

The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings – Specifically, The Icc Emergency Arbitrator Rules (2012)¹

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a. BRIEF INFORMATION ON THE ICC ARBITRATION RULES

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The interim measures, which are also called “provisional measures”, “conservatory measures”, “preliminary injunctions” or “emergency/interim reliefs”², are temporary remedies aiming to avoid unjust results before the final awards are rendered.³

Today, the parties of international business transactions often prefer arbitration as the dispute resolution method and seek interim measures as a speedy and effective remedy upon arise of any dispute. Arbitration is a convenient method for the following reasons: International business

² For the different terminology used by various institutions, see Ergun Özsunay, “Kurumsal Tahkim Sistemlerinde ve Bazı Ulusal Hukukların “Uluslararası Tahkimle İlgili Düzenlemelerinde Geçici ve Koruyucu Önlemler” [“Interim and Conservatory Measures Under the Systems of Arbitral Institutions and the Regulations of Certain National Laws Regarding International Arbitration”], *The Journal of Istanbul Bar Association*, Vol 77, Issue 2, 2003, 267.

³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, Cambridge, 2008, 179-180. (“The Principles”).

transactions have distinct features in comparison to domestic transactions. The buyer and the seller in different states do not often prefer to resolve their disputes before the courts of the other's state, since they have the concern that the court may be biased. On the contrary, they would prefer to bring their business disputes before a "neutral (impartial and independent) decision-maker" whose decisions, granted under due process⁴, are enforceable.

Moreover, arbitration brings some advantages such as expertise, confidentiality and speedy process.⁵ Arbitration method is speedy and efficient as it allows the exercise of party autonomy by virtue of its flexible nature.⁶ Even though this process is speedy, in general, some complex disputes might take time to resolve. At this point, interim measures of protection play a vital role in order to benefit from the efficiency of the arbitration process.

Despite the existence of a valid arbitration agreement⁷, the parties can still apply to courts for interim measures in appropriate circumstances and this conduct does not constitute waiver of the right to arbitrate.⁸ As regards the role of local courts in arbitration proceedings, the general principle is that the courts' intervention should be limited to either i) assistance to or ii) supervision of the arbitration.⁹

⁴ In this study, the terms "due process" refer to "fair trial."

⁵ See Stephen Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions and Anticipated Results*, 12 *International Trade Law Journal*, Winter 2003, 55.

⁶ Accordingly, the parties can tailor the whole arbitral process (i.e. the names and number of the arbitrators, the seat, the applicable and governing law, language of arbitration) by either incorporating an arbitration clause in their agreement or making a separate arbitration agreement.

⁷ In this study, an arbitration clause or a separate arbitration agreement will be both referred to as an "arbitration agreement."

⁸ Moses, *The Principles*, 100.

⁹ See e.g., Ali Yeşilırmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri* [Negotiations, Mediation, Expert Determination and Arbitration As Effective Means of Dispute Resolution for The Development of The Commercial Life and Investment Environment In Turkey : Problems and Suggestions for Solutions], XII *Levha*, April 2011, Istanbul, 134-138. ("Arbitra-

Arbitration may be conducted under either the supervision of institutions or the process agreed by the parties, so-called “ad hoc arbitration”. The institutional rules do not apply automatically; they only apply if the parties incorporate such rules expressly in their arbitration agreements.

Undoubtedly, the most important reason why arbitration may be preferred is the enforceability of the arbitral awards. The awards rendered by the arbitrators will be easily enforced because many countries, today, are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, “the New York Convention”).¹⁰

However, since the New York Convention emphasizes the enforcement of “awards”, the enforcement of “interim measures” ordered by the arbitrators is a controversial issue, which this study will focus on.

II. Different Aspects of Interim Measures and the Enforcement Problem

As per the general principles governing interim measures¹¹, some of the highlights include the following: a) As prerequisites, i) possibility of

tion”). The author examines the role of the local courts in three different stages: i) in pre-arbitral proceedings ii) during the arbitral proceedings iii) subsequent to the granting of the final award by the tribunal.

¹⁰ Today 146 states are parties to the New York Convention. See the status at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited December 11, 2011). There are a few exceptions for the refusal of the enforcement of the arbitral awards by courts under article V of the New York Convention. However, these do not lead to review of the arbitrator’s award on the subject matter. In commercial arbitration, arbitral awards are not subject to appeal. See a detailed explanation of the New York Convention below.

¹¹ We would like to mention here the issue raised by a scholar concerning the legal framework of interim measures in arbitration. Boog has claimed that there is not a single law but there are “various laws” governing the interim measures in arbitration. The author has expressed that different aspects of the proceedings related to the interim measures should be evaluated separately to determine which law shall apply. The different aspects have been enumerated as i) the arbitral tribunal’s power to order interim measures ii) the prerequisites that must be met in order for the decisions on interim reliefs iii) types of interim measures the tribunal may order iv) the procedure of ordering interim measures.

irreparable harm if the interim order is not granted (the situation of urgency) and ii) likelihood of success on the merits must be demonstrated by the applicant b) Security for the costs/payment may be required by the competent authority c) Unless modified, terminated or annulled by subsequent orders, interim measures are valid for the period until the final award becomes enforceable or the case is, otherwise, dismissed.¹² d) Finally, a request for arbitration must be filed subsequent to the obtainment of decisions for interim measures.¹³

Different types of interim measures are applied in different jurisdictions, although they provide similar or identical functions.¹⁴ The purposes of interim measures may be to preserve the status quo, evidence, assets or prohibit one party from taking action in order to prevent imminent harm.¹⁵ In this regard, interim measures can be classified into two broad categories: 1) measures aimed at avoiding or minimizing loss, damage, or prejudice and 2) measures aimed at facilitating the enforcement of arbitral awards.¹⁶ Preservation of evidence, injunctions/remedies, security for costs, security for payment and provisional payment are types of interim measures frequently exercised by the tribunals, in practice.¹⁷

For more information, see Christopher Boog, "The Law Governing Interim Measures" *in* Conflict of Laws in International Arbitration, Franco Ferrari, Stefan Kroll (eds), European Law Publishers, 2011, Munich, 409-411 ("The Governing Law").

¹² See the explanations at Ziya Akıncı, *Milletlerarası Tahkim*, [International Arbitration], Seçkin, Ankara, 2003, 94.

¹³ As an example of national laws, under Article 10 of the Turkish International Arbitration Law, the parties are obliged to initiate the arbitral proceedings within thirty days following the obtainment of interim measures from the courts.

¹⁴ Yeşilirmak, *Provisional Measures*, 10-12. The author examines the types of interim measures under three broad categories and adds an atypical category to them. Accordingly, these categories are i) measures related to preservation of evidence ii) measures related to conduct of arbitration and relations between the parties during arbitral proceedings iii) measures aimed to facilitate later enforcement of award iv) interim payment (referred to as "atypical category" since the moving party is often granted, in full or in part, the remedy it is seeking.).

¹⁵ See Özsunay, *Interim and Conservatory Measures*, 268-269.

¹⁶ Dana Renée Bucy, "How to best protect party rights: The Future Of Interim Relief In International Commercial Arbitration Under The Amended UNCITRAL Model Law", 25(3) *American International Law Review*, 2010, 586 ("Protect Party Rights").

¹⁷ See Ali Yeşilirmak, "Provisional Measures" *in* *Pervasive Problems in International Arbi-*

Interim measures play a vital role in practice. The measures such as, preservation of property or rights might have a life-saving effect whereas, those such as attachment orders or injunctions, partial payment of a claim or security for costs might prevent the losses of the requesting party before the final award is rendered.¹⁸ These measures are deemed “direction to the parties”.¹⁹ On the other hand, interim measures may be even more important than awards²⁰ since action or inaction of a recalcitrant party may render the final award useless for the party winning the case.²¹

As a systematic approach, the question as to which authority is competent for the issuance of interim measure should be answered according to the stage of arbitral proceedings and the institutional rules incorporated in the arbitration agreement: A) In the pre-arbitral stage, the parties may recourse to either i) a court or ii) based on the institutional rule incorporated by the parties: a temporary authority, namely, emergency arbitrator (under the ICC /ICDR Rules) or a tribunal formed on an expedited basis (under the LCIA Rules) B) In the arbitral stage, the parties should generally recourse to the tribunal.

Considering both of the above-mentioned stages, even after the commencement of emergency arbitrator proceedings/arbitral proceed-

tration, Loukas A. Mistelis & Julian D. M. Lew (eds.), Kluwer Law International, Alphen aan den Rijn, 2006, 192 (“Pervasive Problems”).

¹⁸ For the examples of types of interim measures see Gregoire Marchac, “Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules”, 10 American Review of International Arbitration 1999 Note & Comment, 130. (“The Rules”)

¹⁹ See David Wagoner, “Interim Relief in International Arbitration: Enforcement is a Substantial Problem”, 51 Oct Dispute Resolution Journal, 69.

²⁰ See V.V. Veeder, “Provisional and Conservatory Measures” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, 2 United Nations Publication, 21. Available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> (last visited December 27, 2011) (“Provisional and Conservatory Measures”).

²¹ Thus, despite being “interim”, these measures might have “final” and major consequences. See Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer, London, 2005, 14. (“Provisional Measures”).

ings, the parties, however, may still recourse to the courts “only in appropriate circumstances”

Despite this being the principle, it seems more like an exception for the reason that arbitrators have limited powers to issue certain interim measure orders. Thus, the parties will recourse to the courts for any interim measures having impact on third parties (i.e. attachment orders directed against the banks²²).

In light of the explanations above, we would like to address the enforcement of interim measure orders granted by the arbitrators. The primary concern is as to whether the arbitrators are allowed by *lex arbitri* (the governing law of arbitration) to issue interim measures.²³ The arbitrators may not grant interim measure if it is not allowed by *lex arbitri*.²⁴ In other words, some national laws do not allow the arbitrators to order interim measures.²⁵ This issue is of importance especially when the order for the interim measure is to be enforced in a different jurisdiction than the seat of arbitration since the assets of the respondent are located

²² Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd Edition, Kluwer Law International, The Hague, 2001, 921.

²³ See William Wang, “International Arbitration: The Need For Uniform Interim Measures of Relief”, 28 *Brooklyn Journal of International Law* 2003, 1064 (“The Need For Interim Measures”). There are three sets of rules governing the arbitration infrastructure: i) international treaties (i.e. New York Convention), ii) national arbitration laws and iii) institutional rules. *Lex arbitri* is “the law of the jurisdiction in the seat of arbitration”, unless agreed otherwise by the parties. *Lex arbitri* governs all of the issues relating to the procedure of the arbitration. See Mahmut Birsel, “Milletlerarası Tahkimde Tahkim Yerinin Seçiminin Önemi” [“The Importance of Choice of the Seat of Arbitration in International Arbitration”] in *The Seminar on International Arbitration*, ICC Turkey National Committee (“ICC Turkey”), Ankara, March 10, 2003, 66.

²⁴ Raymond Werbicki, “Arbitral Interim Measures: Fact or Fiction?” *Dispute Resolution Journal*, November 2002, January, Vol 57, 2003, 64. The scope of issues governed by the *lex arbitri* will vary from state to state but it will usually regulate the rules i) governing the interim measures ii) entitling the local courts to intervene to support the arbitration iii) entitling the local courts to intervene to supervise the arbitration. See <http://arbitration.practicallaw.com/0-381-8418>, last visited December 11, 2011.

²⁵ It has been reported that under the mandatory provisions of arbitration laws of China, Thailand and Argentina, the arbitrators do not have the authority to order interim measures. See Boog, *The Governing Law*, 416.

therein. In such cases, the parties have no other choice than to apply to courts for interim measures.²⁶

Secondly, even if the arbitrators are vested with the power to order interim measures, the use of this power is very limited. Since the decisions of arbitrators are only binding for the parties before them, and in general, not for the third parties who are not bound by the arbitration agreement, certain types of interim measures may not be issued by arbitrators. (i.e. arbitrators may not issue attachment orders since they may not compel the third parties, such as banks, to comply with their decision.)²⁷ It should be emphasized here that unlike courts, the arbitrators may not render decisions for interim measures to be implemented by the execution authorities (execution offices).²⁸

The parties usually tend to comply with the tribunal's decision on the interim measures. In order to win the battle for the final award, they would not like to put themselves in a disadvantageous position through wrongful conducts. What if any party fails to comply with such a decision of the tribunal? Unlike the courts, arbitrators do not have the power to compel the parties to abide by interim measure orders. "*The international system of commercial arbitration plainly requires the assistance of state courts for the enforcement of an arbitral order for interim measures. Like an award, such an order is not self-executing; and arbitrators lack the sanctions of state courts for the enforcement of their orders.*"²⁹ There are a few tools that the arbitrators can use in order to compel their interim measure orders, i.e. "the costs" and "negative inference from the disobedience". Furthermore, the arbitrators have the power to rule for "damages" resulting from the non-compliance with the interim measure orders. We can draw this conclusion from the fact that the arbitration agreement is a "contract" and such damages are "in connection with the contract"³⁰. Some schol-

²⁶ See Moses, *The Principles*, 106; Erik Schafer, Herman Verbist, Christophe Imhoos, *ICC Arbitration in Practice*, Kluwer Law International, Staempfli Publishers Limited, Berne, The Hague, 2005, 117 ("ICC Arbitration")

²⁷ See Schafer, Verbist, Imhoos, *ICC Arbitration*, 117.

²⁸ See the explanations at Akıncı, *International Arbitration*, 92-93.

²⁹ For the comments, see Veeder, *Provisional and Conservatory Measures*, 22.

³⁰ Some other tools are demonstrated as imposing time limits to make psychological effect

ars accurately state that the power to rule for damages is implied within the power of the arbitrators to issue interim measures.³¹ Accordingly, in our view, since the arbitrators have the power to issue interim measures, they should also have the power to ensure compliance with these orders though, practically, it would not be easy for the arbitrators to calculate the amount of damages resulting from non-compliance.

Apart from the foregoing, prior to the formation of an arbitral tribunal, there is an increasing tendency for the rapid appointment of a temporary authority vested with the powers to order interim measures. The arbitral institutions revise their rules in order to encourage that the parties' applications for interim measures be directed primarily to this temporary authority. The parties are expected to abide by the orders of such authority and remain within the framework of arbitration. At this point, one could argue that due to the courts' concurrent jurisdiction, there is no need for such a temporary authority. However, scholars have commented that even though these temporary authorities in pre-arbitral stage may not replace courts; their function is to supplement the courts. These temporary authorities provide some advantages such as, confidentiality and flexibility as regards the types and conditions of the interim measures. It is presumed that the parties would voluntarily abide by such orders in order to avoid negative inference of the tribunal³² Thus, the opportunities offered by these authorities demonstrate respect for the parties' choice of arbitration and ensure that their dispute be resolved effectively through arbitration. In light of these comments, it has been

on the party or if permitted, imposing penalty for non-compliance. See e.g. Yeşilirmak, *Pervasive Problems*, 197.

³¹ See e.g., Pierre A Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please" *in* *International Arbitration and National Courts: The Never Ending Story*, ICCA International Arbitration Conference Series no 10, Ed. Albert Jan van den Berg, Kluwer Law International, the Netherlands, 2001, 103.

³² See Emmanuel Gaillard and Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences", "The ICC Pre-Arbitral Referee: First Practical Experiences", 20(1) *Arbitration International*, 23-24 available at http://www.shearman.com/files/Publication/a1108147-d2f3-4f5f-9b78-3db43531b99c/Presentation/PublicationAttachment/b0f48c35-0933-451a-ac7f-44b2057800bf/IA_ICC%20Pre-Arbitral%20Referee_040308_07.pdf (last visited March 19, 2007). ("First Practical Experiences").

suggested that the UNCITRAL Model Law should be amended so as to include a provision on obtaining interim relief from a rapidly appointed temporary authority prior to the formation of the tribunal.³³

III. Efforts to Harmonize the Legal Framework of Interim Measures Under the Uncitral Model Law

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966. The Commission was established in order to promote international trade by avoiding the material differences in international trade laws of the states.³⁴

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the Commission on 21 June 1985 and amended on 7 July 2006 (hereinafter, “the Model Law”). The aim of the Model Law is to guide the states to harmonize and modify their national arbitration laws in accordance with the particular needs of international commercial arbitration. The Model Law regulates a wide range of issues concerning the whole arbitration process including the arbitration agreement, the composition and jurisdiction of the tribunal and the courts’ recognition and enforcement of the arbitral awards. The Model Law has a great influence on the states, since it has been adopted by many states. Thus, it reflects a global concept on key aspects of international arbitration practice.³⁵

The interim measures have “urgent” nature. Therefore, Article 9 of the Model Law allows the parties to recourse to courts for interim measures before or during arbitral proceedings and explicitly states that this is “not incompatible with the arbitration agreement.”³⁶

³³ For further explanations regarding the comments and suggestions, see e.g. Bucy, *Protect Party Rights*, 606-607.

³⁴ See <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited March 10, 2007).

³⁵ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html and <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited December 8, 2011).

³⁶ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.

The former wording of Article 17 of the UNCITRAL Model Law insufficiently dealt with the issue of “Power of Arbitral Tribunal to issue interim measures”³⁷ The UNCITRAL Working Group II on Arbitration and Conciliation (hereinafter, “the Working Group”) revised Article 17 of the Model Law.³⁸ As per the Explanatory Note by the UNCITRAL Secretariat, the substantive amendments of 2006 are those relating to enforcement regime of the interim measures. These amendments were made in light of the fact that interim measures are increasingly relied upon in the practice of international commercial arbitration.³⁹

The new provisions are envisaged under a new chapter (chapter IV A) on Interim Measures and Preliminary Orders.⁴⁰ The revised Article 17 regulates certain issues concerning “the power of tribunals to order interim measures”, “ex parte interim measures” (interim measures granted without notice to the other party where there is a risk that the oppos-

pdf. (last visited December 8, 2011).

³⁷ The former wording of Article 17 provided that “*Unless otherwise agreed by the parties, the arbitral tribunal may at the request of a party, order any party to take such interim measure of protection as the tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.*”

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited December 8, 2011).

³⁸ The previous Model Law explicitly governed the power of the tribunal to issue measures but it did not include any provisions as to the enforcement of such measures by the courts or the arbitral tribunal. Since the enforcement of interim measures is an issue to be determined by national laws, unlike the enforcement of awards under New York Convention, the previous Article 17 did not include this issue. However, the lack of uniform rules on enforcement of arbitrator/tribunal-ordered interim measures had negative impact on the attractiveness of arbitration. This is the main reason why UNCITRAL Working Group decided to revise the Model Law. For the explanations above, please refer to Joshua A Brien, “The UNCITRAL Working Group on Arbitration: A Progress Report”, *International Law Forum du Droit International 3: Kluwer Law International, Netherlands, 2001, 253-257*, (“The UNCITRAL Working Group”).

³⁹ For the Explanatory Note, see http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited December 8, 2011).

⁴⁰ For the revised articles of the UNCITRAL Model Law, see <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/A1E.pdf> (last visited March 10, 2007).

ing party will frustrate the purpose of the measure) and “enforcement of interim measures by the courts.”⁴¹

Neither the former nor the revised Model Law involves any specific provision regarding the enforcement of interim measures ordered in pre-arbitral proceedings.

However, since the Model Law is a guide on the legal nature of the interim measures, we will briefly mention the revisions concerning the “interim measures ordered by the arbitral tribunal” and discuss our observations thereof.

As per revised Article 17(A), just like a competent court, the tribunal has discretionary power to order interim measures in arbitral proceedings.⁴² Under the revised Article 17(2), the interim measures can be either in the form of an “award” or “order”. There are some criteria that the forums should apply to determine whether or not to issue interim measures. Accordingly, as prerequisites for the issuance of interim measures, the applicant must establish that a) irreparable harm is likely to occur if the interim measure is not ordered and b) the party is likely to success on the merits of the claim.⁴³

⁴¹ Gerhard Walter and Christoph Brunner, “International Measures and Arbitration-Impact of the ILA Principles on Provisional and Protective Measures in International Litigation on the Draft Provisions on Interim Measures of Protection of the UNCITRAL Model Law on International Commercial Arbitration”, International Cooperation Through Private International Law, Essays in Memory of Peter E. Nygh, TMC Asser Press, 2004, The Netherlands, 470 (“International Measures”)

⁴² \Walter and Brunner, “International Measures ...”, 477. Article 17J is available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/A1E.pdf> (last visited March 10, 2007).

⁴³ Article 17 A reads as follows: “ a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and b) there is reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination”

Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/A1E.pdf> (last visited December 8, 2011). In line with these criteria, the US courts scrutinize the following criteria in order to accept an application for interim measures under the Federal Law: “(1) whether the plaintiff has a substantial likelihood of success on the merits;

As per revised Article 17, if the tribunal accepts the application for the interim measures, it orders a party to: “a) maintain or restore the status quo pending determination of the dispute b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; c) provide a means of preserving assets out of which a subsequent award may be satisfied or d) preserve evidence that may be relevant and material to the resolution of the dispute.”⁴⁴

In addition, the said article sets forth that the tribunal “may modify, suspend or terminate an interim measure it has granted, upon application of any party or in exceptional circumstances and upon prior notice to the parties.”⁴⁵

Revised Article 17(E) also includes the provision of security. “The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.”⁴⁶

According to Article 17 (H) which regulates enforcement issue, as a general rule, an interim measure ordered by an arbitrator/arbitral tribunal shall be recognized and enforced by the competent courts. However, Article 17(I) also includes an exhaustive list of grounds for refusal of the recognition or enforcement by the courts.⁴⁷

(2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.” See Jarrod Wong, “The Issuance Of Interim Measures In International Disputes: A Proposal Requiring A Reasonable Possibility Of Success On The Underlying Merits”, 33 Georgia Journal of International and Comparative Law, Spring 2005, 613-614.

⁴⁴ See Article 17(2) id

⁴⁵ See Article 17 D id

⁴⁶ See Article 17E id

⁴⁷ Accordingly, the enforcement of arbitrator/tribunal-ordered interim measures may only be refused if, at the request of a party, the court finds that: 1) such refusal is warranted on the grounds set forth in Article 36 (1) (a) (i-iv), or 2) the arbitral tribunal’s decision with respect to provision of security has not been complied with or 3) the interim measure has been terminated or suspended by the arbitral tribunal or if the court, ex officio, finds that: 1) the interim measure is incompatible with the powers conferred upon the court unless the court determines to reformulate such measure or 2) any grounds set forth in Article 36 (1) (b) (i) or (ii) apply to the recognition and enforcement.

Some scholars argue that these provisions may give rise to some discussions as follows: “Should the Model Law allow for the issuance of ex parte interim measures by the tribunal?” and “to what extent a court should be given discretion to refuse enforcement of interim measures?”⁴⁸

Apart from the foregoing, the UNCITRAL Model Law and the national laws do not provide an alternative option to the local courts in the pre-arbitral process. The Model Law has been criticized by scholars since it is silent on obtaining interim relief from a rapidly appointed temporary authority prior to the formation of the tribunal (the emergency arbitrator in pre-arbitral proceedings) and its enforcement thereof.⁴⁹

IV. Enforcement of Interim Measures in Pre-Arbitral Proceedings

A. Ad Hoc Arbitration With Particular Reference to Uncitral Rules

Party autonomy principle is apparent in ad hoc arbitration. In this type of arbitration, the parties can govern the arbitral process through a set of rules, sometimes created especially for a particular case.⁵⁰ The parties may either draw up these rules themselves or refer to specific rules or laws.⁵¹ However, the parties most commonly prefer to use the Arbitration Rules of the UNCITRAL as model rules in ad hoc arbitration.⁵²

See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited December 11, 2011)..

⁴⁸ Brien, “The UNCITRAL Working Group”, 256-257

⁴⁹ See the suggestions at Bucy, Protect Party Rights, 606-607.

⁵⁰ Marchac, The Rules, 124.

⁵¹ Cemal Şanlı, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, [Drawing up the International Commercial Contracts and Dispute Settlement Methods], Fourth Edition, Beta, Istanbul, 2011, 266-267.

⁵² See Schafer, Verbist, Imhoos, ICC Arbitration, 10. Also see, Axel Bosch, Provisional Remedies in International Commercial Arbitration, A Practitioner Handbook, De Gruyter, New York, 1994, 8. (“Provisional Remedies”).

The UNCITRAL Arbitration Rules⁵³ (hereinafter, “the UNCITRAL Rules”) were adopted by the UNCITRAL on 28 April 1976. *“The rules provide a set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.”*⁵⁴

The UNCITRAL is not an arbitral institution. The parties may adopt the application of UNCITRAL Rules either in ad hoc arbitration or institutional arbitration.⁵⁵ Although the parties commonly use these rules in ad hoc arbitration; the parties can ask, for instance, AAA to apply the UNCITRAL Rules.⁵⁶

UNCITRAL Working Group decided to revise its Arbitration Rules. In its 46th session in New York, the Working Group proposed some amendments for Article 26.⁵⁷ The UNCITRAL finally revised its Arbitration Rules in 2010.⁵⁸ In order to examine the revisions made by UNCITRAL Rules 2010, we would like to deal with the previous rules and compare them briefly.

⁵³ The current UNCITRAL Arbitration Rules are available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited December 12, 2011).

⁵⁴ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html (last visited March 12, 2007).

⁵⁵ The UNCITRAL Rules are commonly preferred by the parties in ad hoc arbitration. In principle, the ad hoc arbitration is conducted without inclusion of an institution. However, the parties can also agree that an institution (i.e. the ICC) will assist them in the formation of the tribunal (as appointing authority) in the UNCITRAL or other ad hoc proceedings. The related information is available at <http://www.iccwbo.org/court/arbitration/id4619/index.html> (last visited December 12, 2011).

⁵⁶ Wang, “The Need For Interim Measures”, 1065.

⁵⁷ See <http://daccessdds.un.org/doc/UNDOC/LTD/V06/S90/S0/PDF/V06S90S0.pdf?OpenElement> (last visited April 10, 2007).

⁵⁸ For the UNCITRAL Arbitration Rules 2010 see <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited December 12, 2011).

Previous wording of Article 26 of UNCITRAL Rules regulated “Interim Measures of Protection” shortly and insufficiently.⁵⁹ Some observations regarding the detailed provisions brought by the revised Article 26 on the tribunal-ordered interim measures will be provided below:

Just as the revised Model Law, the revised UNCITRAL Rules do not regulate the issue of interim orders in pre-arbitral proceedings either.

(The previous and revised) Article 26 repeats the general principle under Article 9 of the Model Law that applying to courts for interim measures is “not incompatible with the arbitration agreement”. The revised Article 26 preserves the previous wording that “a request of interim measures by a party” is a prerequisite for the issuance of interim measures. In addition, interim measures must be necessary in respect of the subject matter of the dispute.⁶⁰

Further, the revised Article 26 makes some amendments to the former wording and it brings some additional provisions, in accordance with the Model Law. The aim of the amendments is to provide uniformity in emergency relief proceedings.

The revised Article 26 does not state that the arbitrators may grant “any interim measures they deem necessary”. We consider that this revision is due to the fact that the tribunal’s power to issue interim measures is limited. As mentioned before, the tribunal may not grant some measures that are binding on the third parties, such as attachment orders. Thus, we consider that re-writing of the first paragraph is appropriate. Rather, we see that the drafters of the revised Art 26 preferred to give examples of interim measures within the discretionary power of the tribunal in a non-exhaustive way.⁶¹

⁵⁹ For the previous UNCITRAL Arbitration Rules see <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited April 10, 2007).

⁶⁰ David D. Caron, Lee M, Caplan, Matti Pellonpaa, *The UNCITRAL Arbitration Rules, A Commentary*, Oxford University Press, 2006, 533.

⁶¹ The comments on the amendments are available at http://www.uncitral.org/pdf/english/whats_new/11_2010/1123_7_KANG.pdf (last visited December 12, 2011).

We notice that revised Article 26 does not categorize the interim measures as orders or awards. Rather, it only states that interim measures are “temporary measures”. Our view is that the drafters did this intentionally, since the characterization of the decisions for interim measures is a controversial issue, which will be explained below.

In parallel to the Model Law, the revised Article 26 states that the arbitrators may require security for the costs for the issuance of interim measures. The applicant will have to demonstrate the “irreparable harm” and “likelihood of the success on the merits” except for the interim measure regarding the preservation of the related evidence. The rules state that, in such a case, the above requirements shall only apply if the arbitrator considers it appropriate.⁶²

B. Institutional Arbitration

The main difference between the institutional arbitration and ad hoc arbitration is that, the parties need to make specific reference to an institution’s rules in their agreement in order to use such rules.⁶³

The main advantage of the institutional arbitration is that, in addition to a given set of procedural rules, an administrative body (the institution) supervises the arbitration procedure.⁶⁴ However, these institutions do not have the authority to intervene the merits of the case. The tribunal is independent on how to decide on the merits. In this regard, the institutions’ courts have administrative functions and differ from the traditional courts in this sense. If the parties cannot agree on the composition of the tribunal, the institution will take the necessary steps.⁶⁵ In addition, many institutions include the costs and fees within their rules.⁶⁶

⁶² <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

⁶³ Schafer, Verbist, Imhoos, ICC Arbitration, 10

⁶⁴ Bosch, Provisional Remedies, 9

⁶⁵ However, it is worth noting here that the institutions do not have permanent tribunals. See Schafer, Verbist, Imhoos, ICC Arbitration, 10.

⁶⁶ Schafer, Verbist, Imhoos, ICC Arbitration, 11.

These features of institutional arbitration may make it more preferable for the parties than ad hoc arbitration.⁶⁷

In many circumstances, the parties may prefer to apply to arbitral tribunal rather than the national court for interim reliefs. In order to provide interim measures of protection efficiently, the arbitral institutions choose to either speed up the formation of the arbitral tribunal or use 'emergency arbitrators' prior to the constitution of the arbitral tribunal.

The ICDR, LCIA and ICC are among the most preferred institutions for international commercial arbitration. Therefore, we will limit our study to the examination of these institutions only.⁶⁸

1. American Arbitration Association (AAA)

The American Arbitration Association (hereinafter, "AAA") conducts administrative services related to the alternative dispute resolution procedures in the U.S., as well as abroad through its International Centre for Dispute Resolution (hereinafter, "ICDR")⁶⁹.

AAA has two sets of arbitration rules, international and domestic. AAA International Arbitration Rules (hereinafter, the "ICDR Rules") apply to international arbitration proceedings and such rules are conducted by the ICDR, while AAA Commercial Arbitration Rules apply to local arbitration proceedings.

The ICDR is the international division of AAA. The ICDR amended its Rules and added Article 37 regarding the "emergency arbitrator", on 1 May 2006.⁷⁰ Therefore, Article 37 will only apply to arbitration clauses or

⁶⁷ Bosch, *Provisional Remedies*, 9.

⁶⁸ However, it should be noted that there are some other institutions such as Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"). Available at <http://www.chamber.se/skiljeforfarande-2.aspx> (last visited December 15, 2011).

⁶⁹ For further information about AAA see <http://www.adr.org/about> (last visited April 12, 2007). The institution also serves as appointing authority in mediations if the parties can not agree on a mediator.

⁷⁰ Mark Kantor, "Alternatives to the High Costs of Litigation", *International Institute for Conflict Prevention and Resolution*, Vol 24, No 8, September 2006, 136 ("Alternatives").

agreements concluded as of 1 May 2006.⁷¹ The date that will be considered for the application of the said rules is the date of arbitration agreement and not the date on which the arbitration was initiated.⁷²

Article 37 creates a new decision-maker for pre-arbitral proceedings, namely, “the emergency arbitrator”. A broad discretionary power is granted to the emergency arbitrator on deciding whatever interim measures “it deems necessary”. It is different from the wording of ICC PRR Art. 2 where the powers of the referee are listed exclusively, subject to modification by the parties.⁷³ In line with the UNCITRAL Model Law Art. 17(A), Article 37(5) of the ICDR Rules also state that the emergency arbitrator may “order” or “award” any interim measures at its discretion.⁷⁴

ICDR adopted the opt-out policy, under which Article 37 applies automatically unless parties mutually agree otherwise. Upon application for emergency reliefs, ICDR administrator appoints a single emergency arbitrator from its special panel provided by the ICDR. This will be performed within one business day after receipt of an application.

Similar to the disclosure obligation of the tribunal, emergency arbitrator has the obligation to disclose any circumstances that are likely to cause justifiable doubts regarding its impartiality or independence and the parties may challenge within one business day of notification of the appointment by the administrator.

The emergency arbitrator will conduct the emergency procedure in accordance with the schedule it prepares within two business days of appointment.

⁷¹ For the ICDR Rules see <http://www.adr.org/sp.asp?id=29003> (last visited April 12, 2007).

⁷² Ben H Sheppard and Jr, John M. Townsend, “Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule”, 61 July, *Dispute Resolution Journal*, 78 (“ICDR International Emergency Rule”).

⁷³ The ICC PRR will be discussed in detail below.

⁷⁴ See the chart available at Kantor, *Alternatives*, 136.

Under the ICDR Rules, emergency arbitrator may rule that the issuance of interim measures is conditional upon provision of an appropriate security by the party seeking interim measure.

It is important to note that, in line with the debates about the due process issue, Article 37 does not allow *ex parte* applications for interim measures, in contrast with the UNCITRAL Model Law.⁷⁵

The decisions of the emergency arbitrator will be treated as any other order or award of an ICDR arbitrator. It has been commented that ICDR accepts the same principle as the LCIA for the impact of such decisions.⁷⁶ It has been reported that the U.S. courts have enforced the emergency arbitrators' decisions regardless of the fact that they were categorized as interim orders or awards by the emergency arbitrators. Therefore, owing to this pragmatic approach, there seems no enforcement problem about the ICDR Rules.⁷⁷

As a recent interpretation of Article 37 of the ICDR Rules, in *Chinmax* case, the local court (US District Court for the Southern District of California) concluded that the interim order issued by the emergency arbitrator, subject to review by the arbitral tribunal, is not sufficiently final to permit judicial review. Thus, the court denied the motion to vacate arbitration award filed by *Chinmax*.⁷⁸

⁷⁵ Sheppard and Townsend, ICDR International Emergency Rule, 79..

⁷⁶ See Kantor, *Alternatives*, 136-138.

⁷⁷ Guillaume Lemenez and Paul Quigley, "The ICDR's Emergency Arbitrator Procedure in Action", *Dispute Resolution Journal*, November 2008, January 2009, 70. ("ICDR Emergency Arbitrator")

⁷⁸ *Chinmax Medical Systems Inc vs. Alere San Diego Inc* (Case No. 10 cv2467 WQH (NLS)), 2011 U.S. Dist. LEXIS 57889, date decided: May 27, 2011. By its decision dated December 8, 2010, the court had previously concluded that since *Chinmax* failed to show a possibility of irreparable harm or exceptional circumstances to justify a stay of the interim award, *Chinmax's* motion for stay of the interim award was denied. (Case No. 10 cv2467 WQH (NLS)), 2011 U.S. Dist. LEXIS 129722, date decided: December 8, 2010. See <http://www.lexisnexis.com/en-us/home.page>, last visited December 22, 2011.

2. London Court of International Arbitration (LCIA)

Although (London Court of International Arbitration (hereinafter “LCIA”) is based in London, it is an international institution and it provides administration of dispute resolution proceedings for all parties, regardless of their location, and under any system of law.⁷⁹ Articles 9⁸⁰ and 25 of the LCIA Rules (effective as of 1 January 1998) regarding “expedited formation” and “interim and conservatory measures” regulate the issue of interim measures. The LCIA Rules provide a special procedure under which the tribunal will be constituted rapidly in case of “exceptional urgency”. This special procedure will apply upon the request of any party, unless the parties mutually agree otherwise. In other words, LCIA has adopted the “opt-out” policy. Expedited formation of the tribunal will be performed if the parties do not opt out explicitly in their agreement,

As per the party autonomy principle, upon application of the parties, they will form an arbitral tribunal. If the parties fail to agree, then the LCIA Court will appoint the tribunal. The tribunal formed on expedited basis will have the same powers as the arbitral tribunal to issue orders or awards. Accordingly, the arbitral tribunal formed on expedited basis will have the same obligations as the tribunal.

⁷⁹ For detailed information see <http://www.lcia.org/> (last visited April 15, 2007).

⁸⁰ **“Expedited Formation**

^{9.1}

In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules.

^{9.2} Such an application shall be made in writing to the LCIA Court, copied to all other parties to the arbitration; and it shall set out the specific grounds for exceptional urgency in the formation of the Arbitral Tribunal.

^{9.3}

The LCIA Court may, in its complete discretion, abridge or curtail any time-limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time-limit.” See http://www.lcia.org/ARB_folder/arb_english_main.htm#article9 (last visited April 15, 2007).

However, this tribunal has extra powers depending on the urgent nature of interim measure requests.⁸¹ In other words, the LCIA Rules do not include a separate set of emergency procedure; however, they provide the tribunal with the power to modify any time limits in the said Rules.⁸² The tribunal may curtail time limits for the response or any documents that are missing from the request.

The LCIA Rules empower the tribunal “to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration”. The tribunal may order any interim measures that are within the scope of its authority to issue a final award.⁸³ The expedited tribunal’s decisions will be treated as any other order or award of LCIA arbitral tribunal.⁸⁴ Some scholars have commented that the LCIA Rules do not seem to allow *ex parte* interim measures.

As regards the application to the courts for interim measures, The LCIA Rules allow the parties to apply to national courts prior to the formation of the tribunal; however, following the formation of the tribunal, the parties may only apply to the courts in “exceptional circumstances”.⁸⁵

The expedited formation formula has been criticized since it might cause delays especially when the parties agree on a three-member panel. This delay is due to the fact that LCIA is not authorized to override the right of the parties to nominate party-appointed arbitrators. On the other hand, it has been emphasized that the LCIA Rules do not set forth strict time limits for expedited formation. Rather, it is within the LCIA’s

⁸¹ See Kantor, *Alternatives*, 136-138.

⁸² Peter J.W. Sherwin and Douglas C. Rennie, “Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis”, *The American Review of International Arbitration*, Hans Smit and Juris Publishing Inc, New York, 2009, 347 (“Comparative Analysis”).

⁸³ *Id* at 346.

⁸⁴ See Kantor, *Alternatives*, 136-138. At this point, some scholars have claimed that since the LCIA Rules use the term “order”, the expedited tribunal may not issue “interim award” for interim relief. Sherwin and Rennie, *Comparative Analysis*, 347.

⁸⁵ Sherwin and Rennie, *Comparative Analysis*, 347.

discretion to create a schedule to form the tribunal.⁸⁶ In practice, The LCIA limits the time period in which the respondent must reply to the arbitration demand; however, it has been commented that this does not make a considerable change. It has been reported that the requests for expedited formation have reached to 20 by 2010.⁸⁷ As a result, we suggest that the LCIA should terminate its policy of expedited formation and offer a temporary authority as a response to parties' need for urgency in the pre-arbitral stage.

3. International Chamber of Commerce (ICC)

a) Brief Information on the Icc Arbitration Rules

The International Chamber of Commerce (hereinafter "the ICC"), founded in 1919, aims to promote international trade and investment, and the free flow of capital, goods and services.⁸⁸

The ICC arbitration is supervised by the ICC Court (hereinafter the "Court") and administered by the Court's Secretariat. The ICC Court was established in 1923. The Court does not intervene in the merits of the case. The arbitrators are independent in deciding the case. The function of the Court is to follow the progress of each case and review the awards in order to facilitate their enforcement in national courts.

Up to date, the ICC has been working through "National Committees" in many countries for assistance in appointing arbitrators.⁸⁹ How-

⁸⁶ Id at 346.

⁸⁷ See James Hosking, Erin Valentine, David M. Lindsey, "Emergency Measures of Protection : Creeping Consensus or a Passing Fancy?", 2011 Spring Meeting-ABA Section of International Law, "Changing the Rules", 6. Available at <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/EMERGENCY%20MEASURES%20OF%20PROTECTION.pdf> (last visited December 8, 2011). ("Emergency Measures")

⁸⁸ <http://www.iccwbo.org/id93/index.html> (last visited April 16, 2007).

⁸⁹ See <http://www.iccwbo.org/court/arbitration/id5256/index.html> (last visited April 16, 2007).

ever, this issue has triggered some problems. Therefore, the ICC Rules 2012 amend this principle. As per Article 13 of the ICC Rules 2012, the ICC may set a time limit for the national committees or it may by-pass the national committee system in some circumstances as well.⁹⁰

In the past, the ICC did not use to include within its Rules an option for the parties who do not prefer to recourse to courts to seek interim measures before the formation of the tribunal.⁹¹ For this reason, the ICC decided that it is necessary to publish the ICC Pre Arbitral Referee Procedure Rules in addition to its Rules. Subsequently, however, it has been observed that these rules were not used frequently and the new ICC Emergency Arbitrator Rules have been published.

⁹⁰ http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf (last visited December 14, 2011). See the comments on the new ICC Rules at http://www.whitecase.com/files/Publication/0dc491aa-bbc8-4def-a445-64d8ce833dbb/Presentation/PublicationAttachment/a271d26b-674e-4574-96c0-6998ea6324a4/Alert_%20New_ICC_Rules_Unveiled.pdf (last visited December 14, 2011).

⁹¹ In addition to the parties' option to apply to competent courts for the interim measures before the formation of the tribunal, Article 23 of the former ICC Rules on the "Conservatory and Interim Measures" allowed the parties to recourse to courts for interim measures "in appropriate circumstances" even after the formation of the tribunal. The following provisions have been reserved under Article 28 of the ICC Rules 2012 as well:

"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate."

However, the scholars have clarified that this provision did not intend to alter the presumption that once the arbitral tribunal is in possession of the file, requests for interim relief are normally to be addressed to it. Accordingly, the scholars have commented that the "appropriate circumstances", included in the wording of Article 23 of the Rules, occur when the tribunal does not have the authority to issue that measure. For instance, if the party seeks an attachment of the other party's bank account, it can apply to the court since the arbitrators do not have the authority to issue orders that affect the third parties who are not bound by the arbitration agreement. These comments remain to be valid as for the ICC Rules 2012. See, Yves Derain-Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law International, Second Edition, The Hague, 2005, 300 ("Guide to the ICC Rules"). Also see Schafer, Verbist, Imhoos, *ICC Arbitration*, 116-117.

b. Icc Pre-Arbitral Referee Procedure Rules (1990)

The ICC, in addition to its Rules, published a set of rules called the “Rules for a Pre-Arbitral Referee Procedure” (hereinafter “ICC PRR” or “PRR”) in 1990.⁹² These rules have pioneered the arbitration world by introducing an actor, namely, the “referee”. This decision-maker was vested with the authority to decide on the issue of interim measures.⁹³

PRR aimed to provide for the parties seeking interim measures prior to the formation of the tribunal an option other than traditionally-used national courts. In this context, some practitioners consider it as a “third way”, independent of court and arbitral tribunal⁹⁴, to enable the parties to apply for interim measures in case of urgency.⁹⁵ When compared to the courts, PRR envisaged some advantages regarding very short time limits set up in the Rules and the decisions rendered by a third private person with expertise under the supervision of the institution, the ICC.⁹⁶ However, despite the fact that the ICC published these rules twenty two years ago, this procedure has been applied very rarely⁹⁷. It has been reported that as of 2005, only five pre-arbitral referee procedures have been conducted so far.⁹⁸ Many practitioners are not still aware of /ignore

⁹² http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf (April 16, 2007).

⁹³ The ICC PRR were immediately after followed by AAA.

⁹⁴ Ian Meredith and Marcus Birch, “The ICC’s Pre-arbitral Referee Procedure How valuable is it?”, 4 PLC Cross-border Quarterly (Practical Law Company), January-March 2008, 50. Available at http://www.klgates.com/files/Publication/ab0be67f-01ef-4206-9c12-6e91f5b4837e/Presentation/PublicationAttachment/bae41c65-1f1b-43c3-b963-7de5c496b5bc/article_meredith_icc_0108.pdf (last visited December 20, 2011). (“How valuable is PRR”) However, see our further explanations below as regards the fact that based on party autonomy, the parties may agree that the referee shall subsequently serve as an arbitrator in relation to the same dispute.

⁹⁵ However, see our further explanations below as regards the fact that PRR could be used as adjudication process.

⁹⁶ See, Bernard Hanotiau, “The ICC Rules For A Pre-Arbitral Referee Procedure”, *International Arbitration Law Review*, 2003, 76 (“The ICC Rules”).

⁹⁷ See, Mark Kantor, “The ICC Pre-Arbitral Referee Procedure: Momentum For Expanded Use”, Volume 20, Issue 9 Mealey’s *International Arbitration Report* 17, September 2005, 17 (“The ICC Pre-Arbitral Referee”)

⁹⁸ See Hosking, Valentine, Lindsey, *Emergency Measures*, <http://www2.americanbar>.

these rules.⁹⁹ It was criticized that the ICC did not promote these Rules. Further, we believe that the opt-in system adopted for PRR avoided the frequent use of these rules. For these reasons, the ICC has recently regulated the “Emergency Arbitrator Rules” within Appendix V of the ICC Rules 2012 and introduced a new actor, namely, the “emergency arbitrator”. Thus, the PRR, which is explained below, will be replaced by the “Emergency Arbitrator Rules” as of 1 January 2012. The ICC regulated the pre-arbitral procedure more efficiently than the PRR.

In order to clarify the differences between the ICC PRR and the new “Emergency Arbitrator Rules”, the former system of the PRR will be addressed in this section.

The ICC brought an “optional” system, which required the parties to make specific reference to PRR in order to benefit from the system. The parties could either make a separate agreement for the application of PRR or they can make specific reference to the PRR within the wording of the arbitration clause.¹⁰⁰

The ICC recommended the parties to include the following model clause: *“Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.”*¹⁰¹

org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/EMERGENCY%20MEASURES%20OF%20PROTECTION.pdf (last visited December 8, 2011).

⁹⁹ Tercier states that the practitioners ignored the rules since these have not been much used or well-known. See the comments at Pierre Tercier, “Pre-Arbitral Referee Procedure: The ICC Reglement of 1990, application, problems, case law, developments” in *The Seminar on International Arbitration, ICC Turkey, April 6, 2004, Ankara*, 59. (“The ICC Reglement of 1990”).

¹⁰⁰ See Hanotiau, *The ICC Rules*, 75.

¹⁰¹ <http://www.iccwbo.org/court/arbitration/id5095/index.html> (last visited April 16, 2007).

aa. Appointment of the Referee

The PRR provided that the parties may select the referee. In the absence of the parties' agreement, the referee would be appointed by the Chairman of the International Court of Arbitration. The referee orders were "binding until decided otherwise by a court or arbitral tribunal."¹⁰²

As per PRR, the referee would act, in principle, for a short time, just until the constitution of the tribunal. However, since the PRR did not prohibit the referee to act as an arbitrator subsequently,¹⁰³ the parties, in fact, could agree to appoint the referee as a member of the tribunal. We should emphasize that under the PRR, the parties were not obliged to recourse to arbitration after the pre-arbitral referee procedure. The pre-arbitral referee was only created for the parties' need for a decision-maker to evaluate their interim measure requests in cases of exceptional urgency. Though these rules were called "pre-arbitral", after exercising this procedure, the parties could also recourse to courts for the merits of the case.¹⁰⁴

The referee was obliged to state reasons for its decision and issue its order within thirty days upon receipt of the file, unless extended by the Chairman of ICC Court.¹⁰⁵

¹⁰² <http://www.iccwbo.org/court/arbitration/id5002/index.html> (last visited April 16, 2007). Also see Kantor, *The ICC Pre-Arbitral Referee*, 17

¹⁰³ On the contrary, the ICC 2012 Rules Art 2(6) provide that the referee shall not act as an arbitrator subsequently in the arbitration relating to the same dispute. For detailed information, please refer to our explanations below concerning the ICC 2012 Rules.

¹⁰⁴ This could be inferred from the PRR Article 6.3, which stated that the referee's orders would remain in force until the competent authority dealt with the case. The provision used the terminology as "Competent Authority" (arbitral tribunal or national court), so it did not prevent the parties from applying to courts for the merits of the case later. See Kantor, *The ICC Pre-Arbitral Referee*, 17 ; Derain and Schwartz, *Guide to the ICC Rules*, 469.

¹⁰⁵ Kantor, *Alternatives*, 136-138

bb. Scope of the Referee's Powers

The powers of the referee were listed exclusively under four categories as per Art. 2.1 of the PRR. The article read as follows: *"The powers of the Referee are:*

(a) to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of the parties;

(b) to order a party to make to any other party or to another person any payment which ought to be made;

(c) to order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;

(d) to order any measures necessary to preserve or establish evidence."¹⁰⁶

However, scholars commented that these powers were very broad.¹⁰⁷ On the other hand, Article 2.2 provided that the parties could modify these powers by "express written agreement between the parties." So, the rules brought formal requirement for the modification of the referee's powers. The powers of the Referee could not be modified by conduct of the parties or by oral agreement.¹⁰⁸ The Rules provided that the referee had the power to rule on its jurisdiction..¹⁰⁹

cc. Characterization of the Referee's Decision

Pre-arbitral referee procedure has raised some controversial issues. The wording of Article 6.1 of the ICC PRR refer to referee's decision as

¹⁰⁶ <http://www.iccwbo.org/court/arbitration/id5002/index.html>

¹⁰⁷ Kantor, The ICC Pre-Arbitral Referee, 19.

¹⁰⁸ Kantor states that this formalistic requirement for modification is in contrast with the principle of CISG. See Kantor, The ICC Pre-Arbitral Referee, 19

¹⁰⁹ The referee was required to include the reasons that its decision was based on <http://www.iccwbo.org/court/arbitration/id5002/index.html>

“order”; however, this terminology is not of decisive importance. It is the “nature of the decision” which makes it an award or order.¹¹⁰

According to the scholars, the question of the legal nature of the referee’s order was left open in the PRR.¹¹¹ The only court which interpreted this issue is the Paris Court of Appeals (hereinafter, “the Paris Court”). The Paris Court rejected to review or annul the referee’s order due to the reasons that i) PRR did not characterize the proceedings as “arbitration” or the referee as an “arbitrator” ii) the order of the referee did not prejudice the merits of the case, so it was only a temporary decision ii) the order, despite the term used for it, had only the binding effect of a contract.¹¹² In light of such interpretation of the Paris Court, two views have been triggered on the impact of the referee’s decisions : the “contract view” and the “award view”. Each view has different consequences. We will analyze the reasons of these two views below.¹¹³

¹¹⁰ Emmanuel Gaillard, “First Court Decision on Pre-Arbitral Referee”, *International Arbitration Law*, 229 (107) *New York Law Journal*, June 5, 2003, available at http://www.shearman.com/files/Publication/90b0e0bc-adad-4100-b223-262fd3b9e183/Presentation/PublicationAttachment/13da2e1e-69cf-4f16-8938-000cace89e93/IA_060503.pdf (last visited March 18, 2007) (“First Court Decision on PRR”).

¹¹¹ Gaillard and Pinsolle, *First Practical Experiences*, 20.

¹¹² See Tercier, *The ICC Reglement of 1990*, 64 ; Meredith and Birch, *How valuable is PRR*, 52.

¹¹³ Enforcement is a significant problem for (emergency) arbitrator-ordered interim measures. Whether or not the New York Convention allows enforcement of the arbitrator’s interim measure orders is a controversial issue, since both the text and the preparatory materials are silent on the issue. See David Wagoner, “Interim Relief in International Arbitration: Enforcement is a Substantial Problem”, *51-Oct Dispute Resolution Journal*, 68 ; See Yeşilirmak, *Pervasive Problems*, 199.

Article III of the New York Convention only states the enforcement of “awards”. In this regard, some scholars have reported that the drafters of the New York Convention intended the Convention to apply to the final awards and not to decisions on interim measures designated as “interim awards.” See, Moses, *The Principles*, 182. The author states that the awards are classified as i) interim awards ii) partial and interim awards, iii) consent awards, and iv) default awards.

However, certain comments have been raised that such wording of the New York Convention brought some uncertainties as to whether the term “award” does not necessarily mean the “final award”. See Derain and Schwartz, *Guide to the ICC Rules*, 298.

Within this context, it is important to determine the characterization of the interim measure orders. Although the ICC PRR classify the decision as an “order”, the scholars

dd. Court Intervention to Pre-Arbitral Referee Procedure: the Contract View and the Award View

The contract view emerged from the Congo case. This was the first and only case in which a local court interpreted the PRR. In the Congo case, the Paris Court interpreted that the parties were making a contract by agreeing upon the Pre-Arbitral Referee Procedure. In other words, the referee's decision was not a judicial order since the ICC PRR were contractual in nature. Ideally, the parties were expected to comply with these decisions based on the *pacta sunt servanda* principle but what if they did not comply with, in other words, breached the contract?

In the Congo case, there was a sale of oil contract between the parties The Republic of Congo (hereinafter "Congo") and its national oil company (hereinafter "SNPC") and TEP Congo, concluded a contract in order to refinance Congo's debts. The parties had incorporated specifically the PRR, in addition to the ICC Arbitration Rules in their contract. When Congo and SPNC decided to terminate the contract, TEP Congo initiated the pre-arbitral referee proceedings.¹¹⁴ The measures ordered were the obligations for the respondent to continue the performance of the contract and prohibition of any modification by the respondent of a number of related contracts. The basis for granting the measure was:

have claimed that this terminology is not binding and two different views have been developed so far. The first view is that of the Paris Court of Appeals which accepts the interim measures granted by the referee as "contractual undertakings". The second view, in contrast, accepts the decisions for interim measures as "awards" for the enforcement purposes. Thus, following each of these views will have different consequences. In contract view, the courts will treat the non-compliance with the referee order claims as "breach of contract" claims. Thus, the tribunal, if it finds that there is a breach, it will order that the non-complying party should pay the costs and damages arising from non-compliance; as the case may be. On the other hand, under the award view, the referee orders should be treated as awards for the enforcement purposes and enforced easily thereof. This view arises from the broad interpretation of Article III of the New York Convention. As a result, however, they could also be subject to set aside by the courts at the seat of the arbitration. See Gaillard and Pinsolle, *First Practical Experiences*, 20.

¹¹⁴ See http://www.whitecase.com/files/Publication/03fd5329-ed02-45d9-a7ea-b06d9e1c4ece/Presentation/PublicationAttachment/3d58c947-2003-43d2-b0c4-b3c59f107393/dispute_resolution_sept_2003.pdf, (last visited December 19, 2011).

the preservation of the *status quo* and the duty of the parties not to aggravate the dispute.¹¹⁵ The PRR procedure worked so rapidly that the decision was granted only in 42 days.¹¹⁶ Subsequently, Congo challenged the referee's decision before the Paris Court claiming that the decision took the form of an award. However, the court denied Congo's claims by reasoning that the referee was not an arbitrator, and the referee's decision did not address the merits of the case. The court held that the referee's decision was based on the contractual agreement between the parties, so it had a contractual nature. Therefore, the court rejected Congo's challenge since it distinguished the referee's decision from an award.¹¹⁷

Based on the Paris Court's decision, the scholars commented that, as a consequence of the "contract view", the courts should treat non-compliance with the referee's order claims of the parties, just as "breach of contract" claims. Therefore, the competent authority should rule for the remedies as "damages resulting from the conduct of the non-complying party".¹¹⁸ However, in the light of this view, these decisions would not be easily enforced¹¹⁹ like the awards as provided in the New York Convention, which will be addressed in detail below.

¹¹⁵ See Gaillard and Pinsolle, *First Practical Experiences*, 17-18.

¹¹⁶ See Kantor, *the ICC Pre-Arbitral Referee*, 22.

¹¹⁷ The original decision is available at www.iaiparis.com (last visited April 18, 2007). For the comments about the decision see Kantor, *The ICC Pre-Arbitral Referee*, 22; Gaillard and Pinsolle, *First Practical Experiences*, 20.

¹¹⁸ See Gaillard and Pinsolle, *First Practical Experiences*, 20. It seems that this view originates from the interpretation of Article 6.8.1 of the PRR. As per the said article "*The competent authority may determine whether any party that refuses or fails to carry out an order of the referee is liable to any other party for loss or damage caused by such refusal or failure*". Kantor, *the ICC Pre-Arbitral Referee*, 20.

¹¹⁹ It should be emphasized, however, that some scholars interpreted that the characterization of the referee's order as a contract "rather than as a mere opinion or advice" had a positive aspect allowing the parties to apply to the courts to enforce the order directly. Therefore, they evaluated the ICC PRR as an effective protection system. See Jean-Paul Beraudo, "Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals: A Comparison with the Republic of Congo Pre-arbitral Referee Case", 22(3) *Journal of International Arbitration*, 2005, Kluwer Law International, 254.

We will explain here the reasons for the “award view” and the enforcement mechanism brought by the New York Convention for the arbitral awards.

There is no doubt as to whether the interim measure orders have different features than the awards. Awards are decisions resolving substantive rights of the parties. On the other hand, orders on interim measures are temporary decisions relating to the procedural issues that must be resolved to make progress on the arbitral proceedings and they are subject to review (modification, suspension or termination) by the tribunal.¹²⁰ However, pursuant to the “award view”, it could be suggested that terminology used as “order” for the referee’s decisions in PRR should not be regarded as decisive for the enforcement issue. Instead, considering the substance of the emergency arbitrator’s decisions, such decisions may be qualified as “awards” and they should be subject to the same treatment which apply to final awards under New York Convention. This view is contrary to the Paris Court’s decision which accepted the referee’s orders as “contractual undertakings”¹²¹ However, it must be evaluated that this decision was just the first and only court decision regarding the pre-arbitral procedure.

As mentioned above, this view has been justified by the enforcement mechanism provided for the awards under (Article III of the) New York Convention. The aim of the Convention is to provide easy enforcement of the awards by court assistance with the arbitral proceedings. According to this view, it can be inferred from the text of the Convention that the main purpose of the drafters is that courts should not prevent the

¹²⁰ For the explanations concerning the main differences between the orders and awards, see Moses, *The Principles*, 179-180. The author emphasizes that orders are not usually reviewable by a court prior to the rendering of the final award. However, orders that are considered sufficiently final to permit judicial review, can, in some circumstances be challenged at courts.

¹²¹ Tercier commented that the grounds accepted by the Paris Court in Congo case are not always convincing. The author further stated that though it seems doubtful that the interim measure order would fit the requirements of the New York Convention, there is no reason to dismiss right away the possibility of an execution of a writ in a case where the law or practice of the relevant state would allow such a procedure for interim measures. See Tercier, *The ICC Reglement of 1990*, 65.

efficiency of arbitration, so interim measures ordered by the emergency arbitrators should be subject to the same principles which apply to the enforcement of awards.¹²²

In our view, regardless of the above discussions on the nature of the referee's order, in principle, the courts should enforce the interim measure orders granted by the arbitrators (/emergency arbitrators) as per the UNCITRAL Model Law Article 17 (H). This interpretation would be in line with the tendency to minimize the court intervention in the arbitration world. In this regard, we believe that the same interpretation should be made for the decisions of the emergency arbitrator under the new Rules of the ICC, which we will address in detail below.

4. Icc Emergency Arbitrator Rules (2012)

The ICC Rules 2012 (hereinafter "the new ICC Rules"), effective as of 1 January 2012, have introduced us with the 'emergency arbitrator'. This new concept has been adopted as a result of debates as to whether the ICC has not promoted its Pre-Arbitral Referee Procedure Rules; as mentioned earlier in our study. The new "Emergency Arbitrator Rules" (hereinafter, "EAR") will be introduced in this section.

Article 29 of the new ICC Rules introduce a new actor to the arbitration world, namely, 'Emergency Arbitrator' while Appendix V to the Rules set forth the 'Emergency Arbitrator Rules' in detail. In our view, the ICC has accurately adopted the opt-out system (automatic application of the EAR when the parties agree to ICC arbitration) in order to provide the frequent use of the EAR.

The reasons why the ICC followed the policy of drafting the new EAR, instead of using the ICC PRR as an opt-out solution are demonstrated as i) Paris Court's contract view (the view that the ICC PRR were in contractual nature) and ii) The use of ICC PRR as adjudication-like process since urgency was not a mandatory requirement for the applica-

¹²² As basis for the comments see Kantor, *The ICC Pre-Arbitral Referee*, 17-24; Gaillard, *First Court Decision on PRR*,

tion of ICC PRR. The drafters of the new ICC Rules determined that adjudication should not be imposed on the parties. So, they wanted to draft the new EAR rules on opt-out basis.¹²³

As per Article 29(7) of the new Rules, notwithstanding the EAR, the parties may still apply to local courts for interim measures at any time prior to or “in appropriate circumstances”¹²⁴, even after making an application for emergency measures to the emergency arbitrator. Therefore, the option of emergency arbitration proceedings does not function as a waiver of judicial authority (competent court).

As for the scope of application of the new rules, Article 29 of the Rules sets forth the following three circumstances under which the EAR shall not apply:

i) if the arbitration agreement under the Rules was concluded before the date on which the Rules came into force

ii) if the parties have agreed to opt out of the Emergency Arbitrator Provisions or

iii) if the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

¹²³ See Nathalie Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, 29(4) *Association Suisse de l'Arbitrage (ASA) Bulletin*, December, 2011, 815. (“Revised ICC Rules”)

¹²⁴ The judicial authority to which the application is made will evaluate whether the circumstances are appropriate. See Voser, *id* at 814. Art. 29(7) of the ICC 2012 Rules seem to have been regulated in line with Article 28(2) of the new Rules (the former Article 23), where it is set forth that even after the transmission of the file to the tribunal, the parties may apply to courts in appropriate circumstances. By using the interpretations made for Art. 23(2) of the former ICC Rules, we conclude that the circumstances are appropriate to apply to the court where i) the request is made for an interim measure ii) there is urgency iii) the emergency arbitrator does not have the power to grant the measure requested (i.e. order for the attachment of the bank account of the other party) or the emergency arbitrator is paralyzed or is unable to operate (i.e. the emergency arbitrator has died) See, Ali Yesilirmak, “Interim and Conservatory Measures in ICC Arbitral Practice”, 11(1) *ICC International Court of Arbitration Bulletin*, Spring 2000, 35, especially the footnotes no 47-48.

The new ICC Rules exclude the application of the EAR for the arbitration agreements concluded before the new ICC Rules come into force on 1 January 2012. It should be emphasized here that the new ICC Rules will be applied to arbitrations commenced after 1 January 2012, while the EAR are only applicable to arbitration agreements which have been agreed upon after 1 January.¹²⁵

On the other hand, as for the arbitration agreements concluded as of 1 January 2012, in order to avoid the implementation of EAR, the parties must explicitly state in the arbitration agreement that the EAR shall not apply. The new ICC Rules provide for a standard arbitration clause to exclude the applicability of EAR.¹²⁶ We observe that this opt-out approach of the ICC is in line with those of the ICDR and The Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) Rules.¹²⁷

Furthermore, the EAR will not apply if the parties have agreed to another pre-arbitral procedure which provides for the granting of interim reliefs. The aim of this provision was to enable the use of pre-arbitral procedure provided in the agreements such as, the FIDIC contracts. It has been commented that this might cause difficulties in practice since the President of the Court will be required to evaluate the availability of pre-arbitral procedure for each specific contract.¹²⁸

It should be emphasized that EAR will be exclusively applied in the truly urgent situations. As per Art 6(2) of EAR, the emergency arbitrator shall determine in his order whether the urgency is present in the

¹²⁵ Voser, *id* at 813..

¹²⁶ See Standard and Suggested Clauses of the ICC http://www.iccwbo.org/uploaded-Files/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

¹²⁷ See the report at <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/EMERGENCY%20MEASURES%20OF%20PROTECTION.pdf> Also see <http://kluwarbitrationblog.com/blog/2009/06/22/emergency-arbitrator-the-proposed-new-procedure-of-the-scc-rules/> (last visited December 8, 2011)..

¹²⁸ Voser, Revised ICC Rules, 814.

given case.¹²⁹ On the contrary, the ICC PRR did not envisage urgency as mandatory requirement for the application of such rules.

As for the issue of whether the emergency arbitrator's decisions will cause effects on the third parties, Art 29(5) expressly states that EAR set forth in Appendix V shall apply only to parties that are signatories of the arbitration agreement or their successors. Therefore, there are limitations on the interim relief that the emergency arbitrators may grant.¹³⁰ This provision has been evaluated as a safeguard to protect any party from being drawn into emergency arbitrator proceedings without having agreed to arbitrate under the ICC Rules. Accordingly, three points have been emphasized in relation to the said provision: i) In order to rely on the "successor rule", unambiguous documentary evidence of a successor relationship to one of the signatory parties to the arbitration agreement is required. ii) EAR needed to ensure that a respondent to an application for emergency measures should be afforded at minimum the same protection as any other respondent in ICC arbitration iii) Finally, the EAR should not automatically apply to treaty-based investment arbitrations, since these are not based on a signed individual arbitration agreement.¹³¹

The impact of the emergency arbitrator proceedings on the court or arbitral proceedings is a major issue to be raised here. As mentioned earlier, the option of emergency arbitration proceedings does not function as a waiver of judicial authority. Therefore, the parties may always apply to competent courts for interim reliefs. In parallel to the UNCITRAL Model Law and Arbitration Rules, this is explicitly stated under the ICC 2012 Rules Article 29(7).¹³²

As regards the arbitral proceedings, pursuant to Article 1(6) of the Appendix V, unless the arbitrator determines a longer time, the applicant

¹²⁹ Voser, id at 815.

¹³⁰ <http://kluwerarbitrationblog.com/blog/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/> (last visited December 8, 2011).

¹³¹ Voser, Revised ICC Rules, 816-817.

¹³² http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

must submit a request of arbitration within 10 (ten) days following the Secretariat's receipt of the application for emergency measures. If the applicant fails to comply with such obligation, the President of the Court shall terminate the emergency arbitrator proceedings.

Pursuant to Article 29, paras.2-3 of the ICC Rules 2012, the emergency arbitrator's decision shall take the form of an "order" and the arbitral tribunal may modify, terminate or annul such an order.¹³³ It has been expressed that the drafters consciously chose the term as "order" rather than the "award" considering the fact that the orders might not be enforced.¹³⁴ This choice has the following results: the decisions of the emergency arbitrators will not be binding on the arbitral tribunal and the ICC Court will not scrutinize these orders prior to their delivery to the parties.¹³⁵ The enforcement of the emergency arbitrator's orders by the national courts still remains to be an issue to be resolved by the enforcing jurisdiction. However, it is expected that the jurisdictions which have adopted the UNCITRAL Model Law (including Article 17 (H) and 17 (I) may recognize and enforce such orders.¹³⁶

As for the enforcement of the emergency arbitrator's orders by the tribunal, Article 29(4) reads as follows, 'The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of in connection with the compliance or non-compliance with the order.'¹³⁷ Thus, if a party fails to comply with the order of the emergency arbitrator, then such party might incur costs. In this

¹³³ http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf. This is in line with Art 6.3 of the PRR which provided that the referee's order shall not bind any competent authority which may hear any question, issue or dispute in respect of the referee's order.

¹³⁴ Voser, Revised ICC Rules, 818.

¹³⁵ <http://www.cgsh.com/files/News/ae065b2b-52b7-4b20-a990-84b78dbdf9b9/Presentation/NewsAttachment/d651381a-f93b-44eb-8bbf-87e6723eb42a/ICC%20Unveils%20New%20Arbitration%20Rules.pdf> (last visited December 8, 2011).

¹³⁶ Voser, Revised ICC Rules, 818.-819.

¹³⁷ http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

regard, Article 29(2) emphasizes that the parties undertake to comply with any order made by the emergency arbitrator.

As per Article 2(6) of the Appendix V, the emergency arbitrator shall not act as an arbitrator subsequently in relation to the same dispute that gave rise to the application for the interim relief.

A question may be raised as who may serve as an emergency arbitrator? Article 2(1) of the Appendix V state that the president of the ICC Court shall appoint the emergency arbitrator. Prior to being appointed, the emergency arbitrator shall sign a statement of availability in addition to the statements of impartiality and independence as per Article 2(5) of the Appendix V. However, we believe that the above question remains unanswered.

Apart from the foregoing, we observe that, different from the PRR (Article 2), there is no provision in the ICC Rules 2012 as to the powers of the emergency arbitrator. We estimate that the drafters excluded this provision intentionally because even if the referee's powers were set forth in PRR, they were deemed very broad by the scholars and the modification of such powers by express written agreement between the parties was allowed by the PRR.

EAR seem to meet the requirements of parties to the international business transactions. The said rules are likely to provide efficiency, since they set forth time limits.¹³⁸

¹³⁸ Id. Some highlights are as follows: "the President of the Court shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application." (Art.2 (1) of the EAR) "Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator..." (Art. 2(3) of the EAR). "The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so." (Art. 6.4 of the EAR).

As for the interim measures granted after the formation of the tribunal, Article 28 of the ICC Rules 2012 regulates the issue on “Conservatory and Interim Measures” similar to Article 23 of the former Rules.¹³⁹

C. Evaluation and Comparison of the Institutional Rules

The institutions have followed different policies for the application of emergency relief procedures. As a historical review, we observe that the ICC PRR adopted the opt-in policy, while the ICDR and LCIA adopted the opt-out policy.¹⁴⁰ As of 1 January 2012, by entry into force of the ICC 2012 Rules (including its Appendix V), the ICC PRR are replaced by the EAR. As a different policy, the EAR adopt the “opt-out” policy, in contrast with the ICC PRR., with the goal of frequent use of the rules by the practitioners in the future. Pursuant to this policy, since the parties are deemed to adopt the EAR automatically when they adopt the ICC Rules, unless they opt out, we consider that the ICC is likely to accomplish its goal.

As a general principle under the institutional rules, the role of the temporary (emergency) decision maker is not to prejudge the merits of the case.¹⁴¹

¹³⁹ For more information, refer to our previous explanations on Article 23 of the former Rules.

¹⁴⁰ In other words, unlike the ICDR and LCIA, under the ICC PRR, emergency relief procedures would not apply automatically; it would be the choice of the parties to expressly adopt these rules if they wanted to benefit from such procedures. See Sheppard and Townsend, ICDR International Emergency Rule, 78. For the comparison of the institutional rules, refer to the chart at Kantor, Alternatives, 136.

¹⁴¹ See Sheppard and Townsend, ICDR International Emergency Rule, 81. Whether the emergency arbitrator may later be appointed as an arbitrator by the parties for the same dispute, based on the principle of party autonomy, is an issue to be addressed here. The ICC Rules 2012 Appendix V, Art.2(6) states that an emergency arbitrator shall not act subsequently as an arbitrator in any arbitration relating to the same dispute. The PRR was silent on the issue. It should be discussed whether the party autonomy shall prevail or if this rule overrides the party autonomy. In this regard, it could be argued that, there might be some reasons why the parties might prefer to continue the arbitration proceedings with the same decision-maker, i.e., they may be convinced with the emergency

Different from the ICC and ICDR, LCIA does not offer a special decision-maker created solely to issue interim measures prior to the formation of the tribunal. Considering there is much criticism regarding the delays caused by the failure of expedited formation of the tribunal, we recommend that the LCIA should amend its rules regarding the expedited formation of the tribunal for the interim reliefs. The question that arises here is, if the LCIA was to amend its rules, should it follow the opt-out policy (include the emergency procedure within its rules as ICDR and ICC Rules 2012) or the opt-in policy (make use of the emergency procedure optional as the former ICC PRR)?

We will evaluate here these two policies separately. The advantage of opt-out policy, accurately adopted by the ICC Rules 2012 recently, is that even if the parties were not aware of making special reference to pre-arbitral rules during the negotiation of the contract, such procedure would initiate at the request of any party.

On the contrary, if adopting the rules was optional to the parties and they failed to consider the specific reference, they would fail to benefit from the pre-arbitral procedure and it would not be easy to convince the other party to make such an agreement after the dispute arises. This may be justified by the fact that ICC PRR have not been exercised widely¹⁴² and the ICC has replaced them. Therefore, we have observed that the ICC, instead of promoting its PRR, followed the opt-out policy and preferred to include this procedure within its Rules.

Based on the foregoing, we recommend that LCIA should follow the other institutions in creating a new decision-maker for the pre-arbitral proceedings. In our view, LCIA can follow the policy of ICDR and ICC 2012 Rules and include this special procedure within its Rules.

With regard to the form of the emergency arbitrator's decisions, the institutions have made different choices. As there is no emergency arbitrator under the LCIA rules, the rules solely govern that the expedited tribunal's decisions will be treated as any other order or award of LCIA

arbitrator's special knowledge about the case and have confidence on him.

¹⁴² See Kantor, *The ICC Pre-Arbitral Referee*, 3

arbitral tribunal. The ICDR, in line with the Art. 17(2) of the UNCITRAL Model Law, has adopted that the decisions for interim measures may be either “orders” or “interim awards”, while the ICC (PRR and 2012 Rules) has adopted that such decisions may be “orders”. As a result of the successful policy and assistance of the US courts, the ICDR seems to have resolved the enforcement issue. The decisions of ICDR emergency arbitrators have been immediately enforced by the US Courts.¹⁴³

Different from the ICDR, The ICC EAR consciously stipulated that the decisions of emergency arbitrators shall be in the form of “orders”. The reason why the ICC preferred this choice is that the awards under the ICC Rules must be scrutinized by the Court, so, the ICC evaluated that this would not be compatible with the urgency inherent in the EAR. As a result, since the enforcement of emergency arbitrators’ orders is an issue to be determined by the law at the place of enforcement, this issue still remains to be at the national courts’ discretion. However, the courts of the states adopting the UNCITRAL Model Law are expected to enforce the emergency arbitrator’s orders in accordance with Article 17 (H) of the Model Law.

On the other hand, the new ICC Rules seem to highlight another aspect of the enforcement issue: the enforcement by the arbitral tribunal. Article 29(4) provides reallocation of costs by the arbitral tribunal upon request as sanction for the non-compliance with the emergency arbitrator’s decisions. Based on our earlier explanations, the party may claim damages, if any, resulting from such non-compliance.

V. The Approach of the New Provisions of the Turkish Civil Procedure Law

This study does not aim to explore the interim measures under national laws. However, since the enforcement of interim measures by

¹⁴³ Lemenez, and Quigley, ICDR Emergency Arbitrator, 70. Also see Hosking, Valentine, Lindsey, Emergency Measures, <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/EMERGENCY%20MEASURES%20OF%20PROTECTION.pdf>

the courts is an issue to be determined by national laws, we would like to slightly mention the new provisions of Turkish Civil Procedure Law (hereinafter “CPL”) on the issue. Although there seem to be no specific provisions addressing the enforcement of the orders of temporary authorities (i.e. emergency arbitrator), we consider that the approach of the CPL should be dealt with. The CPL has brought an improved system on the enforcement issue with the approach of “court’s assistance in arbitration”, in accordance with the international regulations.

The highlights of this system are as follows:

First of all, as per Art. 410 of the CPL, the “district courts” shall be competent for the issues related to the arbitration proceedings.¹⁴⁴ It is aimed that the members of such courts should be specialized in the issues related to the arbitration.

As regards the enforcement of tribunal-ordered interim measures, Article 414(2) of the CPL explicitly states that “*at the request of a party, the court shall rule that a decision for interim measure granted by an arbitrator or arbitral tribunal be enforced with the condition that there is a valid arbitration agreement.*”¹⁴⁵ It can be inferred that the drafters reflected the UNCITRAL approach for facilitating the enforcement of arbitrator/

¹⁴⁴ It should be noted here that even though the Law Numbered 5235, published in the Official Gazette dated October 7, 2004, No 25606 envisages the establishment of the district courts, the operation of the district courts has been delayed. The Law No 5235, published in the Official Gazette numbered 25606 is available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2004/10/20041007.htm&main=http://www.resmigazete.gov.tr/eskiler/2004/10/20041007.htm> (last visited 22 December 2011).

¹⁴⁵ The Law No 6100, published in the Official Gazette dated February 4, 2011, No 27836 is available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2011/02/20110204.htm&main=http://www.resmigazete.gov.tr/eskiler/2011/02/20110204.htm> (last visited 22 December 2011).

Accordingly, we also observe that the provisions encourage the parties of arbitration agreement to apply primarily to the arbitrators for interim measures. Art 414(3) states that the parties may only apply to court if the arbitrators will fail to act efficiently or in due time. Otherwise, the application to the court for interim measures may be only served upon the permission to be granted by the arbitrators or the written agreement between the parties for such application.

tribunal-ordered interim measures. Turkish International Arbitration Law (hereinafter “IAL”) however, does not include such a provision.¹⁴⁶ We recommend that either such a provision should also be included in the IAL or generally, the provisions of CPL and IAL should be uniform under a single regulation. The latter seems to be more practical. In any event, by analogy, the same approach for facilitating the enforcement of arbitrator/tribunal-ordered interim measures should be also adopted for the disputes having foreign elements. In this regard, it is worthy to note that some scholars have emphasized the importance of creating an “arbitration culture.”¹⁴⁷ We expect that upon the creation of arbitration culture, Turkish courts may tend to enforce the interim measure orders granted both by the ICC emergency arbitrator and the arbitral tribunal without the need to establish satisfaction of the conditions of issuance of an interim order under Turkish Law.

Another issue of interest is whether the arbitrators may terminate the interim measures granted by the courts. As per Art. 414(5) of the CPL, the interim measures granted by the courts while the arbitration is pending may be modified or terminated by the order of the tribunal.¹⁴⁸

¹⁴⁶ Article 6 of IAL only provides the general rule that the arbitrators may issue interim measures and attachment orders except for those binding on third parties or require to be implemented by execution authorities or such other official authorities. The tribunal may require provision of appropriate security. The said Article further provides that if a party fails to comply with interim measures or attachment orders granted by the arbitrators, the other party may request the assistance of the court for such measures or orders. The Law No 4686, Published in the Official Gazette dated July 5, 2001, No 24453 is available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2001/07/20010705.htm&main=http://www.resmigazete.gov.tr/eskiler/2001/07/20010705.htm> (last visited 22 December 2011).

¹⁴⁷ See e.g., Yeşilirmak, *Arbitration*, 185-191; Tom Ginsburg, “The Culture of Arbitration”, 36 *Vanderbilt Journal of Transnational Law*, 2003, 1335-1345. The author describes the arbitration culture as a network. The rapid spread of arbitration makes it more likely that parties will be familiar with it as a dispute resolution option. As a result, it also creates demand for new rules and intense competition to define the network. *Id.*, at 1342.

¹⁴⁸ IAL, however, is silent on this issue. Akıncı has commented that since the arbitrators have limited powers and in case the parties fail to comply with tribunal-ordered interim measures, the only way for enforcement is through a court decision, it should be concluded that the arbitrators do not have such powers. See the comments at Ziya Akıncı, “Devlet Yargısı ile Kıyaslandırığında ICC Tahkimi Uygulaması” [“ICC Arbitration Prac-

VI. Enforcement of Interim Measures in the Pre-Arbitral Proceedings Under New York Convention

The New York Convention (hereinafter “the Convention”) was adopted by the United Nations on 10 June 1958. Promotion of the Convention is among the UNCITRAL’s major functions.¹⁴⁹ The Convention is known as the fundamental treaty of international arbitration.¹⁵⁰ The Convention regulates the recognition and enforcement of the arbitral awards by the contracting states’ courts. The Convention shall apply to awards not considered as domestic.¹⁵¹ Article III of the New York Convention provides that “*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles...*”¹⁵²

... Compared to the State Judiciary”] in The Seminar on International Arbitration, ICC Turkey, Ankara, November 3, 2006, 116-117. In light of these explanations, since the arbitrators decisions’ are not binding for the courts, Art. 414(5) of the CPL should be interpreted as follows: There may be a scenario where a party may apply to the court and obtain an interim measure order though the tribunal does not deem it necessary. Then, since the tribunal’s power extends, in principle, only to the parties, it may order that the conditions for interim measure sought have not been met and such party should refrain from applying to the court. Upon presentation of such an order by the party to the court, it should abide by the tribunal’s order.

¹⁴⁹ The Convention entered into force on 7 June 1959.

See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

¹⁵⁰ See <http://www.iccwbo.org/court/arbitration/id4113/index.html> (last visited April 20, 2007).

¹⁵¹ See William W. Park, “The International Currency of Arbitral Awards” in 1 International Arbitration 2007, Chair John Fellas, Practising Law Institute, 2007, 318-319 (“The International Currency of Awards”).

¹⁵² Article III of the Convention further provides that “... *There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards...*” The text of the New York Convention is available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited April 20, 2007).

However, Article V of the Convention sets out the grounds for the refusal of the enforcement by the contracting states' courts.¹⁵³ Accordingly, there are two types of grounds for such refusal. First type of the grounds in Art V are those which will be considered *ex officio* by the court, even if the parties do not invoke such grounds. These grounds are non-arbitrability of subject matter and violation of public policy.

The second type of grounds of refusal in Article V are those which may be invoked by the parties. Such grounds may be listed as follows: i) incapacity under the law applicable to the parties, ii) invalidity of the arbitration agreement under the law to which parties have subjected

¹⁵³ **Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country." http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

it or if the parties did not agree, then the law of the country where the award was made, iii) lack of due process, iv) excess of authority by the arbitrator, v) infringement of the composition of the arbitral tribunal or the arbitration proceedings under the law chosen by the parties or in the absence thereof, the law of the country where the arbitration took place, vi) the reason that the award has not yet become binding or has been set aside or suspended.¹⁵⁴

We should emphasize that although the intervention of the national courts in arbitration proceedings has been limited; it has not been prevented completely. The Convention allows the member states to refuse the enforcement of awards that were set aside (annulled/vacated) by the court at the seat of the arbitration/the court of the country under the law of which the award was made.¹⁵⁵ Accordingly, the rulings on setting aside (annulment/vacation) of the arbitral awards constitute a way of intervention of the courts in arbitration.¹⁵⁶ However, it has been reported that there have been certain cases where the annulled arbitral award was enforced in a country other than the seat of arbitration.¹⁵⁷

The Convention is silent on the enforcement of interim measures ordered by the tribunal. The question arises here as to whether or not the decisions on interim measures will be subject to the same enforcement mechanism which apply to awards under New York Convention. The scholars generally emphasize that the Convention sets forth the principles for the enforcement of the awards but not the orders, so such principles will not apply to orders.¹⁵⁸

¹⁵⁴ See Park, "The International Currency of Awards", 332-333.

¹⁵⁵ See Albert Jan van den Berg, "Why Are Some Awards Not Enforceable?" in *New Horizons in International Commercial Arbitration and Beyond*, Ed. Albert Jan van den Berg, International Council for Commercial Arbitration Congress ("ICCA") Series No 12, Kluwer Law International, The Hague, 2005, 306. ("Why Are Some Awards Not Enforceable?").

¹⁵⁶ See Nuray Ekşi, "İptal Edilmiş Hakem Kararlarının New York Konvansiyonu'na Göre Tenfizi" ["Enforcement of the Annulled Arbitral Awards Under the New York Convention"], in *Seminar on International Arbitration*, ICC Turkey, April 3, 2009, Ankara, 45.

¹⁵⁷ See Albert Jan van den Berg, *Why Are Some Awards Not Enforceable?*, 307.

¹⁵⁸ See Moses, *The Principles*, 182.

VII. Conclusion

The institutions have noticed that the parties may need the issuance of interim measures so urgently that sometimes it may be too late to await the formation of the tribunal. Thus, various institutions have amended their rules in order to include the temporary authorities acting in emergency proceedings. They have followed different policies for the emergency procedure. Some embedded this procedure in their rules while others made the application of this procedure “optional”, based on the parties’ choice.

As regards the success of the policies, the ICDR’s emergency arbitrator mechanism has been exercised efficiently. The ICC seems to have followed similar policy¹⁵⁹ by regulating its new Emergency Arbitrator Rules. The LCIA’s expedited formation of tribunal policy, however, has been criticized. In this regard, we have suggested that the LCIA, should be inspired by the new ICC Rules and amend its rules by including a temporary authority and specific emergency procedure thereto.

The aim of the emergency relief procedures offered under the institutional rules is to provide the efficiency of arbitration by avoiding two separate procedures as litigation in court and arbitration. Most of the institutions have brought special procedures for interim reliefs in pre-arbitral proceedings in order to meet the requirement of the parties for an alternative to courts. The parties may prefer rapid resolutions held by expert decision makers under due process. They may also require confidentiality. These are the main reasons why this alternative to courts might be appealing for the parties in pre-arbitral proceedings. However, these institutions cannot satisfy the parties when the required interim measure will cause effects on the third parties. Moreover, in the event that any party challenges the decisions granted by such institutions before the national courts, the approach of the courts play vital role.

¹⁵⁹ When the two institutions under the ICC and ICDR Rules are compared, the difference seems that the ICC emergency arbitrator’s decisions may take the form of orders; while the ICDR emergency arbitrator’s decisions may take the form of orders or awards.

Two questions seem to arise regarding the ICC Rules 2012 as “who will be the emergency arbitrator?” and “how will the emergency arbitrator’s decisions be enforced?”

The ICC Rules 2012 set forth the appointment of the emergency arbitrator by the ICC Court. However, we observe that the Rules do not mention who will serve as an emergency arbitrator; except for the provisions set forth regarding the obligations of emergency arbitrators to fill out the statements of acceptance, availability, impartiality and independence. We presume that the ICC will keep a list of emergency arbitrators.

The ICC Rules 2012 (and Appendix V of the Rules) are silent on the question of enforcement of the emergency arbitrator’s order by the national courts. Given the fact that the ICC 2012 Rules do not prevent access to competent courts for interim reliefs, it is a major issue that the courts should be in assistance with the emergency arbitrator proceedings. The Rules also emphasize the limited power of the emergency arbitrators as for the implication of the emergency arbitrator proceedings to the signatories of the arbitration agreement and their successors only. Therefore, the parties may only recourse to national courts, but not to the emergency arbitrators, for the interim measures which cause effects on third parties. In any event, the decisions on interim measures will ultimately be enforced by the courts.

The drafters of the ICC Rules and many practitioners emphasize that emergency arbitrators’ orders may not be enforceable under New York Convention and they will be subject to the discretion of the national courts. It is further emphasized that under EAR, in any event, as soon as the arbitral tribunal is constituted, it may modify, terminate or annul such an order.¹⁶⁰ Although the drafters comment that the “term” order rather than the “award” was consciously used for the emergency arbitrators’ decisions to indicate that such decisions might not be enforced by the national courts, certain practitioners claim that considering the

¹⁶⁰ <http://www.cgsh.com/files/News/ae065b2b-52b7-4b20-a990-84b78dbdf9b9/Presentation/NewsAttachment/d651381a>

(last visited December 8, 2011).

substance of the decisions, the issue as to whether or not the emergency arbitrator's orders may qualify as awards and be enforceable under the New York Convention still remains questionable.¹⁶¹

In our view, following the approach of the UNCITRAL Model Law (Articles 17H) providing for the recognition and enforcement of interim measures granted by arbitral tribunal, similarly, the ICC emergency arbitrator's orders are likely to be enforced by the national courts. In general, it can be interpreted that by making an arbitration agreement, the parties' intent is to be bound by any decisions rendered during the whole arbitral proceedings, which date back to those granted at the pre-arbitral stage. However, in some circumstances, the national courts' discretion may play a vital role to provide equity.

Apart from enforcement by the national courts, ICC Rules 2012 also address the enforcement of the interim measure orders by the arbitral tribunal. As per the said Rules, the decisions of the emergency arbitrator have been expressly accepted as orders and if any party fails to comply with the orders of emergency arbitrators, such party may subsequently incur the related costs. However, in our opinion, even if this regulation is useful, it will not be a pragmatic solution unless the national courts obey the decisions of the emergency arbitrators. Otherwise, there is a risk that a party might bear costs and obtain a decision from a competent court ceasing the effect of the interim relief granted previously by the emergency arbitrator.

In conclusion, in this study, we have tried to clarify the emergency relief mechanisms offered by the three arbitral institutions. As for the efficiency of the emergency reliefs, we have suggested that, in parallel to the recent attempt of the ICC, the LCIA should harmonize its rules so as to include a temporary authority in order to meet the requirements of the parties to the arbitration agreement. As for the enforcement is-

¹⁶¹ For such comments of practitioners, see e.g. <http://blogs.law.nyu.edu/transnational/2011/09/the-new-icc-emergency-arbitrator-rules/>; <http://www.cgsh.com/files/News/ae065b2b-52b7-4b20-a990-84b78dbdf9b9/Presentation/NewsAttachment/d651381a>

(last visited December 8, 2011).

sue, we have indicated that even though, it is the national courts who will have the final word about enforceability of the interim measures, those mechanisms are necessary as the parties of the arbitration agreement require rapid, confidential and efficient ways to resolve their dispute. Accordingly, there is a commonly accepted approach that the courts should assist in arbitration proceedings. We have indicated that, as a reflection of such approach to national laws, in light of the new provisions of Turkish Civil Procedure Law, Turkish courts may be expected to assist enforcement of the arbitrators-ordered interim measures upon request of any party. We have recommended that such provisions should also be included in Turkish International Arbitration Law or these provisions should be integrated under a single regulation in order to encourage the courts' obedience to the arbitrator/emergency arbitrator-ordered interim measures. However, in light of the scholars' criticism, it seems more important to create the arbitration culture in order to ensure enforcement by the courts.

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