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Enforcement of Interim Measures

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This chapter addresses the enforcement of interim measures of relief issued by international arbitral tribunals. The topic is treated in three parts: the evolution of the legal framework for such enforcement, examples of measures that have been enforced, and suggestions for drafting interim measures to maximise their potential enforceability.

I Evolution of legal framework for enforcing arbitral interim measures

Few UNCITRAL delegates will forget the moment some years ago – during a debate on a Model Law provision to require courts to enforce arbitrators’ interim measures – when one of the world’s most senior arbitrators took the floor to question the objective. ‘I have been an arbitrator for more than 40 years,’ he told delegates, ‘and I have never ordered interim relief that the parties did not obey.’ Given the speaker’s stature, no one doubted that parties before him might fear to disregard his orders. And, of course, it remains the case that most parties hesitate to disobey such orders for fear of antagonising a tribunal that has yet to rule on their claims. But spontaneous compliance with arbitral interim measures has never been a universal norm and, if anything, it is less so today than ever. Accordingly, the world has struggled to find a mechanism for effective enforcement of interim measures. That is why another renowned arbitrator, Mr V V Veeder, could complain even two decades ago – at the UN’s 40th anniversary celebration of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (the NY Convention) – that, ‘for too long, there have been difficulties enforcing an arbitrator’s order for interim measures’,

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noting that ‘the better view of [the NY Convention’s] application excludes any provisional order for interim measures from enforcement abroad as a Convention award’.²

Mr Veeder opined that an arbitral interim measure ‘could be at least as [important as], if not more important than, an arbitral award’ because, without such measures, ‘it is sometimes possible for a recalcitrant party to thwart the arbitration procedure – completely and finally’ (for example, by dissipating assets out of which an award would be paid).³ He thus concluded that the lack of enforceability of interim measures ‘strikes at the heart of an effective system of justice in transnational trade’ and required ‘a supplementary convention to the New York Convention on the enforcement by State courts of an arbitral tribunal’s interim measures’.⁴

As Mr Veeder’s remarks confirmed, even by 1998, interim relief was becoming increasingly available from arbitral tribunals and increasingly important. As far back as 1976, the United Nations Commission on International Trade Law (UNCITRAL) had inserted language in its first Arbitration Rules broadly authorising tribunals to issue interim measures; this was already a big step, since ‘[h]istorically, national law not infrequently denied arbitrators the power to order interim measures’.⁵ Yet, even Professor Pieter Sanders, who helped draft those 1976 Rules, regarded the provision as having modest scope. As he wrote at the time, ‘[t]he question of interim measures only occasionally presents itself in an arbitration’ and, even with the new UNCITRAL Rules, arbitral interim measures would not ‘exist where the applicable national (procedural) law provides for the exclusive jurisdiction of the Courts’.⁶ True to Professor Sanders’ assessment, parties’ recourse to these measures grew only gradually in subsequent years.⁷ In time, however, their use did increase, as UNCITRAL duly recorded in 2000.⁸

2 V V Veeder, ‘Provisional and Conservatory Measures in Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects’ 21, UN Publication Sales No. E.99.V.2 (1999).

3 *ibid.*

4 *ibid.* Others who spoke at the same 1998 UN conference also underscored the importance of interim measures; see, e.g., *ibid.* at 46, 49 (remarks by Australia’s former Solicitor General, Gavan Griffith, ‘Possible issues for an annex to the UNCITRAL Model Law’: ‘As a matter of commercial reality, an incapacity to make effective interim measures may entirely destroy the integrity of the arbitral process . . . There is scope to enhance powers for interim awards made in support of the arbitration. Whether made by arbitrators or by courts, such awards should become enforceable beyond the place of arbitration’); see also *ibid.* at 23 (remarks by Sergei Lebedev, President of the Russian Maritime Arbitration Commission, ‘Court Assistance with Interim Measures’).

5 Gary B Born, *International Commercial Arbitration*, pp. 1949, 1950, fn. 37 (2009) (further noting that such major European jurisdictions as Switzerland, Italy, Spain, Germany, Austria and Greece once barred arbitrators from issuing interim measures, which were thus only available from national courts).

6 P Sanders, *Commentary on UNCITRAL Arbitration Rules*, II Yearbook, Com. Arb. 172, pp. 195, 196 (Kluwer 1977)

7 See, e.g., E Schwartz, ‘The Practices and Experience of the ICC Court,’ in ICC (ed.), *Conservatory and Provisional Measures in International Arbitration*, pp. 45, 47 (1993) (between 1978 and 1993 only 25 ICC cases addressed the subject of provisional measures).

8 See Secretary General, ‘Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement’ (hereafter, Possible Uniform Rules), Paragraph 104, UN Doc. A/CN.9/WG.II/WP.108 (2000) (‘Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases’).

The drafters of UNCITRAL's 1976 Arbitration Rules fashioned this provision so that arbitrators' interim measures might conceivably benefit from enforcement under the NY Convention. They did this by authorising tribunals not only to 'take any interim measures it deems necessary', but to do so possibly 'in the form of an interim *award*' and by further providing that a tribunal generally 'shall be entitled to make interim, interlocutory, or partial awards' in addition to 'final awards'.⁹ By emphasising that interim measures might take form as awards, the drafters seemed to aim at their possible enforcement under the NY Convention.

However, hopes for the general enforceability of interim measure awards under the Convention have not been widely realised. The Convention itself does not describe enforceable 'awards' in any way that expressly includes coverage of 'interim awards'. Indeed, given the undoubted rarity of arbitral interim measures in 1958, when the Convention was adopted, its drafters may not have thought at all about tribunals granting provisional relief. Conversely, however, neither is there any textual (or other) reason to suppose that the drafters deliberately excluded arbitral interim measures from the NY Convention's ambit – a point acknowledged by most of the scholars who interpret the Convention's scope in either way regarding such enforceability.¹⁰ After all, Article III of the Convention, requiring that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them',¹¹ never defines 'award', much less expressly restricts enforceability to awards that are 'final' (though it is often said to do so).

Nevertheless, among those jurisdictions whose courts have addressed this interpretive question, a majority appears to have found that tribunal-ordered interim measures (even when styled as interim 'awards') were not enforceable under the NY Convention.¹² A leading case in this respect is the decision by the Supreme Court of Queensland, Australia, in the *Resort Condominiums International* case in 1993.¹³ A US claimant had brought a US arbitration in the state of Indiana against an Australian respondent; the dispute arose under an agreement for reciprocal rights to use timeshare properties controlled by each party. The arbitrator issued an interim arbitration order and award, enjoining the respondent during the arbitration to continue to carry out the parties' agreement and to refrain from entering

9 UNCITRAL Arbitration Rules (1976), Articles 26.1, 26.2 and 32.1, respectively (*emphasis added*).

10 Compare V V Veeder (see footnote 2), at 21 ('The *better view* of [the Convention's] application excludes any provisional order for interim measures from enforcement abroad as a Convention award . . . The decision to that effect of the Australian Court in *Resort Condominiums International* (1993) is persuasive; and commentators who criticize the judgment have never done so with equal persuasiveness' (footnote omitted; *emphasis added*)) with A J van den Berg (footnotes 21 and 22 and accompanying text).

11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III (New York, 1958).

12 See G Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts', in Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards* 1, 15 (Springer 2017) ('it appears that a clear majority of jurisdictions that have addressed the question – doing so less often by express statutory language than by judicial interpretation or academic consensus – decline to treat provisional measures as awards, thereby excluding them from coverage of the Convention's guarantee of recognition and enforcement', citing the volume's national reports from Argentina, Austria, Canada, Croatia, the Czech Republic, Greece, Italy, Japan, the Netherlands, Norway, Russia, Singapore, Switzerland, Taiwan and Turkey).

13 *Resort Condominiums International Inc. v Ray Bolwell and Resort Condominiums, Pty Ltd*, Case No. 389 (Queensland Sup. Ct, 29 Oct 1993), excerpts reprinted in XX Yearbook, Com. Arb. 629 (Kluwer 1995).

into any similar agreement with another entity. The claimant sought to enforce this interim award against the respondent in its home jurisdiction; the Queensland court refused. The court rejected the view that there could be only ‘one final award’ enforceable under the NY Convention (as the respondent argued), given that bifurcation of proceedings yielding partial final awards was increasingly common.¹⁴ However, the court found that an award under the NY Convention must be ‘binding’ on the parties¹⁵ in the sense that it ‘determines at least all or some of the matters referred to the arbitrator for decision’, which it contrasted with an interim measure that, by its nature, ‘may be rescinded, suspended, varied or reopened by the tribunal which pronounced it’.¹⁶

Some US courts have expressly rejected this conclusion, enforcing arbitral interim measures because they finally dispose of a particular request relating to the dispute, even if the measure does not itself resolve part of the dispute.¹⁷ Thus, for example, in *Polydefkis Corp. v. Transcontinental Fertiliser Co.*,¹⁸ involving disputed implementation of a charter party contract between a Greek shipowner and a US trader, a federal court in Pennsylvania confirmed an ‘award’ by arbitrators sitting in London, directing the respondent provisionally to pay a portion of the compensation sought by the claimant into an escrow account – to be controlled jointly by counsel for both parties.¹⁹

Apart from national court decisions, what has been the view of commentators and practitioners as regards enforceability under the NY Convention of arbitral interim measures? As noted, Mr Veeder, at the 1998 UN conference, regarded the ‘better view’ as that the NY Convention did not enforce arbitral interim measures, and UNCITRAL itself appeared to agree, when it subsequently identified issues raised at that 1998 conference that might merit further consideration as to possible solutions: ‘The prevailing view, confirmed

14 *id.*, at 641 (recognising that ‘there are cases where it is highly desirable that . . . issues of liability, being one of the substantive issues referred for decision, are determined in the first instance, leaving the question of quantum of damages to be determined later’).

15 Courts derive this ‘binding’ requirement from Article V(1)(e) of the NY Convention, which establishes among the grounds for a court’s possibly refusing to recognise or enforce a foreign arbitral award the fact that ‘[t]he award has not yet become binding on the parties’.

16 *id.*, at 642.

17 See, e.g., Y Lahlou, A Poplinger & G Walters, ‘Other Issues in Enforcement Proceedings’, in Frischknecht et al. (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York*, 235, 245 to 249 (Kluwer 2018); *id.*, at 247 (‘preliminary awards that require parties to take certain provisional actions during the pendency of the arbitration, such as providing pre-hearing security on the potential award, paying the advance on costs, or making a preliminary payment, have been found to satisfy the requirement for a “specific act” and enforced as “final” in New York’ (footnotes omitted)).

18 1996 WL 683629 (ED Pa.).

19 *ibid.*; see also *Sperry International Trade Inc. v. Government of Israel et al.*, 532 F.Supp 901, 909 (SDNY), *aff’d*, 689 F.2d 301 (2d Cir. 1982) (enforcing the tribunal’s interim measure that (1) barred Israel from calling on a disputed Letter of Credit and (2) ordered that the Letter’s proceeds be paid into an escrow account under joint control of the parties; further explaining that, while ‘the Arbitrators have not definitively resolved the question of which party, if any, is in breach of the contract’, the interim measure did qualify as ‘final’ since the arbitrators ‘did decide what the equities required concerning a further \$15,000,000 investment by Sperry in the project, namely, the proceeds of the Letter of Credit’, which ‘was a clearly severable issue’); see also Bermann (footnote 12), at 16 (‘Only in a minority of jurisdictions is it established that such measures are or may be subject to recognition and enforcement as Convention awards’, citing the volume’s national reports also for Macau, Peru, Romania, Singapore, the United Kingdom and Venezuela as well as one French court decision).

also by case law in some States, is that the Convention does not apply to interim awards'.²⁰ However, Albert Jan van den Berg, perhaps the leading scholar of the NY Convention, believed otherwise, specifically criticising UNCITRAL's report because it 'does not give a source for this statement' and noting that 'there does not appear to be a "prevailing view" on this question' since – at least as at 2000, when Mr van den Berg voiced his critique – '[t]he reference to case law "in some States" is, to my knowledge, limited to one Australian court decision, which is moreover not entirely persuasive'.²¹ Mr van den Berg found greater wisdom in the 'pragmatic view' exemplified by US case law, which he said recognised that 'no major obstacles to the enforcement of a "temporary" award seem to exist'.

*An award will be enforced in accordance with its terms. If one of the terms is that the order contained in the award is for a limited period of time, the enforcement will correspondingly cover that period of time. If the interim award is subsequently rescinded, suspended or varied by an arbitral tribunal, that will as a rule be laid down in a subsequent interim award, which can also be enforced.*²²

The approach sketched out by Mr van den Berg is the one that UNCITRAL ultimately pursued, as its Working Group II took up the challenge in 2001 of enhancing the enforceability of interim measures. However, the Working Group did this in a statutory context, rather than tinker with the wording of the NY Convention, and it ultimately produced a revised Model Law on International Commercial Arbitration (2006) (the Model Law).²³

A background report prepared for this drafting project by UNCITRAL's Secretariat summarised the status of national legislation as of 2000. It found that, quite apart from the possibility of interpreting 'award' within the NY Convention so that interim awards

20 Possible Uniform Rules (footnote 8), at para. 83.

21 A J van den Berg, 'The 1958 New York Arbitration Convention Revisited', in Karrer, P (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?*, 125 (ASA Special Series No. 15, 2001). Following Mr van den Berg's assessment, other commentators and courts in jurisdictions other than Australia did reject the view that arbitral interim measures were enforceable awards; see, e.g., G Born (footnote 6), at 2511 n. 270 (citing 'Judgment of 8 May 2001, Case No. 83 (Tunisian Court of Appeal) (award ordering interim measures was not award within meaning of Article 34 and was not subject to annulment)', and at 2514 n. 279 (citing 'Judgment of 13 April 2010, DFT 136 III 200 (Swiss Federal Tribunal) (provisional measures order not award under Article 190 of Swiss Law on Private International Law and not subject to annulment) and citing 'J Lew, L Mistelis & S Kröll, *Comparative International Commercial Arbitration*, paras. 23 to 94 (2003)), and at 2512 n. 272 (citing 'J-F Poudret & S Besson, *Comparative Law of International Arbitration*, para. 633 (2d ed. 2007) (arbitral decisions ordering provisional measures are not final because they do not finally determine all or part of the dispute)').

22 A J van den Berg (footnote 21), at 143. Other commentators share Mr van den Berg's view; see, e.g., G Born (footnote 5), at 2514 ('the better view is that provisional measures should be and are enforceable as arbitral awards under generally applicable provisions for the recognition and enforcement of awards in the [NY] Convention and most national arbitration regimes').

23 See Report of the Secretary General, 'Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation' (hereafter, Possible Uniform Rules II), para. 55 (22 September 2000) (although UNCITRAL delegates recognised that a treaty might be the best vehicle for an interim measures enforcement regime, yet discussion focused on a statutory solution), UN Doc. A/CN.9/WG.II/WP.110.

that embodied provisional measures might also be enforceable thereunder, a number of states had enacted legislative regimes for dealing separately with enforcement of arbitral interim measures, while the legislation in many countries remained entirely silent on the matter.²⁴ This summary was supplemented during the following five years by various practitioners or scholars who examined enforcement regimes in specific jurisdictions in greater detail; together, these various surveys confirm that, in states that have sought to authorise enforcement of arbitral interim measures, there are many approaches.²⁵

For example, some states that enacted legislation based on the 1985 Model Law added a provision to its Article 17 (authorising tribunals to issue interim measures) expressly permitting court enforcement of such measures.²⁶ Many state enactments authorise parties to request such enforcement,²⁷ some require a request from the tribunal²⁸ and some contemplate requests from either a party or arbitrators.²⁹ There are also procedural variations on each approach (such as requiring that leave be sought from a court before an enforcement action will be judicially entertained).³⁰ Some states, instead, formally modified their implementation of the NY Convention so that it would apply 'as if a reference to an award in those provisions were a reference to such an order' for interim measures.³¹ And a few jurisdictions even authorised enforcement of arbitral interim measures by treaty.³² However, it bears repeating that very many jurisdictions had not addressed this matter legislatively at all. Most importantly, despite the diversity of approaches in the states that had done so, one feature common among many of these laws was that they confined

24 Possible Uniform Rules (footnote 8), at 21.

25 See D Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals for Moving Forward', in van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, 82, 132 to 143 (ICCA Congress Series No. 11, 2003); C Huntley, 'The Scope of Article 17: Interim Measures under the UNCITRAL Model Law', 9 *Vindobona J of Com. L & Arb.* 69, 88 to 95 (2005); A Yeşilrmak, *Provisional Measures in International Commercial Arbitration*, 246 to 269 (Kluwer 2005).

26 See, e.g., C Huntley (footnote 25), at 93, 94 (citing enactments of the Model Law (1985) in Ireland, New Zealand, Scotland and Ontario, Canada, specifying that tribunal orders issued pursuant to Model Law Article 17 constitute awards under, e.g., Model Law Article 35). Legislators in these jurisdictions may well have been aware that the drafters of UNCITRAL Article 17 in the original Model Law (1985) had considered adding language authorising a tribunal to seek executory assistance from a court to enforce its arbitral interim measure; delegates at that time ultimately rejected that proposal 'because it touched on matters dealt with in laws of national procedure and court competence and would probably be unacceptable to many States'. H Holtzmann & J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 531 (Kluwer 1989).

27 See, e.g., Donovan (footnote 25), at 138 (describing law in Germany).

28 See, e.g., Swiss Law on Private International Law, Art. 183(2); see also Yeşilrmak (footnote 25), at 253 (describing law of Tunisia).

29 Possible Uniform Rules (footnote 8), at para. 88.

30 See, e.g., Donovan (footnote 25), at 140, and Yeşilrmak (footnote 25), at 250 (each describing law in Hong Kong).

31 Possible Uniform Rules, at paras. 86, 93; see also Singapore International Arbitration Act, Section 12(1) (2012) (defining a Convention award to 'include an order or a direction made or given by an arbitral tribunal in the course of arbitration'); C Huntley (footnote 25), at 93 (describing enactment of Model Law (1985) by Canadian province of British Columbia).

32 See Yeşilrmak (footnote 25), at 259.

enforcement to interim measures issued by a tribunal seated in the court's own state,³³ making development of a uniform transnational regime all the more desirable.³⁴

UNCITRAL resolved to fill that void when it embarked on revising its Model Law in 2001. The revised Model Law that UNCITRAL ultimately promulgated in 2006 includes a sprawling new Article 17 on interim measures, of which subsections 17H and 17I establish an explicit right and mechanism to enforce arbitral interim measures in the national courts of any relevant jurisdiction. Article 17H requires that an arbitral interim measure, no matter how styled (as an award, an order, a decision) 'shall be recognized as binding and . . . enforced upon application to the competent court, irrespective of the country in which it was issued', subject to certain limited grounds for non-enforcement set forth in Article 17I. These include the grounds already established for non-enforcement of awards on the merits under Model Law Article 36 (which derives, in turn, from Article V of the NY Convention), plus a few grounds only relevant to interim measures, such as that a party has not fulfilled a tribunal requirement to post security for the interim measure.³⁵

The drafters also included in the Model Law (2006) several provisions in response to the temporary nature of interim measures – starting with a clause confirming that a tribunal that has issued an interim measure may at any time 'modify, suspend or terminate' it.³⁶ This power to revise interim measures is necessary since the facts known to a tribunal (or its appraisal of facts already known) may change as the arbitration progresses. To make this revision authority fully effective, the drafters authorised tribunals to require any party that has obtained an interim measure 'promptly to disclose any material change in the circumstances on the basis of which the measure was requested or grounded'.³⁷ Similarly, a party that has obtained court enforcement of such a measure 'shall promptly inform the court of any termination, suspension, or modification of that interim measure'.³⁸

A further provision seeks to broaden the possible scope of enforcement by authorising any court that confronts an interim measure 'incompatible with the powers conferred upon [it]' to 'reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that . . . measure'.³⁹ Finally, the drafters included a closing provision reaffirming that any court entertaining a motion for enforcement of an interim measure 'shall not, in making that determination, undertake a review of the substance of the interim measure'.⁴⁰

To gauge the impact of the Model Law's innovation in interim measures enforcement, one must place Articles 17H and 17I in the larger context of the entire new Article 17,

33 *id.*, at 258, 259 (noting that, as of 2005, only the '[l]aws of a minority of states, for example, Australia, Hong Kong, and Switzerland permit the enforcement of arbitral provisional measures issued abroad').

34 Possible Uniform Rules (footnote 8), paras. 84 to 93. This was particularly likely in jurisdictions authorising interim measure enforcement through Article 17 of the Model Law since the 1985 version of the Model Law provided that most provisions – including Article 17 – applied only 'if the place of arbitration is in the territory of this State'; see Model Law (1985), Article 1(2).

35 Model Law (2006), Article 17I(1)(a)(ii).

36 *id.*, Article 17D.

37 *id.*, Article 17F(1).

38 *id.*, Article 17H(2).

39 *id.*, Article 17I(1)(b)(i).

40 *id.*, Article 17I(2).

whose 11 subsections reflect a dramatic shift in understanding as to the importance of interim measures in international arbitration. Quite unexpectedly, what UNCITRAL launched as a relatively narrow project to provide for transnational enforcement of interim measures grew into a much broader legislative undertaking, ultimately encompassing eight new subsections of Article 17 that define the permissible categories of arbitral interim measures, establish the conditions on which tribunals may grant them, and stipulate a number of other procedural matters regarding their issuance, including the possibility of a subsequent award of damages to an affected party if the tribunal later determines that the interim measures should not have been granted.⁴¹

Since these other provisions are addressed to tribunals rather than courts, they may appear to have little to do with enforcement. But, in fact, a primary reason why the Model Law now specifies which interim measures tribunals may issue, and when and how they may do so, is ‘to reassure courts that were asked to enforce arbitral interim measures that these measures were issued pursuant to a tribunal’s clear authority, and . . . to encourage national legislatures to enact a Model Law that required courts to enforce such measures’.⁴² Additionally, as noted by the Secretariat (and agreed by delegates):

Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases . . . To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making assets inaccessible to the claimant. Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure.⁴³

Thus, a final reason why UNCITRAL developed a detailed regulation regarding arbitral interim measures was to give tribunals greater confidence in exercising their interim authority. Indeed, UNCITRAL delegates subsequently imported nearly all the provisions on tribunal interim measures from Article 17 of the Model Law into Article 26 of the updated Arbitration Rules (2010).

According to UNCITRAL, 80 jurisdictions have now adopted national legislation based on the Model Law; more than 30 have acted in the past dozen years and thus have included the 2006 revisions (sometimes with modifications).⁴⁴ For parties and their counsel now seeking to enforce an arbitral interim measure in any given jurisdiction that has not adopted the 2006 Model Law, it will be necessary to examine national legislation to see if there are other enactments (along the lines of the various approaches previously described)

41 *id.*, Articles 17, 17A to 17G.

42 J. Castello, ‘Generalizing About the Virtues of Specificity: The Surprising Evolution of the Longest Article in the UNCITRAL Model Law’, 6(1) *World Arb. & Med. Rev.* 7, 17–8 (2012) (article describing the evolution of expanded interim measures provisions in the revised Model Law and in the 2010 UNCITRAL Arbitration Rules).

43 Possible Uniform Rules (footnote 8), para. 104.

44 See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 25 February 2019).

that may authorise such enforcement and, if not, to consult national jurisprudence to determine whether legislation that does not expressly so provide has nonetheless been judicially so construed (such as by broadly interpreting the term ‘award’).

In this regard, the impact of the revised Model Law is likely to extend beyond the 30 or more states that have formally adopted the updated statute. That is because the dramatic shift in perspective reflected in the new Model Law – the recognition that arbitral interim measures are important and that their enforceability may be crucial to the effectiveness of international arbitration itself – provoked much discussion in the world of transnational dispute resolution, both during UNCITRAL’s five years of drafting and thereafter. And UNCITRAL’s work coincided with complementary changes both in national laws (for example, practically no jurisdiction now confines the issuance of interim measures to courts instead of arbitrators)⁴⁵ and perhaps even in prevailing views as to the scope of the NY Convention. As expressed by Gary Born:

*the constitutional character of the Convention contemplated that Contracting States’ legislation would need to change, to give full effect to the Convention, and that States’ views of non-arbitrability and public policy would evolve over time; there is no reason that the term ‘award’ should not include reasoned, signed decisions by arbitrators on requests for provisional measures when Contracting States have (almost universally) recognized the authority of arbitrators to grant such relief.*⁴⁶

Already, a few courts have shown themselves to be more receptive to enforcing arbitral interim measures, as we discuss in Section II.

II Recent case law on enforcement of arbitral interim measures orders

Although there are still significant differences across jurisdictions, recent court decisions may signal a trend toward broader recognition and enforcement of arbitral interim measures, even in the absence of an express statutory provision to that effect.

The United States continues to be at the forefront of the enforcement movement. For example, in *CE International Resources Holdings LLC v. SA Minerals Ltd et al.* (2012) (hereafter, *CE International Resources*), a federal district court in New York City confirmed its long-standing jurisprudence that ‘an award of temporary equitable relief . . . was separable from the merits of the arbitration’ and was therefore capable of immediate recognition and enforcement.⁴⁷ While the district court did not expressly refer to the NY Convention (or its statutory implementation, under the Federal Arbitration Act)⁴⁸ as the basis for its power to enforce the interim award, the case involved foreign parties and likely constituted a ‘non-domestic award’ falling within US courts’ expansive application

45 G Born (footnote 5), at 1949, 1950 n. 37 (the restriction was abandoned in Austria in 2006 and in Switzerland and Germany in 1987 and 1988, respectively; within Europe, it appears now to persist only in Italy).

46 *id.*, at 2515.

47 *CE International Resources Holdings LLC v. SA Minerals Ltd et al.*, 2012 US Dist. LEXIS 176158, 6, 7 (SDNY).

48 9 USC Section 1 et seq. (especially Chapter 2 thereof).

of the NY Convention.⁴⁹ Several similar decisions have been issued in other US cases in recent years.⁵⁰

Interestingly, the discussion in this case did not revolve exclusively around the finality of the arbitral order but also addressed the type of temporary relief granted by the arbitrator – an issue that is not so often addressed but may have important practical implications (see Section III). In this case, the sole arbitrator, seated in New York, had issued an interim decision providing for an award ordering the posting of prejudgment security or, in default of that, enjoining the respondent from transferring any assets, wherever located. The respondent argued that the type of interim relief granted by the arbitrator was not available under the law of the seat of arbitration and that the arbitrator thus exceeded his powers, manifestly disregarding the law and breaching public policy.⁵¹ While the district court acknowledged that the relief awarded would not have been available from a New York court, it did not find that the sole arbitrator exceeded his powers by granting the relief. The court relied on the parties' agreement to resolve their dispute under the International Centre for Dispute Resolution arbitration rules of the American Arbitration Association, which allowed the arbitrator to take 'whatever interim measures [he] deems necessary, including injunctive relief and measures for the protection or conservation of property'.⁵² The district court further concluded that '[n]othing about enforcing an order rendered in accordance with the procedures to which the parties agreed offends either New York law or New York public policy'.⁵³

Other common law jurisdictions have recognised the enforceability of arbitral interim measures in recent years. For example, in 2015, the Singapore Court of Appeal confirmed that awards ordering interim relief are 'final' as to the issue they adjudicate (i.e., the question whether the requested relief is warranted) and can therefore be enforced under the Singapore Arbitration Act.⁵⁴ In this case, the 'interim relief' at stake was somewhat unusual: an arbitral order compelling one party to comply with a prior decision by a dispute adjudication board (DAB), constituted under the 1999 FIDIC Red Book, which ordered the party to pay an amount of money to the other party.⁵⁵

Courts in certain civil law jurisdictions also appear to have followed this trend. For example, in 2016, the Supreme Court of Ukraine appeared willing to consider the enforcement of provisional relief granted by a Stockholm Chamber of Commerce arbitral

49 See A J van den Berg, 'The Application of the New York Convention by the Courts', in van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 26, 27 (ICCA Congress Series No. 9, 1999).

50 See e.g., *Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 2012 WL 104773 (SDNY); *Sharp Corporation et al. v. Hisense USA Corporation et al.*, 292 F.Supp. 3d 157 (DDC 2017); *Ecopetrol S.A. et al. v. Offshore Exploration and Production LLC*, 46 F.Supp. 3d 327 (SDNY 2014).

51 *CE International Resources Holdings LLC v. SA Minerals Ltd et al.*, 2012 US Dist. LEXIS 176158, 1 to 9 (SDNY).

52 *id.*, at 14.

53 *id.*, at 9.

54 *PT Perusahaan Gas Negara (Persero TBK) v. CRW Joint Operation* [2015] SGCA 30.

55 *id.*; see also E Tan and R Coldwell, 'Another (Unsuccessful) Challenge to the Finality of Interim Arbitral Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC', Kluwer Arbitration Blog, 15 June 2015.

tribunal in the context of an investor-state arbitration.⁵⁶ In this case, the relief had been rendered in the form of an award enjoining the state from collecting royalties on gas production from the investor at a higher rate than was previously in place. The investor sought to enforce the emergency award in Ukraine and succeeded at first instance before the Perchersk District Court, reportedly because the relief was rendered in the form of an ‘award’ and thus was enforceable pursuant to the NY Convention. Although this decision was later overturned by the Kiev Court of Appeal, in February 2016, the Supreme Court of Ukraine quashed the Court of Appeal’s decision, remanding it for reconsideration while holding that a Ukrainian court could only refuse to recognise or enforce an arbitral award on the grounds enumerated in Article V of the NY Convention and that the Kiev Court of Appeal had not, *inter alia*, taken these grounds into account in overturning the first instance decision.⁵⁷

Likewise, in May 2018, the Cairo Court of Appeal became the first Egyptian court to recognise and enforce an arbitral order for interim measures issued by a foreign tribunal, which was seated in Paris.⁵⁸ The tribunal had issued an interim order enjoining one of the parties to cease and desist from Egyptian court proceedings that sought the liquidation of a performance bond. The Court of Appeal held that arbitral interim measures finally resolve the parties’ dispute with respect to the provisional measures sought in the arbitration and were therefore capable of enforcement.⁵⁹ Notably, the Cairo Court of Appeal stated that enforcement of interim measure orders issued by arbitral tribunals was consistent with the objectives of the NY Convention, namely to favour the enforcement of arbitration agreements and arbitral awards, to ensure predictability in international commercial dealings and consistency among jurisdictions.⁶⁰

Of particular interest was the Cairo Court of Appeal’s express reference to the 2006 revision of the Model Law, clearly providing for enforcement of arbitral interim measures and which the Court said ‘derives from the New York Convention and implements its guarantees and standards’.⁶¹ As the Court recalled, Egypt’s arbitration law is inspired by the Model Law⁶² but was enacted well before the 2006 revision. The Court further noted the potential inconsistency in allowing arbitral tribunals to issue interim measures but then refusing to recognise or enforce them.⁶³

Despite what may be a nascent trend among some national courts towards enforcement of arbitral interim measures, even in the absence of a statutory provision to that effect,

56 *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum JV v. Ukraine*, Decision of the Supreme Court of Ukraine, 24 February 2016, available at <https://www.italaw.com/sites/default/files/case-documents/italaw7391.pdf>.

57 *ibid.*

58 Cairo Court of Appeal, 7th Commercial Circuit, Case No. 44/134 JY, Decision dated 9 May 2018; see also Global Arbitration Review, ‘Cairo court fills interim measures “void” in Egyptian law’, 23 May 2018 (available at <https://globalarbitrationreview.com/article/1169888/cairo-court-fills-interim-measures-void-in-egyptian-law>).

59 Cairo Court of Appeal, 7th Commercial Circuit, Case No. 44/134 JY, Decision dated 9 May 2018, paras. 20, 21.

60 *id.*, para. 21.

61 *ibid.*

62 *id.*, para. 14.

63 *id.*, para. 17.

other jurisdictions remain reluctant to embrace this path. For instance, although the Korean Arbitration Act was revised in 2016 and largely incorporated provisions on interim measures from the 2006 Model Law, it nevertheless limits enforcement of interim measures to those issued by tribunals seated in Korea.⁶⁴ In 2010, the Chilean Supreme Court rejected the *exequatur* of arbitral interim measures granted abroad regarding assets located in Chile.⁶⁵ Similarly, in Russia, the Presidium of the Highest Arbitrazh Court reaffirmed in 2010 its position that only awards finally deciding (part of) the merits of a dispute can be enforced in the Russian Federation.⁶⁶

III Practical considerations for enforcement of arbitral interim measures

Even if a relevant court stands ready to enforce an interim measure issued by an arbitral tribunal, the party seeking such a measure may still need to attend to the form of the relief sought, to maximise the likelihood of effective enforcement. While interim measures can take numerous forms, they often consist of non-monetary relief, generally an injunction to one party to do (or refrain from doing) something. However, the efficacy of such injunctive relief mainly depends on the tools available in each jurisdiction to force compliance with the judicial injunction or to sanction a party's failure to comply.

In a number of common law jurisdictions, courts may have the power to hold the recalcitrant party in contempt for failing to comply with the judge's decision enforcing the interim measure.⁶⁷ For example, in the *CE International Resources* case, the party enjoined by the arbitral tribunal to post security or to refrain from transferring assets abroad (in the order as enforced by the court) failed to comply. As a result, the district court subsequently held the respondent in civil contempt, imposing daily-accruing civil fines and issuing a civil commitment order.⁶⁸

By contrast, in most civil law jurisdictions, there is no equivalent to the common law concept of contempt of court.⁶⁹ That said, courts in those jurisdictions are not powerless in the face of a party that refuses to comply with an injunction or any other form of non-monetary relief. For instance, in France, a judge can order an *astreinte* (i.e., the payment

64 See Doo-Sik Kim, Jae Min Jeon, Seung Min Lee and Arie Eernisse, 'Korea' in *GAR Know-How, Commercial Arbitration*, accessible at <https://globalarbitrationreview.com/jurisdiction/1004953/korea> (accessed on 25 March 2019) ('The amendments make clear that an interim order made by an arbitral tribunal can be recognised and enforced by applying to the court for a decision. However, interim measures will only be enforced by a Korean court if the arbitration is seated in Korea and the order that is made by the arbitral tribunal is compatible with Korean law').

65 See Supreme Court No. 5468-2009, *Western Technology Services International Inc. (Westech) v. a Chilean company, Cauchos Industriales SA (Cainsa)*, 11 May 2010 (case described in UNCITRAL's *Case Law On Uncitral Texts* (CLOUT), dated 23 August 2011 (A/CN.9/SER.C/ABSTRACTS/111), at 5.

66 *Living Consulting Group AB (Sweden) v. OOO Sokotel (Russian Federation)*, Presidium of the Highest Arbitrazh Court, Russian Federation, 5 October 2010, A56-63115/2009, in Albert Jan van den Berg (ed.), XXXVI Yearbook Com. Arb. 317, 318 (Kluwer 2011).

67 C V Giabardo, 'Disobeying Courts' Orders – A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge', 10 J. Civ. L. Stud. (2018), at 38, available at <https://digitalcommons.law.lsu.edu/jcls/vol10/iss1/5>.

68 *CE International Resources Holdings LLC v. SA Minerals Ltd. Partnership*, 2013 WL 324061, at 3, 4 (SDNY)

69 C V Giabardo (footnote 67), at 41.

of a fine for each day the debtor delays compliance with the judgment).⁷⁰ Luxembourg, Belgium, the Netherlands and Italy have similar mechanisms.⁷¹ In Germany, courts enjoy a comparable power, although the fine is paid to the state and not to the petitioner.⁷²

In certain civil law jurisdictions, such as France, the power to order a pecuniary sanction such as an *astreinte* is primarily granted to judges to ensure the enforcement of their own decisions.⁷³ Accordingly, it is questionable whether an enforcing court would have the ability to order an *astreinte* to ensure its own enforcement of an interim measure actually ordered by an arbitral tribunal. The situation may be different in those countries, such as Switzerland, where the courts do not appear to directly enforce the arbitral interim measure but rather issue their own provisional order, mirroring the interim measure initially ordered by the tribunal.⁷⁴ That said, even in France, it would still be possible for the beneficiary of the enforced interim measures order to request the imposition of an *astreinte* later from a judge who specialises in matters of enforcement, if circumstances so justify.⁷⁵

But if the imposition of an *astreinte* turns out to be impossible (whether immediately by the enforcement court or at a later stage), the beneficiary of the order may end up with relatively limited options to force compliance with the injunction. Indeed, it will most likely be left with the sole remedy of seeking an award of further damages from the tribunal against the enjoined party for failing to comply with the interim measure (which arguably constitutes a tort or a breach of the arbitration agreement). Moreover, there may be a further question whether this claim for extra damages should be made before the arbitral tribunal that issued the interim measure or before the courts of the country in which this order was enforced (and not complied with).

Accordingly, parties seeking injunctive interim relief from an arbitral tribunal would be well advised to anticipate, to the extent possible, in which jurisdictions these injunctions are likely to be enforced if the enjoined party does not voluntarily comply. Depending on the coercive tools available in these jurisdictions, the requesting party may want to consider asking the arbitral tribunal itself to accompany its injunction with a self-contained pecuniary sanction in the case of non-compliance, akin to an *astreinte*, to the extent that this possibility is available to the tribunal.⁷⁶ Such a self-contained pecuniary sanction – which might be enforced by a court directly against the enjoined party's assets – may avoid the need to resort to subsequent court litigation regarding the enjoined party's failure to

70 *id.*, at 39.

71 *ibid.*

72 *ibid.*

73 See Article L-131-1 of the French Code of Civil Enforcement Procedures.

74 See P Bärtsch and D Schramm, *Arbitration Law of Switzerland: Practice & Procedure 66* (Juris 2014) ('If the Swiss court enforces the interim measure, it renders a self-standing ruling that is subject to enforcement under Swiss procedural law as if it were a decision rendered from the outset by a Swiss court. Thus, all coercive measures for the enforcement of domestic decisions are available.')

75 See Article L-131-1 of the French Code of Civil Enforcement Procedures.

76 On the ability of arbitrators to issue *astreintes*, see e.g., Alexis Mourre, 'Judicial Penalties and Specific Performance in International Arbitration', in De Ly and Lévy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration, 5 Dossiers of the ICC Institute of World Business Law* (Kluwer Law International, 2008), pp. 52 to 78.

comply with the injunctive interim relief. This could prove very useful, as interim measures are often issued in a context of urgency.

Parties seeking interim relief should also consider whether the measure requested from the arbitral tribunal (including any associated pecuniary sanction for non-compliance) constitutes a known form of relief in the potential place, or places, of enforcement. As illustrated by the *CE International Resources* case, the non-availability of a certain type of relief in the place of enforcement might raise concerns regarding the compatibility of the interim measure order issued by the arbitral tribunal with the public policy of the place of enforcement, thus creating a risk that enforcement is refused. For instance, it was suggested by one commentator on the Egyptian case discussed in Section II that an anti-suit injunction of the type issued by the arbitral tribunal in Paris was contrary to the enjoined Egyptian party's constitutional rights (to seek relief against a third party) and thus to Egyptian public policy.⁷⁷ In the same vein, some jurisdictions consider that disproportionate damages are contrary to their international public policy⁷⁸ and may thus frown upon interim measures that are accompanied by particularly heavy sanctions in the case of non-compliance.

77 See Ibrahim Shehata, 'Are Arbitral Anti-Suit Injunctions Enforceable before Egyptian Courts?', *Kluwer Arbitration Blog*, 23 January 2019.

78 For example, the EU's Rome II regulation notes in its preamble that 'the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum'. (See Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 32); see also A Mourre (footnote 76), at 69 ('in some jurisdictions, judicial penalties may be prohibited insofar as they would lead to an undue enrichment of the creditor').

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