

Journal of Law & Commerce

Vol. 41, No. 2 (2023) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2023.257 • <http://jlc.law.pitt.edu>

COURT-ORDERED INTERIM MEASURES IN INTERNATIONAL ARBITRATION: A COMPARATIVE APPROACH

Ilias Bantekas and Ikram Ullah



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.

Pitt | Open
Library
Publishing

This journal is published by [Pitt Open Library Publishing](http://pittopenlibrarypublishing.com).

COURT-ORDERED INTERIM MEASURES IN INTERNATIONAL
ARBITRATION: A COMPARATIVE APPROACH

Ilias Bantekas and Ikram Ullah***

ABSTRACT

This paper argues that there is a distinct cross-border law concerning court-ordered interim measures in aid of international arbitration, which is made up of two key (intertwined) sources, namely: the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration and supporting case law and legislation in both Model Law states and non-Model Law states. The principles identified in this paper are assumed to qualify as general principles of law. In order for a court at the seat to grant interim relief in international arbitral proceedings the requesting party must demonstrate a *prima facie* case worthy of consideration, the likelihood of irreparable harm and a balance of inconvenience. There is at present no general consensus as to *ex parte* interim measures, with many states and national courts showing significant reluctance to grant these on account of the absence of procedural guarantees that they entail. In equal measure, in the absence of bilateral or multilateral treaties that allow national courts to recognize and enforce foreign interim measures in respect of arbitral proceedings seated abroad, states are equally reluctant to allow parties seated in other jurisdictions to approach their courts for interim relief on the ground that the other party has assets or interests there. Although the courts of some powerful nations allow for such requests, there is no general rule in this regard, and none is expected in the near future.

* Professor of Law, Hamad bin Khalifa University (Qatar Foundation), College of Law and Adjunct Professor, Georgetown University, Edmund A. Walsh, School of Foreign Service.

** Assistant Professor of Law, International Islamic University, Islamabad, Pakistan.

I. INTRODUCTION

On 13 June, 2022, in *ZF Auto. U.S. v. Luxshare, Ltd. and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*,¹ the U.S. Supreme Court decided whether 28 U.S.C. § 1782 can be used to obtain information and documents in aid of private international arbitrations conducted overseas. Sadly for the international arbitration community, it held that U.S. federal law provides little to no authority for federal courts to order discovery arising from requests by parties to arbitral proceedings abroad. Although requests to foreign courts are only of indirect interest in this Article, this judgment exemplifies that absence of perfect synergy between national courts in aid of international arbitration, for which there is otherwise near-perfect global synergy and consensus. Arbitral tribunals are dependent on the courts, of the seat (or other) in order to resolve certain procedural disputes over which they have no discretionary powers or authority.² However, one should not go as far as argue that tribunals are subservient to the courts. The authority of the courts extends only to those issues of the arbitral process that are either outside the scope of the parties' agreement (e.g., third party disclosure) or which are covered by a public policy rule (e.g., absence of equal treatment). This conclusion is further justified by the prohibition of appeals against arbitral awards. There are two (key) reasons for this compulsory relationship between tribunals and the courts. The first ensures for all persons the right to a fair trial and the maintenance of public policy rules. If the courts were unable to appoint a chairman, impose interim measures or assess procedural irregularities the arbitral process may never culminate in an award, or worse still, the stronger party has every incentive to manipulate its weaker counterpart. The second reason is that because the authority of the tribunal is contractual in nature it extends only to those persons that have granted it relevant authority under contract.³ As a result, third parties, such as experts, witnesses, persons in possession of assets or evidence of relevance to the

¹ *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

² See Markham Ball, *The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration*, 22 *ARB. INT.* 73 (2006).

³ Exceptionally, the Luxembourg Court of Appeals has gone so far as to hold that if the arbitration clause stipulated that all disputes arising from the contract are to be resolved by arbitration, then the parties may not order interim measures from the courts as this is beyond what the parties agreed. Court of Appeals judgment, Oct. 21, 2009, [2010] *Journal des Tribunaux Luxembourg* 72.

arbitral proceedings, are under no contractual obligation to adhere to an order of the tribunal, even if their participation in the proceedings is deemed crucial. Moreover, such persons may have no incentive to cooperate with the tribunal. If the *lex arbitri* did not empower the courts to assist the tribunal by addressing binding orders to third parties (where appropriate), the right to fair trial of the original parties would be severely jeopardized.⁴ Furthermore, an order of the tribunal on the parties themselves (e.g. to produce evidence) is only binding as a matter of contract (based on their agreement to adhere to institutional rules which permit the tribunal to issue an order).

Once the tribunal has been constituted, the role of the courts is to ensure against the eventuality of *non liquet* (i.e. that a dispute may not be conclusively resolved because of the absence of a sufficient body of substantive rules), eliminate dead ends which effectively terminate proceedings (e.g. disagreement over substitute arbitrator), as well as safeguard vital interests of the parties (through interim measures) so that these may be available during and at the end of proceedings. It is instructive, although by no means effective or practical, that certain legal systems aspiring to be arbitration-friendly prohibit recourse to the courts once the tribunal has been constituted. The Slovak Supreme Court, for example, has affirmed that upon commencement of arbitral proceedings the courts have no authority to issue interim measures (as opposed to enforcing an interim measure ordered by a tribunal).⁵ Equally, in accordance with Article 1506(1) of the French Code of Civil Procedure (CCP), which provides that the parties may seek interim measures from the courts in international arbitration prior to the constitution of the tribunal, it is implicit that once the tribunal has been constituted any interim remedies can only be sought by the tribunal itself.⁶

An interim measure issued by the courts must necessarily conform to an action that already exists under the *lex arbitri*.⁷ Advanced legal systems will provide for a range of possible actions established under statute or judge-

⁴ See Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 I.C.L.Q. 991 (2020).

⁵ Ruling of the Slovak Supreme Court, June 12, 2013, File no. 5, 24/2013.

⁶ See also *Sociétés Elf Aquitaine and Total v MX and others*, Supreme Cassation Court judgment (12 Oct. 2011), [2012] 1 Rev Crit DIP 121.

⁷ See A. Tsang, *Transnational Rules on Interim Measures in International Courts and Arbitrations*, INT. ALR. 35 (2011); S.M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENTS INT'L TRADE L.J. 55 (2003).

made law. Some national statutes stipulate that if a particular action does not exist the courts may adapt existing actions to the parties' request if by doing so they do not violate the *lex arbitri*. One of the obvious problems with requesting interim measures from the tribunal is that the request itself offers an opportunity to the other party to dissipate its assets or otherwise dispose of the evidence in its possession. In order to mitigate against this eventuality, Article 17B of the Model Law provides for the possibility of preliminary orders, whereby the tribunal is authorized to grant interim measures without notice to the other party. Preliminary orders are tantamount to *ex parte* applications before national courts and given the limited authority of arbitral tribunals in respect of interim measures it is natural that the parties will prefer to apply *ex parte* to the courts rather than rely on tribunals' preliminary orders.⁸ This conclusion is further justified by the fact that interim measures imposed by tribunals affect only the parties to arbitration and hence have no legal consequences with respect to third parties.

Interim measures granted by arbitral tribunals entail significant enforcement limitations, chiefly because their orders are not binding upon third parties,⁹ whereas the requesting party may desire an enforceable (*erga omnes*) instrument for use in the seat as well as abroad. Several domestic laws, such as Article 11(3) of the Spanish Arbitration Act (AA), allow the parties to seek interim measures from the courts either before or during arbitral proceedings.¹⁰ Another option is to empower tribunals to render interim measures in the form of awards, although this is certainly unusual in developed arbitral jurisdictions.¹¹ In this manner the requesting party need not seek court assistance given that the award (on interim measures) is enforceable as such. The OLG Frankfurt has held that interim relief is in

⁸ See H. Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 ARB. INT. 85 (2004) (noting *ex parte* interim measures in support of arbitration are rare and difficult to achieve).

⁹ See the pre-1998 version of the German ZPO, § 1036; in Germany, there was little, if any chance, of interim relief in the pre-1998 regime. See also J. SCHÄFER, *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 226, 228 (K. Böckstiegel, S.M. Kröll & P. Nacimiento eds., 2d ed. Kluwer 2015).

¹⁰ Under the Arbitration Act, art. 23, (B.O.E. 2003, 60) (Spain) interim measures granted by the arbitral tribunal shall be subject to setting aside and enforcement proceedings regardless of the form of those measures.

¹¹ In French law, for example, decisions on interlocutory issues and generally all those that do not terminate the procedure are not afforded the status of awards. See *Société Crédirente v Compagnie Générale de Garantie*, Paris Court of Appeals judgment (29 Nov. 2007), [2009] *Rev Arb* 741.

exceptional circumstances possible even when an award has been rendered (assuming that the challenging party is lawfully pursuing set-aside proceedings), but the claim for relief cannot be tantamount to suspending the application of the terms of the award.¹²

Exceptionally, local courts may be empowered to assist arbitral proceedings seated abroad by ordering that certain actions be undertaken within their jurisdiction. By way of illustration, Belgian courts enjoy authority under the country's 2013 Arbitration Law in respect of certain suits and actions linked to arbitrations seated abroad, namely: with respect to the validity of arbitration agreements;¹³ adoption of provisional or conservatory measures;¹⁴ taking of evidence¹⁵ and recognition and enforcement of provisional or conservatory measures ordered by a tribunal (seated abroad).¹⁶ It is equally possible for the courts of the seat to be requested to issue certain world-wide orders, such as Mareva injunctions (essentially interim freezing orders),¹⁷ but their success will depend on the existence of bilateral or multilateral agreements for the enforcement of civil judgments.

This Article examines the authority of the courts to order interim measures in support of local, as well as (although less so) foreign¹⁸ international arbitral proceedings. As a result, it is beyond the scope of this Article to assess the authority and practice of interim relief by tribunals, whether following the tribunal's constitution,¹⁹ or prior to that.²⁰ In doing so, we are in search of general principles on the basis of the case law and practice

¹² Oberlandesgericht [OLGZ] [Higher Regional Court] June 13, 2013, SchH 6/13, judgment (Ger.).

¹³ C.JUD. (Belg.), art. 1676.

¹⁴ *Id.* art. 1696.

¹⁵ *Id.*

¹⁶ *Id.* art. 1709.

¹⁷ The Supreme Court of Cyprus, for example, has shown a distinct inclination in the use of such orders in order to assist arbitrations seated there. *See* *Seamark Consultancy Services Ltd v Joseph Lasala and Others*, 1A AAD 162 (2007).

¹⁸ *See* V.V. Veeder, *The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process*, in *NEW HORIZONS INT'L COM. ARB. AND BEYOND* 237, 241 (Albert Jan van den Berg ed., 2005).

¹⁹ *See* L.A. Tucker, *Interim Measures Under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects Both Greater Flexibility and Remaining Uncertainty*, 1 *INT'L COM. ARB. BRIEF* 15, 15 (2011); P.J.W. Sherwin & D.C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 *AM. REV. INT'L ARB.* 317 (2009).

²⁰ *See* E. Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 *LOY. U. CHI. INT'L L. REV.* 105 (2012).

that has been accumulated over the course of the past forty years,²¹ although our focus will be on the revised UNCITRAL Model Law on International Commercial Arbitration and Articles 17 and 17J. Article 17 sets out the criteria which the courts must follow for making such an order, but Article 17J extends this authority of the courts to arbitrations set elsewhere. It reads as follows:

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.²²

Both Articles 17 and 17J of the Model Law express, in the opinion of the authors, the current trend in respect of the authority of courts to order interim measures arising from international arbitral proceedings. It is important, therefore, to examine international practice, both judicial and legislative, that seeks to implement these provisions directly (e.g., as concerns Model Law member states), as well as indirectly (in relation to non-member states).²³

II. COURT-ORDERED MEASURES IN THE UNCITRAL MODEL LAW

Although the Model Law has, through Article 9, settled that the application for interim measures is not incompatible with the arbitration agreement, it does not expressly stipulate whether the forum court enjoys the power to issue interim measures.²⁴ Therefore, it was thought that the mere

²¹ See C.C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519 (1991); D.R. Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. 579 (2010).

²² United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

²³ S. Menon & E. Chao, *Reforming the Model Law Provisions on Interim Measures of Protection*, 2 ASIAN INT'L ARB. J. 13 (2006).

²⁴ U.N. Secretariat, *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection*, Note by the Secretariat, ¶ 75, Comm. on Int'l Trade Law, U.N. DOC. A/CN.9/WG.II/WP.119 (Jan. 30, 2002); U.N. Secretary General, Comm. on Int'l Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, Report of the Secretary General, ¶¶ 1–5, Comm. on Int'l Trade Law, U.N. DOC. A/CN.9/264 (Mar. 24, 1985).

adoption by some regimes of Article 9 may not be sufficient, in and of itself, to establish the power of the courts to issue interim measures,²⁵ which in turn gave rise to the need for the formulation of a provision such as Article 17J in the 2006 amendments to the Model Law. While drafting the Model Law, deliberations over a provision regarding the court's power to issue interim measures started with an important question as to whether the procedure to be followed by the court while deciding on an application for interim relief should be laid down in the Model Law.²⁶ Apart from the expression of compatibility element, it was also agreed that other elements, such as the type and range of interim measures, should not be included in the provision as they form an integral part of the domestic legal regime of Model Law states.²⁷ Hence, from the very beginning, there was a degree of consensus whereby the details of the range and scope of interim measures were left to the law of each state and in accordance with established practice.

The rationale militating against the incorporation of a detailed list of procedural rules and measures in the 2006 version of the Model Law may be traced to a proposal put forward by the International Chamber of Commerce (ICC) during the negotiating rounds. It proposed that there is a need to harmonize the law on arbitration across the globe and that the Model Law should ensure the implementation of fundamental principles of justice, i.e., due process, fairness and equality. This notwithstanding, there was significant divergence among States as to the precise scope of available measures and it was felt that instead of formulating detailed rules for the purpose of precision and certainty by altering the concepts in vogue in those regimes, this task should be left to each State by freely adopting a common denominator. The reason for the approach suggested by the ICC was that the solutions rendered by the Model Law, which are considered foreign by the

²⁵ U.N. Doc. A/CN.9/WG.II/WP.119, *supra* note 24, at ¶ 75.

²⁶ U.N. Secretariat, *Possible Features of a Model Law on International Commercial Arbitration: Questions for Discussion by the Working Group*, Working Paper Submitted to the Working Group on Int'l Contract Practices at its Third Session (New York, Feb. 16–20, 1982), ¶ 25, U.N. Doc. A/CN.9/WG.II/WP.35 (Dec. 1, 1981).

²⁷ Report of the Working Group on International Contract Practices on the Work of Its Third Session, ¶ 69, Comm. on Int'l Trade Law, U.N. Doc. A/CN.9/216 (Mar. 23, 1982).

receiving states, might not ultimately be accepted and hence be counterproductive.²⁸

The formulation of uniform and detailed rules as to the powers of court was again considered in the Working Group meetings held for the 2006 amendments.²⁹ As a matter of fact, it was observed that the various aspects of interim measures were treated in different ways in the variety of domestic legal systems by means of different types of classification. In international arbitration specifically, the parties while applying to the foreign courts for interim measures are compelled to fulfil conditions with which they are unfamiliar.³⁰ The other point is that the provisions dealing with the court's power to grant interim measures were absent in the legislation of a number of jurisdictions, which led to the reluctance or unwillingness of certain courts to grant the interim remedy sought. This unwillingness was the result of an absence of similar provisions empowering the courts of particular states to issue interim measures. Moreover, there was considerable uncertainty as to "whether and under what circumstances such court assistance was available."³¹ Hence, the conclusion was that the involvement of courts on matters pertaining to interim relief in support of arbitration varies from country to country. For that reason, it has become more difficult to predict the degree to which a court may be willing to intervene.³² Therefore, initially, it was proposed that there should be uniform rules as to the situations wherein a party to arbitration may apply for judicial interim measures.³³ However, this option was not universally supported by the Working Group.

Although there was consensus in favor of an article making express reference to the empowerment of domestic courts to issue interim measures, which was subsequently reflected in the final version of Article 17J, there

²⁸ U.N. Secretary General, *Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration*, ¶ 2, Comm. on Int'l Trade Law, U.N. Doc. A/CN.9/263/Add.1 (Apr. 15, 1985).

²⁹ U.N. Doc. A/CN.9/WG.II/WP.111, *supra* note 24, at ¶ 9.

³⁰ U.N. Secretary General, *International Commercial Arbitration Possible Future Work: Court-Ordered Interim Measures of Protection in Support of Arbitration, Scope of Interim Measures that May Be Issued by Arbitral Tribunals, Validity of the Agreement to Arbitrate*, ¶ 7, U.N. Doc. A/CN.9/WG.II/WP.111 (Oct. 12, 2000).

³¹ Report of the Working Group on Arbitration on the Work of Its Thirty-Second Session, ¶ 86, Comm. on Int'l Trade Law, U.N. Doc. A/CN.9/468 (Apr. 10, 2000).

³² U.N. Doc. A/CN.9/WG.II/WP.111, *supra* note 24, at ¶ 9.

³³ U.N. Doc. A/CN.9/WG.II/WP.111, *supra* note 24, at ¶ 2.

was a difference of opinion on the standards and criteria to be used by the courts in issuing interim measures. As a result, two variants on the powers of local courts were deliberated. One view (first variant) was that the court should bring into use the procedures and standards laid down in the forum's procedural laws. The alternative view (second variant) was that the court should exercise its power "in accordance with the requirements set out under Article 17."³⁴ However, the general view tilted in favor of the first variant and towards the application by the court of its own procedural standards on the basis that this solution "would have to provide flexibility for the court to adapt to the specific features of international arbitration."³⁵

III. CONDITIONS TO BE FULFILLED IN ORDER TO SECURE INTERIM MEASURES FROM THE COURT

Like any other remedy, the applicant has to fulfil certain conditions before the court to secure the relief of interim measures. Jurisdictions the globe over do not diverge on these conditions intensely; however, some apply them as a three-phased test, whereas others employ them as a two-phased test by combining the second and third phases into one. The conditions to be fulfilled to secure the requested interim measures from the court depend on the kinds of interim measures being sought. In general terms, a three-stage test is adopted by the courts while determining the merits of an application for interim relief. First, the merits of the case will be assessed as a preliminary matter in order to ensure that there is a *prima facie* case or a serious question to be decided. Second, the court must determine whether the refusal to grant the interim relief will result in irreparable injury to the applicant. Finally, on

³⁴ Report of the Working Group on Arbitration on the Work of Its Thirty-Eighth Session, ¶¶ 76–77, U.N. DOC. A/CN.9/524 (June 2, 2003). *See also* U.N. DOC. A/CN.9/468, *supra* note 24, at ¶¶ 85–87; Settlement of Commercial Disputes Preparation of Uniform Provisions on Interim Measures of Protection: Note by the Secretariat, ¶¶ 19, 67, 77–79 U.N. DOC. A/CN.9/WG.II/WP.119 (Jan. 30, 2002); Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Second Session, ¶ 91, U.N. DOC. A/CN.9/573 (Jan. 27, 2005).

³⁵ U.N. DOC. A/CN.9/524, *supra* note 24. *See also* U.N. Doc. A/CN.9/468, *supra* note 24; U.N. DOC. A/CN.9/WG.II/WP.119, *supra* note 24; U.N. DOC. A/CN.9/WG.II/WP.119, *supra* note 24; U.N. DOC. A/CN.9/573, *supra* note 24.

a balance of the two, the court should come to a conclusion as to whether there is merit or a balance of convenience in granting the interim relief.³⁶

The jurisdictions which have converted the three-stage test into a two-pronged alternative accumulate the second and third prongs under the single heading of “balance of convenience.”³⁷ For instance, in order to consider the infliction of irreparable harm, a Canadian court has held that the issue of irreparable harm, and hence the adequacy of damages as a remedy for the parties, is very closely connected to the balance of convenience.³⁸

The variants of these tests have also been applied in different jurisdictions. In Germany, the court will grant interim relief if the applicant convinces the court that he or she is more likely to secure a judgment on the merits pertaining to the monetary or non-monetary claims and that if the interim relief to maintain the status quo is not granted, the enforcement of the judgment to realize such claim would become either difficult or impossible.³⁹ Hence, the plaintiff has only to demonstrate a greater likelihood of a judgment in his or her favor to the exclusion of proof under the two tests. Nevertheless, without disagreeing with the varied employment of these tests, what follows is an analysis of the three-staged test.

IV. MAKING A PRIMA FACIE CASE

As a first test, the applicant has to prove the existence of a *prima facie* case. In this regard, it is worth exploring, which this segment does, how far the applicant should go to prove a *prima facie* case to be entitled to this relief and also how far a court should go into the case before it decides the issuance

³⁶ For Canada, see *RJR MacDonald, Inc. v. Canada (Att’y Gen.)*, [1994] 1 S.C.R. 311; *Manitoba (Att’y Gen.) v. Metro. Stores (MTS), Ltd.*, [1987] 1 S.C.R. 110. For Ireland, see *Osmond Ireland on Farm Bus. v. McFarland* [2010] IEHC 295; *Campus Oil, Ltd. v. Minister for Industry and Energy (No. 2)* [1983] IR 88. For New Zealand, see *Klissers Farmhouse Bakeries, Ltd. v. Harvest Bakeries, Ltd.* [1985] 2 NZLR 143; *Safe Kids in Daily Supervision, Ltd. v. McNeill* [2012] 1 NZLR 714. For India, see *Embassy Prop. Devs. v. Jumbo World Holdings, Ltd.* (2013) (Madras HC); *House Prods. Pvt., Ltd. v. Meediya Plus* (2005) 2 MLJ 256; *Adhunik Steels, Ltd. v. Orissa Manganese and Minerals Pvt., Ltd.* (2007) AIR SC 2563; *Aravind Constr. v. Kalinga Mineral Corp.* (2007) 6 SCC 798.

³⁷ See *RJR MacDonald*, *supra* note 36, para. 48; *British Columbia (Att’y Gen.) v. Wale*, (1986), 9 B.C.L.R. (2d) 333 at 345, *aff’d* (1991); *Mercer Gold Corp. (Nev.) v. Mercer Gold Corp. (BC)*, 2011 CanLII 1664 (B.C. Sup. Ct.) (Can.).

³⁸ *Roxul (West), Inc. v. 445162 BC, Ltd.*, 2001 CanLII 362 (B.C.C.A.) (Can.).

³⁹ *Zivilprozessordnung [ZPO]* [Code of Civil Procedure], §§ 916, 917, 935 (Ger.).

of interim measures. Prior to the verdict of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*,⁴⁰ a plaintiff in Canada, in order to comply with the first test, was mandated to demonstrate a “strong *prima facie* case” as to the merits. However, this judgment held that the requirement to establish the *prima facie* case need not be “strong.” In order to make a *prima facie* case, in the words of Lord Diplock, the plaintiff only has to satisfy the court that “the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.”⁴¹ Since then, Canadian courts have usually gone on to apply the *American Cyanamid* standard.

Even so, the *American Cyanamid* test may not be suitable (or sufficient) in all situations. For instance, with respect to Mareva injunctions, the applicant must prove, *inter alia*, a strong *prima facie* case.⁴² Similarly, in *Innovative Marketing Inc. v. D’Souza*,⁴³ a Canadian court established that a worldwide Mareva injunction will be granted if the applicant is successful in proving a strong *prima facie* case on the merits⁴⁴ and a real risk of dissipation of assets by the defendants.⁴⁵ A New Zealand court has held that the “strong arguable case” test for freezing orders or for service out of jurisdiction is different from the test concerning interim injunctions because the adjective “strong” creates a higher threshold.⁴⁶

Similarly, Lord Diplock’s statement in *American Cyanamid* that the absence of frivolousness and vexatiousness in the claim of the plaintiff will mean that there is a serious question to be tried has been largely rejected in Australia, where it was held that “the governing consideration is that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory orders sought.”⁴⁷ For an interlocutory relief to be

⁴⁰ See *American Cyanamid Co. v. Ethicon, Ltd.*, [1975] A.C. 396, 407 (Can.).

⁴¹ See *American Cyanamid Co. v. Ethicon, Ltd.*, [1975] A.C. 396, 407 (Can.).

⁴² *Chitel v. Rothbart*, 1982 CanLII 1956 (Can. Ont. C.A.). In the same case, a Mareva injunction was explained as it “ties up the assets of the defendant, specific or general, pending any judgment adverse to the defendant so that they would then be available for execution in satisfaction of that judgment. It is certainly ordering security before judgment.”

⁴³ *Innovative Mktg., Inc. v. D’Souza*, 2007 CanLII 5529 (Can. Ont. S.C.).

⁴⁴ *Chitel*, *supra* note 42.

⁴⁵ *Fed. Bank of the Middle East v. Hadkinson*, [2000] 2 All ER 395 (Can. U.K.C.A.).

⁴⁶ See *Safe Kids*, *supra* note 36.

⁴⁷ *Port Coogee No. 790 Pty, Ltd v Coastal Dev Mgmt Pty, Ltd* [2014] WASC 400 (Austl.). See also *Beecham Group, Ltd v Bristol Lab’ys Pty, Ltd* (1968) 118 CLR 618 (Austl.); *Australian Broad Co v*

secured from the court, there must be an identification of legal or equitable rights which a final remedy is sought. If the applicant cannot make such identification, the foundation of the interim relief will disappear.⁴⁸ The extent to which the court will need to consider the legal merits of the plaintiff's claim for final relief, in deciding whether to impart interim relief, will depend on the facts of each case. Hence, there is no hard and fast rule.⁴⁹

Whatever the standards by which to evaluate the existence of a *prima facie* case, the general view is that the threshold of "a serious question to be tried" is a low one, determined by a judge through a preliminary assessment of the merits of the case without making a prolonged examination thereof.⁵⁰ In Ireland and Canada, the existence of a fair bona fide question has not been perceived as a matter requiring examination of facts or law and should be reserved for trial.⁵¹ An Irish court went further by saying that there is no need for the plaintiff to prove his likelihood of success on the merits, for he only needs to demonstrate the existence of a fair bona fide question.⁵² Hence, the likelihood of success does not require proof of the existence of a serious question to be tried. For instance, leave granted by an appellate forum on the merits indicates the involvement of a serious issue. However, the refusal to grant such leave in a case that involves the same issues will not be tantamount to the absence of a serious question. After having satisfied the ingredients of the first prong of the test, the court should move to consider the second prong.⁵³

O'Neill (2006) 227 CLR 55, 65–71 (Austl.); *Public Service Ass'n & Pro Officers' Ass'n Amalgamated Union of New South Wales and State of New South Wales, Dir Gen of the Dep't of Premier and Cabinet* [2013] NSWIR Comm. 4 (Austl.). For the Indian approach, which is similar to that of Australia, see *Techmo Car Spa v. Madras Aluminium Co.*, (2004) 2 ARBLR 284 (India).

⁴⁸ *Samsung Elecs Co v Apple Inc* (2011) 217 FCR 238, 254–62 (Austl.); see also *SZTYO v Minister for Immigr and Border Prot* [2015] FCA 30 (Austl.).

⁴⁹ *Samsung*, *supra* note 48, at 256–62; see also *Buller v. Murray Grey Beef Cattle Soc'y Ltd* [2014] FCA 1127 (Austl.).

⁵⁰ *RJR MacDonald*, *supra* note 36.

⁵¹ *Osmond Ireland*, *supra* note 36. For Ireland, see *Kinsella v. Wallace* [2013] IEHC 112. For Canada, see *RJR MacDonald*, *supra* note 36.

⁵² *Crossplan Invs., Ltd. v. McCann* [2013] IEHC 205 (Ir.); *RJR MacDonald*, *supra* note 36; *Manitoba*, *supra* note 36.

⁵³ *Crossplan Invs.*, *supra* note 52.

V. IRREPARABLE HARM

After having proved the existence of a *prima facie* case, at the second stage, the court will ascertain if the harm to be inflicted on an applicant by the refusal to issue an interim measure will be irreparable. In other words, the court will only determine if the harm incurred by the plaintiff with the refusal of the interim measure will not be remedied by the decision on the merits in his favor,⁵⁴ since damages would not constitute an adequate remedy. A Canadian court elaborated on the term “irreparable” by stipulating that it “refers to the nature of the harm suffered rather than its magnitude.” Harm would be irreparable if it cannot be quantified in monetary terms or cured because in the event of a favorable decision the plaintiff will not be able to collect damages from the defendant. This may be the case, for instance, because the court’s judgment will put a party out of business,⁵⁵ because a party undergoes market loss of a permanent nature or irrevocable harm to its business reputation,⁵⁶ or because the refusal to issue an injunction against particular conduct will result in the permanent loss of natural resources.⁵⁷ However, the impecuniosity of the defendant will not automatically entitle the plaintiff to seek interim relief from the court on the ground that the plaintiff will not subsequently be able to collect damages from the defendant.⁵⁸

In an Irish case, *Osmond Ireland v. McFarland*,⁵⁹ as to the second ground, it was held that impossibility instead of difficulty of assessment of loss should be a basis for characterizing the granting of damages as an inadequate remedy.⁶⁰ In *Curust*, the plaintiff sought an injunction to restrain the first defendant from granting the second defendant the manufacturing, sale and distribution rights over particular products, including rust primer paint, in the territory of Ireland and the United Kingdom. Such a remedy was sought on the grounds, *inter alia*, that under a contract between the plaintiff

⁵⁴ In *House Prods. Priv. Ltd v. Meediya Plus*, 2 MLJ 256 (2005) (India).

⁵⁵ *RL Crain Inc. v. Hendry*, 1988 CanLII 5042 (Can. Sask. Q.B.).

⁵⁶ *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 (HL) (appeal taken from Eng.) (U.K.).

⁵⁷ *MacMillan Bloedel Ltd v. Mullin*, 1985 CanLII 154 (Can. B.C. C.A.).

⁵⁸ *Hubbard v. Pitt* [1976] QB 142 (Eng.).

⁵⁹ *Osmond Ireland on Farm Bus. v. McFarland* [2010] IEHC 295 (H. Ct.) (Ir.).

⁶⁰ *See Curust Fin. Servs. Ltd. v. Loewe-Lack-Werk Otto Loewe GMBH* [1994] 1 IR 450 (SC) (Ir.) (relied on by the Court).

and the first defendant, such rights were exclusively conferred on the plaintiff. However, while entertaining the issue as to whether the damages were an adequate relief for the plaintiff, finally, it was held that loss incurred by the plaintiff, if successful on the merits and defeated on the issue of injunctive relief, would manifestly and exclusively constitute a commercial loss in a very stable market.⁶¹

In the case law of Ireland, the second ground recognized in *Campus Oil*, i.e., the adequacy of damages to compensate a party for losses incurred in the time between the application for interim relief and the final outcome on the merits, was further divided into two elements, namely whether:

- (1) If the plaintiffs were to succeed on the merits, they would be adequately compensated by an award for damages; and
- (2) If the defendants were successful on the merits, they could be adequately compensated under the applicants' undertaking as to damages for any loss which they would have sustained by reason of the granting of interlocutory relief.⁶²

Whether damages are an adequate remedy responds to the question of whether "it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages."⁶³ In Australia, the question of whether the adequacy of damages must be satisfied as a separate element before the impartation of interim relief has attracted some controversy.⁶⁴ The condition that one needs to establish the inadequacy of damages before the grant of interim relief was held to be a separate requirement in *Castlemaine Tooheys*,⁶⁵ whereas it was not mentioned as such in the *Australian Broadcasting* case.⁶⁶ However, these two extremes were reconciled by terming the question of inadequacy of damages as one of the issues ordinarily needed to be settled when the court assesses balance of convenience and justice.⁶⁷ Australian courts will also "make an assessment of the likelihood that the final relief (as granted) will adequately compensate the plaintiff for

⁶¹ *Id.*

⁶² *Campus Oil Ltd v. Minister for Indus. & Energy* (No. 2) [1983] IR 88 (SC) (Ir.).

⁶³ *Evans Marshall & Co Ltd v. Bertola S.A.* [1973] 1 WLR 349 at 379 (Eng.).

⁶⁴ *Johnson v Cetin* [2011] WASC 344 (7 Dec. 2011) (Austl.).

⁶⁵ *Castlemaine Tooheys Ltd v S Austl* [1986] 161 CLR 148 (Austl.).

⁶⁶ *Australian Broad Corp v O'Neill* [2006] HCA 46 (Austl.).

⁶⁷ *See Lime Nominees Pty Ltd v Adelaide Brighton Cement Ltd* [2014] WASC 503 (28 Sept. 2006) (Austl.); *Samsung Elecs Co Ltd v Apple Inc* (2011) FCR 238, 254–62 (Austl.). *See also Buller v Murray Grey Beef Cattle Soc'y Ltd* [2014] FCA 1127 (3 Oct. 2014) (Austl.).

the continuing breaches that will have occurred between the date of the interlocutory hearing and the date when final relief might be expected to be granted.”⁶⁸

VI. BALANCE OF INCONVENIENCE

At the third stage (which is the final one) to secure interim relief, the applicant has to prove that the balance of inconvenience lies in his or her favor. The balance of inconvenience means: “a determination as to which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”⁶⁹ It is stated that owing to the low threshold of the first prong of the test and the difficulties involved in the application of the second prong, this third prong is in most cases determinative of the issuance of interlocutory injunctions.⁷⁰ However, the factors involved in the proper evaluation of “balance of inconvenience” are many in number and cannot be listed because these elements necessarily vary in each case.⁷¹

In the case law of Ireland, the balance of inconvenience is linked very closely and directly to the risk of injustice.⁷² This relationship has further been elaborated on by the Singapore Court of Appeals.⁷³ Since the balance of inconvenience involves balancing the risk of doing an injustice, it is more weighty when compared with mere convenience.⁷⁴ The court should conduct a balancing exercise between the injustice that might be suffered by the plaintiff if the injunction is refused and the plaintiff subsequently succeeds on the merits and the injustice that might be suffered by the defendant if the injunction is granted and the plaintiff later loses on the merits.⁷⁵

⁶⁸ *Samsung Elecs Co Ltd* [2011] FCR 238 (Austl.) para. 66; *Patrick Stevedores Operations No 2 Pty Ltd v Mar Union of Australia* [1998] 195 CLR 1 (Austl.), paras. 65–66; *Sports Data Pty Ltd v Prozone Sports Austl Pty Ltd* [2014] FCA 595 (Austl.).

⁶⁹ *See American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 (HL) (appeal taken from Eng.) (U.K.).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See Allied Irish Bank PLC v. Diamond* [2011] IEHC 505 (H. Ct.) (Ir.).

⁷³ *Maldives Airport Co. Ltd. v. GMR Malé Int’l Airport Pte Ltd.* [2013] SGCA 16 (Sing.).

⁷⁴ *Kolback Sec. Ltd. v Epoch Mining NL* [1987] 8 NSWLR 533, 536 (Austl.).

⁷⁵ *Films Rover Int’l Ltd v. Cannon Film Sales Ltd* [1987] 1 WLR 670 (U.K.); *Madaffari v Labenai Nominees Pty Ltd* [2002] WASC 67 (Austl.).

In Australian case law, the interrelationship between establishing a *prima facie* case and the balance of convenience was elaborated in the case of *Castlemaine Tooheys*,⁷⁶ where it was stated that if the existence of a strong, overwhelming or powerful *prima facie* case concerning a serious question is established, the injunction would be granted even if the balance of convenience does not strongly lie in favor of the claimant seeking the injunction. Conversely, on the face of a marginal *prima facie* case concerning a serious question, the injunction will be granted if the balance of convenience strongly favors the applicant.⁷⁷

VII. CAN THE COURT GO BEYOND THE THREE-PRONG TEST?

The three-pronged test has created certainty and predictability in the jurisprudence developed on the issuance of interim measures. For this reason, the applicant has an opportunity to predict the chances of his or her success before the court. However, an ancillary but important question emerges if the court is or should be bound by the three-pronged test while deciding such application, or if it should have the power to go beyond three-pronged test to apply some other test while trying the application of the interim measures.

In New Zealand, Article 17J is not incorporated in the Arbitration Amendment Act 2007 or the Arbitration Act 1996. Hence the courts derive their power to issue interim measures from Section 9 of the 2007 Act, which is the corresponding provision for Article 9 of the Model Law. Section 9(2) of the 2007 Act states that the “High Court or a District Court has *the same powers as an arbitral tribunal* to grant an interim measure under Article 17A for the purposes of proceedings before that court, and that article and Article 17B apply accordingly subject to all necessary modifications” (emphasis added).⁷⁸

It should be noted that Article 17B of the Model Law is incorporated in the Arbitration Act of 1996. It has been held that in deciding the application of interim measures, given that the tribunal cannot consider the issues beyond those stated in Article 17 of Schedule 1 to the Arbitration Act 1996, the same restrictions would equally apply to the court. For instance, the matters set out in Article 17B(1) of the Model Law “must” be proved before the arbitrator

⁷⁶ See case cited *supra* note 65.

⁷⁷ See also *Marsh v Baxter* [2013] WASC 209 (Austl.).

⁷⁸ See *Safe Kids*, *supra* note 36.

for securing the interim measures and this is also true in respect of the court's power. Then, courts deliberate the question of whether the court could consider matters other than those which the plaintiff "must" prove to be successful in his or her application for interim measures. Again, by analogizing its powers to those of an arbitrator, the court concluded that it cannot consider the matters other than those which the plaintiff has to prove. It elaborated that, just like the arbitrator, the court cannot consider issues such as public interest, the consequences to the innocent or the overall justice of the case, because the tribunal derives its powers from the arbitration agreement and hence is not accoutered with any discretion to consider these two issues. Although the court did not say that just like the arbitrator, it also cannot consider these issues while imparting interim measures, but the manner by which it construed its powers and constraints to be identical to those of arbitrators, it may safely be assumed that the court also cannot consider these.

Nonetheless, the prevalent approach is that the courts are empowered to go beyond the three-staged test. For instance, Canadian courts have been assessing the public interest factor while deciding interim relief applications in the course of civil litigation.⁷⁹ In fact, it was expressly stated by a Canadian court that in assessing a balance of inconvenience, a court must consider, *inter alia*, if either party will incur an irreparable loss, the forcefulness of the plaintiff's case, the public interest and the appropriateness of maintaining the status quo.⁸⁰

Similarly, in Australia, while balancing inconveniences and injustice, courts shall take into consideration the hardships and prejudices likely to be suffered by a third party or the general public were the injunction to be granted,⁸¹ as well as public interest.⁸² This is so because the parties' adherence to their contractual obligation is a public policy concern.⁸³

⁷⁹ See *Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (BC)*, [2011] CanLII 1664 (Can. B.C.S.C), wherein the court was declared obligated to take into consideration, *inter alia*, the public interest while assessing the balance of inconvenience ground.

⁸⁰ *Id.*

⁸¹ *Samsung*, 217 FCR 238 para. 66; *Patrick Stevedores*, 195 CLR 1 at 65–66; *Sports Data*, FCA 595.

⁸² *Castlemaine Tooheys*, 161 CLR 148, 154–56; *Esposito v. The Commonwealth* [2013] FCA 546.

⁸³ *Amalgamated Pest Control Pty Ltd v SM & SE Gillece Pty Ltd* [2016] QDC 134 para. 27 (Austl.).

In India, the Supreme Court applied the three-pronged test, namely that the issuance of an interim order must be “just and convenient”⁸⁴ and not against the public interest.⁸⁵ The move beyond the three-pronged test was justified by the Indian Supreme Court in *Dorab Cawasji Warden v. Coomi Sorab Warden and Others*,⁸⁶ wherein it held that the grant of interim relief is an equitable relief, which rests in the discretion of the court after considering the facts and circumstances of each case. In this regard, the three-pronged test is neither exhaustive nor complete in granting or rejecting interim orders because exceptional circumstances may require the application of wholly different tests from the ones described above.

VIII. REQUIREMENTS TO BE FULFILLED FOR A COURT TO ASSUME JURISDICTION

The hierarchy of courts in each jurisdiction is normally different and so, the level of court in each hierarchy empowered to issue interim measures is different from that of other jurisdictions. This could be a reason why the Model Law does not define the competent court with jurisdiction to entertain the application of interim measures. Rather, the Model Law leaves the matter of assigning the competency of a domestic court to the domestic law. In Australia, for example, the Supreme Court is normally competent to hear applications for interim measures.⁸⁷ In the Philippines, however, the power to issue interim measures is vested in regional trial courts.⁸⁸ In New Zealand, the court competent to issue interim measures has not been specified in the relevant legislation, which states that: “court means a body or organ of the judicial system of a state.”⁸⁹ However, Section 9(2) of Schedule 1 of the Arbitration Act 1996 states that such a court may be the District or the High Court.⁹⁰

⁸⁴ *Hindustan Petroleum Corp. v. Sri Sriman Narayan* (2002) 5 SCC 760 (India). *See also* *Adhunik Steel Ltd. v. Orissa Manganese and Minerals Ltd.* (2007) 7 SCC 125 (India).

⁸⁵ *Prabhjot Singh Mand v. Bhagwant Singh* (2009) 9 SCC 435 (India).

⁸⁶ *Dorab Cawasji Warden v. Coomi Sorab Warden* (1990) 2 SCC 117 JT (India).

⁸⁷ Australian International Arbitration Act 1974, § 18(3).

⁸⁸ Alternative Dispute Resolution Act, Rep. Act No. 9285, §§ 3(k), 28 (2004) (Phil.).

⁸⁹ Arbitration Act 1996, sch 1, § 2(b) (N.Z.).

⁹⁰ *See id.* § 9(2) (replicating the provisions of the Model Law in the Arbitration Act 1996).

After identifying the competent court, the next important issue is whether such court has jurisdiction to entertain claims for interim measures. For the purposes of jurisdiction, Canadian law requires that the applicant should prove the existence of a “real and substantial connection” between the court and the defendant, or the subject matter.⁹¹ In most jurisdictions, this kind of connection in respect to the interim measures to be issued and enforced domestically is not that difficult to ascertain because the factors to be considered are usually clear. In Canada, the following presumptive connecting factors are exhaustive and as a result they *prima facie* entitle a court to assume jurisdiction over a dispute where:

- (1) the defendant is domiciled or resident in the province;
- (2) the defendant carries on business in the province;
- (3) the tort was committed in the province; and
- (4) a contract connected with the dispute was made in the province.⁹²

In Canada, although the situation is not clear, these connections may well be used by the court in assessing jurisdiction in international disputes. Similar conditions for the assumption of jurisdiction are laid down in Norway, where an application for interim measures in relation to persons, asset or property will be made to the court in whose territorial jurisdiction that person or the property is situated or is expected to arrive in the near future.⁹³ The same principles will apply for the interim measures in relation to foreign arbitration. A similar approach has been adopted in the Philippines, where the court will assume jurisdiction if the defendant resides there, the company has its place of business there, the act sought to be enjoined is to be performed there or the property is situated there.⁹⁴

It should be noted, however, that even after the establishment of jurisdiction on the basis of any of the above presumptive connecting factors, Canadian courts may yet deny jurisdiction on *forum non conveniens* grounds.⁹⁵ The relevance of *forum non conveniens* in deciding the assumption of jurisdiction is also reflected in other regimes. For instance,

⁹¹ *Club Rosters Ltd v. Van Breda*, [2012] 1 S.C.R. 572, 618 (Can).

⁹² *Id.*

⁹³ See The Dispute Act 2008, § 32-34 (Nor.).

⁹⁴ See Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08-SC, Rule 5.3 (Sept. 1, 2009) (Phil.).

⁹⁵ See *Club Rosters* [2012] 1 S.C.R. at 576.

Rule 6.28(5)(b) to (d) of the New Zealand High Court Rules states that an application must establish, *inter alia*, that “New Zealand is the most appropriate forum for the trial.” The appropriateness of the forum is assessed on whether New Zealand or foreign courts can or are in a better position to deliver the most effective relief and that the plaintiff will incur an unfair loss if a New Zealand court declines to assume jurisdiction.

IX. EXTRATERRITORIALITY OF COURT’S POWER TO ISSUE INTERIM MEASURES

Courts have long been reluctant to use their power to issue interim measures in support of foreign-seated arbitration largely due to lack of their territorial jurisdiction over foreign arbitrations. However, there are many instances in international arbitration when, for the benefit of arbitration, courts feel compelled to impart this remedy in relation to foreign arbitration. Such need for arbitration to have interim measures issued by the court has begun to attract universal recognition. For instance, in the course of the UNCITRAL Working Group meetings, the proposal that the court should be given power to issue interim measures in support of arbitration even if it was seated in some other jurisdiction received acceptance on the basis of its practical significance. For instance, to “secure assets, follow a vessel, preserve evidence, or ask for actions to be taken in a different jurisdiction from the one where arbitration took place” has become a key element of the modern practice of international arbitration. In order to deal with this proposal, it was suggested that Article 17J should be included in the list of exceptions in Article 1(2) of the Model Law. This suggestion was rejected on the ground that Article 1(2) defined the scope of the Model Law and the Working Group was not assigned with the task of revising that part of the Model Law. Therefore, the phrase “taking place in the country of the court or in another country” was added directly into the text of Article 17J.⁹⁶

As far as judicial practice regarding the court’s power to issue interim measures in relation to arbitration seated abroad, three general approaches are discernible. First, the courts are empowered to grant interim measures in relation to foreign arbitration. Second, their powers in this regard have been

⁹⁶ Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Third Session, U.N. DOC. A/CN.9/589, at 21 (Oct. 12, 2005); see Report on the Working Group on Arbitration on the Work of its Thirty-Eighth Session, U.N. DOC. A/CN.9/524, at 12 (June 2, 2003).

subjected to the parties' agreement or the arbitral tribunal's prior approval. Third, the courts do not have power in this regard. With respect to the first approach, Article 1033 of the German Zivilprozessordnung (ZPO, German Code of Civil Procedure) empowering the court to issue interim measures for domestic arbitrations has been extended to foreign arbitrations or those arbitral proceedings whose seat has not been designated. In accordance with Article 1025 of the ZPO. In Hong Kong, although Article 17J of the Model Law has not been given effect, the courts are empowered to issue interim measures in foreign arbitration proceedings.⁹⁷ Hong Kong courts, in the course of exercising the power of interim measures, must give regard to the fact that such power is:

- (1) ancillary to the arbitral proceedings outside Hong Kong; and
- (2) for the purposes of facilitating the process of a court or arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitral proceedings.⁹⁸

Furthermore, in international arbitration, Hong Kong courts will grant the interim measures after taking into consideration that:

- (1) the arbitral tribunal does not have power to impart all the interim relief sought by the party in a single application because it would be more appropriate to seek all the relief from the court than some from the arbitrator and some from the court;
- (2) the relief should have no impact on third parties to the arbitration over whom the arbitrator does not have any jurisdiction;⁹⁹
- (3) the arbitral tribunal having jurisdiction to impart the interim measures has not yet been constituted.¹⁰⁰

In Hong Kong, notwithstanding the fact that the arbitrators in an arbitration seated abroad have the power to impart interim measures, the courts may grant that remedy on the ground that the legislative intent of the Model Law was to "make the same assistance available to international

⁹⁷ See Arbitration Ordinance (2011), Cap. 609, Div. 4 §§ 45, 60 (H.K.); see also *The Owners of the Ship or Vessel "Lady Muriel" v. Transorient Shipping Ltd.* [1995] 2 H.K.C. 320 (C.A.) (H.K.).

⁹⁸ See Arbitration Ordinance (2011), Cap. 609, Div. 4 §§ 45, 60 (H.K.); cf. *Interbulk (HK) Ltd. v. Safe Rich Indus. Ltd.*, [1992] 2 H.K.L.R. 185 (C.F.I.) (H.K.) (demonstrating Hong Kong courts previously held themselves powerless to issue interim measures in respect of foreign arbitration).

⁹⁹ See *Leviathan Shipping Co. v. Sky Sailing Overseas Co.*, [1998] 4 H.K.C. 549 (C.F.I.) (H.K.).

¹⁰⁰ See *Hsin Chong Construction (Asia) Ltd. v. Henble Ltd.*, [2005] HCCT 23/2005 (C.F.I.) (H.K.).

arbitration as would be to domestic arbitration.”¹⁰¹ Egypt follows the second approach. Article 1 of the Egyptian law limits its application to domestic arbitration, subject to the parties’ agreement.¹⁰² Hence, the power of courts to grant interim measures in relation to foreign arbitration exists only if agreed by the parties, otherwise such power is only in respect of arbitration over which the courts possess jurisdiction.

Although now almost extinct, there used to exist a third approach of not allowing courts to issue interim measures in respect of foreign arbitrations. For instance, the Malaysian High Court did not have this power in relation to foreign arbitration.¹⁰³ However, the subsequent Arbitration (Amendment) Act 2011, by inserting Subsection 3 to Section 11 of the Arbitration Act 2005, conferred such powers on the High Court. To restrict the powers of courts to issue interim measures in domestic arbitrations to the exclusion of foreign arbitration is obviously an unsustainable idea that is also apparent from the experience of Singapore and India. In the *Swift-Fortune* case,¹⁰⁴ the Singaporean High Court interpreted Section 12(7) of the International Arbitration Act 2002 by holding that the court did not have the power to issue interim measures with respect to foreign-seated arbitration. Even so, this approach was eradicated by the International Arbitration (Amendment) Act 2010, which, by adopting Article 17J of the Model Law, replaced Section 12(7) with a new Article 12A, which conferred power on courts to grant interim relief in relation to foreign-seated arbitration.¹⁰⁵ Singaporean courts went even further by stipulating that under Section 12A they possess power to issue interim measures in support of domestic arbitration to preserve assets situated outside Singapore. It was held that “this exercise of power to grant interim measures is not unlike the exercise of the court’s powers and jurisdiction in granting an injunction that covered assets outside Singapore,

¹⁰¹ See Case Law on UNCITRAL Texts (CLOUT), at 7–8, U.N. DOC. A/CN.9/SER.C/ABSTRACTS/64 (Apr. 12, 2007); cf. Case Law on UNCITRAL Texts (CLOUT), at 5–6, U.N. DOC. A/CN.9/SER.C/ABSTRACTS/79 (Oct. 31, 2008) (discussing a case from the Philippines).

¹⁰² See Law No. 27 of 1994 (Promulgating the Law Concerning Arbitration in Civil and Commercial Matters), vol. 10 bis, 21 Apr. 1994 (Egypt).

¹⁰³ *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Co.*, [2008] 5 CLJ 654 (Malay.).

¹⁰⁴ *Swift-Fortune Ltd v. Magnifica Marine*, [2006] S.G.C.A. 42 (Sing.).

¹⁰⁵ International Arbitration Act of 1994, § 12A (1994) (amended 2010).

provided the court has *in personam* jurisdiction over the parties to the local proceedings.”¹⁰⁶

In India, the court’s power to issue interim measures was restricted to domestic arbitrations under Section 2(II) of the Arbitration and Conciliation Act 1996, which concerns those sections with extraterritorial effect, but did not include Section 9. To remedy this, the Indian Supreme Court opined that Indian courts have the power to issue interim relief in support of foreign-seated arbitration.¹⁰⁷ Although the principles laid down in this judgment were arbitration friendly, they were premised on weak foundations and were subsequently found to be invalid and incorrect.¹⁰⁸ This later judgment expressly held that the Indian Arbitration and Conciliation Act does not extend the powers of courts to issue interim measures in foreign-seated arbitrations. Finally, Section 2(II) was inserted in the Indian Arbitration and Conciliation Act of 1996 by the Arbitration and Conciliation (Amendment) Act 2015 No. 3 of 2016, which extended Section 9 to international arbitrations.

X. POWERS OF COURT TO GRANT INTERIM MEASURES BEFORE THE COMMENCEMENT OF ARBITRAL PROCEEDINGS

Issuance of interim measures before the initiation of arbitral proceedings is one of those points where arbitration needs courts the most. Although, in an attempt to autonomize arbitration with court assistance, arbitral institutions now introduce emergency arbitrators for the issuance of interim measures. However, the need for the court at this juncture has not yet completely been wiped out.

The *travaux* to the 1985 version of the Model Law manifests that the availability of interim measures from the court before and during the arbitration proceedings received universal agreement during the deliberation of Article 9.¹⁰⁹ In fact, domestic courts can normally impart interim remedies before the constitution of the arbitral tribunal and hence before the

¹⁰⁶ Five Ocean Corp. v. Cingler Ship Pte Ltd. (PT Commodities & Energy Resources, intervener), [2015] S.G.H.C. 311 (Sing.).

¹⁰⁷ See Bhatia Int’l v. Bulk Trading S.A. & Anr, (2002) 4 SCC 105 (India).

¹⁰⁸ See Bharat Aluminium Co. v. Kaiser Aluminium Tech. Serv., Inc., (2012) 9 SCC 552 (India).

¹⁰⁹ See Int’l Trade L. Comm’n, Rep. of the Working Group on International Contract Practices on the Work of Its Third Session, ¶¶ 39, 68, U.N. DOC. A/CN.9/216 (Mar. 23, 1982).

commencement of arbitral proceedings. States which empower the courts to issue interim measures before the commencement of arbitral proceedings include Egypt,¹¹⁰ Japan,¹¹¹ Germany,¹¹² the Philippines,¹¹³ Turkey¹¹⁴ and Malaysia.¹¹⁵ Hong Kong, on the other hand, allows interim measures before the commencement of arbitration subject to the following conditions:

- (1) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under this Ordinance or any other Ordinance; and
- (2) the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the court.¹¹⁶

Indian courts used to subject the issuance of interim measures before the commencement of arbitration proceedings to the condition that the applicant ought to demonstrate manifestly his or her intention to have recourse to arbitration. In a judgment pronounced before the amendment of the Indian Arbitration and Conciliation Act, 1996, the Indian Supreme Court highlighted the fact that although under Section 9 the application for the interim measure can validly be made before the commencement of arbitration proceedings, nonetheless “the provision does not give any indication of how much before.” The word “before” was held by the Indian Supreme Court to mean that the applicant “must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended” and are certainly within a reasonable time.¹¹⁷

However, Subsection 2 was inserted in Section 9 by the Arbitration and Conciliation (Amendment) Act 2015 No. 3 of 2016, which mandated that the arbitration proceedings must be commenced within ninety days after the date

¹¹⁰ See Law No. 27 of 1994 (Promulgating the Law Concerning Arbitration in Civil and Commercial Matters) *al-Jarīdah al-Rasmīyah*, vol. 16 bis, 21 Apr. 1994, art. 14 (Egypt).

¹¹¹ See [Arbitration Law], Law No. 138 of 2003, art. 15, *translated in* (Japanese Law Translation [JLT DS]), (Japan).

¹¹² See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 926, 1041 (Ger.).

¹¹³ See Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08, Rule 5 (Sept. 1, 2009) (Phil.).

¹¹⁴ See Turkish International Arbitration Law M. 6; *see also* HUMK. M. 414.

¹¹⁵ See Arbitration Act 2005, § 11 (Malay.).

¹¹⁶ See Arbitration Ordinance, (2011) Cap. 609, § 45(5) (H.K.).

¹¹⁷ See *Firm Ashok Traders & Another etc. v. Gurumukh Das Saluja & Others* (2004) 1 SCR 404 (India). *See also* *Sundaram Fin. Ltd. v. NEPC India Ltd.*, AIR 1999 SC 565 (India).

of the issuance of interim measures.¹¹⁸ In order to fulfil the Indian legal requirement of initiation of arbitration proceedings, it is important to understand when arbitration proceedings are considered as having commenced. “Commencement of arbitration proceedings” has been defined in Section 21 of the Arbitration and Conciliation Act 1996, which provides that “the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”¹¹⁹

The tradition of stipulating specific time limits, in which the arbitration proceedings must be commenced, can be seen in other jurisdictions.¹²⁰ For instance, in Chile, the applicant must commence arbitration proceedings (both domestic and foreign) within a maximum of thirty days after the issuance of interim measures.¹²¹ In Thailand, the interim measure will lapse if the arbitration is not commenced within thirty days after the issuance of such order.¹²² In Turkey, with regard to international arbitration, the mandatory period of thirty days has been stipulated to commence the arbitration proceedings, otherwise the interim measures are considered to have automatically been lifted.¹²³ In respect of domestic arbitration, the period is two weeks.¹²⁴

It should be noted that not every legal system specifically addresses the time period for the initiation of arbitration proceedings. In that regard discretion is conferred on the courts to specify such time limit. If within such period the arbitration proceedings are not initiated by the interim relief creditor, the relief would stand elapsed.¹²⁵ Some jurisdictions grant discretion to the court to set out the time within which a party should launch arbitration

¹¹⁸ See The Arbitration and Conciliation Act, 1996, § 9 (India) (amended 2016).

¹¹⁹ See *id.* § 21.

¹²⁰ See The Arbitration and Conciliation Act, 1996, § 21 (India); see *Nat'l Bldg. Constr. v. Ircon Int'l Ltd.*, (1998) 44 DRJ 399 (1997) (India) (citing The Arbitration and Conciliation Act, 1996, § 21).

¹²¹ See *Juzgados Civiles [J. Civ.] [Civil Court]*, 26 May 2005, “*Constructora Sidgo Koppers Salfa Limitada c. Lurgi*,” Rol de la causa: 5234-2005, civil, (Chile).

¹²² See *Arbitration Act*, B.E. 2545 at s.16 (2002) (Thai).

¹²³ See *Turkish International Arbitration Law*, *supra* note 114, at M. 10(A).

¹²⁴ See *HUMK*, *supra* note 114, at M. 397.

¹²⁵ For instance, see *Civil Provisional Remedies Act*, Law No. 91 of 1989, art. 37, 1–3, *translated in* (Japanese Law Translation [JLT DS]) whereunder the court must give two weeks or more time. Similarly, for Germany, see *ZIVILPROZESSORDNUNG*, *supra* note 112, at § 926 and for Hong Kong, see *Arbitration Ordinance*, *supra* note 97, at §§ 45(2), 60(1).

proceedings. The Polish Civil Procedure Code in its Article 733 mandates the court to set the time limit for that purpose, which in any event must not be longer than two weeks.¹²⁶

Whether by statute or judicial discretion, the specification of definite time limits is rational. While considering the amendment to the Model Law on the point of interim measures, it was proposed that interim measures should remain alive for a specific limited time since this is consistent with the right of the respondent to be heard. The other reason for prescribing the time period for the validity of the interim measure is that it might have been issued *ex parte* and the applicant might be in need of having it renewed from the court or the tribunal.¹²⁷ The Indian Supreme Court has vindicated the stipulation of time limits by claiming that when a party makes an application seeking interim measures, said party, in fact, not only implicitly accepts the existence of a final and binding agreement, but also accepts the creation of a controversy mandated to be referred to arbitration proceedings between the parties.¹²⁸ All this establishes that the right of submitting an application for interim measures before the commencement of arbitration proceedings is premised on a condition that there must be a manifest intention on the part of the applicant for the interim measures to be linked to arbitral proceedings. For this reason, the courts in India were supposed to issue interim orders on condition that the applicant in a time specified by the court would take effective steps, such as by issuing a notice of proceedings to the defendant.¹²⁹

XI. INTERACTION BETWEEN THE POWER OF COURT AND ARBITRATOR ON THE POINT OF ISSUANCE OF INTERIM MEASURES

Advancement of arbitration is manifest from the empowerment (or discretions) of the arbitrator to issue interim measures. However, this power of arbitrator coexists with that of the court and this gives rise to some

¹²⁶ See art. 733 k.p.c. (1964 r. Dz. U. Nr. 43, poz. 296) (Pol.).

¹²⁷ See U.N. Secretary-General, *International Commercial Arbitration*, ¶ 26, U.N. DOC. A/CN.9/WG.II/WP.111 (Oct. 12, 2000).

¹²⁸ See *Sundaram Finance Ltd. v. Neps India Ltd.*, (1999) 1 SCR 89 (India); see also Ikram Ullah, *English and Indian Legal Perspective on Third-Party Disclosure in Arbitration: It is Time to Assimilate Third Party Into the Family of Arbitration*, 31 ARB. INT'L 127, 146 (2015) (demonstrating Indian courts' forward-thinking stance towards complex procedural issues in international commercial arbitration).

¹²⁹ *Id.*

questions—for instance: should the court decline an application for interim measures if it is made without securing any prior permission from the arbitrator; how should the court entertain an application for an interim measure if such application has already been adjudicated by the arbitrator and declined? This section discussed the interaction or conflict between the powers of the court and the arbitrator on this point. Beginning with the Model Law, it does not deal with the possible conflict between the powers of the court and those of arbitral tribunals.¹³⁰ In the deliberations of the Working Group meeting, it was suggested that the courts should not entertain an application for interim measures if an application for the same relief had already been declined by the arbitral tribunal. Such proposal could not gather support because it was felt that the courts should not be prohibited from taking up the case *de novo* when so prayed by the applicant.¹³¹ In subsequent meetings of the Working Group, again the obscurity was highlighted, namely: what would be the outcome if the powers of the court and the arbitrator to issue interim measures were coextensive or the power of the court superseded that of the arbitrator? In this respect, it was suggested that the power of the courts should be limited to circumstances where either the arbitral tribunal was unable to issue interim measures or could not (for whatever reason) function in that regard effectively, as would be the case where interim measures were needed to bind a third party or the arbitral tribunal is not yet constituted. However, despite this proposal gathering some support, it was not accepted due to the involvement of far-reaching practical and legal repercussions. It was decided that the complex issues raised by this proposal might be considered by the Working Group at a later stage.¹³²

The fact that the Model Law is silent on this point implies that the powers of the court and the arbitrator to grant interim relief are independent of each other. The jurisdictions which have not yet incorporated Article 17J are still relying on an Article 9-type provision in their legislation. It is usually provided in such circumstances that Article 9 prevails over Article 17J in the

¹³⁰ See U.N. Secretary-General, *International Commercial Arbitration*, ¶2, U.N. DOC. A/CN.9/263/Add.1 (Apr. 15, 1985); see also U.N. Secretary-General, *International Commercial Arbitration*, ¶2, U.N. DOC. A/CN.9/263/ (Mar. 19, 1985).

¹³¹ See Comm'n on Int'l Trade L., Rep. of the Working Group on Arb. and Conciliation on the Work of Its Forty-Second Session, ¶¶ 31, 92 U.N. DOC. A/CN.9/573 (Jan. 27, 2005).

¹³² See Comm'n on Int'l Trade L., Rep. of the Working Group on Arb. and Conciliation on the Work of Its Forty-Third Session, ¶ 103 U.N. DOC. A/CN.9/589 (Oct. 12, 2005).

sense that despite the power of the arbitrator to issue interim measures, any party can also seek that remedy from the courts.¹³³ This approach has been adopted in Austria, where the right of a party to apply for judicial interim measures is completely independent of the right to seek an interim remedy from the arbitrator.¹³⁴ Equally, in Chile, a party need not secure the prior permission of the arbitral tribunal to seek interim measures from the court even after the composition of the arbitral tribunal.¹³⁵ Similarly in Germany, Article 1033 of the ZPO, which deals with the court's power to issue interim measures, does not lay down any condition for securing permission from the arbitrator prior to an application to the courts.¹³⁶ New Zealand's law is even more explicit on this point. Although it allows the court to grant interim relief even if the applicant has not secured prior permission from the arbitrator, where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for all purposes of the application.¹³⁷

In India, where no prior permission from the arbitrator is required,¹³⁸ a court can issue interim measures even if the application for interim measures was made to the arbitral tribunal and is still under consideration by the tribunal.¹³⁹ In this regard, the sole fact that the arbitrators have been appointed to their office is not a ground for dismissal of the application for interim measures from the court.¹⁴⁰ This approach was justified in *Atul Ltd. v. Parakash Industries Ltd.*,¹⁴¹ wherein the court held that the empowerment of an arbitrator to issue interim measures by no means substitutes the power of the courts in this regard. As a result, where an arbitrator has been vested

¹³³ See *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*, [1994] CanLII 845 (Can. B.C. S.C.).

¹³⁴ See ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 585, <https://www.ris.bka.gv.at/GeltendeFassungG.wx?Abfrage=Bundesnormen&GesetzeGesetze=10001699> (Austria).

¹³⁵ See Law No. 19971 art. 9, Sobre Arbitraje Comercial Internacional [About International Commercial Arbitration], Septiembre 10, 2004, DIARIO OFICIAL [D.O.] (Chile).

¹³⁶ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1033, <https://dejure.org/gesetze/ZPO/1033.html> (Ger.).

¹³⁷ See Arbitration Act 1996, sch 1 art. 9(3) (N.Z.).

¹³⁸ See *Shin Satellite Pub. Co. v. Jain Studios Ltd.*, 153 (2008) DLT 604 (India).

¹³⁹ See *Nat'l Highway Auth. of India v. China Coal Constr. Grp. Corp.* (2006) AIR 2006 Del 134 (India).

¹⁴⁰ See *Escorts Fin. Ltd. v. Mohd. Hamif Khan*, 2001 VAD Del 392 (India).

¹⁴¹ See *Atul Ltd. v. Prakash Indus. Ltd.*, 2003 IIIAD Del 459 (India).

with the power to issue interim measures, such power does not oust the jurisdiction of the court and hence the powers of the court to issue interim measures will remain intact even during the pendency of arbitration proceedings.

In *Uppal v. Cimmco Birla*,¹⁴² the applicant filed an application for an interim order before the arbitral tribunal, which was declined. He did not challenge this order before the courts. The applicant subsequently filed an application before an Indian court for the same kind of interim measure without having disclosed the fact that he had already requested a similar relief from the arbitrator and that this had been declined. The Indian court found the suppression of this fact to be of a grave nature and as a result the application for *ex parte* interim relief would stand quashed.¹⁴³ The Indian court's reasoning seems to be in line with the *travaux* of the Model Law, as it was also proposed therein that an applicant should be mandated to inform the court of any development in the arbitration proceedings on the substance of the dispute, as well as any proceeding concerning interim measures.¹⁴⁴

In Hong Kong, in a case concerning an arbitration seated in London, it was held that in arbitrations seated outside Hong Kong, the courts of that country should decline to impart the interim measures if the party did not secure a prior approval from the arbitrator to launch such an application in the court, unless the court is satisfied that justice requires it to grant such interim measures in order to protect the plaintiff from a serious and irreparable harm in the arbitral proceedings.¹⁴⁵ This view was upheld later in domestic arbitration by a Hong Kong court in *Hsin Chong Construction (Asia) Ltd v. Henble Ltd*,¹⁴⁶ where it was held that a plaintiff should first seek the assistance of the arbitral tribunal already seized of the dispute. Where a tribunal has yet to be constituted, the applicant will have to demonstrate the existence of a serious risk that the defendant will remove the asset from the court's jurisdiction to render the arbitral award ineffective.

¹⁴² See *Uppal Eng. Co. (P) Ltd. v. Cimmco Birla Ltd.*, 121 (2005) DLT 539 (India).

¹⁴³ *Id.*

¹⁴⁴ See U.N. Secretary-General, *International Commercial Arbitration*, ¶ 26, U.N. DOC. A/CN.9/WG.II/WP.111 (Oct. 12, 2000).

¹⁴⁵ See *The Owners of the Ship or Vessel 'Lady Muriel' v. Transorient Shipping Ltd.* [1995] 2 H.K.C. 320 (C.A.) (H.K.).

¹⁴⁶ See *Hsin Chong Construction (Asia) Ltd. v. Henble Ltd.*, [2005] HCCT 23 (C.F.I) (H.K.).

XII. CONCLUSION

The extensive debates on court-ordered interim measures clearly exhibits the tensions between those schools of thought that see the role of the courts as restricted in their relations with arbitral tribunals and those that view the courts as an extension of the role and authority conferred upon tribunals. It is not easy to reconcile the two, even though the adherents of both views effectively aim at creating liberal legal systems that attract as much arbitration business as possible. No doubt, given that arbitral tribunals will never achieve the degree of authority enjoyed by the courts in the adoption of interim orders—other than through their limited contract-based power—the courts will always play a significant role in those arbitral proceedings where interim measures are crucial to at least one of the parties. Even so, it should not be assumed that jurisdictions with dedicated judicial chambers facilitating arbitral tribunals will be granted liberal powers to adopt and enforce interim measures outside of the generally accepted three-pronged test. Any such move would go far beyond any notion of arbitration-friendliness, because it would inhibit those parties to contracts with an arbitration clause from choosing seats of this nature.¹⁴⁷ Hence, jurisdictions have to strike a sensible balance between what can reasonably be expected of the courts of the seat in relation to requests for interim orders, so that outcomes are subject to prudent parties' legitimate expectations.

Even so, this Article exhibits a tendency favoring the granting of interim measures, not only in the context of advanced judicial systems in the industrialized world, but also in domains that are either influenced by the common law (chiefly England) or developments stemming from the UNCITRAL Model Law, such as India and Pakistan.¹⁴⁸ This Article has

¹⁴⁷ National competent courts have generally adopted wide discretionary powers in relation to arbitral procedural matters thrust open them by arbitral tribunals, or the parties to arbitral proceedings. This is true, at least, in matters concerning language, number of arbitrators, the dispatch of written communications and requirements concerning the signing of awards. See Ilias Bantekas, *Party Autonomy and Default Rules Regarding the Choice of Number of Arbitrators*, 22 *CARDOZO J. OF CONFLICT RESOL.* 31, 31–43 (2021); Ilias Bantekas, *Receipt of Written Communications in International Commercial Arbitration*, 31 *AM. REV. J. OF INT'L ARB.* 85, 85–107 (2021); Ilias Bantekas, *Language Selection in International Commercial Arbitration*, 36 *OHIO STATE U. J. ON DISP. RESOL.* 125, 129–51 (2021); Ilias Bantekas, *The Requirement of Signed and Dated Awards: Are Arbitrators Ever Entitled Not to Sign?*, 39 *ASS'N OF SWISS ARB. BULL.* 642, 642–55 (2021).

¹⁴⁸ See Ikram Ullah, *Interim Measures in Arbitration under the Pakistani Legal Regime*, 29 *ARB. INT'L* 653, 653–70 (2013).

shown that national courts, at the level of the high court or that of the court of appeal, as well as supreme or cassation courts, possess an excellent understanding of the exigencies of arbitration, as well as the commercial value of arbitration-friendly courts for host states, and in this light will endeavor to facilitate interim relief requests that are sound and reasonable. The Article has shown, indirectly at least, the existence of serious transnational judicial dialogue in the assessment of appropriate and best practice standards pertinent to interim relief. The majority of the national judgments surveyed in this Article, particularly those issued by common law courts, either directly referred to judgments by other courts, or otherwise used language and methodology employed elsewhere. This development underscores one of the hypotheses of this Article concerning the transnational character of interim relief in international commercial arbitration. The literature has viewed judicial dialogue as central to effective transplants.¹⁴⁹ Courts that refer to judgments of their more experienced and busier counterparts, aspire to draw from best practices as well as the authority of these other courts.¹⁵⁰ By so doing they lend credence to their own judgments. Experienced courts, in turn, will refer to and cite other courts where they are attempting to decipher the existence of a customary rule,¹⁵¹ uniformity,¹⁵² or where they too are seeking authority for an issue that has received little attention in the past, or which is new and emerging.¹⁵³

¹⁴⁹ See VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (Oxford Univ. Press 2010); Gary Jeffrey Jacobson, *The Permeability of Constitutional Borders*, 82 *TEX. L. REV.* 1763, 1763–1818 (2004).

¹⁵⁰ See Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 *N. CAROLINA J. OF INT'L L.* 259, 259–309 (2006) (arguing that national judgments not only create state practice, but that judicial dialogue among national courts solidifies such practice into customary law).

¹⁵¹ See *R. v Jones* (2007) 16 UK HL 33 (AC) (concerning judicial dialogue to ascertain the existence of an offence under customary law). See Roger O'Keefe, *Customary Crimes in English Law*, 72 *BYIL* 293, 293–335 (2002).

¹⁵² See Brian Flanagan & Sinead Ahern, *Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges*, 60 *ICLQ* 1, 18022 (2011) (suggesting that guidance and uniformity in judicial interpretation is the key reason why common law judges refer to foreign court decisions).

¹⁵³ See, e.g., Thorley, *The Influential Judgment*, Singapore International Commercial Court in B2C2 Ltd. v. Quoine Pte Ltd. [2019] SGHC(I) 3 (concerning its regulation and status of cryptoassets and smart contracts).

The new battleground is certainly the use of courts, other than by parties to arbitral disputes at the seat, to order interim measures. From a commercial point of view, one might wonder as to the incentives of the courts to enforce interim measures demanded by parties abroad. For rich industrialized states, the incentive may well end up being the expectation of reciprocity, particularly where the volume of requests is even; however, for other less developed states this is certainly not the case. The provision of efficient legal services has emerged as an industry in and of itself throughout the last decade.¹⁵⁴ Industrialized and newly-wealthy countries have realized that speedy and effective dispute resolution mechanisms anchored within national legal systems have the potential to attract interested fee-paying end users while benefiting the local legal profession and peripheral services, such as translators, clerks, legal executives, administrators, and others.¹⁵⁵ When a professional activity becomes an industry it also feeds into the local economy.¹⁵⁶ Legal fees generate taxes,¹⁵⁷ and end-users must also use hotels, restaurants, public and private transport, and airlines. Additionally, if they have enjoyed their experience, end-users will most likely return as tourists. The legal services sector in the United Kingdom is estimated to contribute 3% of the country's GDP,¹⁵⁸ and a large part of that is due to the London Commercial Courts,¹⁵⁹ which largely attract international end-users.¹⁶⁰

These are all significant considerations for both developing and developed states and the importance of arbitration for national economies and

¹⁵⁴ *Everyone's a Law Company*, PRACTICE, July–Aug. 2019, <https://theppractice.law.harvard.edu/article/everyones-a-law-company/>; see Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L. Q. REV. 130 (2021).

¹⁵⁵ See Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 109, 125, 132–33 (2015).

¹⁵⁶ See Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOB. LEGAL STUD. 707, 713 (2011).

¹⁵⁷ Robert W. Wood, *IRS Form 1099 Rules for Settlements and Legal Fees*, BUS. L. TODAY (Jan. 28, 2020), <https://businesslawtoday.org/2020/01/irs-form-1099-rules-settlements-legal-fees/>.

¹⁵⁸ See THECITYUK, LEGAL EXCELLENCE, INTERNATIONALLY RENOWNED (2017), which demonstrates that the legal sector alone was found to generate 311,000 jobs in the United Kingdom.

¹⁵⁹ See *Commercial Court*, GOV.UK, <https://www.gov.uk/courts-tribunals/commercial-court>, for a discussion regarding the London Commercial Courts, which is a subdivision of the Queen's Bench Division of the High Court of Justice and is comprised of several specialist chambers, including insurance, construction, contract and business, financial, commercial and others.

¹⁶⁰ In 2017–18, 70% of the Commercial Court's work was intentional in nature, see JUDICIARY OF ENG. & WALES, *THE COMMERCIAL COURT REPORT, 2017–2018*, at 7, 9 (2019) (U.K.). See Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, 33 PACE INT'L L. REV. 1, 1–41 (2020).

particularly the legal professional field (judges, courts, lawyers etc.) has not gone unnoticed. In the absence of multilateral treaties whereby national courts would be obliged to enforce interim orders' requests by the courts of other states, such requests must come from the parties themselves. The practice is sparse, and many countries may be apprehensive of such a trend mushrooming. The fear might be that such requests constitute an indirect way of bypassing the (intentional) absence of bilateral or multilateral agreements concerning the cross-border enforcement of interim orders. That Article 17J of the Model Law exhorts states to entertain such requests is neither here nor there. It is hoped that the current transnational judicial dialogue among the courts of sophisticated jurisdictions and those applying the UNCITRAL Model Law will lead to a uniform regime of interim relief in respect of international arbitral proceedings that is not constrained by the limitations of domestic civil procedural law. Such development must of course be counter-balanced to deter frivolous and unfounded interim relief requests. A set of guidelines by UNCITRAL in this respect that highlight best practices would go a long way to not only educating local judges, but also removing any ambiguity or otherwise fear to adopt relief measures that might at first glance seem radical or contrary to long-held domestic practices.

