

# Who should decide on interim measures in international commercial arbitration and why?

Ketevan Buadze, MA, LL.M.

## INTRODUCTION

Historically, the powers to order interim measures lies with the courts, and the arbitral tribunal had no or very limited powers to order interim measures.<sup>1</sup> Today, to the extent permitted by the *lex arbitri*,<sup>2</sup> the arbitral tribunals may order a measure the tribunal deems necessary to protect party applying for such measure and for avoiding harm that cannot be remedied once the award is issued<sup>3</sup> unless the parties have agreed otherwise or institutional rules selected by parties regulate otherwise.<sup>4</sup> Model Law dictates the same: "Unless otherwise agreed by the parties, the arbitration tribunal may, at the request of a party, order any party to take such interim measure of protects the arbitration tribunal may consider necessary in respect of the subject matter of the dispute."<sup>5</sup>

Interim<sup>6</sup> or conservatory measure,<sup>7</sup> interim relief,<sup>8</sup> provisional or protective measures,<sup>9</sup> interim and

emergency relief<sup>10</sup> are the names of the preliminary orders<sup>11</sup> or measures applied by the courts and tribunals "to preserve evidence, to protect assets, to respect procedural rights, and otherwise to maintain the status quo pending the outcome of the arbitration proceedings."<sup>12</sup>

Interim measures are issued either in the form of an order or an award<sup>13</sup> and require court enforcement at the seat of arbitration or in the jurisdiction where the enforcement is aimed.<sup>14</sup> Although according to the prevailing viewpoint,<sup>15</sup> the orders or awards of interim measures lack on finality and have an "interim function" only, yet, they are binding.<sup>16</sup> Under the Model Law: "An interim measure issued by an arbitral tribunal shall be

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<sup>1</sup> S. Kröll, et al. *Comparative International Commercial Arbitration* (2003, Kluwer Law International) 588. D. L. Hogas, 'Considerations for Interim Measures in the International Arbitration', 2015 Conf Int'l Dr 290, 297.

<sup>2</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 2017, Cambridge University Press, 92.

<sup>3</sup> N. Voser, 'Interim Relief in International Arbitration: The Tendency towards a More Business-Oriented Approach', 2007, 1 Disp Resol Int'l 171, 178.

<sup>4</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 586.

<sup>5</sup> Model Law, article 17.

<sup>6</sup> As named under UNCITRAL Rules and Model Law.

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<sup>7</sup> As named under ICC Rules, "Conservatory and interim measures".

<sup>8</sup> As referred to by Moses, *Arbitration* 111-126.

<sup>9</sup> Article 183(1) Swiss PIL.

<sup>10</sup> SIAC Rules, Rule 30.

<sup>11</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 118.

<sup>12</sup> A. Redfern, M. Hunter, et al. *Redfern and Hunter on International Arbitration*, 2015, Sixth Edition, Oxford University Press, 313.

<sup>13</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 608.

<sup>14</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 116.

<sup>15</sup> According to the minority viewpoint, some interim measures ordered may be "final". Kröll, *Arbitration* 614. *Yasuda Fire & Marine Insurance v Continental Casualty Co.*, 37 F3d 345 (7th Cir, 1994).

<sup>16</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 608.

recognised as binding and unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I."<sup>17</sup>

The question if applying to the court could be deemed incompatible with parties' agreement to arbitrate is not subject to debate anymore.<sup>18</sup> According to UNCITRAL Rules, "A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."<sup>19</sup> The same idea bears Model Law,<sup>20</sup> some national law<sup>21</sup> and case-law,<sup>22</sup> and institutional arbitration rules.<sup>23</sup> Nevertheless, following the parties' clear and precise agreement, applying for the interim measure to relevant courts may be precluded.<sup>24</sup>

Although, dynamic changes and "a business-oriented" tendency is to be recognised all over the world about the interim reliefs in international arbitration,<sup>25</sup> there are still some questions open, which will be discussed in this paper in the way of discussing and comparing the powers of tribunal and courts when ordering interim measures and assessed with the conclusion, respectively.

## TRIBUNAL, COURT AND INTERIM MEASURES

### I. Power of the arbitral tribunal to order an interim measure

Subject to parties' agreement, the arbitral tribunal may exercise power to order interim measures prescribed by the law or under the arbitration's institutional rules unless it is not excluded according to *lex arbitri* entirely.<sup>26</sup>

Even though most of the legal systems developed and today, they seem like arbitration-friendly,<sup>27</sup> even today, there are legal systems giving no or limited powers to tribunals to order interim measure.<sup>28</sup> For instance, Italian Code of Civil Procedure, Article 818: "The arbitrators may not grant attachments or other interim measures of protection"<sup>29</sup> or Code of Civil Procedures of Argentina, article 753: "Arbitrators cannot order compulsory measures or measures leading to enforcement. They must request them from the judge who will lend the support of his jurisdictional powers for the most swift and effective carrying out of the arbitral proceedings."<sup>30</sup>

Next to the archaic attitudes, mostly legal systems equip tribunals with the powers to order interim measures. There are three approaches known and namely, first, the legal systems that grant arbitral tribunal general power to order interim measure, second, legal systems which grant power to order certain types of interim measure and third, although powers are not granted to the tribunals by law, but it does recognise and acknowledge the powers given by the parties to the tribunal, including ordering interim measures.<sup>31</sup>

<sup>17</sup> Model Law, revised articles, article 17H.

<sup>18</sup> Moses, Arbitration 110-111.

<sup>19</sup> UNCITRAL Rules, Article 26.

<sup>20</sup> Model Law, Article 9.

<sup>21</sup> Dutch Code of Civil Procedure, article 1022a, 1022b. Also, law of the Arab countries, according to M. Abould-Enein, International Interim Relief Measures in International Arbitration in the Arab States, 2002, 3 J World Investment 77-82.

<sup>22</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 618. "the French Cour de cassation has consistently held that the existence of an arbitration agreement does not prevent the courts from ordering statutory investigative measures under Article 145 NCPC."

<sup>23</sup> ICC Rules, article 23 (2), LCIA Rules, article 25 (3).

<sup>24</sup> *ibid.*

<sup>25</sup> N. Voser, 'Interim Relief in International Arbitration: The Tendency towards a More Business-Oriented Approach', 2007, 1 Disp Resol Int'l 171, 185.

<sup>26</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 589-592.

<sup>27</sup> A. Redfern, M. Hunter, et al. Redfern and Hunter on International Arbitration, 318.

<sup>28</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 588.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 590-591.

The first approach is based on the Model Law, meaning the arbitrators are granted broad powers to order interim measures unless otherwise<sup>32</sup> agreed by the parties:<sup>33</sup> "Unless otherwise agreed by the parties, the arbitration tribunal may, at the request of a party, order any party to take such interim measure of protects the arbitration tribunal may consider necessary in respect of the subject matter of the dispute..."<sup>34</sup> Switzerland develops similar approach: "unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures."<sup>35</sup>

The second approach is developed under the English Arbitration Act, section 38 that equips tribunal with the powers to order specific types of interim measure and of course, based on the parties' agreement.<sup>36</sup>

The third approach is developed in countries like USA, France, and Belgium, where the laws do not empower tribunals to grant interim measures; however, the system recognises and respects the parties' agreement authorising arbitrators to decide on interim measures.<sup>37</sup> Good examples are powers of tribunal seated in the USA to issue a subpoena requiring production of document or presence of a witness, which can be enforced by the relevant court.<sup>38</sup>

In compliance with *lex arbitri* and pursuant to the parties' agreement, the tribunal may grant the interim measure as prescribed under the relevant institutional arbitration rules. For instance, LCIA Arbitration Rules enlists the "Interim and Conservatory Measures" available for the tribunal.<sup>39</sup>

<sup>32</sup> Or "contrary" pursuant to S. Kröll, et al. Comparative International Commercial Arbitration, 590.

<sup>33</sup> *ibid.*

<sup>34</sup> Model Law, Article 17.

<sup>35</sup> *ibid.*, Article 183(1) Swiss PIL.

<sup>36</sup> Arbitration Act 1996, section 38.

<sup>37</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 591.

<sup>38</sup> A. Redfern, M. Hunter, et al. Redfern and Hunter on International Arbitration, 310-311. Or peremptory order for the tribunals with seat in England and Wales to require attendance of a witness.

<sup>39</sup> LCIA Arbitration Rules (2014), article 25.

While, ICC Rules of Arbitration, only names the power of the arbitrator to order "interim or conservatory measures": "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate."<sup>40</sup>

When conferring to the arbitral tribunal powers to order interim measure, it is noteworthy the issue related to the emergency arbitrator and preliminary order. According to the developments in international arbitrations, many institutional rules, including LCIA, ICC, HKIAC, SIAC Rules, make it possible to appoint an emergency arbitrator to decide an urgent matter such as interim measures,<sup>41</sup> unless the parties have agreed otherwise.<sup>42</sup> Under UNCITRAL Rules the tribunal may issue a preliminary order, an art of interim measure that can be obtained *ex parte* for the specific time and that can be adopted or amended by the tribunal as an interim measure within the same time frame.<sup>43</sup> Preliminary order is binding upon parties, but not enforceable by the court since it is not an award.<sup>44</sup>

## II. Power of the court to order an interim measure

According to Model Law<sup>45</sup> and "many national laws",<sup>46</sup> the court at the seat of the arbitrations stands for the assistance of the tribunal and the parties to the arbitration,<sup>47</sup> including granting interim

<sup>40</sup> ICC Rules of Arbitration (2017), article 28. The same approach is taken by Arbitration Institute of The Stockholm Chamber of Commerce, article 37.

<sup>41</sup> LCIA Rules, article 9B. ICC Rules, article 29. HKIAC Rules, schedule 4. SIAC Rules, schedule 1.

<sup>42</sup> M. L. Moses, The Principles and Practice of International Commercial Arbitration, 113-114.

<sup>43</sup> M. L. Moses, The Principles and Practice of International Commercial Arbitration, 112.

<sup>44</sup> *ibid.*

<sup>45</sup> Model Law, article 9 and article 27.

<sup>46</sup> M. L. Moses, The Principles and Practice of International Commercial Arbitration, 119.

<sup>47</sup> *ibid.*

measure or enforcement of the interim measure ordered by the tribunal.<sup>48</sup>

Generally speaking, and according to Model Law, "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."<sup>49</sup> Further, Arbitration Act 1996, article 44 states: "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings." Following the same article, the powers include taking the evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings, including for the inspection, photographing, preservation, custody or detention of the property, or ordering that samples be taken from, or any observation be made of or experiment conducted upon the property; for that purpose, authorising any person to enter any premises in the possession or control of a party to the arbitration; the sale of any goods the subject of the proceedings; the granting of an interim injunction or the appointment of a receiver.<sup>50</sup> In the Arab world, the approach is the same.<sup>51</sup> The court may be involved and requested to assist and issue interim measures before or during the arbitration proceeding.<sup>52</sup> In comparison, ZPO and CPC go even further via considering "provisional measures by courts to be the primary form of interim relief."<sup>53</sup>

<sup>48</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 116.

<sup>49</sup> Model Law, article 27.

<sup>50</sup> Arbitration Act 1996, section 44 (2).

<sup>51</sup> M. Abould-Enein, *International Interim Relief Measures in International Arbitration in the Arab States, 2002*, 3 *J World Investment*, 77-82.

<sup>52</sup> *ibid.*

<sup>53</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 623. So called: "concurrent jurisdiction between courts and arbitration tribunals".

Enforcement of the interim measure ordered by the tribunal is also within the scope of the court's assistance. However, it has to be distinguished between ordering a specific measure by the tribunal and actual act of enforcement.<sup>54</sup> Although the first one may remain with the tribunal, the real act of enforcement may require state force in the form of the court act.<sup>55</sup>

Sometimes, not only the court at the seat of the arbitration but also most appropriate court may provide assistance to the tribunal.<sup>56</sup> Additionally, it can be the case when the court at the seat of the arbitration may be in need to ask for the judicial assistance in the different jurisdiction and give a stage to the Hague Evidence Convention. But will the foreign court be motivated to assist? Or is the arbitral proceeding within the scope of "judicial proceeding" under the mentioned convention?<sup>57</sup> As a solution is thought "international harmonisation by an international instrument"<sup>58</sup> to fill the gap of missing international convention regulating the enforcement of interim measures ordered by a tribunal having a seat in another country.<sup>59</sup>

### III. Interim measures: Court v. Tribunal

The schedule below enlists the broadly defined interim measures in five blocks along with the answers (positive/negative) if the tribunal and court may order the measure or not.<sup>60</sup>

<sup>54</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 600.

<sup>55</sup> *ibid.*

<sup>56</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 119.

<sup>57</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 123.

<sup>58</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 615.

<sup>59</sup> *ibid.*

<sup>60</sup> The results in the table are based on S. Kröll, et al. *Comparative International Commercial Arbitration*, 595-603, unless otherwise noted. Also, general definitions of interim measure are taken from S. Kröll, et al. *Comparative International Commercial Arbitration*, 595-603.

## Schedule 1:

Interim measures in international arbitration <sup>61</sup>	Tribunal to order		Court to order	
	Parties/property subject to the dispute	Third parties/property not subject to the dispute	Parties/property subject to the dispute	Third parties/property not subject to the dispute
Preservation of evidence	Positive <sup>62</sup>	Generally negative, but FAA empowers arbitrators to issue subpoenas, enforceable by the court or peremptory order of tribunal in England and Wales to request a witness's attendance. <sup>63</sup>	Positive	Positive
Regulating/Stabilising relations between the parties during the proceedings	Positive	-	Positive	-
Securing the enforcement of the award	As long as it relates to the parties to the dispute, the tribunal has the persuasive power to award an interim measure. <sup>64</sup>	Negative*	Positive	Positive
Security for costs	positive <sup>65</sup>	-	positive	-
Interim payments	positive	-	positive	-

\*There are different approaches regarding the securing enforcement of the award in relation to the property being outside of the dispute and this approach varies in the national legal systems. According to the broad definition of ZPO: "Unless the parties to the dispute have agreed otherwise, the arbitral tribunal may direct, upon a party having filed a corresponding petition, provisional measures or measures serving to provide security as it deems fit with a view to the subject matter of the litigation...",<sup>66</sup> whereas the Belgian Judicial Code, Article 1696 (1) makes particular exclusion: "Without prejudice to Article 1679(2) [right to apply to the courts], the arbitral tribunal may, at the request of a party, order provisional or protective measures, with the exception of an attachment order."<sup>67</sup> In this respect, it is also noteworthy that in some legal systems some measures for the securing of enforcement like for example "attachment" require an additional state authority in the form of a court order to be enforceable, like french law attachments are under exclusive jurisdiction of state courts.<sup>68</sup>

<sup>61</sup> Classification in "five general headings" is taken from S. Kröll, et al. Comparative International Commercial Arbitration, 595.

<sup>62</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 596.

<sup>63</sup> A. Redfern, M. Hunter, et al. Redfern and Hunter on International Arbitration, 310-311.

<sup>64</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 610.

<sup>65</sup> It is possible pursuant to UNCITRAL Rules, institutional arbitration rules, including LCIA, ICC, also, national law, such as Arbitration Act 1996.

<sup>66</sup> ZPO, Section 1041 (1).

<sup>67</sup> S. Kröll, et al. Comparative International Commercial Arbitration, 599-600.

<sup>68</sup> M. Jacques, Attachments and Other Interim Remedies in Support of Arbitration France, 1984, 12 Int'l Bus Law, 107-110.

Schedule 2 below presents court v. tribunal from different procedural positions, including confidentiality of the entire process. Also, it shows some specific interim measures from the perspective of court v. tribunal.

Schedule 2:

In international arbitration:	Tribunal	Court
Granting interim measures before the tribunal/court is established	Positive. The possibility of an emergency arbitrator. <sup>69</sup>	positive
Granting interim measures <i>ex parte</i>	Controversial <sup>70</sup> and in very exceptional cases. <sup>71</sup>	positive
Granting interim measures (in various forms) related to the party to the dispute or property	positive <sup>72</sup>	positive
Granting interim measures (in various forms) related to the third-party or property not subject to the dispute	negative <sup>73</sup>	positive
(Direct) enforceability of the interim measures ordered	Negative. The separate act of state authority in the form of the court act is required. <sup>74</sup>	Directly enforceable
Ensuring the confidentiality of the dispute	Confidentiality is guaranteed unless the parties have agreed otherwise. <sup>75</sup>	Requires specific request to the court, and there is no guarantee that the court will close the process. <sup>76</sup>
Anti-suit injunction	Generally, the power to issue anti-suit injunction rests with the court, <sup>77</sup> but possible to be issued for instance in the form of partial award enforceable under New York convention in the USA: <i>Four Seasons Hotels and Resorts v. Consorcio Barr S.A.</i> <sup>78</sup>	Positive in general, but in European Union according to ECJ, courts of the Member States are prohibited from issuing an anti-suit injunction as it is incompatible with the Brussels Regulation and now, Brussels Recast. <sup>79</sup>
Anti-arbitration injunction	-	positive <sup>80</sup>
Power to sanction counsel	Generally, the answer is negative, but such powers are envisaged under LCIA Rules. <sup>81</sup>	positive

<sup>69</sup> See page 11 above.

<sup>70</sup> Since the tribunal must respect the parties right to be heard.

<sup>71</sup> See page 11 above. In addition, under ZPO 1063 (3) *ex parte* hearing is foreseen: "The presiding judge of the Division for Civil Matters (Zivilsenat) may direct, without having previously heard the opponent, that the petitioner may pursue compulsory enforcement under the arbitration award until a decision has been delivered regarding the petition, or that he is allowed to enforce the provisional measures, or measures serving to provide security, ordered by the arbitral tribunal pursuant to section 1041. Compulsory enforcement under the arbitration award may not extend beyond measures serving to provide security. The respondent is authorised to avert compulsory enforcement by providing security in that amount in which the petitioner may pursue compulsory enforcement."

<sup>72</sup> Summary of Schedule 1.

<sup>73</sup> Summary of Schedule 1.

<sup>74</sup> See page 13 above.

<sup>75</sup> S. M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 2003, 12 *Currents: Int'l Trade LJ*, 55-65.

<sup>76</sup> *ibid.*

<sup>77</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 100-101.

<sup>78</sup> *Four Seasons Hotels and Resorts v. Consorcio Barr S.A.*, 377 F.3d 1164 (11th Cir.2004).

<sup>79</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 100-102.

<sup>80</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 100-101.

<sup>81</sup> LCIA Rules, article 18.6.

## CONCLUSION

For getting closer to the anticipated finale, it should be considered the party's strategy and summarised two significant matters: the possibility of obtaining interim measure *ex parte* and enforceability of the orders on interim measures.

As a general rule, there are three "fundamental"<sup>82</sup> procedural rules the tribunal follows when granting the interim measures, request of the party, jurisdiction of the tribunal and the parties' right to be heard.<sup>83</sup> According to the national procedural codes, the courts usually issue interim measures following the same standard as named above for the tribunals, but with the possibility of *ex parte* orders having the post control mechanisms in place, i.e. challenging orders after they are made. Applying to the courts and requesting their assistance in the international arbitration to order interim measure until the tribunal is constituted or obtaining interim measure *ex parte* could be feasible from the time-economy perspective. However, at the same time, it can be unreasonable from the viewpoint that at least attorney has to prepare all relevant materials for the submission to the court in the official language of the state, which can be different from the contract and arbitration language, thus, it can be timeconsuming and costly. Also, after the tribunal is constituted and already aware of the dispute, the court might not be of the same level of the knowledge of the case. Therefore, if we speak about the need to apply to the court in the tribunal's pre-constitutional period, it has to be mentioned that this trend is gradually becoming outdated as the emergency arbitrator<sup>84</sup> and preliminary orders<sup>85</sup> are getting faster into play. However, from the perspective of enforcement, skipping the court is not foreseeable in the nearest future. It is not disputable that tribunal's order over

the parties' or their property lack the power to enforce, including to impose penalties in case of non-compliance, which exclusively lies with the state courts,<sup>86</sup> and which the state might be reluctant to hand over to the private institutions such as arbitration institutions. Therefore, it should be admitted that the court's involvement for the purposes of enforcement of the measures ordered, at least when the tribunal has issued the order, which requires the court act for the enforcement, is inevitable.<sup>87</sup> However, from another standpoint, the court's enforcement power may not be required at all, as the tribunal's persuasive power might be a good trigger of voluntary compliance of the party to the measures ordered by the tribunal, since a non-compliance may provoke an adverse inference to the cost allocation ordered by the tribunal,<sup>88</sup> or affect the party's image or tribunal's consideration of the case.<sup>89</sup>

Conclusively, to answer to the question who should decide on interim measures in international commercial arbitration and why, it is undoubtful that the tribunal's powers have its limits, firstly because the arbitration is based on the parties' agreement, the parties' consensus, therefore, the tribunal cannot order to do something to the third parties, even if there are "subpoenas" in the power bank of the tribunal under the certain legal systems as described above.<sup>90</sup> Secondly, and to reiterate the above-mentioned, the tribunal lacks the power of enforceability,<sup>91</sup> which means that the tribunal's order is not "self-enforcing",<sup>92</sup> and in other words, the tribunal cannot impose sanctions for being non-compliant to the interim measures ordered.<sup>93</sup>

<sup>82</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 606.

<sup>83</sup> *ibid.*

<sup>84</sup> M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, 113-114. C. Leng Sun, T. Wei, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief*, 2013, 6 *Contemp Asia Arb J*, 349 - 369.

<sup>85</sup> Moses, *Arbitration* 112.

<sup>86</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 610.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> M. Abould-Enein, *International Interim Relief Measures in International Arbitration in the Arab States*, 82.

<sup>90</sup> Pages 10-11 above.

<sup>91</sup> M. Roth, *Interim Measures*, 2012, *J Disp Resol* 425, 435.

<sup>92</sup> K. Lee, *The Powers and Interim Measures of the Arbitral Tribunal in International Commercial Arbitration*, 2008, 18 *J Arb Stud* 103, 127.

<sup>93</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 594.

Therefore, into the "arbitration-friendly" legal systems the tribunals may be the "best forum"<sup>94</sup> to decide on interim measures, due to the reasons that tribunal, (a) is aware of facts and legal aspects of the dispute, (b) has a better perception of the dispute success and (c) can better evaluate the correctness of the interim measure<sup>95</sup> and (d) of course, confidentiality.<sup>96</sup> Yet, should the parties land into the legal system, which does not seem to be "arbitration-friendly", there are always national civil procedure codes, which usually envisage the possibility of granting urgent interim measure if underline

requirements are met. The same could be decided if due to the time pressure and the swift enforcement one may applying to the national court at the seat of arbitration or in the jurisdiction where the interim measure's enforcement is thought. Resuming, it is suggested to look at "court v. tribunal" more as an opportunity rather than a challenge for the party and party's legal representative, since when the parties have agreed to arbitrate, but for the matter of urgency or intending not to invite the party once requesting specific interim measures, a national court might be a good option.

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<sup>94</sup> S. Kröll, et al. *Comparative International Commercial Arbitration*, 589.

<sup>95</sup> *ibid.*

<sup>96</sup> S. M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 55-65.