstances'] is consistent with the approach that it is the Tribunal that is most familiar with the proceedings and is in the better position to judge whether such measures are required").
821)

See §17.04[D].
822)

See, e.g.,Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) (denying preliminary injunction because provisional relief was available from arbitral tribunal); *DHL Info. Servs. (Ams.), Inc. v. Infinite Software Corp.,* 502 F.Supp.2d 1082 (C.D. Cal. 2007) ("The court declines to rush in where the arbitrator is free to tread. Since under the agreement of the parties, almost all their disputes are going to arbitration where interim relief is authorized, it is best not to carve out interim relief from the issues the arbitrator will decide, even though Rule 34(c) of the AAA Rules would allow this Court to do so."); *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) (English High Ct.) (English courts lack power to order provisional measures because of availability of emergency arbitration under LCIA Rules).
823)

For arbitral awards considering whether a particular application for court-ordered provisional measures was permitted under the ICC Rules, *seeFinal Award on Jurisdiction in ICC Case No. 10904*, XXXI Y.B. Comm. Arb. 95 (2006); *Interim Award in ICC Case No. 9324*, 11(1) ICC Ct. Bull. 103 (2000); *Interim Award in ICC Case No. 7589*, 11(1) ICC Ct. Bull. 60 (2000). *See also* §§17.02[A][4][b]*et seq.*; §17.02_[E]; §§17.04[C][3] *et seq*. *See also* T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶¶28 *et seq.* (4th ed. 2018).
824)

See §17.02[G][4][g].
825)

Delphi Petroleum Inc. v. Derin Shipping & Training Ltd, [1994] 73 FTR 241 (Canadian Fed. Ct.).
826)

Vibroflotation AG v. Express Builders Co. Ltd, [1994] HKCFI 205 (H.K. Ct. First Inst.).
827)

See, e.g., U.S. FAA, 9 U.S.C. §7; English Arbitration Act, 1996, §44; Australian International Arbitration Act, §23.
828)

See §16.03[A].

KluwerArbitration