

2020

## Provisional Measures in Aid of Arbitration

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### Recommended Citation

Ronald A. Brand, *Provisional Measures in Aid of Arbitration*, Unpublished (2020).

Available at: [https://scholarship.law.pitt.edu/fac\\_articles/458](https://scholarship.law.pitt.edu/fac_articles/458)

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## Provisional Measures in Aid of Arbitration

Ronald A. Brand\*

### Abstract

The success of the New York Convention has made arbitration a preferred means of dispute resolution for international commercial transactions. Success in arbitration often depends on the extent to which a party may, in advance, ensure that assets or evidence is secured in advance, or that the other party is required to take steps to secure the status quo. This makes the availability of provisional measures granted by either arbitral tribunals or by courts important to the arbitration process. In this chapter I consider the existing legal framework for such provisional measures in aid of arbitration. I give particular attention to the source of the rules that might govern such relief related to international commercial transactions and the arbitration of disputes they may generate. These include the New York Convention, the applicable *lex arbitri*, institutional arbitration rules, and the arbitration contract. I consider how these sources do or do not provide a comprehensive and coherent framework for effective dispute resolution – including especially the effective satisfaction of any resulting arbitral award. I then consider some of the ways in which the arbitration clause may be drafted to specifically take into account the often unanticipated, but always possible, need for provisional measures, providing ten rules for consideration of provisional measures when drafting an arbitration agreement.

**Key words:** arbitration; contracts; New York Convention; UNCITRAL; provisional measures; injunctions; attachments; discovery; taking of evidence; comparative law; international law; private international law; international economic law; conflict of laws

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## I. INTRODUCTION

Largely as a result of the success of the New York Convention,<sup>1</sup> now in effect in more than 160 states,<sup>2</sup> arbitration has become a common approach to dispute resolution in international commercial transactions. While the New York Convention has provided the legal foundation for the recognition and enforcement of both agreements to arbitrate,<sup>3</sup> and arbitral awards,<sup>4</sup> its rather simple structure leaves much of the law governing arbitration agreements, arbitration procedure, and the satisfaction of arbitral awards to other sources of rules. These other sources include domestic law (the *lex arbitri* or “curial law”), the rules of international arbitral institutions, and – often most important – the contract negotiated by the parties to a dispute.

The initiation of dispute settlement in an international commercial relationship, whether by mediation, arbitration, or litigation, generally involves a desire on the part of the party initiating the process for one of two things: a change in the conduct of the other party (specific performance) or compensation for loss suffered as a result of the conduct of the other party (damages). The complexities of cross-border commerce often leave in doubt whether the means for satisfaction of a decision granting either of these types of remedy will exist if, and when, a successful decision is obtained. This makes preliminary decisions in the process of dispute settlement that ensure the availability of the ultimate relief being sought particularly important.

In arbitration, the multiple sources of legal rules that may govern the relationship and the results of dispute settlement create ambiguity, if not significant difficulty, in efforts to preserve the possibility of satisfying a successful award. This is a result of a varied framework of laws governing the availability of the remedy being sought, resulting in a lack of clarity

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<sup>1</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), available at [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards).

<sup>2</sup> [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

<sup>3</sup> New York Convention, *supra* note 1, art II.

<sup>4</sup> *Id.* art. III.

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regarding whether the satisfaction of provisional measures will be both legally and practically available.

In an ideal world, business parties and their lawyers would have certainty in terms of what law applies, and what results that law provides, at all stages of the transaction and dispute settlement processes. This includes the time of negotiation of the contract, the time at which any disagreement regarding the transaction occurs, the time at which dispute settlement is initiated, the time during which dispute settlement is conducted, and the time at which the results of dispute settlement must be recognized and enforced. One should be able to know as to each possible question that might arise: what law will apply; whether that law is one designed to govern arbitration, judicial proceedings, or some other law; whether any non-sovereign rules will apply; and whether the contract can or has been used to exercise party autonomy in a way that is allowed by the law governing the question at issue.

The opportunities for instantaneous transfer of assets across borders, and the vagaries of the cross-border legal framework for securing the satisfaction (not just the recognition) of arbitral awards, make the legal ability to obtain such security important at all stages of the transactional and dispute resolution relationship. Despite the global harmonization of the law on the recognition and enforcement of arbitral awards through the New York Convention, and some level of harmonization of national arbitration laws through the UNCITRAL Model Law on International Commercial Arbitration (and particularly its 2006 amendments),<sup>5</sup> there is a lack of clear harmonization of the rules governing the availability of provisional relief that will make certain the ability to enforce a final arbitral award once it is rendered. The ability of parties to international commercial relationships to transfer assets to locations where enforcement is difficult or impossible, to change business structures in order to frustrate award enforcement, and to prevent the disclosure of evidence that can help an arbitral tribunal render a fair and reasoned award, all present opportunities to frustrate the dispute settlement process, and thus require the ability to prevent that frustration when it is appropriate to do so. This makes it particularly important to plan for these matters in the commercial contract that includes an agreement to arbitrate.

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<sup>5</sup> UNCITRAL Model Law on International Commercial Arbitration, available at [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration).

In this chapter I consider the existing legal framework for provisional measures in aid of arbitration, both those available from arbitral tribunals and those available from courts. I give particular attention to the source of the rules that might govern such relief related to international commercial transactions and the arbitration of disputes they may generate, and the way in which those sources do or do not provide a comprehensive and coherent framework for effective dispute resolution – including especially the effective satisfaction of any resulting arbitral award. I then consider some of the ways in which the arbitration clause may be drafted to specifically take into account the often unanticipated, but always possible, need for provisional measures.

## II. THE LEGAL FRAMEWORK FOR PROVISIONAL MEASURES GRANTED BY ARBITRAL TRIBUNALS

While there are numerous potential sources of rules applicable in any international commercial arbitration proceeding, there are four principal sources of those rules that are important to the question of provisional measures:

- 1) the New York Convention;
- 2) the arbitration law of the state that is the seat of arbitration (the *lex arbitri* or “curial law”);
- 3) the institutional rules chosen by the parties in their arbitration agreement; and
- 4) the provisions of the contract that includes the agreement to arbitrate.<sup>6</sup>

Whenever multiple sources of rules may apply, it is useful at the outset to understand the hierarchy of those rules. The four principal sets of rule sources in arbitration have different hierarchy for different purposes. Generally, it is the party contract that will trump other sources of rules.

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<sup>6</sup> The substantive law chosen to govern the contract generally, as well as the substantive law that governs the arbitration agreement (which may or may not be the same), will, of course, also be important to dispute resolution, but are not likely to play a significant role in the question of provisional measures.

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Arbitration is a creature of contractual consent. Unlike litigation, without consent of the parties there cannot be arbitration. This means that the source of that consent – the contract – is key to determining who has agreed to arbitration, what they have agreed to arbitrate, how that arbitration will be governed, and where we find the other rules that will apply. The parties select the applicable institutional rules in the contract. The choice of the seat of arbitration in the contract is similarly a choice of the national arbitration law that will govern both internal and external procedures. This makes the contract most important, and the institutional rules second in terms of trumping other rules, followed by the national arbitration law.

At the same time, the hierarchy is reversed when it comes to the application of mandatory rules. To the extent there are mandatory rules in the New York Convention, those rules cannot be changed by any of the other three sources. Even though the applicable national arbitration law is chosen by the parties through the designation of the seat of arbitration, once chosen it may have mandatory rules that cannot be derogated from in either the institutional rules or the parties' contract. And an arbitral institution may set rules that cannot be changed if parties want their disputes to be settled in accordance with the rules of that institution. Thus, it is crucial at all times to understand which rules in each of the New York Convention, national arbitration law, and the institutional rules are mandatory and which are default rules.<sup>7</sup>

Because the contract sits at the top of the rules ladder when drafted to avoid conflict with mandatory rules contained in any of the other sources, it is fundamental that arbitration agreements, whether free-standing or contained within a full commercial contract, be drafted with care. This is particularly true for questions regarding provisional relief. The careful drafting required must begin with a clear understanding of the sources of provisional relief available; how those sources fit together to both award relief and provide for its realization; the types of relief available from each source; the effect of each type of relief; and the ultimate goals to be achieved in the use of such relief. This makes it useful to begin with a discussion of just what rules dealing with provisional relief, if any, are contained in each of the other three legal sources. The fourth – and most important – source is best considered after also reviewing how courts can assist in both granting and executing provisional measures. Thus, I will

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<sup>7</sup> A full discussion of mandatory rules in each source is beyond the scope of this chapter.

follow the discussion of the three primary types of legal instruments important to arbitration with consideration of the judicial role in granting and enforcing provisional measures, and then conclude with a focus on the contract and provide practical comments about drafting in order to best take advantage of all four sources.

### A. The New York Convention

The New York Convention is, of course, the principal source of rules on the recognition and enforcement of both arbitration agreements and arbitral awards. Article II obligates all contracting states to honor arbitration agreements.<sup>8</sup> The Convention sets the formal validity requirement for an international commercial arbitration agreement by requiring that it be in writing and signed by the parties.<sup>9</sup> It further provides exceptions to the obligation to honor an arbitration agreement based on substantive validity, including the arbitrability requirement of Article II(1), and the more basic substantive validity rules of Article II(3).<sup>10</sup>

The New York Convention contains no rules that apply explicitly to the question of provisional measures. The basic Article III rule requiring the recognition and enforcement of foreign arbitral awards, subject to the grounds for non-recognition set forth in Article V, simply states that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” This clearly applies to a final award at the termination of arbitration, but the question of whether it applies as well to a preliminary order that provides provisional relief is not clear on the face of the Convention.

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<sup>8</sup> New York Convention, *supra* note 1, art. II.

<sup>9</sup> *Id.* art. II(2).

<sup>10</sup> *Id.* art. II(1) and (3). Article II(3) states the requirement of referring the parties to arbitration when an agreement exists “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” The Convention provides no choice of law rule for purposes of determining what national contract formation law applies to these questions of substantive validity.



The 2016 UNCITRAL Secretariat Guide to the New York Convention is intended to catalogue national court interpretation of various issues arising from the New York Convention.<sup>11</sup> In discussing the meaning of “arbitral award” under Article I(1), however, it does not fully answer the question of whether tribunal decisions granting or denying provisional measures are subject to recognition and enforcement as awards under Article III. The Guide does state that “reported case law shows that decisions that finally resolve a dispute, either in whole or in part, are considered to be ‘awards’ within the meaning of the Convention,”<sup>12</sup> and “[c]ourts have applied . . . two criteria – namely, the finality and the binding effect of an award – to decisions made by arbitrators when determining whether particular decisions qualify as ‘arbitral awards’ under the Convention.”<sup>13</sup> The finality requirement obviously presents at least textual concern with an award of provisional measures of any type. Such an award clearly does not finally settle the dispute. Thus, a Belgian court has held that an order that one party pay the other party a certain sum prior to the conclusion of arbitral proceedings was not a “final” award that could be recognized and enforced under the Convention.<sup>14</sup> However, “[o]ther courts have held that an interim or partial award amounts to an ‘award’ within the meaning of the Convention, if it finally determines at least part of the dispute referred to arbitration.”<sup>15</sup> Thus, courts have defined “finality” to be

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<sup>11</sup> UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016\\_guide\\_on\\_the\\_convention.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf).

<sup>12</sup> *Id.* ¶ 23.

<sup>13</sup> *Id.* ¶ 25.

<sup>14</sup> *Id.* ¶ 33, *ECONERG Ltd. v. National Electricity Company AD*, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, Bulgaria, 23 February 1999, 356/99, XXV Y.B. Com. Arb. 678 (2000).

<sup>15</sup> *Id.* ¶ 34, citing *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.*, Supreme Court of Queensland, Australia, 29 October 1993, XX Y.B. Com. Arb. 628 (1995); *Oberlandesgericht [OLG] Thüringen*, Germany, 8 August 2007, 4 Sch 03/06; *Drummond Ltd. v. Instituto Nacional de Concesiones – INCO et al.*, Supreme Court of Justice, Colombia, 19 December 2011 and 3 May 2012, XXXVII Y.B. Com. Arb. 205 (2012) (with English translation); and *Alcatel Space, S.A. v. Alcatel Space Industries, S.A. and others*, District Court, Southern District of New York, United States of America, 25 June 2002, 02 Civ.2674 SAS, XXVIII Y.B. Com. Arb. 990 (2003).

something less than an award that results in full termination of the arbitral proceedings.<sup>16</sup>

As the discussion which follows indicates, the modern trend under both national arbitration statutes and institutional arbitration rules is to consider certain orders for provisional measures to be “awards” under the New York Convention capable of recognition and enforcement in accordance with Article III.

### **B. National Arbitration Law: The *Lex Arbitri* or “Curial Law”**

While it is not possible here to consider every national arbitration law, global harmonization of arbitration law based on the UNCITRAL Model Law provides a very useful point of departure.<sup>17</sup> “Legislation based on the Model Law has been adopted in 83 States in a total of 116 jurisdictions.”<sup>18</sup> This makes the Model Law the most useful reference in any global consideration of national arbitration laws.

The original 1985 UNCITRAL Model Law was amended in 2006 with the particular purpose of providing a detailed set of rules for provisional measures awarded by arbitral tribunals. Article 17 of the resulting text provides the starting point for those rules, and listing the types of measures a tribunal may grant, as follows:

Article 17. Power of arbitral tribunal to order interim measures

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

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<sup>16</sup> Gary Born notes that an “award” must satisfy “three basic conditions: (a) the award must result from an agreement to ‘arbitrate’; (b) the award must have certain minimal characteristics inherent in the concept of an ‘award’; and (c) the award must resolve a substantive issue, not a procedural matter.” GARY BORN INTERNATIONAL ARBITRATION: LAW AND PRACTICE 376 (2d ed., Wolters Kluwer, 2016).

<sup>17</sup> UNCITRAL Model Law, *supra* note 5.

<sup>18</sup> [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status).

(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.

These are, of course, similar to the types of provisional measures courts may grant in the course of litigation in order to accomplish similar goals. Article 17 A follows with the test that must be met before such interim measures are granted:

Article 17 A. Conditions for granting interim measures

- (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
  - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
  - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

The Model Law goes on to allow for “preliminary orders,” which may be granted *ex parte* until an interim measure can be granted after notice and hearing, if “prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.”<sup>19</sup> A preliminary order expires after 20 days if not turned into an

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<sup>19</sup> Model Law, *supra* note 5, art. 17 B(2).

interim measure,<sup>20</sup> and “shall be binding on the parties but shall not be subject to enforcement by a court.”<sup>21</sup> Thus, preliminary orders do not circulate under the New York Convention as “awards.”

Interim measures may circulate under the New York Convention. This result is also made explicit under the Model Law in Article 17 H(1), which addresses the question of recognition and enforcement of an interim measure awarded by an arbitral tribunal, stating:

- (1) An 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, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

Article 17 I sets forth the exclusive grounds for refusal of recognition and enforcement of an interim measure, which parallel the grounds for denial of recognition and enforcement of awards in Article V of the New York Convention and Article 36 of the UNCITRAL Model Law.<sup>22</sup>

Thus, in a state which has enacted the 2006 amendments to the Model Law, the question of recognition and enforcement of a provisional measure awarded by an arbitral tribunal after notice and opportunity to be heard is rather clearly answered. Notably, and important to the discussion below, Article 17 J of the Model Law provides that, even if the arbitral tribunal has the authority to issue provisional relief in the form of interim measures, the courts retain that same power whether the arbitration is seated in the state of enactment or in another state. Thus, the Model Law grants courts such powers for purposes of measures in aid of arbitration, wherever it is seated.<sup>23</sup>

Other arbitration laws are not so friendly to provisional measures awarded in arbitration. While London is a common seat for arbitration, the accompanying *lex arbitri*, standing alone (subject to any institutional arbitration rules that might be adopted and to the contract), leaves a tribunal without full power to award provisional measures. Article 39 of the

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<sup>20</sup> *Id.* art. 17 C(4).

<sup>21</sup> *Id.* art. 17 C(5).

<sup>22</sup> *Id.* art. 17 I(1).

<sup>23</sup> *Id.* art. 17 J.

Arbitration Act 1996 deals with provisional awards, but in a manner that stops short of the Model Law example:

39 – Power to make provisional awards.

(1) 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.

(2) This includes, for instance, making –

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal’s final adjudication; and the tribunal’s final award, on the merits or as to costs, shall take account of any such order.

(4) *Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.*<sup>24</sup>

Thus, the tribunal will have the power to grant provisional awards *only if* the parties specifically grant that power in their agreement.

The U.S. Federal Arbitration Act, enacted in 1925, shows its age by having no provision addressing the question of provisional measures granted by arbitral tribunals. The question is thus left open in U.S. federal law, with the possibility of supplementation by state law which can fill in the gaps. That gap-filling function is a bit complicated by the federal preemption doctrine applicable particularly in the field of arbitration.

Under Article VI of the United States Constitution, federal statutes and treaties are the supreme law of the land and take precedence over state law.<sup>25</sup> Moreover, the U.S. Supreme Court has made clear that the Federal

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<sup>24</sup> U.K. Arbitration Act 1996, art. 39 (emphasis added).

<sup>25</sup> U.S. Const., art VI, ¶ 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”).

Arbitration Act provides a strong federal policy favoring arbitration.<sup>26</sup> The National Conference of Commissioners on Uniform State Laws has considered this federal policy and the preemption doctrine in promulgating the Uniform Arbitration Act in 1956,<sup>27</sup> and the Revised Uniform Arbitration Act (RUAA) in 2000.<sup>28</sup> In the Prefatory Note to the latter of these two Acts, the Uniform Law Commissioners (ULC) noted their interpretation of the room for interplay between state and federal law in the following language:

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The focus in these cases is on the effect of FAA preemption on choice-of-law provisions routinely included in commercial contracts. *Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored – as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA’s prime directive that agreements to arbitrate be enforced.<sup>29</sup>

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<sup>26</sup> “The [Federal Arbitration] Act, this Court has said, establishes ‘a liberal federal policy favoring arbitration agreements.’” *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_, 138 S.Ct. 1612, 1621 (2018) (quoting from *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967))).

<sup>27</sup> Uniform Arbitration Act (1956), information available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=f60b379c-6378-4d9d-b271-97522fad6f89>.

<sup>28</sup> Revised Uniform Arbitration Act (RUAA), available at <https://www.uniformlaws.org/viewdocument/final-act-2?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736&tab=librarydocuments>.

<sup>29</sup> National Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act (Last Revisions Completed Year 2000)*, prefatory note at 3.

The ULC did not intend the RUAA to deal with international arbitrations, noting that “[t]he subject of international arbitration is not specifically addressed in the RUAA.”<sup>30</sup> They rather indicated that U.S. states could provide a gap-filler to the Federal Arbitration Act for international arbitration through adoption of the UNCITRAL Model Law or similar provisions, and that some states had done so.<sup>31</sup> The UNCITRAL website notes that eight states have used the Model Law in enacting state legislation for international arbitration cases, with only one – Florida – having done so with the 2006 amendments.<sup>32</sup> Thus, while it is possible for states to enact explicit authorization for arbitral tribunals to grant provisional measures when the arbitration is seated in the enacting state, it is important to determine whether the state statute does in fact provide for such authorization.<sup>33</sup>

Because New York is a U.S. state in which international arbitration is likely to be seated, it is worth considering its state law on arbitration. Article 75 of the New York Civil Practice Law and Rules (CPLR) contains the only provisions in New York statutes dealing with arbitration. The Article contains no sections dealing with the authority of an arbitral tribunal seated in New York to grant provisional relief. The only related provision is section 7502(c), which provides that the courts may entertain an application for such relief in connection with an arbitration that is pending or one that is to be commenced.<sup>34</sup> That provision is discussed in further detail below under court authority to render provisional relief in aid of arbitration.

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<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.*

<sup>32</sup> [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status). The other states and the years of enactment are: California (1988), Connecticut (1989), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991), and Texas (1989).

<sup>33</sup> Examples of other U.S. state statutes that authorize arbitral tribunals to order provisional measures include: Arizona (A.R.S. § 12-3008(B)); California (1988 California International Arbitration and Conciliation Act (“CIACA”) (Code of Civil Procedure section 1297.11 et seq.); Georgia (under O.C.G.A. § 9-9-38(a)); Illinois (710 ILCS 30/15-10); Louisiana (LA. REV. STAT. ANN. § 9:4257); Michigan (MCL § 691.1688(2)(a)); Nevada (N.R.S. 38.222); South Carolina (S.C. CODE § 15-48-130(3)); North Carolina (N.C. GEN. STAT. § 1-569.8(a)).

<sup>34</sup> N.Y.C.P.L.R. § 7502(c).

Not all provisional measures deal with attachments or injunctions or are directly related to assets that might be the subject of attachment or execution should a final arbitration award be granted. One type of preliminary matter that can be important is the ability to obtain evidence from the opposing party in arbitration. The New York Convention has no provisions dealing with obtaining evidence, and most national arbitration statutes, and most institutional arbitration rules, address the taking of evidence only in a limited manner.

The UNCITRAL Model Law gives the arbitral tribunal general discretionary authority on evidence gathering, but allow the parties to modify this by agreement. Absent other agreement by the parties, “the arbitral tribunal may . . . conduct the arbitration in such manner as it considers appropriate,” including “the power to determine the admissibility, relevance, materiality and weight of any evidence.” Article 27 then provides that “[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence,” and that “[t]he court may execute the request within its competence and according to its rules on taking evidence.” Like most of the Model Law provisions, this allows only the courts of the state of the seat of arbitration to provide such assistance.

The U.S. Federal Arbitration Act does have specific rules regarding the gathering of evidence. Section 7 of the Act provides that:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.<sup>35</sup>

The right to summon “any person,” and not just a party indicates the more liberal rules of evidence generally found in U.S. courts as compared to other judicial systems of the world.

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<sup>35</sup> 9 U.S.C. § 7.



### C. Institutional Arbitration Rules

The analysis of whether an arbitral tribunal may grant provisional measures does not, of course, end with a review of the New York Convention and the *lex arbitri* (with the UNCITRAL Model Law being the prime example of national arbitration law given its wide use in existing national legislation). Authorization of authority to grant provisional measures may occur as well in the institutional arbitration rules chosen by the parties to apply to their dispute.

The principal example of arbitration rules applicable to provisional measures is found in the UNCITRAL Arbitration Rules.<sup>36</sup> Most recently amended in 2013, those rules provide for “interim measures” in Article 26. Not surprisingly, the UNCITRAL Rules parallel the UNCITRAL Model Law 2006 amendments, first by providing that an arbitral tribunal may provide interim measures,<sup>37</sup> and defining an interim measure in language parallel to that found in Model Law Article 17(2).<sup>38</sup> This is followed with the standard that must be met for the award of interim measures,<sup>39</sup> consistent with Article 17A(1) of the Model Law. Moreover, as in the Model Law, “[a] request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”<sup>40</sup>

The UNCITRAL Arbitration Rules serve as the global example for the rules of many arbitral institutions, and certainly provide indication of evolutionary trends in arbitral rules. Over the past two decades, most major arbitral institutions have also adopted or added rules authorizing tribunals to issue provisional measures.

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<sup>36</sup> Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>.

<sup>37</sup> *Id.* art 26(1).

<sup>38</sup> *Id.* art 26(2).

<sup>39</sup> *Id.* art. 26(3).

<sup>40</sup> *Id.* art 26(9).

The International Chamber of Commerce (ICC) Rules provide for “Conservatory and Interim Measures” in Article 28,<sup>41</sup> authorizing the tribunal to “order any interim or conservatory measure it deems appropriate,” unless the parties have provided otherwise in their agreement.<sup>42</sup> The article goes on to allow the tribunal to issue such measures as an “award,” and to acknowledge that any application for such measures to a court does not constitute a waiver of any of the rights under the arbitration agreement.<sup>43</sup> The ICC Rules also provide for an Emergency Arbitrator, before the tribunal has the file.<sup>44</sup>

The International Dispute Resolution Procedures of the International Center for Dispute Resolution (ICDR) of the American Arbitration Association, in their International Arbitration Rules, provide for both emergency measures of protection in Article 6, and interim measures in Article 24.<sup>45</sup> Emergency measures are available before the constitution of the tribunal.<sup>46</sup> Once the tribunal is constituted, it may order “any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property,”<sup>47</sup> and such measure may be in the form of an “award.”<sup>48</sup>

Article 25 of the LCIA Rules, titled “Interim and Conservatory Measures,” authorizes the tribunal to order “security for all or part of the amount in dispute,” “the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party,” and “any relief which the Arbitral Tribunal would have power to

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<sup>41</sup> ICC Arbitration Rules (in force as from 1 March 2017), available at <https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>.

<sup>42</sup> *Id.* art. 28(1).

<sup>43</sup> *Id.* art. 28(1) and (2).

<sup>44</sup> *Id.* art. 29.

<sup>45</sup> International Dispute Resolution Procedures of the International Center for Dispute Resolution, available at [https://www.adr.org/sites/default/files/ICDR%20Rules\\_0.pdf](https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf).

<sup>46</sup> *Id.* art. 6.

<sup>47</sup> *Id.* art. 24(1).

<sup>48</sup> *Id.* art. 24(2).

grant in an award” as such a measure.<sup>49</sup> This power “shall not prejudice any party’s right to apply to a state court or other legal authority for interim or conservatory measures to similar effect.”<sup>50</sup>

The Swiss Chambers’ Arbitration Institution (SCAI) Rules authorize the tribunal to “grant any interim measures it deems necessary or appropriate,” and to grant them “in the form of an interim award.”<sup>51</sup> The tribunal may also issue preliminary orders *ex parte*.<sup>52</sup> In doing so, however, the rules make clear that such authorization does not prevent a party from requesting interim measures from a court, and that such a request does not constitute a waiver of the arbitration agreement.<sup>53</sup>

When we consider tribunal authority for the taking of evidence, most institutional arbitration rules do not go beyond noting that the tribunal shall have discretion in determining how evidence questions are to be determined. The Swiss (SAIC) Rules are an example that goes perhaps further than most in this regard:

Article 24

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
3. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within a period of time determined by the arbitral tribunal.

The LCIA Rules go much further than most on the question of evidence taking. Article 22.1 provides as follows:

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<sup>49</sup> London Court of International Arbitration (LCIA) Arbitration Rules (effective 1 October 2020), art. 25.1, available at <file:///C:/Users/Ron/AppData/Local/Temp/LCIA%20Arbitration%20Rules%20PDF%20Download%202.pdf>.

<sup>50</sup> *Id.* art. 25.3.

<sup>51</sup> Swiss Chambers’ Arbitration Institution (SCAI) Rules, art. 26, available at <https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws>.

<sup>52</sup> *Id.* art. 26(3).

<sup>53</sup> *Id.* art. 26(5).

22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

. . . . .

(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;

(iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal;

(v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant;

(vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;

The clear trend in institutional arbitration rules is to authorize arbitral tribunals to grant such measures, and in many cases to authorize the institution itself to move *ex parte* to provide temporary measures pending notice and an opportunity to be heard. Once both parties have been allowed to weigh in on the matter, the resulting measure is considered to be an award that is capable of circulation under the New York Convention, even though it does not finally settle the dispute. This allows parties to plan appropriately for the necessary first step in dispute resolution by which they obtain security that ensures the ability to collect upon or otherwise enforce a favorable arbitration award at the end of the process.

### III. JUDICIAL AWARDS OF PROVISIONAL MEASURES IN AID OF ARBITRATION

The above discussion makes clear that modern arbitration statutes and arbitration rules, while authoring arbitral tribunals to grant provisional measures, do so in tandem with similar authority retained by the courts. Those laws and rules generally explicitly state that the ability of arbitral tribunals to grant provisional measures does not prevent parties from going to court to obtain provisional relief in aid of the arbitration proceedings, and that recourse to the courts for such purposes does not constitute a waiver of the results of the agreement to arbitrate.<sup>54</sup> This means that a party seeking provisional measures will often have multiple sources from which such relief might be granted, and thus brings a forum-shopping aspect into the early dispute resolution strategy. It also requires that the agreement to arbitrate be drafted with such matters in mind so that the best strategic options will in fact be available.

The multiple sources of provisional measures do not end with the arbitral tribunal and the courts at the seat of arbitration, but also include courts in states in which assets may be located against which an award might ultimately be enforced. This requires careful attention to the facts surrounding the transaction/dispute, as well as to the laws of a potential variety of states.

#### A. Attachments, Injunctions and Similar Matters

The first step to get past in the question of court-ordered provisional measures in aid of arbitration is that of mandatory rules. If an applicable law would prohibit such measures as a mandatory rule, then they would not be available, and the New York Convention is at the top of the ladder of hierarchy of mandatory rules. In the past, some courts in the United States have held that Article II(3) of the New York Convention forbids court-ordered provisional measures in aid of arbitration. In its 1974 decision in

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<sup>54</sup> See, e.g., UNCITRAL Model Law, *supra* note 5, art. 17 J; UNCITRAL Arbitration Rules, *supra* note 36, art. 26(9).

*McCreary Tire & Rubber Co. v. CEAT, SpA*,<sup>55</sup> the Third Circuit U.S. Court of Appeals held that it could not grant the attachment of assets in aid of arbitration because the rule of judicial non-intervention resulting from the New York Convention's required respect for arbitration agreements would make such provisional measures "inconsistent with [the] purpose" of the New York Convention.<sup>56</sup> While this approach was followed in some other U.S. courts,<sup>57</sup> other courts held that Article II(3) did not have such a result.<sup>58</sup> The House of Lords also rejected the *McCreary* analysis of Article II(3), stating that "when properly used such measures serve to reinforce the agreed method [of arbitration], not to bypass it."<sup>59</sup>

The better approach seems clearly to be that provisional measures in aid of arbitration promote a policy favoring arbitration by assisting that process once chosen. And, as modern arbitration legislation and rules indicate, there is in fact an expectation that courts will be able to grant such assistance, and that such assistance will be fully consistent with the decision to resolve a controversy by arbitration. Thus, for example, the UNCITRAL Model Law makes clear that courts have such power regardless of whether the arbitration is seated in the state in which the law is enacted.<sup>60</sup>

While Article 1(2) of the UNCITRAL Model Law makes the general rule that the provisions of the Model Law "apply only if the place of arbitration is in the territory of this State,"<sup>61</sup> that provision explicitly makes exception for the Articles dealing with provisional measures, and Article 9 expressly states that "[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an

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<sup>55</sup> 501 F.2d 1032 (2d Cir. 1974).

<sup>56</sup> 501 F.2d at 1038.

<sup>57</sup> *See, e.g.*, *Cooper v. Ateliers de la Motobecane*, 442 N.E.2d 1239 (N.Y. 1982).

<sup>58</sup> *See, e.g.*, *Bordern, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) ("a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [the New York Convention]").

<sup>59</sup> *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.* [1993] AC 334, 354 (House of Lords).

<sup>60</sup> UNCITRAL Model Law, *supra* note 5, art 17 J.

<sup>61</sup> *Id.* art. 1(2).

interim measure of protection and for a court to grant such measure.”<sup>62</sup> The use of the language “a court,” and not “a court in this State” indicates an intent not to limit such authority to only the courts of the state that is the seat of arbitration, and Article 17 J explicitly authorizes courts of the state of enactment to grant interim measures in support of arbitration proceedings “irrespective of whether their place is in the territory of this State.”<sup>63</sup> Thus, courts have not only granted provisional measures in aid of arbitration, but have done so in aid of arbitration seated outside the forum state.<sup>64</sup>

The U.S. federal system is worth a bit of additional attention at this stage, in order to fully understand the relationship of federal and state courts when it comes to judicial measures meant to capture or restrict the use of assets. That relationship often means that a federal district court will look to the law of the state in which it is located, and that is true on the issues we are now considering. Thus, Federal Rule of Civil Procedure (FRCP) 64 “borrows” from state law for purposes of the determination of remedies, unless a federal statute explicitly provides otherwise:

FRCP 64 – Seizing a Person or Property

(a) Remedies Under State Law – In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person

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<sup>62</sup> *Id.* art. 9.

<sup>63</sup> *Id.* art. 17 J.

<sup>64</sup> *See, e.g.*, Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd. [1993] A.C. 334 (H.L.) (U.K. courts have power to grant provisional measures in support of non-U.K. arbitration); The “Lady Muriel” v. Transorient Shipping Ltd., [1995] H.K.C.A. 615 (Hong Kong Ct. App.) (granting provisional measures in aid of foreign arbitration when assets were present in Hong Kong); Application of Deiuemar Compagnia di Navigazione SpA v. M/V Allegra, 198 F.3d 473 (4<sup>th</sup> Cir. 1999) (ordering inspection of vessel in the United States in aid of arbitration seated in London); TLC Multimedia Inc. v. Core Curriculum Tech., Inc., [1998] B.C.J.No 1656 (B.C.Sup.Ct.) (Model Law art. 9 grants power to order measures in aid of foreign arbitration); Silver Standard Res. Inc. v. JSC Geolog, (1998) 168 D.I.R.4th 309 (B.C.Ct. App.) (Model Law art. 9 grants power to order measures in aid of foreign arbitration); 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 London arbitration); Atlas Chartering Services, Inc. v. World Trade Group, Inc., 453 F.Supp. 861, 863 (S.D.N.Y. 1978) (granting attachment of New York bank account in aid of London arbitration).

or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.<sup>65</sup>

This makes it necessary to determine what remedy is available, even in federal court, by looking to state law.

Perhaps the most used state law provision on provisional measures in aid of arbitration as a remedy is that in New York, found in New York Civil Procedure Law and Rule § 7502(c), which provides that the trial court (the “supreme court” in New York),

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.<sup>66</sup>

This clearly gives courts the authority to grant provisional measures in the form of attachment or injunction in support of arbitration, no matter where that arbitration is seated.

In U.S. states that have enacted the Revised Uniform Arbitration Act, the question of available of provisional measures in aid of arbitration may fall under that Act’s provisions, even though the Act itself is explicitly stated by the Uniform Law Commissioners not to affect international arbitration.<sup>67</sup> The drafters evidently did not foresee the extent to which federal procedures may rely on state law when it comes to remedies, including the remedy of provisional measures in aid of arbitration. Once one follows FRCP 64 to state law, however, when that state law is the enactment of the RUAA, then its provisions apply. In Pennsylvania, for example, which enacted the RUAA in 2019, this leads us to § 7321.9 of Title 73 of the Pennsylvania Consolidated Statutes,<sup>68</sup> which provides that, “before an arbitrator is appointed” the court “may enter an order for

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<sup>65</sup> U.S. Federal Rule of Civil Procedure 64.

<sup>66</sup> N.Y.C.P.L.R. § 7502(c).

<sup>67</sup> See *supra* note 30 and accompanying text.

<sup>68</sup> 73 PA Cons. Stat. § 7321.9.



provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.”<sup>69</sup> Once an arbitrator is appointed and authorized to act, however, the arbitrator “may issue orders for provisional remedies, including interim awards,” and parties may go to “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.”<sup>70</sup>

Here it is important to note that local law may restrict the types of remedies available through provisional measures ordered by courts in aid of arbitration. As noted immediately above, in New York, courts (whether federal or state) may grant attachments and injunctions under N.Y.C.P.L.R. 7502(c). In Pennsylvania, § 7321.9 allows measures that reach “to the same extent and under the same conditions as if the controversy were the subject of a civil action,”<sup>71</sup> but may do so only prior to appointment of the arbitrators, absent exceptional circumstances. Under Article 17 J of the UNCITRAL Model Law, the courts have the “same power” as arbitral tribunals have under Article 17,<sup>72</sup> but then are told that they “shall exercise such power in accordance with its own procedures in consideration of the

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<sup>69</sup> *Id.* § 7321.9(a).

<sup>70</sup> *Id.* § 7321.9(b).

<sup>71</sup> 73 PA Cons. Stat. § 7321.9(a).

<sup>72</sup> UNCITRAL Model Law, *supra* note 5, art. 17(2):

(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.

specific features of international arbitration,”<sup>73</sup> thus suggesting that further powers under their civil procedure laws may require consultation.

In sum, it is generally assumed today that courts may order provisional measures in aid of arbitration, and that such aid may extend to arbitration seated within and without the forum state of the court issuing such order. This will be accomplished, however, under local law, which will include the arbitration law of the forum state, but is likely to overlap as well with civil procedure rules applying to provisional measures generally, and likely as well to be in some way connected to the type of provisional measures the court could award in litigation. Thus, careful analysis of the law in the state in which measures might be required is always advised. This, of course, is much easier after a dispute has arisen than when the arbitration clause is being drafted at the time the contract is first negotiated.

## **B. Obtaining Evidence**

The question of measures in aid of taking of evidence are also dealt with differently in connection with what courts can do in aid of arbitration, just as they are in questions of what the tribunal itself may do. Article 27 of the UNCITRAL Model Law provides that “[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence,” and that “[t]he court may execute the request within its competence and according to its rules on taking evidence.”<sup>74</sup> Like most of the Model Law provisions, this allows only the courts of the state of the seat of arbitration to provide such assistance.<sup>75</sup>

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<sup>73</sup> *Id.* art. 17 J.

<sup>74</sup> *Id.* art. 27.

<sup>75</sup> *See id.* art. 1(1) (“The provisions of this Law . . . apply only if the place of arbitration is in the territory of this State”).

### 1. The United States: 28 U.S.C. § 1782

The United States has a unique federal statute, 28 U.S.C. § 1782, that allows federal district courts to order a person residing in or found in the district “to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”<sup>76</sup> While this would seem to include an arbitral tribunal, the Federal Circuit Courts are split on that interpretive question.

In order to obtain court assistance in evidence gathering, an applicant pursuing Section 1782 discovery must establish that (a) the discovery is for use in an actual or contemplated proceeding in a “foreign or international tribunal”; (b) the applicant is an “interested person” in the proceeding; and (c) the person from whom the discovery is sought resides or is otherwise found in the district of the court where the application is filed. The decision to grant such discovery is in the discretion of the federal district court. In 2004, the Supreme Court determined in *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>77</sup> that, in exercising this discretion, the district court must consider:

- 1) whether the discovery sought is within the foreign tribunal’s jurisdictional reach and, thus, accessible without resorting to Section 1782;
- 2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance;
- 3) whether the applicant’s request conceals an attempt to circumvent foreign restrictions on the gathering of evidence, or other policies of a foreign country or the United States; and
- 4) whether the request is unduly intrusive or burdensome.<sup>78</sup>

The *Intel* case involved a request for assistance in gathering evidence for use in a proceeding resulting from an antitrust complaint against Intel Corporation that had been filed with the Directorate – General for

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<sup>76</sup> 28 U.S.C. § 1782.

<sup>77</sup> 542 U.S. 241 (2004).

<sup>78</sup> 542 U.S. at 264-65.

Competition of the Commission of the European Union. The Court held that the district court had the authority under § 1782 to entertain the discovery request, and then set out the guidelines for consideration of that request, determining that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”<sup>79</sup> The opinion made no mention of earlier Court of Appeal cases dealing with the application of § 1782 to arbitration.

Because *Intel* involved a request for judicial assistance in a proceeding other than a court, it demonstrated a breadth of application of § 1782 that could be interpreted to include arbitral tribunals as well. The historic path of consideration of § 1782 for requests in aid of arbitration has not, however, resulted in a clear position in this regard, and the matter will remain uncertain until the Supreme Court takes up the issue directly. It is worth briefly summarizing that path in the federal circuit courts of appeal.

In 1999, both the Second and Fifth Circuit U.S. Courts of Appeal held that § 1782 does not extend to providing evidence taking assistance to “foreign or international” arbitral tribunals. In *NBC v. Bear Stearns*,<sup>80</sup> the Second Circuit refused a request to apply the provision to an ICC arbitration seated in Mexico. Finding the absence of reference to private proceedings in the legislative history of the statute, the Court determined that the record “strongly suggests” that arbitration was excluded from coverage by the statute.<sup>81</sup> In *Republic of Kazakhstan v. Biedermann International*,<sup>82</sup> the Fifth Circuit held that the term “foreign or international tribunal” required that the forum being assisted must be a governmental entity. Both the Second and Fifth Circuits have reaffirmed this position subsequent to the Supreme Court’s *Intel* decision. In 2009, the Fifth Circuit found *Biedermann* to be controlling, focusing on the public/private distinction between arbitration and litigation or even judicial-like administrative proceedings in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*.<sup>83</sup> Most recently, the Second Circuit held has also taken this position in its 2020 decision in *Guo v. Deutsche Bank*

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<sup>79</sup> 542 U.S. at 258.

<sup>80</sup> 165 F.3d 184 (2d Cir. 1999).

<sup>81</sup> 165 F.3d 184 at 189.

<sup>82</sup> 168 F.3d 880 (5th Cir. 1999).

<sup>83</sup> 341 F. App’x 31, 33 (5th Cir. 2009).

*Securities Inc.*,<sup>84</sup> stating that the China International Economic and Trade Arbitration Commission (CIETAC) arbitration proceedings for which assistance was sought was “a private commercial arbitration for which § 1782 assistance is unavailable.”<sup>85</sup>

Both the Sixth and Fourth Circuits have read the *Intel* decision of the Supreme Court rather differently. In its 2019 decision in *In re Application to Obtain Discovery for Use in Foreign Proceedings*,<sup>86</sup> the Sixth Circuit held that an arbitration panel operating under the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) qualified as “foreign or international tribunal” under § 1782. The court based its decision upon “careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history of § 1782(a).”<sup>87</sup>

In early 2020, the Fourth Circuit sided with the Sixth Circuit in allowing § 1782 to be used in support of arbitration proceedings in the United Kingdom, in *Servotronics, Inc. v. Boeing Co.*<sup>88</sup> The Court relied heavily on the record of the 1964 amendment of the statute, which deleted the words “in any judicial proceeding pending in any court in a foreign country” from the former version, replacing them with “in a proceeding in a foreign or international tribunal.”<sup>89</sup> This analysis led the Court to conclude that “[t]he current version of the statute, as amended in 1964, thus manifests Congress’ policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international tribunals.”<sup>90</sup>

The § 1782 question has also arisen in the Ninth Circuit, in *HRC-Hainan Holding Co. LLC v. Yihan Hu*,<sup>91</sup> where the parties seeking

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<sup>84</sup> 965 F.3d 96.

<sup>85</sup> 965 F.3d at 108.

<sup>86</sup> 939 F.3d 710, 713 (6th Cir. 2019).

<sup>87</sup> 939 F.3d 714.

<sup>88</sup> 954 F.3d 209 (4th Cir. 2020).

<sup>89</sup> 954 F.3d at 216.

<sup>90</sup> 954 U.S. at 216.

<sup>91</sup> No. 20-15371 (9th Cir. March 4, 2020).

discovery assistance are involved in CIETAC arbitration proceedings. The even split to date in the Circuit Courts makes it likely that the Supreme Court might take up the matter in the near future.

## 2. The United Kingdom

The question of judicial assistance in taking evidence in aid of foreign arbitration proceedings has also been the subject of decisions in 2020 in the United Kingdom. In *A & B v. C, D & E*,<sup>92</sup> the Court of Appeal for the first time authorized discovery in the United Kingdom from third parties upon the request of arbitrators in a proceeding in New York. When a U.K. party to the U.S. arbitration was not willing to go personally to New York to testify in the arbitration proceedings, the tribunal authorized other parties to request that a U.K. court compel his testimony. The Court addressed § 44 of the Arbitration Act 1996, which gives the court “the same power of making orders about matters [of taking evidence] as it has for the purposes of and in relation to legal proceedings.”<sup>93</sup> The application was opposed on the grounds that § 44(2)(a) does not allow testimony to be taken of persons who are not parties to the arbitration because it only covers “the taking of evidence of witnesses.”<sup>94</sup> Lord Justice Males, writing for a unanimous Court of Appeal stated that the provision “does apply to taking the evidence of a witness who is not a party to the arbitration.”<sup>95</sup>

## IV. THE CONTRACT: USING THE LEGAL FRAMEWORK AVAILABLE TO PLAN FOR PROVISIONAL MEASURES

While the private contract is at the bottom of the hierarchy in terms of mandatory rules, and thus must be prepared with a complete understanding of the laws that impose rules that cannot be changed, most rules in

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<sup>92</sup> [2020] EWCA Civ. 409.

<sup>93</sup> U.K. Arbitration Act 1996, § 44.

<sup>94</sup> *Id.* § 44(2)(a).

<sup>95</sup> [2020] EWCA Civ. 409, ¶ 62.

international legal instruments dealing with commercial arbitration are default rules, allowing for party autonomy and the exercise of freedom of contract. Thus, ultimately it is the basic matter of consent, which is the foundation of arbitration, that determines whether arbitration will occur, how that arbitration will be conducted, who will be involved in the arbitration, and how the results of that arbitration will be made effective. This makes the drafting of the provisions related to arbitration, and particularly those related to the potential use of provisional measures, key to the ability to have such measures available when and if they are needed.

Most arbitration institutions provide sample arbitration clauses that are rather basic in form. This creates the rather deceptive impression that arbitration agreements should contain limited terms and can rely heavily on the incorporation of a set of institutional rules to exercise most of the choices that will be important to the arbitration process. For parties involved in international commercial relationships of any significant size, reliance on such simple clauses can create serious problems, including in potential efforts to obtain provisional measures in support of arbitration. While some of the simple choices contained in concise arbitration clauses do accomplish much – including setting the framework for provisional measures – it is important to understand just how they do so and thus whether additional terms can be appropriate.

#### **A. Choice of the *Lex Arbitri* Through the Choice of the Seat of Arbitration**

One of the most important, though sometimes most misunderstood, provisions of any arbitration agreement is the selection of the “seat” or “place” of arbitration. As any basic introduction to arbitration will explain, this provision is in no way a designation of the location at which the tribunal will hold its meetings. Quite simply, it is a choice of law clause. The fact that it includes no explicit language about choice of law is simply one of those quirks of the development of the language of arbitration. It is a quirk that cannot be ignored.

Because the choice of the seat of arbitration is the choice of the arbitration law of the state in which that seat is located, that choice brings with it many consequences. One of these consequences is the first step in

determining the availability of provisional measures, both from the arbitral tribunal and from the courts. As the discussion above indicates, states with arbitration law based on the UNCITRAL Model Law, if they include the 2006 amendments, will provide a legal framework that both grants the arbitral tribunal the ability to issue provisional measures and recognizes the ability of courts to grant such measures in aid of arbitration. This makes important more than just the arbitration law of the state that is the seat of arbitration, however, as the rules governing what courts may do to support arbitration with provisional measures may be found in, and may borrow from, the rules of civil procedure that are available for similar purposes in judicial proceedings.

This leads to the following rules that can apply to choice of the seat of arbitration when acting on a desire to be properly prepared for the use of provisional measures:

- 1) *Always remember that choice of seat is choice of law. Do not use language that can be ambiguous and thus interpreted to determine venue rather than applicable arbitration law.*<sup>96</sup>
- 2) *Select a seat in which the arbitration law clearly authorizes the arbitral tribunal to grant provisional measures.*<sup>97</sup>
- 3) *Select a seat in which the combination of arbitration law and civil procedure clearly authorizes the courts to order provisional measures in aid of arbitration.*<sup>98</sup>
- 4) *Select a seat that is a Contracting State to the New York Convention.*<sup>99</sup>

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<sup>96</sup> Avoid language such as “The arbitration shall be held at X.” While some instruments use the term “place of arbitration,” the term “seat” is necessarily more specific and probably the better term to use.

<sup>97</sup> Note that, as discussed above, the choice of the United Kingdom as the seat of arbitration should be accompanied either by explicit language in the arbitration agreement that the arbitral tribunal is authorized to grant provisional measures or by the clear selection of institutional arbitration rules that grant such authority. *See supra* note 24 and accompanying text.

<sup>98</sup> Keep in mind that some states, like those in the United States which have enacted the Revised Uniform Arbitration Act, may limit the extent of judicial assistance through provisional measures once the arbitral tribunal is appointed. *See supra* notes 68-70 and accompanying text.



**B. Choice of the Institutional Rules to Apply**

The choice of institutional rules to govern arbitration serves as a simple shorthand by which many matters are determined through the process of incorporation by reference of those rules. Thus, matters clearly dealt with in the chosen institutional rules need not, and – to avoid confusion – probably should not, be separately stated in the arbitration agreement. This leads to the following rules on choice of institutional arbitration rules, which can be added to the rules already stated:

- 5) *Select institutional rules that clearly authorize the arbitral tribunal to grant provisional measures.*
- 6) *Select institutional rules that do not inhibit the ability to seek provisional measures from a court, either at the seat or in another state.*
- 7) *Consider whether the institutional rules selected require any further language in the arbitration agreement in order to authorize the availability of provisional measures, or to ensure that such measures are available both from the arbitral tribunal and the courts.*

**C. Choosing to Facilitate Global Enforcement of Provisional Measures**

Provisional measures are often used to ensure that assets of the other party remain available and in a location where award enforcement is possible once the arbitration is complete. This makes the question of the grant of measures necessarily tied to the question of effective enforcement of such measures. If provisional measures are available from both the

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<sup>99</sup> Article I(3) of the New York Convention provides that “any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.” Seating arbitration in a New York Convention Contracting State will ensure the circulation of any award, even among States that have made this available declaration.

arbitral tribunal and from the courts, then one must determine which is the better forum in which to seek such measures. This is not a question that is easily answered when an arbitration clause is first drafted, and may remain difficult even once arbitration has commenced.

The advantage of obtaining provisional measures from an arbitral tribunal is that, to the extent the *lex arbitri* and the institutional rules indicate that the measures come in an “award” for purposes of the New York Convention, those measures may circulate through recognition and enforcement consistent with Articles III and V of the Convention. Thus, drafting to have clear authority for the award of provisional measures by the tribunal facilitates the enforcement of those measures when and where assets are found. It does, however, require that the law of the location of enforcement be compatible with such enforcement in a manner that makes the tribunal’s measures effective. Given the ease of transfer of access in today’s global digital environment, this creates some unpredictability at the contract drafting stage.

Historically, judicial attachments and injunctions operate only within the territory in which the court granting them has jurisdiction. This is a natural result of territorial limitations on sovereignty. Thus, judicial grants of provisional measures tend to travel well only within the state in which they are issued. This makes judicially-ordered provisional measures in aid of arbitration in the form of attachments and injunctions perhaps less valuable than similar measures awarded by an arbitral tribunal. On the other hand, if the assets necessary to execution on such a measure are located in the state of the court issuing the measure, it is easier to go directly from the order to its enforcement. Arbitral tribunals do not have power to enforce their own measures in most instances, meaning that provisional measures ordered by a tribunal will require recourse to a court for purposes of enforcement. Thus, maximum efficiency comes from court-ordered provisional measures that can be enforced in the same court that ordered them.

If assets are likely to be either in a state other than that of the court ordering provisional measures, or globally dispersed, then at first glance, a provisional measure ordered by an arbitral tribunal may appear to be best suited to travel. Again, this is a result of tradition of territorial limitations on the effectiveness of judicial decisions. Modern cases have, however, recognized modern conditions. Nowhere is this clearer than in the United Kingdom, where what traditionally were known as Mareva Injunctions and Anton Pillar Orders now go under the rubric of a “freezing order,” available

under § 37 of the Supreme Court Act 1981.<sup>100</sup> Such orders issued *ex parte* prior to filing a case, and are considered to be global injunctions, effective on the target's assets worldwide. While the U.S. Supreme Court has stated that U.S. courts cannot issue such injunctions,<sup>101</sup> U.K. courts have expanded their value by ruling that they are available in aid of arbitration when combined with the authority granted under § 44 of the Arbitration Act 1996, and are effective even for arbitration seated outside the United Kingdom.<sup>102</sup> Thus, for arbitration seated in the United Kingdom, and possibly for cases seated elsewhere, the U.K. courts may be possible

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<sup>100</sup> I have described this development elsewhere as follows:

A Mareva injunction is an order, sometimes granted *ex parte*, temporarily freezing assets which may be required to satisfy a judgment or expected judgment in order to prevent the dissipation of assets or their removal from the jurisdiction during the pendency of the case. *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, [1975] 1 W.L.R. 1093 (C.A.). The authority for the Mareva injunction is now found in statute at § 37(1) of the Supreme Court Act 1981. This procedural mechanism allows a plaintiff to secure its claim against the assets of a defendant even before a writ is issued, where there is an undertaking to issue it forthwith. It is available to secure assets prior to arbitration as well as prior to or concurrent with litigation.

The Anton Piller order may also be issued *ex parte*. It is a form of discovery, amounting almost to a civil search warrant, whereby the plaintiff or intended plaintiff may search for articles which are subject to litigation or for evidence, and if such are found, inspect the articles and remove them to the safekeeping of a solicitor or the Court. Although the order was first used in intellectual property actions, in the form of an injunction requiring the defendants to permit the plaintiffs to enter on the defendant's premises to inspect all documents relating to the plaintiff's designs for certain machines, it is now available for "the search for and seizure of evidential material which is relevant to any action or proposed action."

RONALD A. BRAND, *INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS* 342-43 (2d ed. Wolters Kluwer, 2019).

<sup>101</sup> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

<sup>102</sup> *See, e.g., Mobil Cerro Negro Limited v Petroleos de Venezuela SA* [2008] EWHC 532.

sources of provisional measures that purport to have effect on a global basis.

The possibility that a court might be the most desirable forum from which to seek a provisional measure because it will also be able to enforce that measure in the state in which it sits leads to possible contract drafting that goes beyond the normal arbitration clause list of factors. It also raises the possibility of combining both arbitration and judicial forum-related rules in the clause. Thus, while one would normally only think of consent to judicial jurisdiction when drafting a choice of court clause, and not an arbitration clause, it may well be good planning to have consent to jurisdiction explicitly expressed in an arbitration agreement for purposes of (a) bringing judicial proceedings after arbitration to confirm (in the seat) or recognize and enforce (in another state) the resulting award, and (2) bringing judicial actions for the purpose of obtaining and enforcing court-ordered provisional measures. For example, if Party A from State A, and Party B from State B, have chosen arbitration seated in State C, and Party A has significant assets in States B, D, and F, Party B may benefit significantly from a provision by which Party A consents to jurisdiction either in those specific States, or generally in the courts of any state in which Party A may have (or be able to move) assets.

If such a consent to jurisdiction of courts for the purpose of ordering provisional measures and recognizing and enforcing both provisional and final awards is obtained, it is then advisable as well to facilitate service of process as easily as possible, and in a manner that avoids the need for transmission of documents for service abroad under the Hague Service Convention, which can significantly delay the proceedings necessary to make the award effective.<sup>103</sup>

The discussion in this section leads to the following rules we may add to our list:

- 8) *Be aware of the locations in which assets may be found on which a provisional measure may be desired to have effect. You may***

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<sup>103</sup> While it is beyond the scope of this discussion, a case in which arbitration was followed by both jurisdiction and service concerns of the nature described here (with clear lessons for better drafting of arbitration agreements) is *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.*, 9 Cal.5th 125460 P.3d 764 (2020).

*want to seat arbitration in a state in which the courts are more likely to grant measures considered to have global effect.*

- 9) *Consider including language by which the parties consent to jurisdiction in the courts of states in which it may become useful to seek provisional measures and their enforcement, whether ordered by a court or an arbitral tribunal.*
- 10) *Consider including consent to local service of process on an authorized agent for such purposes in states in which it may become useful to seek provisional measures and their enforcement, whether ordered by a court or an arbitral tribunal.*

## V. CONCLUSION

Provisional measures in, and in aid of, arbitration can be extremely important in making certain that an agreement to arbitrate leads to results that give effect to a successful award. The ability to obtain and enforce such measures will depend on how a party makes effective use of the New York Convention, the *lex arbitri*, the institutional rules, and – most importantly – the terms of the arbitration agreement. Modern arbitration laws and institutional rules are designed to make available provisional measures granted by the arbitral tribunal. In most states, courts may also grant provisional measures in aid of arbitration, sometimes even if that arbitration is seated in another state. Making good use of the available arbitration instruments, and of the courts, however, requires a proper understanding of the opportunities they provide. It also requires that arbitration agreements be carefully drafted in order to maximize the benefits of the provisional measures that the basic arbitration instruments and courts make available.