

CONSIDERATION UPON ARBITRATORS' COMPETENCE TO ORDER PROVISIONAL MEASURES DURING THE INTERNATIONAL COMMERCIAL ARBITRATION PROCEDURE¹

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ABSTRACT: *The scope of provisional measures is to protect the rights of the parties which may be prejudiced during the arbitral procedure. The risk that important evidence may be lost or that the goods subjected to litigation may be alienated, which would make the execution difficult is particularly high, especially concerning international commercial arbitration. The aim of the study hereby is to analyze how the arbitrators' competence to order interim measures is reflected in the main arbitration institutions and the internal legislations, as well as the limitations thereof.*

KEYWORDS: *provisional measures; international commercial arbitration; arbitrators; competence*

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Although arbitration has the advantages of swiftness and flexibility compared to the traditional way to resolve a dispute through the national courts, the period of time required by the arbitral procedure may cause a party certain damages, even irreparable, ultimately affecting the efficiency of the arbitration award.

In order to avoid such situations, the parties may apply for interim measures of protection².

Their aim is to preserve a certain status quo or a legal situation, in order to protect the rights subjected to arbitration³.

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² In terms of terminology, provisional measures are found in national laws and regulations of the institutions of arbitration under the names of conservative protective and interim measures, such terms being used interchangeably. See Emmanuel Gaillard, John Savage, "Fouchard, Gaillard, Goldman On International Commercial Arbitration", Ed. Kluwer Law International, Haga, 1999, p. 709.

³ See Gary B. Born, „International Commercial Arbitration“, Ed. Kluwer Law International, Netherlands, 2009, p. 1944.

Interim measures are found in the practice of international commercial arbitration under different forms, classified by the doctrine in few categories⁴.

A first category is comprised by the measures intended to maintain a status quo or to avoid irreparable damages⁵. Their purpose is to prevent the changes in the status quo that may compromise the execution of the arbitration award, such being necessary to protect the object of the litigation, regulating the relationship of the parties until the resolution of the dispute⁶.

For example, a party wishes to be granted the authorization to immediately sell perishable goods⁷ or to prevent an infringement of the intellectual property rights which form the object of the arbitration, until the award⁸.

Another category of interim measures refers to securing evidence. Art. 26, par. 2 let. d of Uncitral Rules of 2010 provide that the court of arbitration has the authority to order measures designed to protect the relevant evidence.

Also, French legislation allows the interested party to request measures destined to preserve evidence which may influence the outcome of the litigation, for justified reasons⁹.

A special category of interim measures are the so-called "a référé" measures, provided by the French and Dutch legislation¹⁰.

Pursuant to these measures, a creditor may request immediate payment from his debtor, as an advance from the sum subjected to the litigation¹¹. The „des référés" award is temporary by nature, as the main litigation will be tried by a court of arbitration or a court of jurisdiction. Also, the request will be granted only if the claim is undisputed.

The French Courts granted judgments for „a référé" measures, although an arbitration convention existed, considering two essential conditions: that the court of arbitration had not already been formed and justification for the urgency of such measure¹². Regarding the latter condition, it comes from the necessity to respect the jurisdiction of the court of arbitration, hence, unless the urgency is justified, the interested party shall be obliged to wait for the court to be formed before bringing such claim¹³.

Provisional measures serving the same purpose are also found in British law. The British Arbitration law of 1996 provides in Section 39 „Authority to grant provisional measures" that the parties may agree for the court of arbitration to grant any interim measures, which shall be mentioned in the final award, such as compelling a party to pay a sum of money. The arbitration award shall confirm or refute the above measure.

⁴ See Gary B. Born, „International Commercial Arbitration", Ed. Kluwer Law International, Netherlands, 2009, p. 1995.

⁵ See Andrew Tweeddale, Kerem Tweeddale „Arbitration of commercial disputes. International and English Law and Practice", Oxford University Press, 2007, p.299. UNCITRAL model law stipulates in Art. 17, par. 2, let. a) that the court of arbitration may order provisional measures maintaining or restoring the status quo until the settlement of the dispute.

⁶ See Gary B. Born, cited, p. 1997.

⁷ See Emmanuel Gaillard, John Savage, cited., p. 721.

⁸ See Gary B. Born, cited, p. 1995.

⁹ See art. 145 of the New French Civil Procedure Code.

¹⁰ See Emmanuel Gaillard, John Savage, cited., p. 728.

¹¹ See Andrew Tweeddale, Kerem Tweeddale, cited, p. 303.

¹² See Emmanuel Gaillard, John Savage, cited, p. 732.

¹³ See Emmanuel Gaillard, John Savage, cited, p. 732.

British doctrine¹⁴ suggested however that the courts should use these measures given by the parties precautionary in order to prevent causing a long term injustice. For example, a provisional measure of paying a sum of money may be granted and executed by the obliged party. Pursuant to the arbitration award, the same party shall be compelled to pay a certain sum of money, but in a smaller amount, and the difference cannot be recovered due to the fact that the other party had become insolvent in the meantime.

Although in the beginning, national courts had exclusive authority upon interim measures, nowadays both state judges and arbitrators have such competence, prevailing differences regarding the moment and the way the measures are granted.

Most of the international arbitration conventions do not contain express provisions regarding interim measures.

An exception thereof is represented by the European Convention on International Commercial Arbitration of Geneva from 1961¹⁵, which provides in art. IV, par. 4 that a request for provisional or conservatory measures addressed to a judicial authority cannot be considered neither incompatible with the arbitration convention, nor a waiver of the competence of the court of arbitration for solving the dispute.

Hence, the Convention expressly stipulates that the request for provisional measures may be brought before a court of justice, without affecting the validity of the arbitration convention, yet, without making any reference to the competence of the court of arbitration to order such measures.

The *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* of Washington from March, 18th, 1965¹⁶ provides in Art. 47 that, under the reserve of a different convention of the parties, the court of arbitration may recommend any conservatory measures, to safeguard the rights of the parties, if the circumstances demand so.

In applying this article, the jurisprudence of the International Center for the *Settlement of Investment Disputes* stated that *although the Convention uses the verb „recommend”, in fact it is the court that has the authority to order provisional measures mandatory for the parties*¹⁷.

National legislations reflect the following main trends: some states grant the arbitrators wider authority to take provisional measures, some enumerate categories of measures that can be granted while a limited one forbids the arbitrators to order such measures.

Pursuant to Art. 17 of Uncitral model law, the court of arbitration may order provisional measures in the absence of a contrary convention, at a party's request.

During the arbitration, temporary insuring measures, as well as ascertaining certain factual circumstances may be granted by the court of arbitration, in case of non-compliance, the execution of such measures may be ordered by the courts of justice, pursuant to Art.

¹⁴ See Bruce Harris, Rowan Planterose, Jonathan Tecks, „The Arbitration Act 1996. A commentary”, Ed. Blackwell Publishing, Oxford, 2007, p. 193.

¹⁵ Ratified by Romania through the Decree no. 281/1963 published in the Official Bulletin no. 12 of 25/06/1963.

¹⁶ Ratified by Decree no. 62/1975 published in the Official Bulletin no. 56 of 07/06/1975.

¹⁷ See *Occidental Petroleum Corp v. Republic of Ecuador* ICSID Case no. ARB/06/11 of 17 august 2007, Tokios Tokelés v. Ukraine ICSID Case no. ARB/02/18 of July the 1st 2003, available at [www. http://icsid.worldbank.org](http://icsid.worldbank.org)

358⁹ of the Romanian Civil Procedure Code. Absent any specification, these provisions have been interpreted in the sense that any of the securing measures provided by the Civil Procedure Code, specifically the securing and judiciary distraint, the garnishment and all temporary measures will need to comply with the admissibility conditions provided by the law for the injunction¹⁸.

Similar provisions are found in the Art. 183 of the Swiss Law on Private International Law of 1987, named „provisional and protective measures”. According to these legal provisions, had the parties not stipulated otherwise, the court of arbitration may order temporary or protective measures. Should the parties fail to comply, the court of arbitration may request assistance from a court of jurisdiction. This intervention of the courts shall not be mistaken for the competence to order provisional measures itself¹⁹.

The authority or the arbitrators to order provisional measures is recognized in similar terms in Sweden²⁰, Japan²¹, India²², New Zealand²³ and Greece²⁴.

British Arbitration Law of 1996 provides that the court of arbitration has the competence to order measures for the keeping, inspection, ownership and securing the evidence upon the property subjected to arbitration²⁵. As far as other types of securing measures, the arbitrators shall be authorized to order such only if the parties agreed, as stipulated in Section 39, par. 1 of the above-mentioned law. It was considered that, pursuant to this latter provision, the British Law is limited in responding to the expectations of the parties involved in arbitration²⁶.

Although the French legislation does not contain any provision regarding the competence of the arbitrators to order temporary measures, the doctrine recognizes their existence²⁷.

Neither Federal Law regarding arbitration of the United States contains any explicit provision thereof. The American jurisprudence appreciated however that the arbitrators have an implicit competence to order temporary provisions, unless prohibited pursuant to the arbitral convention, while the doctrine considers there is a presumption regarding the existence of this competence²⁸.

There are also legal systems which prohibit the arbitrators to grant temporary measures. The Italian Civil Procedure Code stipulates in Art. 818 that the arbitrators cannot grant provisional or protective measures, thus provisions remaining unchanged after the general reform or the arbitration of 2006²⁹.

¹⁸ See Gabriel Homotescu “Litigii patrimoniale. Soluționarea lor pe calea arbitrajului”, Ed. Lumina Lex, Bucharest, 1999, p. 81-82.

¹⁹ See Jean-François Poudret, Sébastien Besson, “Comparative law of international arbitration”, Ed. Sweet & Maxwell Limited, Londra, 2007, p. 543.

²⁰ Section 25, par. 4 of Swedish Arbitration Law.

²¹ Art. 24, par. 1 of Japanese Arbitration Law.

²² Art. 17 of Indian Arbitration and Conciliation Law.

²³ Art. 17 of New Zealand Arbitration Law.

²⁴ Art. 17, par. 1 of Greek International Commercial Arbitration Law.

²⁵ Section 38, par. 4 of British Arbitration Law.

²⁶ See Gary B. Born, cited, p. 1957.

²⁷ See Jacques Béguin, Michel Menjuq, „Droit du commerce international”, Ed. Litec, Paris, 2005, p. 1034.

²⁸ See Gary B. Born, cited, p. 1956.

²⁹ See Giorgio Meo, „Updates of the last Italian reform in arbitration” published in Romanian Arbitration Journal no. 3 of 2008, p. 47.

Similar provisions are also found in the Argentinean Law³⁰.

The rules of the institutions of arbitration generally contain provisions entitling the arbitrators to grant provisional measures.

During arbitration, securing and temporary measures, as well as determining the status quo, are granted by the court of arbitration by injunction, pursuant to Art. 50 par. 1 of the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania. In case of non-compliance, the measures shall be executed in the same conditions as a court order.

Pursuant to Art. 23 of the Rules of the International Arbitration Court of Paris, the parties may request granting provisional or conservative measures either to the arbitration court, after it has been legally constituted, or to a court of jurisdiction.

Interpreting this text, the doctrine considered that the parties have the possibility to address the court of arbitration independently from the payment of the arbitration costs in full or any other formality, which may prevent or burden the interested party, or may delay the measures, hence ensuring their efficiency³¹.

If the request is addressed to the court of justice after the litigation has started, the parties are bound to notify the Court Secretary, who shall immediately notify the court of arbitration thereof³².

The Rules do not contain any limitative or declarative enumeration of the situations that may justify the provisional measures, however they do specify the necessity for the petitioner to show adequate safeguards for solving the claim.

Within Art. 25 of the Rules of the International Court of Arbitration in London, it is specified that the court of arbitration may order certain provisional and conservative measures, such as: keeping, depositing, sale or any other disposal of property or goods, under a party's control and in connection with the subject of the litigation.

From more points of view, the authority of the arbitrators to grant provisional measures is limited. On the one hand, the arbitrators are able to grant provisional measures only in regard to the parties of the arbitrary convention, and not to a third party. Although this provision is not expressly stated by the different legal systems³³, it is however an obvious consequence of the contractual nature of arbitration.

Secondly, the arbitration court does not have the authority to enforce the execution of the provisional measures, this being an exclusive attribute of the courts of jurisdiction³⁴.

Finally, the court of arbitration can only take provisional measures after its formation, this being a very important practical aspect, since most of the times the parties seek to obtain such measures at the very beginning of the arbitration.

In order to remove this inconvenience, some arbitration institutions passed regulations allowing the parties to be granted provisional measures even before the formation of the court of arbitration.

³⁰ See Margaret L. Moses „The Principles and Practice of International Commercial Arbitration”, Cambridge University Press, New York, 2008, p. 102

³¹ See Erik Schäfer, Herman Verbist, Christophe Imhoos “ICC arbitration in practice”, Ed. Kluwer Law International, Haga, 2005, p. 115.

³² Art. 23, par. 2 of the Rules of the International Court of Arbitration of Paris.

³³ Art. 17 of UNCITRAL Law and Art. 696 par. 1 of the Belgian Judicial Code authorizes the court of arbitration to order provisional measures only regarding the parties.

³⁴ See for reference art. 17H, par. 1 of Uncitral Law.

Such are the Pre-arbitral Procedure Rules of the International Court of Arbitration in Paris, in effect since January 1st, 1990.

The purpose of the rules is to permit the parties to request an arbitrator (called Referee) to order on any urgent matter, before the formation of the court of arbitration. This way, the parties may obtain conservative measures or measures meant to restore a situation, in order to prevent further immediate damages or irreparable loss³⁵.

The order is provisional *per se*, until the end of the dispute by the award or by the parties' agreement³⁶. Regarding the nature of the act granting these measures, the French jurisprudence stated that it cannot be considered an award, but a contractual provision, and cannot therefore be the subject of an action for annulment³⁷.

Moreover, pursuant to Art. 6.3. of the Pre-arbitral Rules, ordering provisional measures does not prejudice the merits, and such will be in effect until the competent authority shall decide otherwise.

The main inconvenient of these rules is the fact that the parties must sign a written convention stipulating their right to use this special procedure. Many times, the parties do not anticipate the necessity of such measures at the time of closing the contract and the arbitration convention³⁸.

Despite these considerations, although in the beginning the use of these rules was quite diminished, after 2001, the number of cases solved through pre-arbitral procedure increased³⁹.

The simultaneous competence of the court of arbitration and courts of jurisdiction to grant provisional measures is an exception from the principle of the non-intervention of national courts during the arbitration procedure. Since this is not a matter of public interest, the parties have the faculty to remove it, establishing an exclusive competence for the arbitrators regarding the provisional measures⁴⁰. Excluding the possibility of the parties to address national jurisdictions to obtain interim measures may be stipulated in the arbitration agreement or may result implicitly. Thus, it may be considered that the parties waive the possibility to address the national courts when they agree for the arbitration to proceed pursuant to the Arbitration Rules of the International Center for the *Settlement of Investment Disputes*. As stated in Art. 39, par. 6 of these Rules, *the parties can request any judicial authority to grant provisional measures, but only if such had been stipulated in writing in their convention*. An implicit exclusion of the competence of the national courts to grant provisional measures results from the situation when the parties use the pre-arbitration procedure of the International Court of Arbitration in Paris, mentioned above. A particular question arises from the situation when the parties request the national courts to grant provisional measures before the formation of the court of arbitration – whether the arbitrators are bound by these measure or they could revoke or modify them⁴¹. The answer can only be affirmative, the court of arbitration

³⁵ Art. 2.1, let. a) of the Pre-arbitration Procedure Rules of the International Court of Arbitration in Paris.

³⁶ This provision is mentioned in the introduction to the Pre-arbitration Procedure Rules of the International Court of Arbitration in Paris.

³⁷ See Erik Schäfer, Herman Verbist, Christophe Imhoos, cited, p. 73.

³⁸ See Gary B. Born, cited, p. 1971.

³⁹ See Erik Schäfer, Herman Verbist, Christophe Imhoos, cited, p. 187.

⁴⁰ See Emmanuel Gaillard, John Savage, cited, p. 718.

⁴¹ See Arnoldo Wald „Arbitration in Brazil: Case Law Perspective” in Romanian Arbitration Journal, no. 4 of 2010, p. 39.

being fully competent both to settle the dispute and to maintain or not the provisional measures ordered by the national courts.

The competence of the arbitrators to order provisional measures is recognized by most of the national legislations and the rules of institutions of arbitration, which can only be interpreted as a confirmation of the fact that arbitration is truly an efficient mechanism for settling international commercial disputes.

However, currently the possibility of the parties to address the national courts must be preserved, since there are situations when this is the only way for the parties to effectively protect their rights, thus the competence of the arbitrators being still limited.

