



NEM ENERGY SHORT BRIEFS ON INTERNATIONAL ARBITRATION

INTERIM MEASURES IN INTERNATIONAL ARBITRATION: THE POWERS OF ARBITRATORS & THEIR LIMITATIONS

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1. CAN ARBITRATORS ORDER INTERIM MEASURES UNDER THE UNCITRAL MODEL LAW?

Yes, arbitrators can order interim measures of protection.¹ This is well stipulated in Article 26 (1) of the UNCITRAL Arbitration Rules and Article 17 B of the UNCITRAL Model Law. Both provisions are to the effect that, the arbitral tribunal may, at the request of a party, grant interim measures.

An interim measure is defined under Article 26 (2) of the UNCITRAL Arbitration Rules, as:

“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, 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, (i) current or imminent harm or (ii) 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.”

Although the powers to grant interim measures were historically reserved for the national courts, the arbitrators in recent years have also been granted these powers. The basis for interim measures of protection is to ensure that the party's rights can be protected pending the outcome of a dispute. Requests for interim measures are usually made at the first procedural hearing attended by all the parties. Fairness should be the basis for granting interim measures and as such, each party should be given a fair opportunity to present its case before any final decision on the application is made. This requirement is stipulated in Article 17C (2) of the UNCITRAL Model Law, which requires the arbitral tribunal to give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

¹ In this short brief, the focus will be on the provisions of the UNCITRAL Arbitration Rules and the UNCITRAL Model Law

Whereas most interim measure applications are inter parte, there are instances where the application can also be made ex parte depending on the nature of the relief sought. In all circumstances, the granting of an interim measure should be followed by submissions so that the parties have a fair and equal opportunity to present their case.² Article 17 D of the UNCITRAL Model Law gives the Arbitral Tribunal powers to modify, suspend or even terminate the interim measures. Additionally, Article 17E of the UNCITRAL Model Law gives the arbitral tribunal powers to request the party who has applied for an interim measure to provide appropriate security in connection with the measure.³

1.1. POWERS OF THE ARBITRATOR TO GRANT INTERIM MEASURES.

Before the arbitrator grants the interim measures, it is imperative to first determine their powers in this respect. These powers can be granted expressly in an arbitration agreement-although this is rare. However, often the national laws and arbitration rules do expressly grant the powers to the arbitrator to grant interim measures.

In circumstances where there are no express powers to grant interim measures, and if it's established that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the lex arbitri, arbitrators may conclude that they have an implied power to offer interim measures. Besides the granting of interim measures, the tribunals also have the power to issue partial awards (authorised by the courts) that are binding until a final resolution is reached. Nevertheless, as stipulated in **Article 26 (3) as the UNCITRAL Arbitration Rules** before granting the interim measures, the arbitral tribunal should be satisfied that:

“(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 a reasonable possibility that the requesting party will

² Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures.

³ Article 17 E of the UNCITRAL Arbitration Rules

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.”⁴

In addition to the requirements and powers discussed above, under Article 17G of the UNCITRAL Model Law, the arbitral tribunal has powers to award costs and damages concerning interim measures. The Article states that,

“The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.”

1.2. CONSIDERATIONS BEFORE GRANTING THE INTERIM MEASURES.

The main considerations are discussed above as reflected in **Article 26 (3) of the UNCITRAL Arbitration Rules**. In addition to the discussion above, before granting the interim measures, the arbitrator should establish if they have prima facie jurisdiction over the dispute. Additionally, they should establish if the applicant has a reasonably arguable case and that the case has a probability of succeeding on the merits of its claim; however, arbitrators should not prejudge the merits of the case.⁵

1.3. TYPES OF INTERIM MEASURES AND THEIR IMPORTANCE

The main types are spotlighted in Article 26 (2) as the UNCITRAL Arbitration Rules. A party may request interim measures to not only protect their rights but also protect their property, especially if these rights are likely to adequately impact the outcome of the arbitration. These interim measures include among others those that preserve the status quo, those that facilitate the production of evidence, measures that facilitate the enforcement of an award, and injunctions.

⁴ Article 26 (3) as the UNCITRAL Arbitration Rules

⁵ Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures.

- **The arbitrator can order these interim measures of protection:**
- Security for costs especially if the respondent has reasons to believe that the claimant is insolvent or not capable of paying arbitration costs in case he/she loses.
- Injunctions are court orders that may prevent a party from doing something.
- Preserving the status quo requires a party to take, or refrain from taking, specified actions.
- Applications for the preservation or detention of property
- Active interim measures requiring a party to continue the performance of contractual obligations.⁶

2. WHAT ARE THE LIMITS OF THE ARBITRATOR'S POWERS?

The limitations of the arbitrator's powers to grant interim measures are stipulated in Article 3 of the Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures and these are outlined below:⁷

- Third parties

Arbitrators cannot grant interim measures requiring actions by third parties. This is because their powers are established by the arbitration agreement which basically applies to only the parties to the contract and not third parties. In essence, the arbitrator's powers to grant interim measures are limited to parties to the arbitration agreement and not third parties. However, arbitrators can require a party to the arbitration to take steps in relation to a third party.⁸

- Enforcement of interim measures

As highlighted in Article 17H of the UNCITRAL Model Law:

"An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to

⁶ Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures.

⁷ Ibid

⁸ ibid

the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I”.

From the above provision, it is clear that arbitrators do not have the power to directly enforce interim measures they may grant. This is a power reserved for the national courts. Consequently, national courts play a crucial role in the enforcement of interim measures granted by the arbitrators, especially in States which have adopted Articles 17H and 17I of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)- which enables the government to recognise and enforce interim measures issued in the form of an interim award.⁹

- Penalties

Arbitrators cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*. However, depending on the type of measure, arbitrators may impose different sanctions to promote compliance.¹⁰

⁹ Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures

¹⁰ Chartered Institute of Arbitrators: Guidelines for Application of Interim Measures

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Victoria is a lawyer and an Energy and Mining expert, with extensive experience working on various projects in the different parts of the Globe. She is a holder of a PhD in International Energy Law and Policy (Dundee). Victoria is the Founder and Executive Director of the African Energy and Minerals Management Initiative. She is the CEO and lead consultant at Nalule Energy & Minerals Consultants (NEM-www.nemenergyco.com).

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