Document information

Publication

- Provisional Measures in International Commercial Arbitration

Bibliographic reference

Julian D.M. Lew, 'Foreword', in Ali Yesilirmak , Provisional Measures in International Commercial Arbitration, International Arbitration Law Library, Volume 12 (© Kluwer Law International; Kluwer Law International 2005) pp. v - vii

Foreword

Julian D.M. Lew

Interim Measures in International Commercial Arbitration by Dr Ali Yesilirmak is an essential and timely treatise. It will be welcomed, used and relied on by all those involved with international arbitration: whether as counsel, arbitrators, judges of national courts or scholars.

International arbitration has succeeded for two reasons. First, national courts are in most cases unsuited and are unacceptable as a venue for the settlement of international business transactions. Second, and by corollary, arbitration is specifically geared and structured to provide the dispute settlement structure for matters arising from transactions between parties from different countries.

International instruments, such as the New York Convention, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law have provided the basic standards for the effectiveness of international arbitration around the world. The flexibility needed for international arbitration explains the permissiveness of most national arbitration laws and international arbitration rules. They are there generally and increasingly to support and assist the system rather than to control it. Hence, parties have the possibility to determine the form and procedure for the arbitration, the number and authority of the arbitrators, place of arbitration and the law or rules to govern the arbitration.

Despite all the progress and developments, interim measures of protection remains one of the main areas where national laws and the jurisdiction of national courts cross one another regularly. Which jurisdiction or forum prevails for the consideration and grant of interim measures? What law should be applied to these issues? There is a constant conflict between the relevant national laws, the kinds of interim relief available, the circumstances in which interim relief may be appropriate, and the criteria according to which international tribunals may decide to grant interim relief.

Complications arise at different stages of the arbitration process: before the tribunal is established and when there is a tribunal dealing with the substantive dispute. For a party seeking relief there are practical questions: where should it go to seek the measures of protection it requires? It could go to any national court

that has jurisdiction over the other party or its assets? This may facilitate the choice of a national jurisdiction which is sympathetic to the relief being sought. On the other hand, by identifying a specific arbitral forum for disputes between the parties, the arbitration agreement expressly excludes the jurisdiction of all national courts. Accordingly, in many situations, there is no justification for orders being granted by any national court.

Even more difficult to predict are the rules to be satisfied to obtain interim relief from an international arbitral tribunal. National courts follow their own law on what reliefs are possible and what risks or factors must be shown to satisfy the court that the interim relief is justified. By contrast, the international tribunal has no *lex fori* on which it can rely. In practice the tribunal may grant or refuse relief based on some national law, eg the law of the place of arbitration, or the law applicable to the substance of the dispute, or the law of the party against whom the orders are sought. Equally, in the absence of mandatory law to the contrary, arbitrators may rely on and apply transnational standards widely accepted in national laws, generally accepted or developed from international practice.

By their very nature the various forms of interim relief require orders that can be enforced and made effective. This is difficult in the international arena especially as the New York Convention only applies to final decisions in the form of awards; it does not apply to orders or decisions which are to maintain the *status quo* and which may be cancelled, withdrawn, varied or confirmed in the final award. Hence the current UNCITRAL project to amend the Model Law so that interim relief ordered can be effectively enforced.

International arbitration tribunals have no fixed regime. In determining the relevance and form of interim measures arbitrators have no regularly applicable law; it differs from case to case. Also relevant may be the law governing the arbitration, the applicable arbitration rules, and the origins of the arbitrators; the nationality or places of business of the parties; and the place where the substantive contract is to be performed. A tribunal will invariably have in mind that any order it makes should be effective (as no tribunal wishes to make an order which is unlikely to be accepted and obeyed and which challenges its authority).

In this book Ali Yesilirmak has provided much useful guidance as to the approach which international tribunals have and generally do follow where interim relief is sought. The analyses are based on the application of various national law provisions and different international arbitration

rules. With reference to many international arbitration awards (many of which are unpublished) Dr Yesilirmak shows how the concepts, principles and rules have
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been interpreted and applied. This is particularly important for two reasons. First, it will help parties and their lawyers to anticipate how arbitrators may react to certain situations, and may be a guide for arbitrators as well. Second, increasingly, parties in international arbitration are seeking to rely on and ask arbitrators to (or even argue that arbitrators must) follow convenient or pertinent decisions of other tribunals. However there is no formal precedent in international arbitration.

As with all international arbitration materials the book is based on comparative law, international instruments and arbitration practice. Dr Yesilirmak's book is a timely study of an area which is sparsely covered and which is an ever more important weapon and protection in international arbitration. This book will be an indispensable tool for those interested in interim measures of protection and international arbitration.

Julian D M Lew

London

July 2005
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Preface

This book is a slightly amended and updated version of the author's PhD thesis submitted in 2003 to Queen Mary College, University of London. It provides guidance in respect of the problems and uncertainties concerning interim protection of rights in arbitration.

The author is grateful to the Schmitthoff Foundation for the grant of Mrs. Ilse Schmitthoff Scholarship that enabled him to initiate his doctoral studies.

He further wishes to express his gratitude to all those whose support and cooperation contributed greatly to this book, in particular the American Arbitration Association and the International Court of Arbitration of the International Chamber of Commerce for granting permission to research through arbitral decisions in their databases and to evaluate in this book the outcome of such research. The author is also thankful to the staff working in those institutions for their patience and invaluable assistance, particularly to William K Slate II, the late Michael Hoellering (former General Counsel), Luis M Fernandez, Eric Tuchmann and Laura Ferris Brown of the AAA, and Dr. Robert Briner, Dr. Horacio Grigera Naon (former Secretary General), Dominique Hascher (former General Counsel), Dr. Anne Marie Whitesell, Emmanuel Jolivet, Fernando Mantilla Serrano (former Counsel), Slyvie Picard Renue of the ICC.

Special thanks are due to Professor Alan S. Rau for the introduction of the subject of this book to the author, Carl Baudenbacher for his and his family's enormous support and friendship, and to Professors Hans Baade, Roy M. Mersky, Michael S. Sturley, Russell J. Weintraub and Mr. Jonathan Pratter of the University of Texas, School of Law, Professors Hasan Nerad and Hakan Pekcanıtez of (formerly) the University of Dokuz Eylül, the late Professor John Adams of Queen Mary College, Centre for Commercial Law Studies, Professor Ian Fletcher of University College of London, Larry Shore of Herbert Smith for their kind assistance and support throughout the author's postIgraduate studies. Thanks are also due to the staff, particularly Sue Sullivan and Sandra Baird at the Centre for Commercial Law Studies, Queen Mary College for their kind assistance and to Angie Raymond of the Centre as well as Vincent Verschoor of
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Kluwer Law International for their kind editorial assistance. Also, to the publisher of this book, Bas Kniphorst, whose patience and assistance is much appreciated. Finally, the author wishes to express his deepest indebtedness to his supervisors Professor Julian D. M. Lew, QC and Dr. Loukas Mistelis, for their guidance, support, encouragement and friendship.

The author devotes this book to his wife Arzu Aksaç, for small recognition of her everlasting support and patience.

This book endeavours to reflect the law as of 30 May 2005.

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