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Editors

Alexander J. Bělohlávek
Professor
at the VŠB TU
in Ostrava
Czech Republic

Naděžda Rozehnalová
Professor
at the Masaryk University
in Brno
Czech Republic

Questions About This Publication

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„We regret to announce the death of our most reputable colleague Prof. Nikolay Natov from Bulgaria. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team."

Address for correspondence & manuscripts

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Jana Zajíce 32, Praha 7, 170 00, Czech Republic

editor@lexlata.pro

Editorial support:

Tereza Tolarová, Jan Šamlot, Lenka Němečková, Karel Nohava, Kim Mašek

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List of Abbreviations

1923 Geneva Protocol	Protocol on Arbitration Clauses signed in Geneva on 24 September 1923
1927 Geneva Convention	Convention on the Execution of Foreign Arbitral Awards signed in Geneva on 26 September 1927
1961 Geneva Convention	European Convention on International Commercial Arbitration signed in Geneva on 21 April 1961
ADR	Alternative Dispute Resolution
AUT	Austria
BIT	Bilateral Investment Treaty
Brussels I Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CCP	Polish Code of Civil Procedure
CDC	Cartel Damage Claims
CETA	The Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COMI	Centre of Main Interest
COMMISA	Corporación Mexicana De Mantenimiento Integral
Constitutional Court RF	Constitutional Court of the Russian Federation
ČR	Česká republika (Czech republic)
DEU	Deutschland (Germany)
Directive	Directive on Alternative Dispute Resolution in Consumer Cases
EC	The European Community
EC Treaty	Energy Charter Treaty signed in Lisbon on 17 December 1994
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EGPC	Société Egyptian General Petroleum

	Corporation
EU	European Union
FCIArb	Fellow of the Chartered Institute of Arbitration
Global Panel	Global Enforcement and Recognition Panel
HLV Report	The Heidelberg-Luxembourg-Vienna Report
ICAC	International Commercial Arbitration Court at the Chamber of Commerce of Trade and Industry of the Russian Federation
ICC	International Chamber of Commerce
ICCA	International Congress and Convention Association
ICCt	The International Criminal Court
ICSID	International Centre for Settlement of Investment Disputes
INSOL-Europe	International Association of Restructuring, Insolvency & Bankruptcy Professionals
ISDS	Investor-state dispute settlement
KBC	Karaha Bodas Company
KKO	Korkein oikeus (The Supreme Court of Finland)
LCIA	London Court of International Arbitration
NATCAS	Société National Gas Company
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958
OHADA	Organisation for the Harmonization in Africa of Business Law
OTV	Omnium de Traitement et de Valorisation
Pertamina	Persusahaan Pertambangan Minyak Dan Gas Bumi Negara
PIL	Private International Law
PPP	Public-private partnership
RAA	Russian Arbitration Association
RIMA	Russian Institute of Modern Arbitration
SCC	Stockholm Chamber of Commerce
Swiss PILA	Swiss International Private Law
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U.A.E.	United Arab Emirates
UK	United Kingdom

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	The UNCITRAL Model Law on International Commercial Arbitration adopted in 1985
US	United States of America
VIAC	Vienna International Arbitral Centre
WJA	The World Jurist Association
ZBP	Polish Bank Association
ZPO	Zivilprozessordnung

Articles

Roman Prekop | Peter Petho

Arbitral Interim Measures – Enforcement Pitfalls

Key words:
interim measure | provisional relief | enforcement | execution

Abstract *| This article addresses the enforcement of arbitral interim measures in international arbitration. The authors find that although the enforceability of arbitral interim measures is critical for the efficacy of arbitration, there does not appear to be any worldwide recognized binding instrument requiring national courts to enforce such measures. In particular, the New York Convention does not explicitly address arbitral interim measures, which thus results in different views. Also, although the UNCITRAL Model Law explicitly provides for the recognition and enforcement of arbitral interim measures, it is merely a non-binding guideline. Consequently, the enforceability of arbitral interim measures appears to be left to the tender mercies of the national legal orders and courts. This necessarily leads to significant uncertainty for arbitration practitioners and users. The authors believe that such a state of affairs is undesirable, but they do not foresee any indication that a significant improvement could be brought about within a few years. On this basis, the authors conclude that the requesting party, usually, must seriously consider filing a request for interim measure directly with a national court.*

Roman Prekop is a founding partner at Barger Prekop Attorneys admitted to practice in the Slovak Republic and in New York. He is a member of the Slovak Bar Association, New York State Bar Association, Chartered Institute of Arbitrators, UK (FCIArb), International Bar Association, American Bar Association and Austrian Arbitration Association, and is a co-chair of the Slovak chapter of New York State Bar Association's International Section. Roman Prekop focuses his practice on litigation and international arbitration, energy sector regulation, competition and projects, M&A, and on corporate and banking matters. E-mail: rprekop@bargerprekop.com

Peter Petho is a senior associate at Barger Prekop Attorneys admitted to practice in the Slovak Republic. He is a member of the Slovak Bar Association, Chartered Institute of Arbitrators, UK (FCIArb), International Bar Association, and 'below 40' platforms of the ICC, LCIA, ICCA, Austrian Arbitration Association and Swiss Arbitration Association. Peter Petho focuses his practice on litigation and international arbitration, construction law, real estate transactions, EU law, and on general commercial matters. E-mail: ppetho@bargerprekop.com

I. Introduction

7.01. Has the enforcement of your final award proved futile, simply because the debtor had too much manoeuvring space during arbitration? When inserting an arbitration clause into a cross-border contract, did you have to warn the client that the arbitrators' powers are inferior to those of court judges? Or, have you had the feeling that when it comes to international arbitration, there is an elephant in the room? If so, there may be a subtle, but common reason. Unlike foreign final awards, foreign arbitral interim measures may be simply too weak.

7.02. As you will read below, there is likely no single regime for the enforcement of foreign arbitral interim measures, but rather a myriad of inconsistent state regimes. First, the New York Convention does not explicitly address arbitral interim measures, which necessarily results in different views and uncertainty as to its applicability. Second, the UNCITRAL Model Law,[1] although explicitly providing for the recognition and enforcement of arbitral interim measures, is only a non-binding instrument and thereby enables many different ways of its implementation. Third, a closer look at national arbitration laws reveals that even typical arbitration fora (such as England, Switzerland, or Sweden) do not enforce foreign arbitral interim measures.

7.03. Importantly, it very often only makes sense to enforce a final award if you can preserve the status quo during arbitration. Hence, it begs the question: if you can preserve the status quo only by resorting to state courts, why agree on arbitration instead of court litigation and thus multiply the needed dispute fora? This question is even more pressing in the EU member states, where the Brussels I Regulation renders the court's interim measures enforceable in other member states.

7.04. Some may speculate that states will gradually push arbitration to the limits of its very existence. We would say that this will not be the case if the arbitration practitioners and users unite the masters of the world and agree on an aligned arbitration trump similar to the 1958 New York Convention. It's about time.

II. Interim Measures

7.05. **Definition.** Interim measures can be defined as measures of provisional nature aimed at protecting a party's rights before the tribunal renders the final award or even before arbitration

[1] The UNCITRAL Model Law on International Commercial Arbitration adopted in 1985, as amended in 2006.

begins.[2] Such measures can be divided into three categories.[3] First, measures aimed at facilitating arbitration, such as orders requiring a party to allow evidence to be taken.[4] Second, measures aimed at avoiding loss and preserving a certain state of affairs until the dispute has been resolved, such as orders requiring a party to continue in certain actions or to refrain from taking certain actions.[5] Third, measures aimed at facilitating the future enforcement of an award, such as orders attaching the respondent's assets either in or outside the jurisdiction in which the arbitration takes place.[6]

7.06. **Options for interim measures.** In practice, it is not unusual that a party to arbitration may need one or more such measures. Usually, such party has two options. First, it may consider requesting such measure from the tribunal. Choosing this option would normally be logical because this option follows the presumption that the parties to an arbitration agreement wish to have their entire dispute decided in arbitration. In fact, many national arbitration laws and rules support such logic by permitting tribunals to render interim measures, some of them even as *ex parte* measures.

7.07. Second, the party wishing to obtain an interim measure may consider requesting such measure from the respective national court. In fact, modern arbitration laws usually empower national courts to render interim measures in support of arbitration, at least before the tribunal has been constituted. Such interim measures are also often without prejudice to the parties' right to have the dispute on the merits resolved in arbitration.

7.08. **Choosing the right forum.** From a practical point of view, choosing the right option is often critical for a party wishing to obtain an interim measure. Before making a choice, such party needs to consider a number of issues. One of such issues is what kind of redress the requesting party has against a recalcitrant party. For instance, if a party wishes to obtain an order preventing the other party from disposing of its assets, it needs to ensure that the order will be effective even if the other party refuses to comply. However, unlike national courts, arbitral tribunals do not have coercive powers. Therefore, from this perspective,

[2] Decision of the Swiss Federal Supreme Court dated 13 April 2010, 4A 582/2009, paragraph 2.3.2. An English translation of this decision is available at: http://www.swissarbitrationdecisions.com (accessed on 25 February 2019).

[3] Report of the Secretary General of the United Nations Commission on International Trade Law, Working Group on Arbitration, A/CN.9/WG.II/WP.108, 14 January 2000, paragraph 63, available at: https://undocs.org/en/A/CN.9/WG.II/WP.108 (accessed on 25 February 2019).

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

the applying party may be more inclined to request an interim measure from the respective national court. But, in some states, the applicable procedural law (or arbitration rules) prevents the party from doing so. Also, choosing this option may not be in the best interest of the applying party, particularly in situations where the applying party wants to avoid detailed involvement of national courts in the dispute.

7.09. **Balanced solution.** In the majority of cases, the most balanced solution is to request an interim measure from the tribunal and have such measure enforced before the respective national court. This solution ensures that all relevant issues in dispute are decided by the tribunal and minimizes the intervention of national courts to the extent of that necessary to maintain the efficacy of arbitration and future enforcement of a final award.

III. Enforcement of Interim Measures under the New York Convention

7.10. **New York Convention.** One of the main advantages of international arbitration is the world-wide reaching enforceability of foreign final awards under the New York Convention. The New York Convention sets out uniform rules for the recognition and enforcement of foreign awards, which now apply in 159 jurisdictions. There is no comparable international instrument in respect of foreign court judgments.

7.11. **Prevailing view.** However, the prevailing view seems to be that the New York Convention does not apply to arbitral interim measures, not even those issued in the form of an award.

7.12. The proponents of such view usually argue that arbitral interim measures do not satisfy the finality requirement, which they see implied in Article V(i)(e) of the New York Convention.[7] For instance, Bermann points out that "[t]he difficulty lies in considering such measures to be not only 'binding' (which they almost certainly are), but also 'final' (which is questionable)."[8]

[7] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Oxford: Oxford University Press paragraph 7.19 (6th ed., 2015)., Mika Savola, Interim Measures and Emergency Arbitrator Proceedings (Presentation for the 23rd Croatian Arbitration Days in Zagreb, 3-4 December 2015), page 14, available at: https://arbitration.fi/wp-content/uploads/sites/22/2016/04/23-cad-savola-interim-measures-and-emergency-arbitrator-proceedings.pdf (accessed on 25 February 2019), and Luke Nottage & Chester Brown, Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts, National Report for Australia, page 5, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340806 (accessed on 25 February 2019).

[8] George A. Bermann, Recognition and Enforcement Of Foreign Arbitral Awards: The Application Of The New York Convention By National Courts (July 2, 2014 draft), page 17, available at: https://www.iacl2014congress.com/fileadmin/user_upload/k_iacl2014congress/General_reports/Bermann_-_General_Report_Recognition__Enforcement_of_Foreign_Awards_July_2_2014__2_.pdf (accessed on 25 February 2019).

Also, Poudret and Besson argue that '[w]hatever interpretation is given to [Article V(1)(e) of the New York Convention], the authors did not envisage that a decision of an arbitrator could be questioned by a subsequent decision, and this is precisely an essential characteristic of provisional measures.'[9] The proponents of this view also often refer to the Queensland (Australia) Supreme Court's decision holding that "the reference to 'arbitral award' in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties […]."[10]

7.13. **Minority view.** On the other hand, although this is a minority view, there are certain plausible arguments for concluding that arbitral interim measures are enforceable under the New York Convention.

7.14. In particular, it appears rather questionable whether an award capable of being enforced under the New York Convention must be 'final' in any sense. The requirement that an award be final was explicitly set out in Article 1(d) of the Geneva Convention on the Execution of Foreign Arbitral Awards (the 'Geneva Convention'),[11] the predecessor of the New York Convention. However, no such requirement was transposed into the language of the New York Convention. Rather, the 'finality' requirement under the Geneva Convention was replaced with the requirement that an award be 'binding' under Article V(i)(e) of the New York Convention. As arbitral interim measures are usually considered to be 'binding', they satisfy the 'binding' requirement under Article V(i)(e) of the New York Convention.

7.15. In addition, the requirement that an award be 'binding' under Article V(i)(e) of the New York Convention does not mean that awards not satisfying this requirement fall outside the scope

[9] JEAN F. POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, London: Sweet & Maxwell Ltd 546 (2nd ed., 2007).

[10] The Supreme Court of Queensland, *Resort Condominiums International Inc.* v. *Ray Bolwell* (1993) 118 ALR 655.

[11] Under Article 1(d) of the Geneva Convention, "[i]n the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called 'a submission to arbitration') covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary: […] (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending […]."

of the New York Convention.[12] Article V(i)(e) of the New York Convention merely provides that the enforcing court may refuse to recognize and enforce a foreign arbitral award that has not yet become binding on the parties. In other words, even non-binding awards are awards falling within the scope of the New York Convention, but enforcing courts have discretion in deciding whether to enforce such awards or not.

7.16. Also, even if an award capable of being enforced under the New York Convention had to be 'final', Born suggests that interim measures satisfy such requirement because they "are 'final' in the sense that they dispose of a request for relief pending the conclusion of the arbitration."[13] Similarly, according to Kojovic, "[a]n interim award on provisional relief resolves whether the request for provisional measure should be granted or not. It represents a final determination of the issue thus defined."[14] This view also seems to have support in certain decisions of US and French courts,[15] and among US commentators.[16]

7.17. Finally, from a policy perspective, the possibility to enforce such measures is critical for the efficacy of arbitration and future enforcement of a final award. For instance, Veeder points out that '[i]n the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration procedure—completely and finally.'[17] Born concurs that if arbitral interim awards were not enforceable under the New York Convention, 'the parties will be able to and significantly more willing to refuse to comply with provisional

[12] The New York Convention does not define awards through any formal or material requirements. The definition of 'arbitral awards' is set out in Article I(2) of the New York Convention, according to which "[t]he term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

[13] 3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, THE NETHERLANDS: KLUWER LAW INTERNATIONAL 2515 (2nd ed., 2014).

[14] Tijana Kojovic, *Court Enforcement of Arbitral Decisions – How Final is Provisional?* 18(5) JOURNAL OF INTERNATIONAL ARBITRATION, 511, 523-524 (2001).

[15] For instance, in *Publicis Communication and Publicis S.A.* v. *True North Communications*, the Court of Appeals for the Seventh Circuit held that the arbitral interim measure at hand was final in respect of the matters it resolved and, as such, capable of being enforced (Court of Appeals for the Seventh Circuit, *Publicis Communication and Publicis S.A.* v. *True North Communications Inc.*, 206 F.3d 725 (7th Cir. 2000)). Born also refers to the Judgment of the Paris Court of Appeal of 7 October 2004 (2005 Rev. arb. 737), according to which arbitrators' provisional measures were held to be final: 'The arbitral tribunal has definitely ruled on the request for conservatory measures ... [and has] expressed in an award their power to on an emergency request that participates in the resolution of the dispute." (3 GARY B. BORN, *supra* note 15, at 2514).

[16] 3 GARY B. BORN, *supra* note 15, at 2514.

[17] Van Vechten Veeder, *Provisional and conservatory measures*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, Austria: United Nations Publication 21 (1999).

relief, resulting in precisely the serious harm that provisional measures were meant to foreclose.'[18]

7.18. **Conclusion.** It follows that there seems to be a significant uncertainty as to whether arbitral interim measures are enforceable under the New York Convention. In fact, the UNCITRAL Secretariat stressed this uncertainty in its 1999 Note on the Possible Future Work in the Area of International Commercial Arbitration,[19] which subsequently led to the 2006 amendment to the UNCITRAL Model Law.

IV. Enforcement of Interim Measures under the UNCITRAL Model Law

7.19. **UNCITRAL Model Law.** The UNCITRAL Model Law serves as a guideline for national legislatures wishing to have arbitration laws in accordance with modern international commercial arbitration standards. It is therefore not surprising that the 2006 amendment to the UNCITRAL Model Law introduced a comprehensive set of rules governing the recognition and enforcement of both domestic and foreign arbitral interim measures.

7.20. **Discussions in the 1980s.** According to *travaux préparatoires* (preparatory notes), the enforceability of arbitral interim measures was already discussed in the 1980s. More specifically, one of the drafts of Article 17 provided that 'if enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court] [the Court specified in article V] to render executory assistance.'[20] However, the Working Group eventually decided to delete this provision because it viewed such provision as incomplete and unlikely to be accepted by many states.[21]

7.21. **UNCITRAL revisiting the topic.** In 1999, the UNCITRAL Secretariat revisited this discussion in its Note on the Possible Future Work in the Area of International Commercial Arbitration.[22] It suggested, among other things, that a further study be made and, based on such study, tentative solutions

[18] 3 GARY B. BORN, *supra* note 15, at 2515.

[19] Note of the Secretary General of the United Nations Commission on International Trade Law, A/CN/9/460, 6 April 1999, paragraph 122, available at: https://undocs.org/EN/A/CN.9/460 (accessed on 14 December 2018).

[20] Report of the Working Group on International Contract Practices on the work of its sixth session, A/CN.9/245, 22 September 1983, paragraph 70, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V83/619/69/PDF/V8361969.pdf?OpenElement (accessed on 14 December 2018).

[21] *Ibid*, at paragraph 72.

[22] Note of the Secretary General of the United Nations Commission on International Trade Law, A/CN/9/460, 6 April 1999, paragraphs 115-127, available at: https://undocs.org/EN/A/CN.9/460 (accessed on 14 December 2018).

be first presented. In March 2000, the UNCITRAL General Assembly accorded this matter high priority[23] and the UNCITRAL Secretariat then prepared a first draft of provisions governing the enforcement of both domestic and foreign arbitral interim measures.[24]

7.22. **Two variants.** The draft included two variants. The first required a national court to enforce an arbitral interim measure (subject to certain exceptions).[25] The second entitled (but did not require) a national court to enforce such measure.[26] The UNCITRAL Secretariat also suggested that the Working Group consider additional provisions, such as those imposing a duty to inform the court of any changes regarding the interim measure, provisions making the enforcement subject to leave of the tribunal, provisions entitling the court to make the enforcement subject to the requesting party providing security, or provisions entitling the court to reformulate the arbitral interim measure.[27]

7.23. Eventually, the Working Group adopted the first variant, arguing that 'setting forth an obligation for courts to enforce interim measures might ultimately enhance their effectiveness.'[28] The discussions about the specific language of this variant (and additional provisions outlined above) continued until July 2006, when the Working Group adopted a final text of a new Chapter IV.A dealing with interim measures and preliminary orders.[29] The recognition and enforcement of arbitral interim measures was addressed in Section 4 titled 'Recognition and enforcement of interim measures' containing two newly adopted Articles 17H and 17I.

7.24. **Obligation to recognize and enforce.** Under Article 17H, a national court is required to recognize and enforce an arbitral

[23] Report of the United Nations Commission on International Trade Law on the work of its thirty-second session, A/54/17, 1999, paragraph 373, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/854/30/PDF/V9985430.pdf?OpenElement (accessed on 14 December 2018).

[24] Report of the Secretary General of the United Nations Commission on International Trade Law, Working Group on Arbitration, A/CN.9/WG.II/WP.110, 22 September 2000, Section II(B), available at: https://undocs.org/en/A/CN.9/WG.II/WP.110 (accessed on 25 February 2019).

[25] Variant 1 provided that 'An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless […].' (emphasis added)

[26] Variant 2 provided that 'The court may, upon application by the interested party, order enforcement of an interim measure of protection referred to in article 17, irrespective of the country in which it was made.' (emphasis added)

[27] Report of the Secretary General of the United Nations Commission on International Trade Law, Working Group on Arbitration, A/CN.9/WG.II/WP.110, 22 September 2000, Section II(C), available at: https://undocs.org/en/A/CN.9/WG.II/WP.110 (accessed on 25 February 2019).

[28] Report of the Working Group on Arbitration of the United Nations Commission on International Trade Law on the work of its thirty-third session, A/CN.9/485, 20 December 2000, paragraph 81, available at: https://undocs.org/en/A/CN.9/485 (accessed on 25 February 2019).

[29] Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, A/61/17, 2006, Section IV(B), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V06/558/15/PDF/V0655815.pdf?OpenElement (accessed on 14 December 2018).

interim measure irrespective of the country in which it was issued (subject to the provisions of Article 17I discussed below).[30] A national court may, if it considers appropriate, order the requesting party to provide appropriate security unless the arbitral tribunal has already made a determination regarding security or where such decision is necessary to protect the rights of third parties.[31] A requesting party is also required to inform the national court of any termination, suspension, or modification of the respective interim measure.[32]

7.25. **Grounds for refusal to recognize and enforce.** Article 17I sets out the grounds for refusing the recognition and enforcement of arbitral interim measures. In particular, these grounds follow the grounds for refusing the recognition and enforcement of foreign awards set out in Article 36 of the UNCITRAL Model Law (and Article V of the New York Convention).[33] In addition, upon the responding party's objection, a national court may refuse to recognize and enforce an interim measure if (i) the requesting party failed to comply with the tribunal's determination regarding security, or (ii) the interim measure was terminated or suspended by the tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted.[34] Finally, a national court may refuse to recognize and enforce an interim measure (even *ex officio*) if the interim measure is incompatible with the powers conferred upon the national court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance.[35] In any event, under Article 17I(2), any determination by the court is only effective for the purposes of the application to recognize and enforce the interim measure and the court must not, in making that determination, undertake a review of the substance of the interim measure.

7.26. **Worldwide implementation.** The UNCITRAL Secretariat does not maintain a specific list of countries that have adopted Articles 17H and 17I of the UNCITRAL Model Law into their national arbitration laws. Its official website only designates 23 jurisdictions that have implemented the 2006 amendments

30 Article 17H(1) of the UNCITRAL Model Law.
31 Article 17H(2) of the UNCITRAL Model Law.
32 Article 17H(3) of the UNCITRAL Model Law.
33 Article 17I(1)(a)(i) and Article 17I(1)(a)(ii) of the UNCITRAL Model Law.
34 Article 17I(1)(a)(ii) and (iii) of the UNCITRAL Model Law.
35 Article 17I(1)(a)(i) of the UNCITRAL Model Law.

into their national laws.[36] However, this number does not seem to correspond to the number of jurisdictions that specifically adopted Articles 17H and 17I. For instance, Slovakia is listed as a country that has not implemented the 2006 amendments, but the Slovak Arbitration Act, arguably, includes rules governing the recognition and enforcement of both domestic and foreign arbitral interim measures, which are based on Articles 17H and 17I.

V. Enforcement of Interim Measures under National Laws

7.27. Depending on whether they enforce arbitral interim measures, national laws can be divided into three categories: (1) national laws enforcing both domestic and foreign arbitral interim measures, (2) national laws only enforcing domestic arbitral interim measures, and (3) national laws not enforcing any arbitral interim measures. We discuss these categories (together with examples of countries falling within each) in more detail below.

V.1. National Laws Enforcing Both Domestic and Foreign Arbitral Interim Measures

7.28. **Germany.** Arbitration in Germany is governed by Book 10 (Sections 1025 through 1066) of the German Code of Civil Procedure.[37] Under Section 1041(2), a court may permit the enforcement of an arbitral interim measure unless a corresponding measure of temporary relief has already been petitioned with a court. The court may also issue a differently worded order if this is required for the enforcement of the measure. These rules also apply to arbitrations having their seat outside of Germany.[38]

7.29. At first sight, it may appear that German enforcement courts enjoy wide discretion in deciding whether to enforce arbitral interim measures. The threshold for obtaining an enforcement order does not seem to be high. According to Jan K. Schaefer, German courts only consider 'whether there is a valid arbitration agreement and whether the order granted is not wholly

[36] Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed on 25 February 2019).

[37] Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202, 2006 I page 431; 2007 I page 1781), as amended (the 'German Code of Civil Procedure').

[38] Section 1062(2) of the German Code of Civil Procedure.

misbalanced.'[39] A pro-arbitration approach of the German Code of Civil Procedure also seems to follow from the court's competence to reformulate an arbitral interim measure. As Jan K. Schaefer points out, this competence aims at preventing the courts from refusing to enforce a measure that does not fit into the German legal system, although reformulating an interim measure may not be an easy task, as demonstrated by German case law.[40]

7.30. **Austria.** Austrian arbitration is governed by the Austrian Code of Civil Procedure,[41] specifically by Sections 577 through 618. Under Section 593(3), Austrian courts are required to enforce both domestic and foreign arbitral interim measures.[42] Austrian courts may also reformulate an arbitral interim measure if such measure provides for a means of protection unknown to Austrian law. Section 593(4) further provides certain grounds for refusing to enforce an arbitral interim measure. In particular, a domestic measure cannot be enforced if the measure suffers from a defect constituting a ground for setting aside a domestic award. A foreign measure cannot be enforced if the measure suffers from a defect constituting a ground for refusal to recognize and enforce a foreign arbitral award. Irrespective of the country of its origin, an arbitral interim measure also cannot be enforced if (i) the enforcement would contradict an Austrian court measure requested or issued earlier or an earlier foreign court measure, or (ii) the measure provides for a means of protection unknown to Austrian law and no appropriate means of protection provided under Austrian law has been requested.

7.31. **East-Asian Arbitration Meccas.** The most renowned pro-arbitration jurisdictions in East Asia are Hong Kong and Singapore. Arbitration laws governing international arbitration in both countries provide that arbitral interim measures are, with the leave of the respective court, enforceable as if they were court interim measures.[43] Under Section 61(2) of the Hong Kong Arbitration Ordinance, the court will not grant leave to enforce an arbitral interim measure unless the requesting party shows that the measure is a type of measure that may be made

[39] Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, Section 4.2.2.3 (1998).

[40] *Ibid.*

[41] Law of 1 August 1895 Austrian Code of Civil Procedure, RGBI. Nr. 113/1895, as amended (the 'Austrian Code of Civil Procedure').

[42] GEROLD ZEILER, AUSTRIAN ARBITRATION ACT, Vienna: Neuer Wissenschaftlicher Verlag 105 (2016).

[43] Section 61 of the 2011 Hong Kong Arbitration Ordinance Cap 609, as amended (the 'Hong Kong Arbitration Ordinance') and Section 12(6) of the Singapore International Arbitration Act, Chapter 143A, as amended (the 'Singapore International Arbitration Act').

by a tribunal seated in Hong Kong. The Singapore International Arbitration Act does not provide such limitation.

7.32. **Post-Communist Countries.** In the past couple of years, several post-communist countries adopted rules aimed at enforcing both domestic and foreign arbitral interim measures.

7.33. **Poland.** For instance, in 2005, Poland introduced Article 1181(3) of the Polish Code of Civil Procedure,[44] according to which an arbitral interim measure is enforceable 'after attachment of an enforceability clause.'[45] Polish courts declare domestic arbitral interim measures enforceable without ordering an oral hearing.[46] The grounds for refusing to enforce a domestic measure are set out in Article 1214(3), which comprise the lack of arbitrability under Polish law and contradiction with Polish public policy. Under Article 1215(1), foreign arbitral interim measures are declared enforceable after an oral hearing. The grounds for refusing to recognize and enforce a foreign measure are set out in Article 1215(2), which correspond to the grounds set out in Article V of the New York Convention.

7.34. **Slovenia.** In 2008, the Slovenian legislature adopted a new Law on Arbitration (the "Slovenian Arbitration Law"), which, among other things, established 'a unified legislative regime for the enforcement of both domestic and foreign arbitral interim measures.'[47] In particular, under Article 43(1) of the Slovenian Arbitration Law, '[t]he recognition of an interim measure issued by a domestic or foreign arbitration shall be decided by the court having jurisdiction pursuant to the rules governing the enforcement and securing of claims.' Under Article 43(2), the grounds for refusing to enforce a domestic measure correspond to the grounds for setting aside a domestic award, which are virtually identical to those set out in the UNCITRAL Model Law. The grounds for refusing to enforce a foreign measure explicitly refer to the grounds set out in Article V of the New York Convention.

7.35. **Slovakia.** Finally, in 2014, the Slovak legislature amended the Slovak Arbitration Act,[48] including the provisions addressing interim measures. According to newly introduced Section 22c, interim measures, except for *ex parte* measures, are execution

[44] Polish Act of 17 November 1964 - Code of Civil Procedure, as amended (the 'Polish Code of Civil Procedure').

[45] Łucja Nowak, unofficial translation into English of an excerpt from Polish Act of 17 November 1964 - Code of Civil Procedure (Dz. U. of 1964, no. 43, item 296), available at: https://www.sakig.pl/uploads/upfiles/pdf/kpc-ang.pdf (accessed on 14 December 2018).

[46] Marcin Aslanovicz, Sylvia Piotrowska, *Poland*, *in* THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK, Huntington: Jurisnet 361 (2013).

[47] Matija Damjan, *Arbitral Interim Measures and the Right to Be Heard*, CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION, HUNTINGTON: JURISNET 72, 84 (2011).

[48] Act No. 244/2002 Coll. on Arbitration, as amended (the 'Slovak Arbitration Act').

titles. An enforcement court is required to refuse to enforce an arbitral interim measure if (i) the conditions for ordering an interim measure under the Act or under the parties' agreement have not been met, (ii) the requesting party has not provided the security ordered by the tribunal, (iii) the interim measure has been terminated or modified, or (iv) the interim measure contradicts Slovak public policy. Arguably, pursuant to Section 22e, these provisions also apply to foreign interim measures.[49]

V.2. National Laws Only Enforcing Domestic Arbitral Interim Measures

7.36. **England & Wales.** The English Arbitration Act,[50] albeit being generally recognized as a pro-arbitration arbitration law, only provides for the enforcement of domestic arbitral interim measures.[51] The enforcement process comprises three steps. First, a tribunal must first issue an interim measure referred to in Sections 38 or 39. Second, under Section 41(5), if a party fails to comply with such measure, the tribunal may issue a so-called 'peremptory order', i.e. an order to the same effect prescribing such time for compliance with it as the tribunal considers appropriate. Third, if a party fails to comply with the peremptory order, the requesting party or the tribunal may ask the court to enforce such order in accordance with Section 42. At the same time, the tribunal is entitled to (i) order that the defaulting party will not be entitled to rely upon any allegation or material which was the subject matter of the peremptory order, (ii) draw adverse inferences, (iii) proceed to an award on the basis of such materials as have been properly provided to it, or (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

7.37. **Switzerland.** Just like the English Arbitration Act, a very flexible Swiss arbitration law governing international arbitration

[49] Under Section 22e of the Slovak Arbitration Act, '[t]he provisions of Sections 22a, 22b and 22d only apply to interim measures ordered in arbitration that is pending in the territory of the Slovak Republic.' This suggests that Section 22c (dealing with the enforcement of arbitral interim measures) also apply to foreign arbitral measures. However, under Section 2(3), only provisions of Sections 2(2) and 27 apply to arbitrations having their place outside of Slovakia. Therefore, an argument can be made that Section 22e, which aims at extending the applicability of Section 22c to foreign arbitral measures, cannot be applied in case of foreign arbitrations. Hence, the solution adopted by the Slovak legislature created unnecessary ambiguity and one may have difficulty understanding why the Slovak legislature did not amend Section 2(3) by adding a reference to Section 22c (compare with Article 1(2) of the UNCITRAL Model Law, which enumerates the provisions addressing the recognition and enforcement of arbitral interim measures (Articles 17H and 17I) in the list of provisions applicable to both domestic and foreign arbitrations).

[50] English Arbitration Act 1996, as amended (the 'English Arbitration Act').

[51] Jan K. Schaefer, *supra* note 41, at Section 4.1.2.3, the International Comparative Legal Guide to International Arbitration 2018, England & Wales, 15th Edition, Question 7.6, available at https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/england-and-wales (accessed on 25 February 2019).

(Chapter 12 of the 1987 Federal Private International Law Act) (the 'Swiss PILA') also only provides for the enforcement of domestic interim measures. Under Article 183(2) of the Swiss PILA, if a party does not comply with an arbitral interim measure, the tribunal (not a party) may ask the court for assistance. The court will only enforce an arbitral interim measure if the measure is recognized by Swiss procedural law.[52] However, under Article 176 of the Swiss PILA, Article 183 only applies to arbitrations seated in Switzerland. Further, according to Swiss commentators, it is also unlikely that Swiss courts would enforce a foreign arbitral interim measure as a foreign award because the Swiss Supreme Court has held that arbitral interim measures are not 'awards'.[53]

7.38. **Hungary.** In 2017, Hungary introduced a new, modern arbitration act (Act LX of 2017 on arbitration) (the "Hungarian Arbitration Act"). The Hungarian Arbitration Act, among other things, introduced a comprehensive set of rules governing the enforcement of arbitral interim measures in Sections 26 and 27. These Sections are largely based on Articles 17H and 17I of the UNCITRAL Model Law. However, Sections 26 and 27 of the Hungarian Arbitration Act are not referred to in the list of provisions that apply also to arbitrations having their place outside of Hungary (Section 1(2) of the Hungarian Arbitration Act). Therefore, it appears rather unlikely that foreign arbitral interim measures would be enforceable in Hungary under Sections 26 and 27 of the Hungarian Arbitration Act.

V.3. National Laws Not Enforcing Any Arbitral Interim Measures

7.39. National arbitration laws that do not provide for the enforcement of domestic or foreign interim measures are, for instance, found

[52] The International Comparative Legal Guide to International Arbitration 2018, Switzerland, 15th Edition, Question 7.6, available at https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/Switzerland (accessed on 25 February 2019).

[53] Georg von Segesser, Christopher Boog, *Interim Measures*, *in* INTERNATIONAL ARBITRATION IN SWITZERLAND, A HANDBOOK FOR PRACTITIONERS, The Netherlands: Kluwer Law International 123 (2013), Lukas Wyss, *Switzerland*, INTERIM MEASURES IN INTERNATIONAL ARBITRATION, HUNTINGTON: JURISNET 747 (2014), and the International Comparative Legal Guide to International Arbitration 2018, Switzerland, 15th Edition, Question 7.6, available at https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/Switzerland (accessed on 25 February 2019).

in China,[54] the Czech Republic,[55] Italy,[56] and, surprisingly, even in Sweden.[57] Except for Sweden, the common feature of these arbitration laws is that they do not empower domestic arbitral tribunals to issue interim measures. Therefore, it is not surprising that these arbitration laws do not enforce also foreign interim measures. Sweden seems to be an interesting exception in the list of countries not providing for the enforcement of any interim measures. This is mainly because arbitral tribunals seated in Sweden are entitled to issue interim measures,[58] and Sweden is generally recognized as an arbitration-friendly country.

VI. Conclusion

7.40. The enforceability of arbitral interim measures is critical for the efficacy of arbitration. However, there does not appear to be a worldwide recognized binding instrument requiring national courts to enforce such measures. In particular, it is very questionable whether arbitral measures are enforceable under the New York Convention. Given this ambiguity, it always rests with national courts to decide whether arbitral interim measures qualify as 'awards' capable of being enforced under the New York Convention. This naturally leads to different outcomes, which is clearly undesirable.

7.41. The 2006 amendment to the UNCITRAL Model Law aimed to fix this ambiguity by introducing a comprehensive set of rules governing the enforcement of both domestic and foreign arbitral interim measures. Yet, it appears that this amendment has not been implemented into a significant number of national legal orders. Therefore, one may have serious doubts as to whether this amendment reached its goal.

7.42. Thus, it appears that a party intending to request an arbitral interim measure always needs to review the national laws of the state where the other party's assets are located. For instance,

[54] The International Comparative Legal Guide to International Arbitration 2018, China, 15th Edition, Question 7.6, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/china (accessed on 25 February 2019).

[55] The International Comparative Legal Guide to International Arbitration 2018, Czech Republic, 15th Edition, Question 7.6, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/czech-republic (accessed on 25 February 2019).

[56] The International Comparative Legal Guide to International Arbitration 2018, Italy, 15th Edition, Question 7.6, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/italy (accessed on 25 February 2019).

[57] The International Comparative Legal Guide to International Arbitration 2018, Sweden, 15th Edition, Question 7.6, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/sweden (accessed on 25 February 2019).

[58] IBA Arbitration Guide: Sweden (Updated January 2018), available at: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx (accessed on 25 February 2019).

an English claimant wishing to request a freezing order from a tribunal seated in Switzerland against a respondent having its assets in Germany needs to know whether the German legal order would enforce a Swiss arbitral freezing order.

7.43. Depending on whether national laws enforce arbitral interim measures, they can be divided into three categories. The first category includes national laws enforcing both domestic and foreign arbitral interim measures. Such national laws are, for example, in Germany, Austria, Hong Kong, Singapore, Poland, Slovenia, and Slovakia. The second category includes national laws only enforcing domestic arbitral interim measures. A bit surprisingly, even some of the most pro-arbitration laws fall within this category, such as the English Arbitration Act and Swiss PILA. Finally, the third category includes national laws not providing for the enforcement of any arbitral interim measures. Here, we can find arbitration laws that do not empower arbitral tribunals to issue interim measures (e.g. China, the Czech Republic, and Italy), but also national laws which empower arbitral tribunals to do so (e.g. Sweden).

7.44. This state of affairs is far from desirable when looking at it from a pro-arbitration perspective. However, it is difficult to imagine that a significant improvement will come about within a few years. Therefore, at this point of time, it appears that in the majority of cases involving a potentially recalcitrant adverse party, the party wishing to request an interim measure should seriously consider filing such request directly with a national court rather than with the tribunal lacking any coercive powers.

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Summaries

DEU [***Im Schiedsverfahren ergangene vorläufige und einstweilige Maßnahmen - Fallstricke für die Vollstreckung***]

Der Artikel befasst sich mit der Vollstreckung einstweiliger Verfügungen im internationalen Schiedsverfahren. Die Autoren vertreten die Auffassung, dass – ungeachtet der grundlegenden Bedeutung der Vollstreckbarkeit solcher einstweiligen Verfügungen im Schiedsverfahren für die Effizienz solcher Verfahren – wohl keine global anerkannte, verbindliche Rechtsquelle existiert, welche die Anerkennung solcher Verfügungen durch die Gerichte zwingend voraussetzen würde. Vor allem haben wir hier das New Yorker Übereinkommen,

welches die im Schiedsverfahren ergangenen einstweiligen Verfügungen nicht ausdrücklich erwähnt. Das hat verschiedenste Meinungen ausgelöst. Andererseits ist zu konzedieren, dass das UNCITRAL-Mustergesetz, welches die Anerkennung und die Vollstreckung von im Schiedsverfahren ergangenen einstweiligen Verfügungen ausdrücklich regelt, nur eine unverbindliche Empfehlung darstellt. Vor diesem Hintergrund sieht es so aus, als ob die Vollstreckbarkeit einstweiliger Verfügungen, welche von Schiedsrichtern erlassen wurden, dem Wohlwollen nationaler Rechtsordnungen und der innerstaatlichen Gerichte anheimgestellt ist. Dies führt unausweichlich zu erheblicher Rechtsunsicherheit. Den Autoren zufolge ist der Stand der Dinge zwar wenig wünschenswert; zugleich bestehen aber keine Anzeichen dafür, dass es in den kommenden Jahren zu einer grundsätzlichen Besserung kommen könnte. Im Hinblick darauf schließen die Autoren, dass Streitparteien, die den Erlass einer einstweiligen Verfügung anstrengen, im Regelfall nur bleibt, die Beantragung direkt bei einem innerstaatlichen (nationalen) Gericht zu erwägen.

CZE [***Předběžná a prozatímní opatření vydávaná v rozhodčím řízení - nástrahy pro výkon***]

Tento článek se zabývá výkonem předběžných opatření v mezinárodním rozhodčím řízení. Autoři zastávají názor, že ačkoli je vykonatelnost předběžných opatření v rozhodčím řízení zásadní pro efektivitu rozhodčího řízení, zdá se, že neexistuje globálně uznávaný závazný pramen práva, který by vyžadoval, aby soudy taková opatření uznaly. Především je to Newyorská úmluva, která výslovně neuvádí předběžná opatření vydávaná v rozhodčím řízení, což evokuje různé názory. Současně je nutno uvést, že ačkoli Vzorový zákon UNCITRAL výslovně upravuje uznávání a výkon předběžných opatření vydávaných v rozhodčím řízení, jde pouze o nezávazné doporučení. Vzhledem k tomu se zdá, že vykonatelnost předběžných opatření vydávaných rozhodci je ponechána na milost národním právním řádům a vnitrostátním soudům. To nevyhnutelně vede ke značné nejistotě. Autoři mají za to, že tento stav je nežádoucí, ale nevidí náznaky toho, že by mohlo dojít k zásadnímu zlepšení v průběhu několika let. S ohledem na to autoři uzavírají, že strana požadující vydání předběžného opatření musí obvykle zvážit podání žádosti o předběžné opatření přímo u vnitrostátního (národního) soudu.

POL [***Środki tymczasowe i postanowienia przedwstępne orzekane w postępowaniu arbitrażowym – pułapki związane z wykonywaniem***]

W opinii autorów, chociaż wykonalność środków tymczasowych wydawanych w postępowaniu arbitrażowym ma zasadnicze znaczenie dla efektywności postępowania arbitrażowego, jednak wydaje się, że nie istnieje globalnie uznawane wiążące źródło prawa, które nakładałoby na sądy obowiązek uznawania tego typu środków. W związku z tym wydaje się, że wykonalność środków tymczasowych wydawanych w postępowaniu arbitrażowych jest zdane na łaskę krajowych porządków prawnych i sądów krajowych. Autorzy są zdania, że jest to sytuacja niepożądana, jednak nie dostrzegają żadnych sygnałów, które zwiastowałyby zasadniczą poprawę sytuacji w ciągu najbliższych lat. Autorzy konstatują, że strona występująca o wydanie środka tymczasowego musi zazwyczaj zastanowić się nad złożeniem stosownego wniosku o wydanie środka tymczasowego bezpośrednio do sądu krajowego.

FRA [***Les mesures provisoires dans la procédure d'arbitrage - les écueils de leur exécution***]

Quoique la force exécutoire des mesures provisoires prises dans le cadre d'une procédure d'arbitrage soit essentielle pour l'efficacité de cette procédure, il semble qu'il n'existe pas de source de droit contraignante et mondialement reconnue qui stipule l'obligation des juges à reconnaître de telles mesures. Partant, l'exécution des mesures provisoires prises dans le cadre d'une procédure d'arbitrage serait laissée à l'appréciation des juges nationaux appliquant les règles de droit nationales. Les auteurs sont d'avis que cet état est loin d'être souhaitable, mais estiment qu'une amélioration fondamentale est peu probable dans un proche avenir. Dans ce contexte, la partie demandant la prise d'une mesure provisoire, doit en principe considérer la possibilité de s'adresser directement à une juridiction nationale.

RUS [***Предварительные и временные меры, принятые в арбитраже - ловушки для исполнения***]

Авторы придерживаются мнения, что, хотя исполнимость предварительных мер, принимаемых арбитражем, и имеет решающее значение для эффективности арбитража, очевидно отсутствие признанного в мировом масштабе обязательного источника права, требующего, чтобы суды признавали такие меры. С учетом этого кажется, что исполнимость предварительных мер, принятых арбитражем, остается во власти национальных

законодательств и национальных судов. Авторы считают, что такое состояние нежелательно, и не видят признаков серьезных улучшений в течение нескольких лет. Учитывая это, авторы пришли к выводу, что сторона, требующая принятия предварительных мер, обычно должна рассмотреть возможность подачи ходатайства о принятии предварительных мер непосредственно в национальный (внутригосударственный) суд.

ESP [***Medidas provisionales y preliminares en el procedimiento arbitral - riesgos de la ejecución***]
Los autores sostienen que, a pesar de ser la ejecutoriedad de las medidas preliminares dictadas en el procedimiento arbitral, del todo fundamental para la eficacia del procedimiento arbitral, aparentemente no existe una fuente con carácter vinculante y reconocida a nivel global que exija que tales medidas sean reconocidas por los tribunales. Es por ello, al parecer, que la ejecutoriedad de las medidas preliminares dictadas en el procedimiento arbitral está a la merced de los ordenamientos jurídicos y los tribunales nacionales. Los autores consideran esta situación indeseable, sin embargo, no prevén una mejora fundamental en los próximos años. En este sentido, los autores concluyen que aquella parte que solicita el dictamen de una medida preliminar habitualmente considera la posibilidad de que se presente la solicitud del dictamen de la medida preliminar directamente en el tribunal nacional.

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Bibliography

Marcin Aslanovicz, Sylvia Piotrowska, *Poland*, *in* THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK, Huntington: Jurisnet (2013).

NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Oxford: Oxford University (6th ed., 2015).

Gary B. Born, *International Commercial Arbitration*, *in* THE NETHERLANDS: KLUWER LAW INTERNATIONAL (2nd ed., 2014).

Matija Damjan, *Arbitral Interim Measures and the Right to Be Heard*, *in* CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION, Huntington: Jurisnet (2011).

Tijana Kojovic, *Court Enforcement of Arbitral Decisions – How Final is Provisional?* 18(5) JOURNAL OF INTERNATIONAL ARBITRATION 511 (2001).

JEAN F. POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, London: Sweet & Maxwell Ltd (2nd ed., 2007).

Georg von Segesser, Christopher Boog, *Interim Measures, in* INTERNATIONAL ARBITRATION IN SWITZERLAND, A HANDBOOK FOR PRACTITIONERS, The Netherlands: Kluwer Law International (2013).

Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW (1998).

Van Vechten Veeder, *Provisional and conservatory measures*, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, Austria: United Nations Publication (1999).

Lukas Wyss, *Switzerland*, INTERIM MEASURES IN INTERNATIONAL ARBITRATION, Huntington: Jurisnet (2014).

GEROLD ZEILER, AUSTRIAN ARBITRATION ACT, Vienna: Neuer Wissenschaftlicher Verlag (2016).