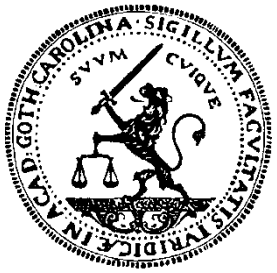

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On the Legal Frameworks and Substantive Standards Governing the Granting of Interim Measures in International Commercial Arbitration

Master thesis
30 credits

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Arbitration Law

Fall 2011

Contents

Summary

The institute of interim measures is an integral component in international commercial arbitration. However, there are uncertainties in terms of the procedural aspects of these measures. One pertinent issue is the legal frameworks that govern the granting of arbitral interim measures. The matter of what substantive standards and requirements to apply on requests for interim measures is unresolved, and different approaches are advocated and employed. This thesis examines the legal structures that potentially provide tribunals with these standards, as well as the specific prerequisites themselves.

Aside from aspects of jurisdiction, enforcement and types of measures, the legal frameworks that govern the granting of arbitral interim measures is subject to controversy. In general, the law at the place of the arbitration, the law governing the parties' contract and international standards are expressed as the primary sources that tribunals take recourse to. However, the law at the place of the arbitration and the law governing the parties' contract seldom encompass requirements for the granting of arbitral interim measures; a circumstance that potentially has forced arbitrators to turn to national civil procedural laws for guidance. Although strongly promoted by some commentators, the primacy of international standards is questioned due to the difficulty in establishing uniform practice within a confidential procedure. The approach in the UNCITRAL Model Law provides a defined structure, but is perhaps undermined by its content and its role as a model law.

A number of possible applicable substantive standards can be discerned in international arbitration, specifically jurisdiction, *prima facie* case or probability of success on the merits, urgency, irreparable or serious harm to the requesting party, proportionality and no prejudgment of the merits. The requirements of urgency, irreparable or serious harm and the bar on prejudgment are found to be somewhat more established and referred to than other standards. Yet, depending on the circumstances, other requirements may well be of significance in a tribunal's decision.

A case study of arbitral interim measures in Sweden and within the SCC confirms the diverging approaches with which the problem is resolved, but perhaps also bears evidence of a development towards a more internationalized system separate from national laws.

From a party perspective, the uncertainty of different systems and requirements may be detrimental per se. Defined standards in the rules of arbitral institutions are therefore submitted as an appropriate alternative to the current structure. Potentially, this would fashion a more predictable and attractive regime for arbitral interim measures.

Sammanfattning

Interimistiska säkerhetsåtgärder är en viktig komponent i internationella skiljeförfaranden. Emellertid är institutet förenat med en rad oklarheter. Ett sådant element är de regelverk som reglerar beviljandet av interimistiska säkerhetsåtgärder meddelade av skiljemän. Vilka förutsättningar som ska vara uppfyllda för att en skiljenämnd ska bevilja säkerhetsåtgärder är inte fastställt, och olika tillvägagångssätt förespråkas och nyttjas. Denna uppsats behandlar dels de legala strukturer som potentiellt tillhandahåller skiljenämnder med dessa förutsättningar, dels specifika förutsättningar per se.

Förutom angränsande aspekter som jurisdiktion, verkställighet och typer av säkerhetsåtgärder är de legala regelverk som reglerar beviljandet av interimistiska säkerhetsåtgärder i skiljeförfaranden omtvistade. Generellt sett vänder sig skiljenämnder till lagen i det land där skiljeförfarandet äger rum, lagen som reglerar parternas mellanhavanden eller internationella standarder för att utröna vilka förutsättningar som ska vara uppfyllda. De två förstnämnda källorna innehåller dock sällan uppställda krav för beviljandet av säkerhetsåtgärder, vilket möjligen frammanat situationen där skiljemän vänt sig till nationella processlagar för vägledning. Likaså kan idén om internationella standarder ifrågasättas utifrån svårigheten att etablera en praxis inom ett konfidentiellt förfarande. Det tillvägagångssätt som återfinns i UNCITRAL:s Modellag ger visserligen en tydlig struktur, men dess innehåll och utformning som modellag medför också begränsningar.

En rad specifika förutsättningar för beviljandet av säkerhetsåtgärder kan urskiljas i internationella skiljeförfaranden. Dessa utgörs av krav på jurisdiktion, sannolika skäl till anspråk, angelägenhet, oersättlig eller svår skada hos den kärande parten, proportionalitet och förbud mot förtida dom. Kraven på angelägenhet, oersättlig eller svår skada och förbudet mot förtida dom förefaller vara mer etablerade än andra förutsättningar. Beroende på omständigheterna borde emellertid även andra förutsättningar kunna vara av betydande vikt vid en skiljenämnds beslutsfattande.

En fallstudie i interimistiska säkerhetsåtgärder i Sverige och inom ramen för Stockholms Handelskammares Skiljedomsinstitut bekräftar variationen i existerande tillvägagångssätt men visar kanske också på en utveckling mot ett mer internationellt förankrat system åtskiljt från nationella lagar.

Ur ett partsperspektiv kan osäkerheten kring diversifierande system och förutsättningar vara negativ. Därför förespråkas en alternativ struktur med definierade förutsättningar i skiljedomsinstitutens regelverk. Detta tillvägagångssätt kan möjligen främja ett mer förutsägbart och attraktivt system för beviljandet av interimistiska säkerhetsåtgärder i internationella skiljeförfaranden.

Preface

A number of individuals deserve recognition in relation to the completion of this thesis.

Professor *Christopher Gibson,* thank you for opening my eyes to arbitration and single-handedly inspiring me to conclude my law studies within the area of arbitration law.

Simon Ottosson, *Aron Skogman* and *Daniel Waerme,* thank you for directing my attention to the particular subject of this thesis.

Finn Madsen, *Lars Edlund* and *Patricia Shaughnessy*, thank you for valuable comments and general guidance at the initial stages of my study.

Finally, *Lotta Maunsbach*, thank you for structure, support and overall supervision throughout this process.

Lund, December 2011

Oscar Rydén

Abbreviations

AAA	American Arbitration Association
ACICA Rules	Rules incorporating Emergency Arbitrator Provisions of the Australian Centre for International Commercial Arbitration (2011)
ICC	International Chamber of Commerce
ICC Rules	Arbitration and ADR Rules of the International Chamber of Commerce (2012)
ICDR	International Centre for Dispute Resolution
ICDR Procedures	International Dispute Resolution Procedures of the International Centre for Dispute Resolution (2009)
ICSID Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (2006)
LCIA Rules	Arbitration Rules of the London Court of International Arbitration (1998)
New York Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
SAA	Swedish Arbitration Act (1999:116)
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010)

SCC EA Rules	Appendix II of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre (2010)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Arbitration (as amended in 2006)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (as revised in 2010)
ZPO	Zivilprozessordnung, German Code of Civil Procedure

1 Introduction

1.1 Background

In international commercial contracts, parties often agree to take recourse to arbitration in case of a dispute. Thereby, the parties effectively remove potential disputes from the arena of national court systems and rely on a private dispute resolution regime, adapted to the world of international commerce.[1] Arbitration can either be carried out *ad hoc*, whereby the entire process is in the hands of the parties, or within an institution, whereby a neutral establishment provides a framework of rules and procedures for the arbitration.[2] If the parties fail to conciliate during the process, arbitration results in an award. Generally, both nationally and internationally, awards are binding and enforceable.[3] Given the above, and with other characteristics such as neutrality, party autonomy, confidentiality and final dispute resolution, arbitration poses an attractive alternative to civil litigation in national courts.[4]

During the course, or perhaps more commonly at the outset of a dispute, a party sometimes implements dilatory or destructive actions in order to, on the one hand, improve the chance of success, and on the other hand, obstruct or complicate the opposing party's case. A party, knowing it is in breach, may also remove the subject or intended result of the dispute, rendering a decision ineffectual. Such actions erode the entire process of dispute resolution in multiple ways. First, it hinders the adjudicatory to render a decision based on the facts and circumstances of the case. Second, it may eliminate the possibility to get compensation for faulty behaviour, e.g. by removing assets that the winning party can claim title to or as reimbursement. Typical destructive conduct includes, but is not limited to, dissipation of assets, dissipation and destruction of evidence, intentional default of contract obligations and disclosure or misuse of intellectual property.[5]

Hence, to uphold the viability of adjudicating disputes, measures maintaining *status quo* pending the resolution of the dispute, and facilitating the achievement of the intended result, are essential.[6] Historically, national courts have been the sole forum for requesting interim measures,[7] and may still be the favoured venue due to various reasons.[8] However, most national legal systems, as well as rules of international arbitral institutions, allow

[1] Redfern & Hunter 2004, p. 1.
[2] *Id*. p. 46-47.
[3] *Id*. p. 8, 10-11.
[4] Lew, Mistelis & Kröll 2003, p. 3-6.
[5] Born 2009, p. 1943.
[6] *Ibid*.
[7] Lew, Mistelis & Kröll 2003, p. 588.
[8] Redfern & Hunter 2004, p. 333-336.

interim measures to be granted within arbitral proceedings.[9] Yet, as mentioned, the need for interim measures is perhaps most prominent at an early stage of the dispute, maybe even before the arbitral tribunal has been constituted. To fill this gap, arbitral institutions around the world have recently begun to implement rules that allow an emergency arbitrator to hear motions for interim measures when the tribunal is yet to be formed.[10] This development revitalizes questions in relation to interim measures in international commercial arbitration.

The institute of interim measures in arbitration is not short of complexities. One of the most pertinent issues is the legal framework for granting such measures.[11] What grounds will suffice to induce an arbitrator to grant a request for interim measures – what conditions must be met? Should national civil procedure laws have precedence, or are there international standards that need to be taken into account? National arbitration laws and rules of arbitral institutions are generally silent on the matter, leaving parties and arbitrators in deficiency of legal guidance.

1.2 Purpose

The purpose of this thesis is twofold. *First*, the objective is to examine the legal framework for the granting of interim measures in international commercial arbitration. In view of the fact that the process of granting arbitral interim measures is unregulated, thus forcing arbitrators to independently locate suitable standards, the study has two levels. Hence, its focus is i) what legal frameworks or sources of law may be used by tribunals to find the standards to apply on requests for interim measures, and ii) what specific substantive standards are in fact applied in the process of granting arbitral interim measures.

Second, the author aims to evaluate these legal frameworks and specific substantive standards from a party perspective. A number of questions lay the foundation for this analysis: What are the potential effects of current structures? Given that a balanced process is desirable, in which both flexibility and predictability is of significant importance, what structure may fashion the most attractive and reasonable scheme for interested parties, and perhaps for arbitration *per se*, in terms of arbitral interim measures? Can a certain regime make parties more or less inclined to utilize arbitral interim measures, and can any such structure be said to correspond with the parties' reasonable expectations on the arbitral procedure?[12]

[9] Lew, Mistelis & Kröll 2003, p. 589-591.
[10] For example, the SCC implemented its "Emergency Arbitrator" regime (SCC EA Rules) in January 2010.
[11] See Madsen 2008, p. 346, and Yesilirmak 2005, p. 3.
[12] Compare with Yesilirmak 2005, p. 3.

1.3 Method

The area of arbitral interim measures is somewhat unregulated, in terms of both national legislation and private regulatory frameworks. Thus, this study is primarily based on legal doctrine on international arbitration. English and American authors dominate the consulted doctrine. The nationality and legal background of these authors may have had impact on the formation of their works; a fact that should be taken into account when studying the material. As to specific commentary, Born's extensive work on international commercial arbitration and Yesilirmak's in-depth study of provisional measures in arbitration deserves explicit recognition. In addition, relevant statutory provisions and institutional rules are periodically examined and presented.

As a case study, the Swedish legislation, the SCC Rules and SCC case law is specifically examined in light of the stated purpose. Here, legislative history, commentary and practice is studied. Naturally, arbitral case law is limited. In an attempt to illuminate practice within SCC proceedings, as an example of international arbitration, a section has been devoted to such relevant material. Excerpts and commentary material on four emergency arbitrator decisions form the basis of that section. This material is chosen out of necessity; the original awards and decisions are not accessible, and no other SCC case law relevant for arbitral interim measures has been found. Although different in some respects, interim measures on emergency basis are subject to equivalent requirements as interim measures during the normal course of arbitral proceedings.[13] Hence, with some reservation, these may provide information relevant for this thesis.

The extraordinary circumstances with regard to the form and amount of primary sources of case law suggests that conclusions in relation to much of that material can only, realistically speaking, amount to qualified conjectures and assumptions. Similarly, opinions in doctrine have not been scrutinized in light of actual practice, thus rendering the reasonableness of any analysis premised on the accuracy of such opinions.

In order to maintain stringency, analyzing and evaluating comments are intertwined with the empirical elements of the study. However, as a general structure, paragraphs representing the author's view are found at the end of each descriptive section.

1.4 Definitons and Terminology

The phrase "interim measures" is the predominant term used to specify the measures that are the focus of this thesis. However, in international commentary and practice, these measures are also commonly referred to as

[13] See *infra* p. 33.

provisional measures, conservatory measures, interim relief or provisional relief. For linguistic reasons, the term "interim relief" may be utilized from time to time.

Different plausible definitions of arbitral interim measures exist. An exact definition is not vital for the purpose of this thesis, but suggestively, interim measures can be described as "*awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process*."[14] The objective is ordinarily to maintain a factual or legal situation, but the protection of party rights may also take the form of orders for specific performance or resuming interrupted operations.[15]

As the title implies, this study concerns *international commercial* arbitration.[16] The term "international" implicates a perspective beyond the confinements of national borders, be it because of the parties' differing domicile, their place of business or the place of the arbitration. That being said, all arbitral proceedings can be viewed as national in a sense,[17] and the presented material does not necessarily apply exclusively to situations where, e.g., the parties are of different nationality. Moreover, the term "commercial" is used to indicate that arbitrations between private commercial parties are the focus of this thesis. For example, consumer arbitrations and arbitrations between two or more states may implicate different rules and considerations,[18] and these are not specifically taken into account.

In references to case law, the terms claimant or applicant are used to identify the party requesting an interim measure, and the term respondent to identify the party towards whom the interim measure is addressed. Thus, these designations do not necessarily correspond to party positions in an overarching dispute.

Finally, arbitrators, arbitral tribunals and tribunals are used interchangeably throughout the study. Hence, there is no significance in the difference between tribunals of one single arbitrator and tribunals of a number of arbitrators.

1.5 Delimitations

In addition to the delimitations resulting from the applied definitions above, the focus of this thesis is situations whereby parties have subjected their dispute to a private regulatory framework. Thus, be it in *ad hoc* or

[14] Born 2009, p. 1944.
[15] *Ibid*.
[16] Note the frequent use of this designation in the titles of works on arbitration. See e.g. Lew, Mistelis & Kröll 2003, Redfern & Hunter 2004, Yesilirmak 2005, Born 2009.
[17] Redfern & Hunter 2004, p. 12.
[18] Lew, Mistelis & Kröll 2003, p. 50-51.

institutional form, a central element is that the parties have chosen certain rules to govern the procedural aspects of their dispute.

There are several salient issues pertaining to arbitral interim measures. For example, there is considerable divergence in approaches on the constitution of the arbitral jurisdiction to order such measures. From where that authority is derived and the relationship between different forms of authorization are key aspects in the area of arbitral interim measures.[19] Furthermore, the issue of lack of enforcement mechanisms for these measures is of significant importance. In many jurisdictions, the enforcement of interim measures ordered by tribunals is dependent on the voluntary compliance of affected parties. This structure threatens to diminish the efficacy and impact of arbitral interim measures.[20] Due to the scope of this thesis, and although touched upon, these issues are not the focus herein. Hence, when not specifically addressed, jurisdiction to order interim measures is presumed existent *ipso facto*, and enforcement is not particularly considered.

Moreover, in any study of interim measures in arbitration, the possibility for arbitrating parties to take recourse to national courts is an inevitable element. However, due to the limits of this study, court-ordered interim measures in aid of arbitration will only be briefly commented on as the obvious alternative to arbitral interim measures.

1.6 Disposition

To facilitate the purpose of this thesis, the reader must first be familiarized with interim measures in arbitration as such, including their legal foundation, the characteristic mechanics of them and their relationship with court-ordered interim measures. Thus, Chapter II provides a fundamental overview of pertinent issues in terms of interim measures in arbitration.

Chapter III is devoted to the substantive standards used in assessing requests for interim measures. The chapter partly deals with different regimes for determining applicable standards, and partly on particular substantive standards employed to assess requests for arbitral interim measures.

In Chapter IV, the Swedish structure is examined with regard to what previously has been presented. Case law from the SCC is studied to potentially illustrate prevailing practice within the SCC. The chapter is ended with a brief analysis of the cases, its implications, and its position in an international perspective.

Chapter V concludes the thesis with a discussion on the presented material. The focal point is the suitability and reasonableness of applicable standards, the consequences of current structures and preferable approaches.

[19] Compare with Yesilirmak 2005, p. 54-66.
[20] Compare with Yesilirmak 2005, p. 237-238. See also Madsen 2008, p. 345.

2 The Fundamentals of Arbitral Interim Measures

2.1 The Need for Arbitral Interim Measures

The first actual structures of interim measures as a part of international dispute resolution can be traced back to the beginning of the 20th century.[21] The general growing importance of the protection of rights in arbitration can be seen as a natural consequence of the increase in trade and business across national borders.[22] The need for these interim measures have increased vastly since then, and particularly over the past decades, much because of globalization and greater confidence in arbitration.[23]

The significance of arbitral interim measures is almost indisputable.[24] It has been expressed that the availability of interim measures is a prerequisite for the efficacy of arbitration.[25] When disputes arise between parties with origin or business activities in different countries, additional problems and risks appear compared to completely domestic situations. Hence, the importance of interim relief in international settings may be even more apparent.[26] Yet, the significance of arbitral interim measures is not limited to their protective purpose, they may also function as leverage and as a central element in a party's tactical scheme in a dispute.[27]

Furthermore, there are numerous arguments in favor of arbitral interim measures. For example, arbitral interim measures can be seen as a matter of respect for the parties' agreement.[28] By choosing arbitration, the parties have removed potential disputes between them from the realm of national courts. Arguably, they have done so for a reason. Also, court proceedings are inherently burdened by principles of publicity, often diametrically opposite of the aim of the parties.[29] Finally, a fundamental feature of arbitration is the speed and efficacy with which its procedures are carried

[21] Yesilirmak 2005, p. 13, 20.
[22] *Id*. p. 20, 43.
[23] *Id*. p. 14. Yesilirmak confirms this by reference to the increase of decisions on interim measures. See also Yesilirmak 2000, p. 31.
[24] Yesilirmak 2005, p. 13.
[25] See e.g. United Nations Commission in International Commercial Arbitration, report of the Working Group on Arbitration on the work of its thirty-second session, (Vienna, 20 – 31 March 2000), A/CN.9/468, p. 13.
[26] Born 2001, p. 920.
[27] Born 2009, p. 1944.
[28] Yesilirmak 2005, p. 49.
[29] *Id*. p. 52-53.

out. Arbitrators are well-equipped to handle questions of interim measures, and can do so within a more streamlined procedure.[30]

2.2 The Legal Foundation for Arbitral Interim Measures

2.2.1 Overview

International arbitration procedures are governed by multiple sources of law. Arbitration is based on a private agreement between two or more parties. A significant source of guidance pertaining to the dispute at hand and the arbitration process can thereby be said to be the parties' contract.[31] Arbitration contracts may contain references to certain institutional rules, chosen by the parties as the overarching complex of rules to govern the process between them. Such references effectively incorporates the rules of that institution and generally means that the parties, in addition to utilizing the regulatory framework, thereby designate the institution to administer and monitor the arbitration For some time now, the tendency has been to give way to and enforce such agreements.[32]

The legal framework for arbitral interim measures can arguably be discussed on different levels; there are multiple aspects of it. In terms of the arbitral competence for ordering interim measures and the sources of law actually governing the granting of such measures, the primary relevant sources of law are the parties' agreement and the *lex arbitri*.[33]

2.2.2 The Parties' Agreement - Institutional Rules

Party autonomy is one of the most fundamental concepts in international commercial arbitration.[34] The idea that the power to order interim measures is conferred upon arbitrators by way of the parties' agreement is widespread among commentators.[35] Although some argue that such power is inherent in the role of the arbitrator, the prevailing view is that conferral of power is made by stipulation or by reference to arbitration rules.[36] The parties' right to, by reference, incorporate institutional rules into their contractual relationship and dispute resolution scheme is a prominent expression of party autonomy in international arbitration.[37]

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[30] *Id*. p. 51-53.
[31] Lew, Mistelis & Kröll 2003, p. 4.
[32] Redfern & Hunter 2004, p. 76-77.
[33] Boog 2011, p. 409-411.
[34] *Id*. p. 416.
[35] *Id*. p. 412.
[36] *Id*. p. 413.
[37] Born 2009, p. 1753.

Institutional arbitration rules regularly empower arbitrators with extensive authority to grant interim measures if the parties do not agree otherwise.[38] For example, the SCC Rules provides that "*[t]he Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate*."[39] Similarly, the ICC Rules stipulates that unless the parties have agreed otherwise, the tribunal can "*order any interim or conservatory measure it deems appropriate*."[40] With only insignificant variations, the same is true for many both institutional and non-institutional rules.[41]

A number of arbitration institutions have during the past two decades modified their rules to meet the requirements of urgent arbitral relief. These rules have taken different forms and operated under somewhat different conditions.[42] Since January 2010, the SCC has an operating framework for pre-arbitral relief in the form of the Emergency Arbitrator Rules.[43] This structure provides an emergency arbitrator with the same discretion to order interim measures as a tribunal in the normal course of arbitration proceedings.[44] Similar rules have been adopted by a number of international arbitration institutions, among them and most recently the ICC.[45]

2.2.3 Lex Arbitri

The place where the arbitration is held is more than a geographical reality; it is also the determinative factor of the law that will govern the arbitration, the *lex arbitri*.[46] Due to the fact that parties commonly agree to place the arbitration somewhere neutral in relation to their origin or business, the law governing the arbitration is often different from the law governing the substantive matters of the dispute.[47] Although the autonomy of the parties

[38] *Id*. p. 1958.
[39] SCC Rules Art. 32.
[40] ICC Rules Art. 28.
[41] See e.g. ICDR Procedures Art. 21, SIAC Rules Art. 26, UNCITRAL Rules Art. 26.
[42] For example, the ICC launched its Pre-Arbitral Referee Procedure in 1990, albeit not very commonly used during its lifetime. The ICDR (International Centre for Dispute Resolution), the international branch of the AAA, amended its rules in 2006 to fashion the granting of interim measures at the outset of disputes. See Born 2009, p. 1971, and ICDR Procedures Art. 37.
[43] SCC Rules Appendix II.
[44] SCC EA Rules Art. 1(2).
[45] See e.g. ICC Rules Art. 29, SIAC Rules Schedule 1(6), ACICA Rules Schedule 2 Art. 3(3). The ICC Rules does not, unlike most other emergency arbitrator rules, specifically address the extent of the power to order interim measures. However, given the language of Art. 29, these rules provide for the same type of authority as stipulated for a normal arbitrator.
[46] Redfern & Hunter 2004, p. 84.
[47] Tweeddale 2005, p. 221. At an early stage, contracting parties therefore have great possibilities to pre-structure the resolution of potential future disputes. By considering the place where an arbitration is to be held and including this in the arbitration agreement, the parties can ensure to have their dispute resolved in a place with a *lex arbitri* in favor of arbitration. If the parties refrain from incorporating such determination in their contract, the question of the seat of the arbitration is generally left to the tribunal or the arbitral institution. See Redfern & Hunter 2004, p. 79, and UNCITRAL Rules, Art. 18(1).

may extend to the choice of a specific procedural law,[48] it is not uncommon that the procedural law and the *lex arbitri* converge in the absence of such choice.[49]

The *lex arbitri* is generally described as the law of the place or the seat of the arbitration, and comprise of mandatory rules that will affect the proceedings.[50] The rationale behind this so called seat theory is derived from the notion that an arbitration has its basis in national law. By way of permissive national legislation, a private tribunal conducts a process normally within the state's exclusive competence.[51] The idea that the arbitration is governed by the substantive laws of the place where it is held is internationally accepted and recognized.[52]

Lex arbitri can be characterized as a law of procedure, i.e. the law that governs the procedural aspects of an arbitration. It has, *inter alia*, been suggested to consist of rules governing the arbitrability[53] of a dispute, the general conduct of the arbitration, as well as the area of interim measures of protection.[54] Generally, in arbitral awards, national court authority and commentary, the power of arbitrators to grant interim measures is determined in accordance with the law at the arbitral seat.[55]

2.2.4 National Arbitration Laws

Lex arbitri as such is not a legal system, but merely a reference to the application of, in most cases, national arbitration laws.[56] If the parties have chosen a procedural law to govern the arbitration, the *lex arbitri* will still have precedence in terms of its mandatory provisions.[57]

Historically, national legislatures have been reluctant to allow private tribunals to grant interim measures.[58] However, the majority of modern arbitration laws permit arbitral interim measures, but only if the parties by agreement, either concluded in the arbitration contract or indirectly by way of reference to institutional rules, have vested such power in the tribunal. Absent indications that the parties have agreed otherwise, they will generally be presumed to have included such conferral of power in their contract.[59]

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[48] Redfern & Hunter 2004, p. 84, 87.
[49] Tweeddale 2005, p. 241.
[50] *Id*. p. 233.
[51] *Id*. p. 234.
[52] Redfern & Hunter 2004, p. 83.
[53] The concept whereby some subject matters are incapable of being arbitrated. See e.g. Redfern & Hunter 2004, p. 19.
[54] Redfern & Hunter 2004, p. 81, and Born 2009, p. 1962.
[55] Born 2009, p. 1962.
[56] *Ibid*.
[57] *Id*. p. 1751.
[58] *Id*. p. 1950.
[59] *Id*. p. 1951.

However, there are still countries that have not yet adhered to the pro-arbitration structure with regard to interim measures.[60] If parties situate their dispute resolution procedure within these jurisdiction they have arguably exposed their agreement to the regulatory restrictions of those jurisdictions in terms of interim measures.[61] In congruence with this, arbitrators have been intuitively unwilling to order interim measures when the *lex arbitri* is non-permissive.[62]

2.3 The Mechanics of Arbitral Interim Measures

This section does not purport to give a complete presentation of arbitral interim measures, encompassing all aspects and dissimilarities of and between various legal systems and rules. The objective is to present generalities and practices most commonly used in contemporary international arbitration.[63]

2.3.1 Types of Measures

There are multiple types of plausible measures in international commercial arbitration. Some commentators suggest that the type of, or content of a measure is, within the boundaries of a party's request, much determined by the discretion of the arbitrator.[64] However, in this context, others hold that determining the adequate and permissible measure is not an arbitrary or discretionary process; it is performed within a scheme of rules and principles. Although the range of conceivable measures is broad, the variety is restricted by national requirements, the parties' contract and the fact that measures only have effect *inter partes*.[65]

Given the legal framework described above,[66] parties can prescribe what types of interim measures are admissible by way of contract. The parties' freedom to contract on procedural aspects is nevertheless subject to the mandatory provisions of the *lex arbitri* and/or the chosen procedural law.[67]

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[60] Countries like Thailand, Argentina and Italy still deem interim measures to be within the exclusive competence of national courts. See Boog 2011, p. 414.
[61] Born 2009, p. 1963. Such national legislation can arguably be said to provide an arbitration scheme in violation of the New York Convention and its requirement to recognize international arbitration agreements.
[62] Born 2009, p. 1963.
[63] For the basic structure of the categorization of measures below, see Yesilirmak 2005, p. 11-12.
[64] Yesilirmak 2000, p. 33, and Lew 2000, p. 29.
[65] Born 2009, p. 1994. The idea that arbitrators only have jurisdiction over the parties to the arbitration agreement is expressed in the UNCITRAL Model Law. See e.g. UNCITRAL Model Law Art. 26 (2), which describes interim measures as measures by which an "arbitral tribunal orders *a party* [---]." See also Born 2009, p. 1965-1966.
[66] See *supra* p. 12-15.
[67] Boog 2011, p. 434.

Most arbitration rules provide arbitrators with wide discretion with regard to types of interim measures. The ICC Rules permits the tribunal to grant "*any interim or conservatory measure it deems appropriate*."[68] The SIAC Rules and the SCC Rules, only to name two, contain similar language.[69] The same is true with regard to pre-arbitral interim measures granted on emergency basis.[70] This has been suggested to give arbitrators a large portion of autonomy in determining adequate and attuned measures. In this process, arbitrators are arguably free to base decisions on principles derived from different sources of law, whether it is national law or international practice.[71] The UNCITRAL Rules[72] takes a different approach by providing a suggestive "laundry-list" of the types of measures that are admissible.[73]

As for arbitration rules, most national arbitration laws do not address the issue of types of arbitral interim measures.[74] An exception is the UNCITRAL Model Law which has the same content as the UNCITRAL Rules Art. 26.[75] Some jurisdictions have or will soon implement matching language.[76]

The sections below present a general categorization of plausible interim measures in arbitration.[77]

2.3.1.1 Preservation of Evidence

These measures are intended to prevent the dissipation or loss of evidence relevant for the arbitration. Loss or dissipation of evidence can occur naturally but also as a result of party conduct, either intentional or unintentional. Regardless of the reason, preservation of evidence is important to facilitate an adequate and correct process.[78]

Preservation of evidence should be discerned from another type of order from a tribunal; an order to produce evidence. Such orders are generally not considered provisional, as they prescribe production and not preservation of evidence.[79]

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[68] ICC Rules Art. 28.
[69] See SIAC Rules Art. 26, and SCC Rules Art. 32.
[70] See e.g. SCC EA Rules Art. 1(2), ICDR Procedures Art. 37(e), SIAC Rules Schedule 1(6).
[71] Boog 2011, p. 438.
[72] See also the LCIA Rules Art. 25 which is somewhat similar but not as specific.
[73] See UNCITRAL Rules Art. 26.
[74] Boog 2011, p. 438.
[75] UNCITRAL Model Law Art. 17.
[76] Boog 2011, p. 439.
[77] Several commentators have presented classifications and categorizations. This categorization corresponds to one of them, but is arguably somewhat representative. Compare with Yesilirmak 2005, p. 11-12.
[78] Yesilirmak 2005, p. 207.
[79] *Id*. p. 11.

2.3.1.2 Injunctions

The objective of an injunction is to order a party to take, or refrain from taking, certain actions. Injunctions can, *inter alia*, take form of orders of specific performance, orders to refrain from specific actions pending the resolution of the dispute and orders to preserve certain items or goods.[80]

A variant under this category is measures aimed at preserving *status quo*, which is perhaps the most common form of interim measure. Actions like terminating an agreement, disclosing trade secrets or using intellectual property are typical objectives in this category.[81] A problem with this kind of measure is the issue of at what time *status quo* is to be related. *Status quo* might well be altered between the time when the parties are performing their respective contractual obligations, at the time when dispute arises and at times during the arbitration.[82]

2.3.1.3 Preservation of Assets and Security for Satisfaction of Awards

In order for the winning party to be able to realize the outcome of an award, predominantly in the form of a claim of monetary reimbursement, a tribunal may have to order a party to preserve certain assets, or to provide security for the satisfaction of the other party's claim. If, after final resolution of a dispute, the losing party has diverted the subject of the dispute or all obtainable assets for the satisfaction of the claim, arbitration awards would be rendered illusory.[83]

2.3.1.4 Other Measures

Other measures that can be mentioned briefly are orders intended to secure payment of legal costs, orders to enforce confidentiality obligations, orders for interim payment and anti-suit orders.[84]

2.3.2 Non-Coersive Enforcement

Arbitral tribunals, unlike national courts, are in almost all jurisdictions not vested with the authority to render automatically enforceable awards. Consequently, an arbitral tribunal is not equipped with the power to coercively enforce its own orders. If an award is not voluntarily complied with, a competent court must aid the arbitration process by enforcing the award.[85] The overarching rule of non-coercive enforcement applies to

[80] Yesilirmak 2005, p. 208.
[81] Born 2009, p. 1995.
[82] *Id*. p. 1998-1999.
[83] Yesilirmak 2005, p. 12, 214-218. See also Born 2009, p. 2002-2007.
[84] See Born 2009, p. 2004-2010.
[85] *Id*. p. 1968, 2019. In some jurisdictions, the same scheme also applies in terms of interim measures; see e.g. Swiss Law on Private International Law Art. 183(2) (an English translation of the Swiss Law on Private International Law has been consulted, see

interim measures as well, perhaps even more evidently than in relation to final awards.[86]

In the domestic setting, national legislatures have taken different approaches with regard to the enforceability of arbitral interim measures. While a few jurisdictions almost routinely enforce such orders, others represent the more restrictive view and require courts to either transpose a tribunal-ordered interim measures into a court-ordered ditto under limited judicial review, or simply require courts to issue a completely independent order *de novo*.[87]

Internationally, enforcement of awards is done by way of the New York Convention, under which the possibility to refuse enforcement is very limited.[88] While the New York Convention provides an international structure for enforcement of awards, it does not explicitly address the issue of enforcing arbitral interim measures. The issue turns on the nature of "orders" for interim measures and the meaning of "awards". Some argue that interim measures are incapable of being awards, in that they are not final or binding, and hence not enforceable under the New York Convention. Others assert that interim measures delivered as awards fulfill the requirement of "finality" and thus are enforceable under said convention. The latter view is prevailing in states like the U.S., Australia and the Netherlands.[89]

Despite the obvious insufficiencies and shortcomings of the current enforcement regime of arbitral interim measures, international arbitration practice shows that such measures have traditionally been voluntarily complied with.[90] Also, parties are generally not inclined to antagonize or provoke the tribunal, possibly an expression of some sort of informal

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http://www.umbricht.ch/pdf/SwissPIL.pdf). In other jurisdictions, such as Sweden, tribunal-ordered interim measures are neither directly enforceable nor indirectly enforceable with the aid of national courts. See *infra* p. 36.

[86] See Born 2009, p. 1966-1968. However, the Netherlands Code of Civil Procedure Art. 1056 (an English translation of the Netherlands Code of Civil Procedure has been consulted, see http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/portrait.pdf) provides for arbitral tribunals to impose penalties for non-compliance. Also, an ICC tribunal has held that, given the absence of contrary agreement and obstructing mandatory provisions of local law, an injunction coupled with a fine in case of non-compliance was an accessible form of measure to order under the ICC Rules. See Final award in ICC case 7895 from 1994, in ICC International Court of Arbitration Bulletin Vol. 11/No. 1 (2000), p. 64-65.

[87] Yesilirmak 2005, p. 247-256.

[88] See Art. V of the New York Convention and its limited grounds for national courts to refuse enforcement of international arbitral awards.

[89] Yesilirmak 2005, p. 257-264. Note that after its revision in 2006, the UNCITRAL Model Law stipulates judicial enforcement of tribunal-ordered interim measures, irrespective of the country in which the tribunal is seated. This new regime is seen as an advantageous development of the arbitral process and potentially the equivalent of the New York Convention with regard to interim measures. See UNCITRAL Model Law Art. 17 H, I. See also Born 2009, p. 2026, and Madsen 2008, p. 349.

[90] Yesilirmak 2005, p. 238. See also Born 2009, p. 2019.

leverage.[91] Although tribunals lack coercive power, their orders might therefore have far-reaching persuasive affect on the parties.[92]

2.4 The Alternative – Court-ordered Interim Measures

The involvement of courts in arbitral proceedings is a delicate subject. As much as arbitration is a choice of subjecting a potential dispute to a private adjudicatory, it is a choice of divesting courts the authority to intervene in that process.[93] Together with the growing independence of arbitration, this depicts the role of courts as more supplementary than parallel in relation to arbitration. As for interim relief, court intervention may interfere with the arbitration as well as with another jurisdiction's supervisory role.[94] Suggestively, court-ordered measures may even have such impact that the entire dispute resolution procedure and the parties' positions are thrown off balance.[95] However, national courts still play an important role in terms of interim measures. Courts have the ability to coercively enforce their judgments, many times a vital aspect when seeking interim relief.[96] Also, courts can generally hear and grant *ex parte*[97] requests and order measures towards third parties, powers normally not deemed vested in tribunals. Furthermore, different from tribunals, courts are not encumbered by a, in some cases, protracted constitutive process. Even though court intervention is sometimes seen as detrimental to the entire arbitration process, these aspects illuminate the importance of the alternative; court-ordered interim measures in arbitration.[98]

2.4.1 Concurrent Jurisdiction in National Arbitration Laws

As described above, contemporary arbitration laws generally permit arbitral interim measures. Nonetheless, these laws also commonly retain parallel competence for national courts to order interim measures in relation to arbitrating parties, unless the parties agree otherwise. Hence, for the most part, modern arbitration legislation provides for a relationship of concurrent jurisdiction between courts and tribunals.[99] This means that even though parties have taken recourse to arbitration and thereby disassociated national

[91] Yesilirmak 2005, p. 242-243.
[92] Redfern & Hunter 1999, p. 353, and Yesilirmak 2005, p. 238.
[93] Born 2009, p. 1973.
[94] *Id*. p. 2060.
[95] Lew, Mistelis & Kröll 2003, p. 622.
[96] Born 2009, p. 1966.
[97] There is considerable controversy on whether or not arbitral tribunals are or should be authorized to grant *ex parte* measures. See Born 2009, p. 2016, and Yesilirmak 2005, p. 222-223.
[98] Boog 2011, p. 445.
[99] Born 2009, p. 1972.

courts from their dispute, requests for interim measures can be directed to and processed by such courts.[100]

The existence of concurrent jurisdiction can be seen as contrary to the basic notion of one private dispute resolution forum and non-involvement of national courts.[101] However, it is generally accepted that concurrent jurisdiction with regard to interim measures does not impede arbitration, but works in tandem with it. In situations where measures needs to be enforced at once or directed to third parties, national courts can aid the effectiveness of arbitration. Therefore, most legal systems and legal commentators acknowledge concurrent jurisdiction and assent to its positive features.[102]

2.4.2 Concurrent Jurisdiction in Institutional Arbitration Rules

The majority of institutional arbitration rules adhere to the principle of concurrent jurisdiction, but some provides a framework favoring arbitral interim measures.[103] The ICC Rules thereby stipulate that parties may seek interim relief from national courts either before a dispute is submitted to the tribunal or "*in appropriate circumstances even thereafter*".[104] The LCIA Rules are even more explicit in the preference of arbitral interim measures. A part from pre-arbitral situations, these rules only allow for court-ordered interim measures in "*exceptional cases*".[105]

The SCC Rules and the UNCITRAL Rules[106] represent an alternative and less restrictive view on concurrent jurisdiction. These rules do not qualify the concurrent authority but merely states that requests for interim measures to national courts are not in violation of the arbitration agreement.[107]

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[100] *Id*. p. 1973. The doctrine of compatibility summarizes the situation by holding that, firstly, a request for interim measures to a national court is not a waiver to arbitrate, and secondly, an arbitration agreement does not divest the courts of jurisdiction over interim measures. See Yesilirmak 2005, p. 75-76.
[101] Boog 2011, p. 445.
[102] Yesilirmak 2005, p. 67. See also Boog 2011, p. 445. However, there are differences in the application of concurrent jurisdiction. While jurisdictions like Belgium, the Netherlands, Germany and Sweden expressly stipulate concurrent jurisdiction over interim measures in arbitration, the English Arbitration Act 1996 Section 44 takes a more restrictive approach by prescribing under what circumstances courts have independent authority to grant interim measures in relation to arbitration. See Belgian Judicial Code Art. 1679(2), 1696(1) (an English translation of the Belgian Judicial Code has been consulted, see http://www.cepani.be/en/Default.aspx?PId=859), Netherlands Code of Civil Procedure Art. 1022(2), German ZPO Section 1041 (an English translation of the German ZPO has been consulted, see http://www.dis-arb.de/en/51/materials/german-arbitration-law-98-id3), Swedish Arbitration Act Section 4. See also Born 2009, p. 2047.
[103] Born 2009, p. 2051.
[104] ICC Rules Art. 28.
[105] LCIA Rules Art. 25. See also Born 2009, p. 2050.
[106] Note that the UNCITRAL Rules are not tied to a particular arbitral institution.
[107] SCC Rules Art. 32(5), UNCITRAL Rules Art. 26(9).

3 Standards for Granting Arbitral Interim Measures

3.1 Introduction

Distinct from the issue whether or not arbitral tribunals have the authority to grant interim measures is the issue what grounds such measures are to be granted on. The question what standards ought to apply and what requirements that needs to be fulfilled are somewhat overlooked in the debate on arbitral interim measures. Presumptively, the substantive standards, i.e. the principles governing the granting of interim measures, can be found in different sources of law and legal systems.[108]

In a national court setting, the granting of measures is governed by the law of that jurisdiction. Applicable standards and obtainable measures are defined under that law and possibly relevant court practice.[109] Some national statutes explicitly stipulate that courts shall apply their own law when confronted with requests for interim measures in relation to arbitrating parties.[110] A similar approach is taken in the UNCITRAL Model Law.[111]

3.2 Institutional Rules and National Arbitration Laws

A tribunal's authority to grant interim measures is to a great extent derived from national arbitration statues and institutional arbitration rules.[112] However, few arbitration laws contain principles or specific requirements for arbitral tribunals to apply when considering requests for interim measures.[113] Born suggests that this indicates that the *lex arbitri* does not, and is not intended to, provide the standards for granting arbitral interim measures. If not so, the law at the place of the arbitration would logically contain references to guiding principles.[114] Similarly, arbitration rules generally provide arbitrators with wide discretion in granting interim measures without defining any substantive standards governing such processes.[115] Most rules merely state that arbitrators may grant any interim

[108] Born 2009, p. 1976.
[109] Lew 2000, p. 26. See also Born 2009, p. 2055.
[110] See e.g. Swiss Law on Private International Law Art. 183(2).
[111] UNICTRAL Model Law Art. 17J.
[112] See *supra* p. 12-15.
[113] Born 2009, p. 1977. See e.g. English Arbitration Act 1996 Section 38, Belgian Judicial Code Art. 1696(1), and Swedish Arbitration Act Section 25.
[114] Born 2009, p. 1978.
[115] *Id*. p. 1977.

measures they "deem appropriate".[116] The absence of guidance in both arbitration laws and in institutional arbitration rules has been suggested to force arbitrators to take recourse to national civil procedure regimes when confronted with requests for interim measures.[117]

Perhaps somewhat different from a standard, there is however one requirement that can be found in both arbitration statutes and institutional rules,[118] namely that the tribunal can order the applicant to provide security. The intention is to safeguard the respondent's rights in case of a measure being wrongfully ordered and harmful to that party. This prerequisite has been applied[119] and has support in legal commentary.[120]

3.3 Conflict of Laws

As to the conflict of laws,[121] three sources have been identified as determinative in terms of granting arbitral interim measures, specifically i) the law at the seat of the arbitration, i.e. the lex arbitri, ii) the law governing the merits of the case, i.e. the law governing the parties' contractual relationship, and iii) international standards.[122]

There are examples of cases where application of *lex arbitri* has been the preferred method,[123] as well as cases where the law governing the parties' contract has been taken into account in terms of interim measures.[124] Lew concludes that, although the first alternative might provide a more defined and certain process, it lacks rationality. Additionally, deciding issues of interim measures without intervention of a specific law is common practice.[125] Lew suggests that some sort of international practice is

[116] See e.g. ICC Rules Art. 28, SCC Rules Art. 32. Nevertheless, some rules have certain security requirements, and others provide a somewhat more indicative language, e.g. the LCIA Rules Art. 25. However, the ACICA Rules have followed the UNCITRAL Rules and prescribes certain requirements for interim measures. See ACICA Rules Art. 28(3).
[117] Madsen 2008, p. 346.
[118] See e.g. the SAA Section 25 paragraph 4 and the SCC Rules Art. 32(3).
[119] See Interim Award in ICC case 7544 from 1996, in ICC International Court of Arbitration Bulletin, Vol. 11/No. 1 (2000), p. 56-60.
[120] See e.g. Yesilirmak 2005, p. 187.
[121] The term "conflict of laws" is used to illustrate the situation where different sources of law or frameworks of rules may be applied by arbitrators to locate the standards under which a request for an interim measures is to be assessed. Hence, herein, it does not correspond to the meaning of the term employed in traditional conflict of laws or private international law doctrine.
[122] Boog 2011, p. 424-425.
[123] See e.g. Final Award in ICC case 8786 from 1996, in ICC International Court of Arbitration Bulletin, Vol. 11/No. 1 (2000), p. 81-84.
[124] See e.g. Interim Award in ICC case 8879 from 1998, in ICC International Court of Arbitration Bulletin, Vol. 11/No. 1 (2000), p. 84-91.
[125] See e.g. Partial Award in ICC case 8113 from 1995, in ICC International Court of Arbitration Bulletin, Vol. 11/No. 1 (2000), p. 65-69. See also Lew 2000, p. 27.

developing in the area of arbitral interim measures,[126] arguably a view akin to the idea of international standards.

This view is, *inter alios*, favored by Born. He concludes that there are few reasons why the *lex arbitri* should be the determinative source of law for granting interim measures. Since all national arbitration laws are silent on the matter, a logical conclusion is that such statutes simply do not encompass the issue at hand. Additionally, there is no viable rationale in deciding requests for interim measures differently depending on where the arbitration is held. According to him, the diverging substantive standards for granting interim measures in different jurisdictions is not a factor that is included in the parties' analysis when determining the arbitral seat.[127] Similarly, Born argues that interim measures are not considered when deciding what law to govern the parties' contractual relationship, and even if it did, national laws still fall short of providing any standards. In addition, implementing this system could result in a bifurcated process in which requests for interim measures are evaluated in accordance with different laws depending on the characteristics of the request.[128]

Born further asserts that international standards, derived from arbitral awards in which common principles of law has been determinative, will fashion arbitral interim measures corresponding to the "parties reasonable expectations", in multiple ways.[129] First, standardized requirements will apply to requests for arbitral interim measure. Second, these standardized requirements will apply irrespective of the place of the arbitration. Third, the established requirements will be attune with the specific needs of international arbitration procedures. Additionally, this regime might well render choice-of-law issues less critical.[130]

The approach advocated by Lew and Born definitely has merit. One can only adhere to the notion that the lack of defined standards in national arbitration statutes is not a matter of coincidence; legislatures have made an intentional choice in not regulating the area of granting arbitral interim measures. Whether it is out of fear for the reception of such legislation, or due to the belief that the question is better resolved within the arbitral community, is irrelevant. If the objective would have been a state regulated process, such mechanisms would have been incorporated. This is not only preferred, it is also crucial, in general terms, for arbitration as such. The regime demonstrates a default position of non-involvement by states and state courts, as well as the impact and independence of arbitration. The same reasoning arguably applies on institutional rules. As with statutes, drafters

[126] Lew 2000, p. 27.
[127] Born 2009, p. 1978.
[128] For example, the law governing the parties' contract might be limited to just that, not encompassing issues falling outside of the contractual relationship. Also, different laws might be set to govern different contracts between two parties or even different aspects of a contract. See Born 2009, p. 1978.
[129] Born 2009, p. 1978.
[130] *Id*. p. 1978-1979.

have intentionally left out detailed provisions for the granting of interim measures.

Although international standards, given their uniform application, would provide standardized requirements and a homogeneous process independent of jurisdiction, there are considerable uncertainties in relation to this view. The emergence of such standards is perhaps preconditioned on the existence of reference structures and transparency. The concept of "practices" is indisputably based on evolving ideas and principles, much as synthesis is a result of thesis and antithesis. Thus, access to arbitral case law is indispensable for the development of international standards, and the question is if the arbitration community can provide the necessary material to fashion this.[131] Still, even if sufficient material would be accessible, would it be possible to discern converging practice to the necessary extent? It remains unclear whether arbitrators from different jurisdictions, legal traditions and arbitral institutions are influenced by the same regimes, or if widely accepted international standards are unattainable. Lastly, if international standards are or can be established, will arbitrators in fact apply these and is there anything that ensures such harmonized practice? Case law bears evidence of varying views on how to handle requests for interim measures, why an international standard might not even be plausible considering the diversity in approach and legal and domicile background amongst arbitrators.

3.4 Substantive Standards

3.4.1 Overview

Arbitration statutes and arbitration rules seldom encompass substantive standards for granting interim measures. When parties include predetermined standards in their contract, such agreements should be respected and applied by the arbitrator, although this rarely occurs either. Yet, the process of granting interim measures is not to be carried out in a legal vacuum, solely left to discretion of the tribunal.[132] To meet the expectations of commercial parties, the process must follow some kind of standard, and thus contain some predictability. However, there is great divergence as to what conditions are required.[133]

In general,[134] the granting of arbitral interim measures revolve around requirements of i) jurisdiction, ii) *prima facie* case or probability of success on the merits, iii) urgency, iv) irreparable or serious harm to the requesting

[131] It seems like the amount of published case law is in fact increasing, but the question is if it is enough and if it is even representative for the "global" arbitration community.
[132] Born 2009, p. 1980.
[133] Lew, Mistelis & Kröll 2003, p. 603.
[134] The following sections do not cover all possible variations in international arbitration. They rather state generalities and converging opinions among commentators.

party, v) proportionality, and vi) no prejudgment of the merits.[135] Depending on the nature of the requested type of measure, different standards might apply. Thus, the substantive standards required to grant interim measures should be analyzed in the light of the intended measure.[136]

3.4.2 Jurisdiction

In some cases, tribunals are burdened by jurisdictional issues and challenges. Requests for interim measures may also be submitted early in the arbitral process, before questions of jurisdiction have been answered.[137] However, the fact that jurisdictional issues are unresolved does not impede the tribunal's ordering of interim measures; a practice supported by case law.[138] Under urgency considerations, tribunals have also implemented an approach of "satisfaction of *prima facie* jurisdiction".[139] Yet, if the tribunal during the arbitration finds that, e.g., a jurisdictional challenge was justified, any interim measure ordered under such misconstruction should be revoked.[140]

The question of jurisdiction is often decided at the outset of proceedings. If no challenges or obvious circumstances disqualifying the tribunal from ordering interim measures arises, a showing of a, on its face, valid arbitration agreement should suffice to satisfy the jurisdiction requirement.[141]

3.4.3 Prima Facie Case or Probability of Success on the Merits

Tribunals and commentators alike have held that *prima facie* establishment of a case, or alternatively put, probability or likelihood of success on the merits, is required to grant interim measures. The rationale behind this standard is to ensure that the requesting party actually has a right that is justified to protect by way of an interim measure, or that the request is not merely frivolous.[142] Conversely, other tribunals have been reluctant to apply this standard as it may be inconsistent with another requirement, namely that interim measures may not produce a prejudgment of the merits.[143] Thus, it has been argued that this requirement has little real impact on the granting of interim measures.[144]

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[135] Yesilirmak 2005, p. 175. See also Born 2009, p. 1981, 1992, and Lew 2000, p. 27.
[136] Born 2009, p. 1994.
[137] Yesilirmak 2005, p. 175.
[138] Born 2009, p.1992-1993.
[139] Yesilirmak 2005, p. 175. *Prima facie* jurisdiction has been satisfactory in a number of cases in the Iran – U.S. Claims Tribunal.
[140] Born 2009, p. 1993.
[141] Compare with SCC Emergency Arbitration 139/2010. See *infra* p. 39-40.
[142] Yesilirmak 2005, p. 177.
[143] Born 2009, p. 1990.
[144] Lew, Mistelis & Kröll 2003, p. 604.

Notwithstanding, there seems to be some consensus regarding the importance of said standard.[145] Born suggests that the process in which a *prima facie* case is established does not prejudge the merits as it is an inherently provisional assessment, subject to review at any time. If interim measures are to be reasonable and well-anchored in the dispute, the arbitral tribunal must evaluate the "*prima facie strength of the parties' respective claims [---]*."[146] Additionally, this approach corresponds to the equivalent national court processes in most developed legal systems.[147]

The potency of a presented *prima facie* case, coupled with the strength of other presented conditions, may affect the outcome of a measure assessment. Thus, a rather fragile *prima facie* case may be mended by a strong showing of urgency and truly irreparable harm.[148]

Here, the general approach taken by Born seems reasonable. In order to make informed decisions, some sort of rudimentary review of the claim on which the measure is based must be conducted. The fear of prejudgment is perhaps anchored in a general hesitance to provide statements that can be misinterpreted or exaggerated by parties, rather than in the process of evaluating the likelihood of success. After all, arbitration's survival is dependent on the trust parties invest in tribunals. However, it is truly imperative that arbitrators consistently make only *prima facie* assessments, and thereafter address the dispute unaffected of such assessments. In that sense, the requirement may well reassure parties that decisions on interim measures do not affect the subsequent resolution of the dispute.

Furthermore, a system where the weight of each circumstance is evaluated both independently and collectively, and where the significance of one circumstance can compensate for the lack of another, seems both rational and beneficial. In situations where a *prima facie* showing is unlikely but the potential harm devastating, flexibility and dynamic structures are vital for arbitrators to deliver reasonable and effective results.

3.4.4 Urgency

Interim measures are only granted when justified due to the urgency of such orders. If the requesting party does not suffer damage awaiting the final resolution of the dispute, i.e. in the absence of an interim measure, the requirement of urgency is not fulfilled.[149]

It is noted that urgency is not to be interpreted literally, so as to require the arbitral tribunal to establish serious damage to a party in the near future. Instead, the urgency requirement is assessed in relation to the full extension

[145] Yesilirmak 2005, p. 178, and Born 2009, p. 1991.
[146] Born 2009, p. 1991.
[147] *Ibid.*
[148] *Ibid.*
[149] Yesilirmak 2005, p. 179.

of the arbitration process.[150] A broad definition of urgency was adopted in an ICC case, where the tribunal held that the fact that "*a party's potential losses are likely to increase with the mere passing of time*", and that it would not be reasonable for such party to await the final resolution of the dispute, was deemed adequate to establish urgency.[151] Additionally, the required level of urgency may vary depending on the potential hardship a measure would cause the responding party.[152] Worth noting is that the revised UNCITRAL Model Law has omitted the requirement of urgency.[153]

Urgency is one of the most well-established requirements, acknowledged by almost all commentators. Yet, some question its relevance and the revised UNCITRAL Model Law contains no reference to it. Given the broad definition above, the burden of establishing urgency is not heavy to carry. In situations where parties have on-going obligations, the severity of breaches of contract naturally increases with time, thus making urgency a factual reality. In that sense, urgency may well be superfluous. Also, some degree of "urgency" is possibly an integral part of injury assessments or proportionality considerations, and thereby taken into account. Certainly, one could argue that ordering an interim measure absent urgency would not be balanced. Notwithstanding, the requirement is perhaps better left untouched.

3.4.5 Irreparable or Serious Harm

Related to the urgency requirement is the requirement of irreparable or serious harm or injury to the requesting party in the absence of a measure. The concept may also be expressed in the way that "*it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted*."[154]

The difference between "irreparable" on the one hand, and "serious", "imminent" or "substantial" on the other hand, is a frequently debated subject. Irreparable injury is generally considered an injury harmful to the extent that monetary damages, if awarded, would not be sufficient compensation for the harm caused,[155] whereas serious or substantial injury represents a lower threshold. While some tribunals express a requirement of irreparable harm, others seem to find serious or substantial injury satisfactory.[156] However, due to the practical difficulties in showing proper irreparable injury, most commentators argue that serious or substantial

[150] Born 2009, p. 1987.
[151] Yesilirmak 2005, p. 179, citing Interlocutory Award in ICC case 10596 from 2000 (unpublished).
[152] Lew, Mistelis & Kröll 2003, p. 605.
[153] See UNCITRAL Model Law Art. 17. See also Born 2009, p. 1986.
[154] Lew 2000, p. 28.
[155] Yesilirmak 2005, p. 180.
[156] Yesilirmak suggests that irreparable harm may be connected to common law tradition, whilst there in civil law jurisdictions seems to suffice with "danger in delay". Yesilirmak 2005, p. 180.

injury suffices in international arbitration. This view is also confirmed in practice, even in cases with contradictory language.[157] The difference thus seems more semantic than literal. Yet, when revising the UNCITRAL Model Law, the drafters decided to omit the word "irreparable" as it stipulated a too high standard that potentially would induce arbitrators to evaluate requests by their sole discretion rather than actually applying a set standard.[158]

Born suggests that tribunals, in reality, evaluates a number of factors when determining the existence of serious harm and conducts a "balancing of interests or hardships".[159] Suggestively, "*tribunals appear to consider the extent to which (a) a claimant will suffer serious injury during the arbitral proceedings; (b) the extent to which such injury appears incompensable in a final award; and (c) the extent to which it is just and fair that the burden of risk of loss during the arbitral proceedings fall on one party or another.*"[160] Included under (c) are, *inter alia*, assessments on whether one of the parties is trying to upset *status quo* to its advantage, the parties' respective likelihood of success on the merits and the relative detrimental effects on the parties if a measure is not granted.[161]

The required seriousness of an injury may vary depending on the facts and outcome of the above mentioned "balancing procedure", including the nature of the requested order and the conduct of the respondent. Where a *prima facie* case is established, tribunals are prone to order interim measures if the requesting party show probability of harm and the respondent is unlikely to suffer damage because of the measure, especially when the respondent's actions appear destructive with regard to the parties' relationship or dispute. Discarding the disputed subject or removing assets so as to leave the final relief ineffective or futile are examples of typical actions that may be deemed causing sufficient injury.[162] However, if the respondent's actions are not intended to disrupt the contractual relationship or the arbitral proceedings, tribunals may require a higher level of serious harm, contiguous to "irreparable" harm.[163] It is however noted that the lower threshold pertaining to situations where a party's conduct risks aggravating the dispute and altering *status quo* should not be frivolously adopted in relation to other situations and other types of interim measures, such as enforcement of confidentiality agreements or security for costs. The special approach is considered justified in the pursuit of restraining unilateral

[157] Born 2009, p. 1982-1983.
[158] See e.g. United Nations Commission on International Trade Law, Working Group on Arbitration and Conciliation on its forty-first session, note by the Secretariat (Vienna, 13-17 September 2004), A/CN.9/WG.II/WP.131, p. 6.
[159] This corresponds to the approach in Art. 17 A(1)(a) of the UNCITRAL Model Law. See Born 2009, p. 1984.
[160] Born 2009, p. 1983.
[161] *Ibid.*
[162] *Ibid.*
[163] *Id*. p. 1984.

actions by a party aimed at altering circumstances to its own advantage and to the detriment of the opposing party.[164]

Although often stipulated in a concise sentence, the "harm requirement" seemingly involves a complex evaluation of a number of factors. The suggested "balancing of hardships" regime is perhaps the most realistic description of the procedure. Not surprisingly, the possible considerations related to the requirement, and the number of elements it encompasses, are greater than the language implies. This might be seen as endangering the predictability of an assessment. However, these consideration are not unique for arbitration in any way, and irrespective of forum, parties must retain the amount of trust in the system so as to allow the adjudicator to reach a reasonable result.

However, as Born acknowledge, the classic formulation "irreparable harm" is somewhat obsolete. The mere use of the term is therefore misleading, and serves no purpose. Hence, although it may already be in use in practice, the application of an explicitly lower threshold would be preferable.

3.4.6 Proportionality

Resembling, and perhaps even the equivalent of, the process of balancing interests and hardships, some commentators argue that tribunals are required to consider the relative affects of the intended measure on the parties. Thus, the allocation of risk between the parties must be proportionate, i.e. be based on proportionality between the possible loss or injury to the respondent and the potential gain or advantage to the applicant of the requested measure.[165] The requirement of proportionality is also stipulated in Art. 17 A(1)(a) of the UNCITRAL Model Law.[166]

The concept of proportionality is arguably akin to, or even inherent in the requirement of harm. In that sense, it is less of a requirement and more of a generic designation of the process it implicates. Nevertheless, its relevance is not disputed, albeit as an element of the "harm assessment".

3.4.7 No Prejudgment of the Merits

Tribunals may not, in the process of granting interim measures, prejudge the merits of the case.[167] Such conduct may infect or even be in breach of the tribunal's neutrality and independence. Historically, tribunals have been unwilling to grant interim measures when the request has required a

[164] *Id*. p. 2001.
[165] Yesilirmak 2005, p. 182.
[166] See Madsen 2008, p. 350.
[167] Lew 2000, p. 27.

substantial examination of the underlying merits of the case.[168] The lower threshold tentatively applicable on the requirement of serious harm is not considered appropriate with regard to the standard of prejudgment.[169]

The requirement now examined might, as noted above, come in conflict with the requirement of establishing a *prima facie* case. However, commentary has questioned whether a preliminary assessment of a party's case, in order to decide whether or not to grant a preliminary measure, can be considered a prejudgment. Given that such determination does not have *res judicata* affect in the final award, the question is generally answered in the negative. Instead, the requirement that no prejudgment of the merits may occur is an expression of the principle that decisions on interim measures do not interfere with the tribunal's determination of the final award and does not mean that the case will be decided in a particular way. Additionally, no *res judicata* affect arises.[170] This approach is also found in the UNCITRAL Model Law.[171]

As a general principle, prejudgment of the merits is unacceptable in any adjudicating process. In that respect, this is a fundamental negative requirement. Prejudgment is intrinsically intertwined with establishing a *prima facie* case, and a balance must be struck between the two. However, a strict definition of prejudgment would cripple the granting of arbitral interim measures, as it would within a court system. The approach described above therefore provides a sound basic structure, whereby arbitral interim measures *per se* are generally seen as compatible with the bar on prejudgment.

3.4.8 Additional Negative Requirements

Apart from the prohibition on prejudgment of the merits, one commentator[172] identifies a number of other negative requirements. First, under the so called "clean-hands-doctrine", tribunals may deny interim measures when the requesting party, too, is at fault. For example, interim measures have been denied due to the fact that a requesting party delayed in raising its claims based on the faulty behavior of the respondent.[173] Second, when the requested measure is not capable of being carried out, it may be denied. Arbitral case law shows that tribunals have taken the issue of enforcement, or rather the probability of it, into account when considering

[168] Yesilirmak 2005, p. 183-184, referring to and citing the Interim Award in ICC case 6632 from 1993 (unpublished). See also Second Partial Award in ICC case 8113 from 1995, in ICC International Court of Arbitration Bulletin, Vol. 11/No. 1 (2000), p. 65-69.
[169] Born 2009, p. 1981.
[170] *Id*. p. 1988-1989.
[171] See UNCITRAL Model Law Art. 17 B.
[172] See Yesilirmak 2005, p. 182-183.
[173] Yesilirmak 2005, p. 186, citing Partial Award in ICC case 7972 from 1997 (unpublished).

interim measures.[174] Third, granting an interim measure must not take the form of final relief, i.e. being equivalent of granting relief for the entire case.[175] This requisite has been questioned as an exaggeration. It should not be considered undesirable that the requested interim measure directly corresponds with the relief sought after in the final award, but rather natural. Hence, this fact should not hinder a tribunal to grant an interim measure of that sort.[176] Finally, the requested measure must not be incapable of serving the intended purpose, or be moot.[177]

Although not frequently referred to, these standards might well be considered in arbitral proceedings. However, the requirement that an interim measure must not substitute a later award, and thus rendering such award superfluous, is somewhat debated. Case law shows that arbitrators have been disinclined to order measures that would accord similar or identical relief as an award.[178] As has been expressed, perhaps this is yet another misdirected effort to stress and reaffirm the impartiality of arbitrators and the non-preclusive effect of interim measures. In some cases, there might be but one effective remedy. The fact that interim measures are merely preliminary relief, coupled with e.g. the deposit of proper security, should be sufficient to deem such remedy obtainable. Additionally, a granting process which is dependent on the potential later enforcement of a measure seems drastic. In general, arbitral interim measures are not enforceable, why such standard would inevitably preclude the majority of requested measures from being granted.

3.5 The UNCITRAL Model Law and Rules

The exception to the prevailing structure in arbitration statutes and arbitration rules is the UNCITRAL Model Law and the UNCITRAL Rules.[179] These constructions provide defined standards, and require an applicant to satisfy the tribunal that:

> *(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
> *(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this*

[174] *Id*. p. 186. The application of such standard could have extraordinary effect in jurisdictions where arbitral interim measures are neither directly or indirectly enforceable.
[175] *Id*. p. 184. See also Lew, Mistelis & Kröll 2003, p. 605.
[176] Born 2009, p. 1989.
[177] Yesilirmak 2005, p. 187.
[178] See e.g. SCC Emergency Arbitration 144/2010, *infra* p. 40-41.
[179] Also note that the ACICA Rules incorporating Emergency Arbitrator Provisions (2011) contain standards similar to the ones found in the UNCITRAL documents. See ACICA Rules Art. 28(3).

possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[180]

These provisions stipulate three fundamental requirements; likelihood of harm, proportionality and reasonable possibility that the requesting party will succeed on the merits of the claim. The "likelihood of harm" requirement is related to the traditional requirement of "risk of irreparable harm". The semantic difference may indicate that a less rigid standard and a more "business-oriented" approach is prescribed.[181] Furthermore, the requirement of "proportionality" must be met by valuing the opposing interests and risks of the parties. It has been suggested that the posting of proper security should be considered at this stage.[182] Finally, the requirement of "reasonable possibility of success on the merits" calls for an evaluation of the strength of the requesting party's case. The question to be answered is whether or not the applicant's case is sufficiently strong and thus justifiable to protect.[183] The drafters intentionally chose this language so as to emphasize that the tribunal's evaluation should not correspond to a complete assessment of the case.[184]

Born criticizes the regime provided in the UNCITRAL documents due to the fact that these have omitted important elements such as standard of proof and urgency. Furthermore, he concludes that their aim is misdirected towards monetary damages, and thus focused on irreparable harm, and prescribes set standards irrespective of the type of measure that is requested.[185]

The criticism is, in some respects, warranted. Although the opposite has been expressed, some traces of the "irreparable harm" standard arguably lingers in the language of the UNCITRAL documents.[186] Based merely on the practical difficulties in proving the existence of such harm, this can rightly be questioned.[187] Alarming is also the omitted urgency requirement. Even though urgency has been suggested to be of less importance in contemporary international arbitration,[188] the common view in legal commentary seemingly withholds its significance.[189] Perhaps this requirement is needed in order for a regime to be widely accepted.

[180] UNCITRAL Model Law Art. 17 A(1) and UNCITRAL Rules Art. 26(3).
[181] Voser 2007, p. 184-185.
[182] Madsen 2008, p. 350-351.
[183] Voser 2007, p. 177.
[184] Madsen 2008, p. 351.
[185] Born 2009, p. 1979-1980.
[186] See e.g. United Nations Commission on International Trade Law, report of the Working Group on Arbitration on the work of its fortieth session (New York, 23-27 February 2004), A/CN.9/547, p. 23-24.
[187] The revised ACICA Rules, seemingly inspired by the UNCITRAL documents, explicitly requires "irreparable harm".
[188] Voser 2007, p. 177-178.
[189] See e.g. Born 2009, p. 1986-1988, Yesilirmak 2005, p. 178, Lew 2000, p. 27.

As to stipulate required levels of proof, the production of such detailed rules can be precarious endeavors, especially in relation to general framework documents like these. Also, with such standards, the flexibility in any assessment, which is so highly sought after in arbitration, is naturally circumscribed. Moreover, the fact that the UNCITRAL Model Law and the UNCITRAL Rules lack differentiated standards depending on the nature of the requested measure does not necessarily have to harm the process of granting arbitral interim measures. Notwithstanding, there might be greater demands on flexibility in arbitration, yet that flexibility perhaps exists inherently in the arbitral structure. At the same time, it would be an almost impossible task to provide defined requirements encompassing multiple types of measures that changed organically depending on the type of requested measure. In this regard, faith in arbitration and in arbitrators' discretion may be the only obtainable reassurance.

In his criticism, Born is clearly seeking highly adaptive standards, tailored to the particular needs of international commercial arbitration. Although the objective is righteous, the consequences of his suggestion and the underlying context of his critic can be questioned. Suggestively, the aim is to find balance between predictability and flexibility. As noted above, the question is whether international standards can provide that balance. Also, Born seems reluctant to adhere to any predetermined, and perhaps codified, standards. Whether this is true or not, and whether or not Born's view is representative for the arbitral community, is hard to say.

3.6 Considerations in relation to Pre-Arbitral Interim Measures

New institutional rules providing for emergency relief generates the question whether such interim measures are to be granted under the same standards as measures granted during the arbitration proceedings. The view that the same standards apply to pre-arbitral interim measures seems to have support in doctrine.[190] Also, arbitration rules with the incorporated emergency feature appear to vest the emergency arbitrator with the same wide authority to grant interim measures as they do with ordinary arbitrators and tribunals. The special provisions concerning emergency relief generally contain language corresponding to the language of the regular rules or simply refer to the provisions of the regular rules.[191]

It seems reasonable to assume that the time constraints in these procedures may alter arbitrators' application of standards for granting requests, and

[190] Yesilirmak 2005, in note 127, p. 137.

[191] Compare, e.g., ICDR Procedures Art. 21 and Art. 37. See also SCC EA Rules Art. 1(2). However, some procedural requirements that differ from the regular rules in terms of interim measures occur. For example, according to some rules, unless the parties agree otherwise, the emergency arbitrator may not act as arbitrator in the subsequent proceedings. See e.g. SIAC Rules Schedule 1(4), ACICA Rules Schedule 2 Art. 2(3).

plausibly affect the accuracy and reliability of such decisions. *Prima facie* assessments and subsequent requirements may have to be addressed more summarily than in a normal course of proceedings. On the other hand, the risk of upsetting the subsequent proceedings by way of prejudgment of the merits should decrease due to the preliminary character of these orders, the limited scrutiny of the cases and the fact that emergency arbitrators often are excluded from the following arbitration.

These problems are arguably not specific for arbitration, but inbuilt in all emergency based proceedings. In the author's view, given that reasonable standards are applied, albeit somewhat summarily, these aspects do not endanger the reliability or efficacy of tribunal-ordered interim measures.

4 Arbitral Interim Measures in Sweden

4.1 The Legal Foundation in the SCC Rules and in the SAA

The SCC Rules is a rather representative framework in terms of interim measures. Article 32 of the SCC Rules simply state that tribunals may order "*any interim measure it deems appropriate*." The same regime is prescribed in terms of emergency interim measures in the SCC EA Rules.[192] The SCC Rules provides arbitrators with great freedom in granting interim measures, which was an intentional choice by the drafters. For example, the idea of a non-exclusive list of possible measures was rejected to maintain the broad authority provided by the provisions' language.[193] In comparison with the UNCITRAL Model Law, this approach has been called "minimalistic".[194]

In accordance with its Section 46, the SAA applies to arbitrations with "international connection"[195] conducted in Sweden. The SAA is widely based on party autonomy.[196] Although it was declared that the UNCITRAL Model Law did not form the basis for the SAA, the UNCITRAL Model Law was allotted much significance in the drafting process,[197] and considerable inspiration has arguably been gathered therefrom.[198] Under the act, parties are free to agree on numerous issues pertaining to their dispute resolution procedure, for example to apply certain institutional rules or other procedural rules in the arbitration.[199] However, although the parties' contractual freedom is far-reaching, there are mandatory provisions in the SAA, binding on parties and arbitrators alike. The purpose of stipulating obligatory provisions is to safeguard the basic requirements of due process.[200]

The SAA explicitly stipulates that arbitral tribunals are, at the request of a party, given the competence to grant measures intended to secure a claim that is to be tried by the tribunal.[201] This competence is broad and provides

[192] SCC EA Rules Art. 1(2).
[193] Magnusson & Shaughnessy 2006, p. 59-60.
[194] Shaughnessy 2010 I, p. 463.
[195] An arbitration has "international connection" when at least one of the parties had its domicile abroad when the arbitration agreement was entered into, or if the dispute concerns business carried out abroad. See Madsen 2009, p. 355.
[196] Madsen 2009, p. 49, and Government Bill 1998/99:35, p. 43.
[197] Government Bill 1998/99:35, p. 47.
[198] Heuman 1999, p. 350. See also Madsen 2009, p. 25, 48-49.
[199] Heuman 1999, p. 266.
[200] Madsen 2009, p. 58.
[201] SAA Section 25 paragraph 4. However, it can be questioned whether the SAA encompass and endorse situations where an emergency arbitrator is appointed to rule on pre-arbitral relief. The SAA Section 25 stipulates that *arbitrators* can order measures

authority to, *inter alia*, order measures intended to safeguard the future enforcement of an award and to preserve evidence.[202] The language of the provision is not intended to limit the variety of plausible measures,[203] and the arbitral authority to grant interim measures should not be seen as confined to the framework of standards pertaining to similar measures in the Swedish Code of Judicial Procedure and Swedish case law.[204]

Furthermore, tribunal-ordered interim measures are not enforceable.[205] Tribunals are neither vested with means of coercion to enforce orders, nor will national courts enforce such decisions. However, if a party refuses to adhere to an order for interim relief, such conduct has been suggested to possibly affect the tribunal's decision in the overarching dispute.[206]

4.2 Applicable Standards

4.2.1 Overview

The view on applicable standards for granting arbitral interim measures vary among Swedish commentators. Due to predictability considerations and the significance of the UNCITRAL Model Law in the drafting process of the SAA, Madsen advocates an approach whereby the UNCITRAL Model Law provides guidance.[207] In a long term perspective, Madsen concludes that Sweden should adopt the UNCITRAL Model Law, and thereby fashion a more appropriate regime for arbitral interim measures.[208]

Since the revised UNCITRAL Model Law stipulates enforceable arbitral interim measures, Lindskog questions Madsens's view and promotes an approach by which the arbitrator has wide discretion to evaluate the need for interim measures. However, Lindskog refers to a SCC case in which the tribunal held that the standards in the Swedish Code of Judicial Procedure could take precedence.[209] Although holding that arbitrators have great

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during the course of the proceedings. Hence, the SAA can be construed so as to govern existing arbitral proceedings, but not proceedings at a time when a tribunal is yet to be formed. For different reasons, both Shaughnessy and Lindskog appear to find the SAA and the SCC EA Rules compatible. See Shaughnessy 2010 II, p. 356-357, and Lindskog 2010, comment to Section 25 (note 131). See also Westberg 2007, p. 617-636.

[202] Government Bill 1998/99:35, p. 229.

[203] *Id*. p. 228. See also Holtzmann & Neuhaus 1989, p. 530-532.

[204] Heuman 1999, p. 350. See also Shaughnessy 2010 II, p. 344, and Madsen 2008, p. 354-355. Compare with Holtzmann & Neuhaus 1989, p. 530-532.

[205] Government Bill 1998/99:35, p. 73, 228.

[206] *Id*. p. 74. For example, reluctance to follow an order may be taken into account when estimating amounts of damages. See also Heuman 1999, p. 350. However, this view has been questioned; see Westberg 2007, p. 621, and Lindskog 2010, comment to Section 25 (note 133).

[207] Madsen 2009, p. 223.

[208] Madsen 2008, p. 356.

[209] Lindskog 2010, comment to Section 25 (note 125).

freedom, perhaps Lindskog finds it logical to apply the standards that courts utilize when evaluating requests.

Heuman stresses the uncertainty pertaining to applicable standards. With a reference to Swedish procedural law, Heuman argues that, although arbitrators have discretionary power, they may be unwilling to grant interim measures absent showing of probable cause and risk of sabotage. Probable cause and risk of sabotage are two overarching circumstances required for security measures to be granted under the Swedish Code of Judicial Procedure.[210]

4.2.2 SCC Case Law

4.2.2.1 Introduction

Under the Swedish regime, arbitral case law may provide interesting insights regarding SCC-tribunals' practice pertaining to interim measures. However, the discussion below is highly speculative, primarily due to two reasons. First, arbitral case law is, for natural reasons, scarce. Thus, published material is limited, and even more limited in terms of interim measures. Second, the studied material is not SCC cases in their entirety, but rather excerpts, summaries and comments. Therefore, this examination is burdened with great uncertainty in determining the critical elements in the decisions, and even if those elements would be discernible when confronted with the complete material, additional aspects might have been considered but not expressed in the summaries and comments that lay the foundation for the following discussion.

Hereunder, one case from 2001[211] and summaries of four emergency arbitrations from 2010[212] will be briefed and analyzed in relation to what this thesis have provided so far.[213]

4.2.2.2 Case 096/2001

The present case revolved around claims for i) retaining title to, and ii) restitution of, delivered goods due to non-payment. The claimant (seller) also requested "provisional remedy" consisting of "attachment" of property, i.e. the goods, held by the respondent (buyer). The claimant argued that there was a risk that the respondent would transfer the property, and thus injure the claimant.

The tribunal first held that ordering "attachment" of property, in its literal sense, was not within its authority and could only be ordered by a competent

[210] See Fitger 2011, comment to Chapter 15 Sections 1-3.
[211] Published in Stockholm Arbitration Report 2003:2, p. 47-58.
[212] Published in an article by Johan Lundstedt.
[213] All cases involved one or more foreign parties.

national court.[214] However, the application was construed as also encompassing a request for an order prohibiting the respondent from effectuating any transfer of the disputed property, a non-action within the tribunal's authority to order.

When assessing the request, the tribunal acknowledged the lack of applicable standards for granting arbitral interim measures in both the SAA and the SCC Rules. The tribunal therefore took recourse to Swedish procedural law and thereunder identified two main requirements: *prima facie* proof of the case and an urgent need for the measure.[215] This approach was, according to the tribunal, justified as it corresponded to the approach in many other jurisdictions and would provide a reasonable result.

Since the first claim was based upon an explicit provision in the contract between the parties, providing for the seller to retain title to delivered goods until full payment was rendered, and that the supposed default in payment was not denied, the *prima facie* requirement was fulfilled.[216] However, seller remedies under the law governing the contract did not include restitution, why the second claim was not found to be *prima facie* proven.

When considering the urgency of the measure, the tribunal concluded that the claimant's argument, asserting the existence of risk of transfer of the property, especially in light of the indications that the respondent was insolvent, was somewhat questionable. However, due to the considerable injury a transfer of the property would incur, coupled with the fact that the respondent did not answer to any communications and refrained from taking part in the proceedings, the claimant's need of the measure was found urgent. Thus, there was a risk that the property would be transferred to a third party, by which an award in favor of the claimant would be less effective.[217]

The express application of Swedish procedural law is *per se* noteworthy. Even though there are other examples where tribunals have turned to national civil procedure regimes for guidance, the approach seems somewhat outdated given the views in contemporary commentary.[218] It can be questioned exactly what circumstances induced the tribunal to apply the standards used in Swedish courts. The mere geographical fact may have

[214] And subsequently effectuated by a state enforcement agency.
[215] Alternatively put, "*whether there is an appearance of a right in favour of the claimant to be protected by the measure*", and "*whether there is a risk that the property will be lost as a result of the transfer to a third party*". See Pombo 2003, p. 60.
[216] Note that the arbitration was conducted ex parte – the respondent did not respond to any communications or take part in any of the proceedings.
[217] Pombo 2003, p. 61.
[218] However, the case was decided in 2002, after which the view on arbitral measures may have changed. For example, the revision of the UNCITRAL Model Law can arguably have affected the discourse on arbitral interim measures. Also, as mentioned before, the studied material on international arbitration is perhaps not representative for the global arbitration community, and thus not as "international" as it purports.

been determinative, as well as the fact that the tribunal's chairman was of Swedish nationality.

4.2.2.3 Emergency Arbitration 064/2010

Dispute arose due to failure to pay outstanding amounts under an agreement for the sale and purchase of a transshipment business. The claimant requested interim measures in the form of injunctions directed at the respondent and, among others, two other companies, state authorities of a certain country and a certain individual. The injunctions were aimed at prohibiting these persons from, *inter alia*, selling any shares or real property related to the agreement or authorizing or registering any transactions of shares or real property related to the agreement.

The emergency arbitrator first considered whether the claimant had, *prima facie*, made a showing of reasonable possibility of success on the merits. Since the respondent did not contest that it owed the amounts claimed, this requirement was deemed satisfied. Before evaluating other aspects of the request, the arbitrator held that he had no jurisdiction over third parties, why the respondent was the only plausible recipient of an order.

After restating the principles of imminence, urgency and irreparable harm to the claimant in the absence of a measure, the arbitrator held that the claimant had provided facts to satisfy neither of these requirements. The arbitrator found no convincing indications that the respondent would transfer the assets beyond the reach of the claimant, neither was it clear that the claimant would even suffer damage if that was to occur. The earnings from such transfer would accrue creditors and would therefore not be detrimental to the claimant.[219]

Here, the arbitrator addressed the request without references to any particular source of law. The applied standards arguably correspond with the common approach in international commentary. After the case was *prima facie* established, the arbitrator focused on the question of harm and aspects related to it. As noted above, there are other requirements with potential affect, but since irreparable harm was not deemed present, standards such as the prejudgment bar never required attention.

4.2.2.4 Emergency Arbitration 139/2010

In this case, the arbitrator was confronted with a request to order the respondent to refrain from invoking payment under a number of bank guarantees provided by the claimant in accordance with a contract between the parties. The claimant disputed the respondent's termination of the contract, and thus argued that the respondent should be prohibited from invoking the guarantees.

[219] Lundstedt 2011, p. 2-4.

Due to a jurisdictional challenge, the arbitrator first concluded that he had *prima facie* jurisdiction. The fact that a, on its face, valid arbitration agreement had been presented, stipulating arbitration under the SCC Rules, satisfied the arbitrator in this regard.
Next, the arbitrator held that the claimant had, *prima facie*, showed that the challenge to the respondent's termination of the contract was justified. Thus, the requirement of reasonable possibility of success on the merits of the claim was fulfilled.

Furthermore, the arbitrator held that the requested measure was not justified due to the risk or fact that the respondent invoked payment under the guarantees. Even if such conduct constituted breach of contract and would in fact cause injury, the claimant still had means to recover damages at a later stage. Therefore, the harm possible incurred by the claimant was neither irreparable nor of urgent or imminent nature. The arbitrator motivated the applied standard by referring to it as a standard ordinarily used in many jurisdictions and explicitly stipulated in the UNCITRAL Model Law.

By reference to national regimes and the UNCITRAL Model Law, the arbitrator examined aspects of urgency, risk and harm. This approach has evident basis in presented doctrine. The language of the studied summary implies, if correctly reproduced, that the arbitrator reviewed the case with a wide perspective, and perhaps conducted a more general proportionality assessment. Together with the findings of *prima facie* jurisdiction and *prima facie* case, this case arguably represents an approach in line with that of many commentators.

4.2.2.5 Emergency Arbitration 144/2010

Dispute arose after the respondent had terminated a reseller agreement under which the claimant owned the right to sell certain products. The termination was challenged and the claimant requested interim measures ordering the respondent to continue delivering the products.[220] Irrespective of the correctness of the termination, the claimant also requested access to certain equipment for service and maintenance work.

The arbitrator first acknowledged that the authority to grant interim measures under the SCC Rules is wide, but that the focus unequivocally is to secure a claim or future claim. Coupled with a reference to Chapter 15 Section 3 of the Swedish Code of Judicial Procedure, the arbitrator found that, although orders for specific performance are plausible, a measure ordering the respondent to continue delivery would in this case amount to a substitute for a later judgment; it would render a later award in favor of the claimant superfluous. Such order could however possibly be motivated when a respondent's conduct constituted "manifest obstruction or an obvious misconduct in business".[221] However, with regard to the request for

[220] The claimant also made an alternative request not presented here.
[221] Lundstedt 2011, p. 8.

access to equipment, the arbitrator deemed it established that the claimant had an urgent need of such measure in order to fulfill its contractual obligations in relation to third parties, and thereby avoid liability under those contracts. The considerable impact of potential liability, coupled with the limited detrimental affect an order would have on the respondent, satisfied the arbitrator that the requirements for an interim measure were fulfilled.[222]

Here, the arbitrator seemingly had the SCC Rules and the Swedish Code of Civil Procedure working in tandem. The main analysis turned on whether or not the requested measures could be seen as a substitute for a later award. This standard has been expressed in arbitral legal commentary, but also in relation to security measures under the Swedish Code of Civil Procedure.[223] Whether the arbitrator was influenced by Swedish procedural law or general principles is unclear, but the mere reference to the Swedish regime indicates its impact on the procedure.

With regard to the request for access to equipment, which did not implicate the problems above, the arbitrator appears to have applied a balancing test and considered the need for the measure and the relative consequences to the parties if such measure was not granted.

4.2.2.6 Emergency Arbitration 187/2010

This dispute emanated from a shareholders agreement stipulating the claimant's right to, at all times, retain a minimum percentage of the shares in a company, and the respondent's obligation to offer its shares to the claimant if the claimant's ownership percentage were to fall below that minimum level. When such situation arose, the respondent offered its shares to the other shareholders of the company, but not to the claimant, and thus breaching its obligation under the shareholders agreement. The claimant requested an order barring the respondent from in any way transferring its shares in the company.

According to the arbitrator, the only applicable standard for granting an interim measure is that the measure must be deemed appropriate, partly by the showing of probable cause for the applicant's case and partly by the necessity of the measure in safeguarding a substantive right of the applicant.

Given the content of the shareholders agreement, the actions taken by the respondent and the fact that the respondent failed to rebut any of the allegations made in the request, the claimant had established probable cause for its case. In accordance with the agreement, the situation at hand resulted in an owed obligation on the part of the respondent, and a corresponding right on the part of the claimant. The respondent's offer made to the other shareholders of the company was sufficient to satisfy the arbitrator that, in

[222] However, the order was never effectuated as the respondent voluntarily provided the claimant with the requested equipment.
[223] See Fitger 2011, comment to Chapter 15 Section 3.

order to safeguard the claimant's right to the shares, a measure was needed. Hence, the request was granted.

The basis of this decision seems to have been the SCC Rules and the wide discretion those rules provide arbitrators with. Second, without reference to any source of law, the arbitrator stipulated probable cause and necessity of the measure as the only two requirements. Given the studied material, the analysis did not address questions of harm, urgency or even proportionality. Neither the extent of potential injury nor the respective consequences to the parties was considered in the decision. Although nothing suggests the analysis was unreasonable, it can be interpreted as a summary process. Alternatively, the arbitrators approach can be seen as an expression of the true effects of the current regime in national arbitration laws and institutional rules; without any substantive guidance, arbitrators are free to evaluate requests with extraordinary autonomy and sole discretion.

4.2.3 Conclusions on SCC Practice

A number of interesting aspects pertaining to the examined cases are worth noting. First, when read together, these cases seem to depict a general development in Swedish arbitration, whereby arbitrators are less inclined to turn to Swedish procedural law when confronted with requests for interim measures. By comparing the first case and the fourth emergency arbitrator decision, the development is most apparent. The principle distinction between applying the national procedural law and applying general standards is arguably significant. The difference in flexibility and room for the discretion of the arbitrator, but at the same time predictability, is almost certain. The reason for this development is however unclear. The arbitral community has perhaps been affected by the overarching discourse regarding interim measures and the revision of the UNCITRAL documents. Yet, although there are signs, the purported development is in no way proven.

Second, and perhaps a consequence of the above described development, a shift in terminology seems to have taken place. The later decisions correspond to contemporary arbitral commentary in the sense that the language is more uniform. Even though the actual consequences of this might seem trivial, the semantic difference is perhaps a witness of a more structural shift in terms of the standards actually applied.

Third, although the applied standards, or at least some of them, frequently converge, the cases still show diverging practice. Equivalent standards can be applied as a result of different regimes, why an equally interesting question is wherefrom they are derived. The studied material indicates that the applied standards were influenced by Swedish procedural law, the UNCITRAL Model Law and perhaps also international practice and legal doctrine. By itself, this fact illuminates the different approaches that exist, and the potential consequences it might bring. In this regard, approaches

promoted by Swedish commentators and structures actually applied in SCC arbitrations are as varying as in the international setting.

Finally, speculatively, the place of arbitration and its *lex arbitri*, as well as the nationality of the arbitrator or tribunal, should not be overlooked when considering circumstances potentially affecting the choice of law in terms of interim measures. That recourse is taken to the procedural rules of the *lex arbitri* is not uncommon, but arbitrators with different origin or legal background would perhaps not be equally inclined to give effect to the national procedural rules of Sweden as a Swedish arbitrator would.

5 Closing Remarks

5.1 On Substantive Standards

A number of potentially applicable substantive standards have been examined and analyzed above. All the expressed requirements are arguably created and applied in order to fashion reasonable processes providing reasonable results. Undoubtedly, they all serve a legitimate purpose in their aim to construct a balanced procedure. However, it would be tremendously difficult, and perhaps somewhat non-credible, to pass judgment on their absolute applicability and respective significance based on the material studied within this thesis. Yet, below follows a few final remarks pertaining to the specific substantive standards examined.

Some of the presented standards seem more rooted in arbitral practice and among commentators than others. Questions of urgency, harm and prejudgment return in almost all doctrine. A reasonable conclusion is thus that these form the fundament of standards for interim measures in international commercial arbitration. Depending on the specific circumstances of a case, including factual conditions, party-conduct and tactics, other questions may well require attention. Still, the basic standards may have greater impact on the outcome.

With Born's theory in mind, a vital element of a request assessment is balancing interests and hardships, or alternatively the principle of proportionality. Thereunder, a number of factors are taken into account, and arguably, such process facilitates flexibility and reasonable results. Yet, a more flexible structure implies wider discretion, and thus raising issues of predictability and consistency. Inevitably, general proportionality considerations entail greater confidence in the arbitrator's function as an unbiased, objective and sensible adjudicator. Given the demand of a dispute resolution scheme tailored to commercial disputes *per se*, and perhaps simultaneously to the specific dispute at hand, said considerations seem to contribute to a sound balance between opposing interests.

Additionally, and in accordance with the flexible structure based on proportionality, a liberal approach towards the individual requirements and the dynamics of their interrelation might be preferable. For example, the prejudgment prohibition and *prima facie* establishment of a case does not have to be seen as irreconcilable standards, but merely as compatible requirements with opposite angels. Moreover, a structure whereby, e.g., a strong showing of urgency and harm can mend a weak showing of likelihood of success endow arbitrators with the necessary tools to provide effective and adaptable interim relief.

In many cases, similar or corresponding requirements are applied. Therefore, the divergence in terms of specific standards may not be of equal

interest as the rationale on which their application is based, i.e. the sources from where the standards are derived.

5.2 On Conflict of Laws

Arguably, commercial parties utilize arbitration because of its differing characteristics compared to litigation. Suggestively, although arbitration *per se* is a flexible process and designed to suit vastly different disputes, most parties would give preference to predictable procedures in which the standards governing their dispute and the questions pertaining to it are certain. It can be questioned whether a process in which certain aspects are potentially decided under different standards, and where the choice to apply a specific set of standards is completely unregulated, meets the expectations of disputing parties.[224] Of course, arbitrating parties may well be satisfied with the current structure. It is not impossible that if approached, parties would in fact prefer the system of arbitral interim measures to remain as it is. However, this analysis illuminates possible problems in and alternatives to the prevailing structure.

There are arguably several consequences under the current regime. First, as it is uncertain what requirements apply, the parties face difficulties in assessing the strength and weaknesses of their respective cases. Both the requesting party and the responding party would benefit from a higher degree of certainty in terms of the principles governing a request evaluation. However, there is predictability both as to what standards to apply, as well as if the application of such standards is absolute or flexible. Although both "levels" of predictability would give greater certainty, a system actually requiring the fulfilment of a number of prerequisites, albeit with some discretion as to what extent,[225] would provide parties with a truly valuable knowledge. Such knowledge, or the lack of it, undeniably affects a party's decision-making process as it provides the tools required to make informed decisions on how to form and present a request. Ultimately, it is a question of the allocation of limited resources; is it reasonable to spend valuable time and assets on a process that is highly uncertain? Without knowledge of the rules of the game, chance may be too much of a factor. In the end, parties may take recourse to national courts and thereby engage in a more predictable process.

Furthermore, the current situation does not only affect the parties, also arbitrators may find themselves in somewhat of a predicament. Absent a given structure, arbitrators have turned to different sources of law to find guidance.[226] Thus, for obvious reasons, perhaps arbitrators too would benefit from a predetermined regime in the exercise of their mandate.

[224] Compare with Yesilirmak 2005, p. 3.
[225] Compare with the discussion above about the dynamics between different standards. See *supra* p. 44.
[226] See SCC case law for the application of different standards, *supra* p. 37-42.

Under these considerations and presumptions, defined and uniform standards are preferable. The question is from where they should be obtained. This thesis has shown that the majority of national arbitration statutes lack provisions on applicable standards. These laws are therefore not equipped to govern the granting of arbitral interim measures. More plausible, and arguably more common, is for tribunals to turn to the national procedural laws of the *lex arbitri* or the law governing the contract. Requirements provided in such statutes have often developed over time, and are positively balanced standards. Additionally, arbitration is not an entirely autonomous process; it is in the very nature of arbitration to import rules from other systems. However, arbitration is developed as a separate and different system from national courts; it could possibly be described as an "a-national" procedure,[227] in which the neutrality of the adjudicator and the adjudicating process is one of the main features. Much of arbitration's attractiveness may be vested in that neutrality, and the notion of a separate and independent system may possibly possess intrinsic value.[228] Be it for cosmetic or substantive reasons, the detachment of arbitration in relation to national laws can in this regard be beneficial. Moreover, where national laws are governing, interim measures in international arbitration will be crippled by non-uniformity and possibly rather differing standards.

Under wide implementation of the UNCITRAL Model Law, differing standards and lack of uniformity would be non-issues. Predominantly, national arbitration laws would thereby stipulate equivalent or identical standards to be applied in arbitration proceedings. In spite of raised concerns with its specific features, the UNCITRAL Model Law represents a simple system to address the problem of non-uniformity. Ultimate and all-encompassing standards are, truthfully, simply not obtainable. The requirements under the UNCITRAL Model Law are the result of the experience and wisdom of many scholars and practitioners. Without empirically challenging them, these standards arguably form a reasonable and functioning framework. Yet, this regime shares a problem with the application of national procedural rules; the intervention of national law. Again, the concept of arbitration as a separate and independent system may be of such significance that legislatures and practitioners alike have aversion to adhere to any constructions of this sort.[229]

As some advocate, perhaps the most desirable structure would have its basis in principles and standards developed by tribunals in their practice. International standards could potentially take form through case law and thereby fashion a defined and standardized structure, adapted to international commercial arbitration. Disputing parties would not as evidently have to counter the detriments of uncertainty and lack of uniformity as in the current scheme. Indisputably, this would provide for a predictable, more attractive and straightforward system for the granting of arbitral interim measures. As previously discussed, the question is if

[227] Compare with Lew, Mistelis & Kröll 2003, p. 65.
[228] Compare with Lew, Mistelis & Kröll 2003, p. 5-7.
[229] Compare with Born 2009, p. 1980.

international standards are attainable, and whether or not arbitrators would feel compelled, or associated with the standards to such extent, to apply them. Arbitrators with certain geographic or legal background may intentionally or unintentionally apply standards to which he or she is accustomed. With this factor in mind, potential divergence in practice becomes not only more evident, but also more likely. Also, the inherent problem in developing and establishing practice within a confidentiality-based procedure should not be underestimated. Aside from in the minds of individual arbitrators, the emergence of a uniform practice seems somewhat unlikely. Perhaps a system with international standards regarding the granting of interim measures is a utopian endeavour. In any case, the approach is not short of ambition.

5.3 De Lege Ferenda

So, what alternative can facilitate a more predictable and attractive instrument for parties to attain interim relief in arbitration? Stipulated requirements, in some form, are preferable when homogenous application is the objective. It is unlikely that parties, at a stage where the terms of their pending business relationship are drafted, consider such specific contract provisions as under what circumstances interim measures may be invoked and granted in a future arbitration. The objective should arguably be to simplify the process but retain the characteristics of arbitration. In this regard, the author submits the alternative of defined requirements in the rules of arbitral institutions. The concept is neither revolutionary nor unemployed. Interim relief in arbitrations under the UNCITRAL Rules and the recently revised ACICA Rules is subject to set requirements, unless the parties agree otherwise.

The suggested system has three potentially appealing features. First, as with any structure providing stipulated standards, parties and arbitrators would be informed of the prerequisites for interim relief. Thereby, a higher degree of certainty and predictability would characterize the process, and consequently make parties more aware of its existence. Second, by incorporation, the framework for granting interim relief would essentially be based on the contract between the parties. The concept of party autonomy would thus be more evidently upheld, and at the same time, should the parties deem the rules inappropriate or unreasonable, they would have the right to agree on the application of other standards. Third, an interim relief process would be autonomously conducted, independent of *lex arbitri* or other national laws. Given that there is significance to the notion of arbitration's independence, standards in this form would arguably provide a structure in accordance with that notion. Suggestively, this approach could function as a middle way between the two almost diametrically opposite approaches of "national regulation" and "international deregulation" previously described.

However, under the proposed regime, undesired lack of uniformity is still a problem. Inevitably, even if a rather significant convergence is plausible, not all institutions would stipulate the same standards. Similarly, diverging interpretation and practice amongst arbitrators remains a risk even with, on their face, defined requirements. Also, most arbitral institutions utilize rules facilitating arbitral interim measures, but have refrained from incorporating defined requirements. The approach is positively deliberate, and perhaps based on a reluctance to circumscribe the sovereignty of arbitrators.[230]

Furthermore, with the characteristics of arbitration in mind, are detailed provisions, mandatory frameworks and further regulation the desired progress? Be it by way of national laws or institutional rules, is a general development of more directives and less flexibility what arbitration needs in order to provide an attractive alternative to litigation? Possibly, a trend towards "judicalization" of arbitration[231] is truly emerging, and regulating the area of interim measures would perhaps intensify that development. Undeniably, retaining the practicability and characteristics of arbitration and arbitral interim measures is somewhat conditioned on the confidence in practicing arbitrators. Some might argue that set standards are detrimental to that confidence and the entire process. Yet, a more uniform and defined system governing the granting of interim measures would perhaps not harm the institute of arbitral interim relief, but rather aid it.

The area of arbitral interim measures is evolving. New ways to obtain relief is emerging, as is the legal framework and discourse pertaining to interim measures. While requests grow in numbers, the importance of these measures arguably increases. Although there are other aspects of equal or even greater importance, such as the issue of enforcement, structuring the framework on interim measures is a step in the right direction to maintain arbitration as such, and arbitral interim measures specifically, as viable and attractive dispute resolution mechanisms in international commerce.

[230] Compare with Shaughnessy 2010 I, p. 463.
[231] See Shaughnessy 2010 II, p. 358.

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