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Issues for Enforcement of Decisions of the International Investment Arbitration on Temporary Protection Measures

Dilboboyev Nozimbek Shavkat ugli
Department of International Private Law, Tashkent State University of Law
LLM70420102: International Arbitration and Dispute Resolution
E-mail:dilboboyevnozimbek@gmail.com

Abstract. In recent years, many of the leading arbitral institutions have amended their rules in order to make arbitration more responsive to users' needs. A key development has been the introduction of emergency arbitrator procedures, which enable parties to obtain urgent relief before the substantive tribunal is formed. For good reason, these new mechanisms are receiving significant attention from parties and arbitrators. However, have enforcement mechanisms kept pace with these developments? Therefore, this article addresses the implementation of interim measures of relief issued by international arbitral tribunals through exploring current legal frameworks for such enforcement, foreign case law practices, examples of such measures that have been enforced and suggestions for drafting interim measures as well as alternatives for harmonizing into international framework to maximize their potential enforceability.

Keywords: interim measures, provisional measures, arbitral order, arbitral award, binding award, prima facie jurisdiction, status quo

Introduction.

Enforcement of arbitration awards is the most important issue in resolving international investment disputes. Otherwise, the efforts and costs incurred in the dispute resolution process will have no effect. However, arbitral awards are not limited to arbitral awards.

In particular, among arbitral awards, decisions on temporary safeguards are of particular importance. Temporary protection measures are temporary protection means provided in special cases. The purpose of the interim protection measures is to protect the material and procedural rights of the parties until the case is considered on its merits.

The party requesting the interim measures must demonstrate the rights to be protected by the interim measures in dispute. Such rights must be related to a particular dispute in arbitration, be available at the time the request is made, and not be speculative. Interim measures may be granted at the request of the parties or on the arbitrator's own initiative. Interim measures may be granted at the request of the parties or on the arbitrator's own initiative.

Methodology.

The research methodology is based on both the general scientific methodology of cognition of reality and private-scientific methods: historical, system-structural analysis, comparative legal analysis, analysis of judicial practice data. The study of international and foreign legislation on the recognition and enforcement of interim measures as well as several case law practices was carried out using the methods of specific research, logical and statistical analysis. In work, the author relied on the results of research by European and American legal theorists in the considered and related fields of knowledge, and international frameworks as well as the foreign legislations and practices of European, North American, Latin American, African countries and Australia as well.

Results and Discussion.

Of particular importance here is the timing, conditions and types of temporary safeguards, as well as the powers of arbitration tribunals. This is because these issues are features that are particularly valued in the enforcement of the arbitral tribunal's interim protection measures.

So what is the deadline for taking temporary safeguards?

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Temporary safeguards may be granted at any time before the final decision of the arbitral tribunal. The legal basis for this is stated in Article 39 of the ICSID Arbitration Rules: "At any time during the proceedings, a party may request interim measures recommended by the court to preserve their rights."[1].

International tribunals typically have a clear mandate to take interim measures, as contained in the UNCITRAL Model Law and their constituent instruments:

- ❖ UNCITRAL Model Law (Article 17);
- ❖ ICSID Convention 1965 (Article 47);
- ❖ ICSID Arbitration Rules 2006 (Article 39);
- ❖ ICSID Additional Facility Rules 2006 (Article 46);
- ❖ ICC Arbitration Rules 2021 (Article 28);
- ❖ SCC Arbitration Rules 2017 (Article 37).

In addition, the power of tribunals to grant such interim measures may be enshrined in international investment agreements. The following bilateral investment agreements are examples of this:

- ✓ Guatemala - Trinidad and Tobago BIT (2013);
- ✓ Canada - Romania BIT (2009);
- ✓ Mexico - United Kingdom BIT (2006);
- ✓ Canada - EU CETA (2016).

Unlike UNCITRAL and other arbitration rules, the ICSID Arbitration Rules do not set specific requirements for taking temporary measures. However, these requirements are formulated by the tribunals as follows:

1) prima facie jurisdiction of the tribunal;
2) prima facie existence of a right susceptible of protection (establishment of the case);
3) necessity of the measure requested;
4) urgency of the measure requested; and
5) proportionality of the measure requested[2].

Prima facie jurisdiction of the tribunal

To establish prima facie jurisdiction, many international tribunals consider whether the legal claims brought before them are “capable of falling within” the legal instrument and applicable rules in question. Tribunals further tend to assess whether the claims fall prima facie within the consent of the parties (Talinn v. Estonia Decision on Respondent's Application for Provisional Measures).

Where arbitral tribunals have had to assess their prima facie jurisdiction, they have often reached decisions to:

a) decline prima facie jurisdiction and thus interim relief
b) confirm prima facie jurisdiction without granting provisional measures (where one or more of the other requirements have not been met)
c) find the test satisfied and order provisional measures in full or in part (where the other requirements have been met).

Prima facie existence of a right susceptible of protection

In making this prima facie determination, the tribunal must first assume and accept the facts as alleged by the requesting party pro tempore, that is for the time being. Then, the tribunal must consider whether the facts alleged are susceptible of constituting breaches of the applicable treaty. In order to perform such task, the tribunal must apply a prima facie standard of review, both in respect of the capacity of the facts to fall within the ambit of the treaty protections and of the understanding of these protections.

Necessity of the measure requested

The criterion of necessity “implies an assessment of the risk of damage” which interim measures are intended to prevent. The standard of significant and substantial harm - if a party would suffer substantial prejudice absent interim measures, then the interim measures are “necessary” and the substantial harm requirement is satisfied (Gabrial Resources v. Romania Decision on Claimant's Second Request for Provisional Measures; Talinn v. Estonia Decision on Respondent's Application for Provisional Measures).

Urgency of the measure requested

Most investment tribunals consider the urgency of a vital criterion for granting provisional measures in investment disputes. Some tribunals consider a provisional measure to be urgent where an action prejudicial

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to the rights of either party is likely to be taken before a final decision is rendered (Rizzani de Eccher v. Kuwait ICSID Decision on Provisional Measures; Pugachev v. Russia Ad hoc Arbitration Interim award).

When assessing the required level of urgency, tribunals often consider two factors:

A. The nature / type of the requested provisional measure, in particular the rights whose protection is targeted by such measure.

B. The seriousness, imminence, and irreparability of the prejudice / harm that might ensue if the requested measure is not granted.

Obligation to prove and evidence

Burden of proof - usually the obligation to prove the above requirements is the obligation of the person requesting the interim measure. In rare cases, the tribunal may find that the obligation to present evidence rests with the party in the best position (Garcia Armas and Others v. Venezuela PCA Procedural Order No. 9).

Types of temporary protection measures

The following temporary safeguards were imposed by the tribunals:

1. Obtaining and defending evidence.
2. Ensuring the implementation of the decision (security for costs).
3. Suspend or terminate other litigation.
4. Prevent the disclosure of confidential information.
5. Ensuring a specific contractual obligation.
6. Measures to be taken to protect the life and safety of the parties.

Obligation of temporary protection measures and its implementation.

Not all of the documents authorizing the tribunals to take interim measures state that they are binding. For example, according to Article 47 of the ICSID: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party"[3].

Nevertheless, the question may arise in the context of ICSID as Article 47 of the Washington Convention states that arbitral tribunals may 'recommend' interim measures which suggest that they have no binding character. However, several arguments can be made against this. First of all, as stated by the ICJ, the subject-matter and purpose of interim measures is to preserve the rights of the parties: for these measures to be effective they should be mandatory. Secondly, as pointed out by an arbitral tribunal, the linguistic versions of the Washington Convention differ slightly. For example, in the Spanish version, the binding character of interim measures is quite clear[4].

According to the definition given by the UNCITRAL Model Law, an interim measure is a temporary measure aimed at protecting the outcome of the arbitration proceedings. An Arbitral Tribunal, therefore, may order 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 "[5]. Arbitrators' power to order interim measures is widely recognized by several jurisdictions and arbitral institutions and their relevant regulations (such as, by way of example, the UNCITRAL Rules, the ICC Rules).

However, there are still a few Countries where arbitrators are not allowed to issue interim measures, such as Italy, Greece and Austria. Italy, in particular, has a conflicting position. In fact, article 818 of the Italian Code of Civil Procedure prevents arbitrators from ordering interim measures. As an exception to this general rule, article 35 of the Legislative Decree no. 5 of 2003 introduced the possibility for arbitrators to order the suspension of the shareholders' resolutions, thus, confining the possibility of interim measures only within arbitration proceedings concerning corporate matters.

Some commentators did not construe this innovative provision as a real exception to the general rule that prevents arbitrators from issuing interim measures. Indeed, the order to suspend a shareholders' resolution is a self-executing interim measure that does not need enforcement.

The United States, Federal Arbitration Act does not specifically contemplate the arbitrators' power to issue interim measures but it does not even exclude this power. Parties may agree to entrust either arbitrators or

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ordinary courts with such power. However, if an arbitration clause exists, courts appear to be less incline to issue interim measures and may interpret such request as a waiver to arbitration (see McCreary Tire Rubber Company v. Ceat, 501 F. 2d 1032, 3d Cir. 1974).

The United Kingdom adopted the so-called "subsidiary approach" according to which parties bound by an arbitration clause should request an interim measure within the arbitration proceedings, in the first place and, eventually, resort to courts only for those interim measure, such as ex parte mareva injunction, that can only be granted by courts. In other jurisdictions, such as in Germany and in Hong Kong, the so-called "free choice model" was adopted. This allows the parties of an arbitration to choose between requesting the interim measures to arbitrators or to courts.

Despite this big step forward, the problem remains the interim orders' enforceability, which requires the parties to revert to ordinary courts.

Applicable enforcement mechanisms

In international commercial arbitration, the key enforcement mechanisms are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the applicable domestic arbitration laws, many of which are based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).

The New York Convention is silent on the question of arbitrator interim awards and orders. On the face of it, the convention applies only to "awards", thereby seemingly excluding arbitrator orders, interim or otherwise. Moreover, there is no definition of "award", but finality is considered an essential characteristic of an award in many jurisdictions - not least because the convention provides that a party may resist enforcement of an award on grounds that it is not yet "binding" . As such, this raises questions over the enforceability of orders and awards that are only interimbinding.

At the UN's 40th anniversary celebration of the New York Convention in 1998, several speakers identified the need to strengthen interim measures as a crucial next step in enhancing the Convention's support for international arbitration. In particular, VV Veeder warned that 'for too long, there have been difficulties enforcing an arbitrator's order for interim measures', given that' the better view of [the New York Convention's] application excludes any provisional order for interim measures from enforcement abroad as a Convention award '[6]. Mr. Veeder opined that an arbitral interim measure 'could be at least as [important as], if not more important than, an arbitral award' because, without such measures, 'it is sometimes possible for a recalcitrant party to thwart the arbitration procedure - completely and finally '(for example, by dissipating assets out of which an award would be paid). He thus concluded that the lack of enforceability of interim measures' strikes at the heart of an effective system of justice in transnational trade 'and went so far as to recommend' a supplementary convention to the New York Convention on the enforcement by State courts of an arbitral tribunal's interim measures'.

When UNCITRAL subsequently identified issues raised at that 1998 conference that might merit its own further work on possible solutions, it identified the problem of arbitral interim measures' enforceability and - appearing to echo Mr. Veeder - explained: 'The prevailing view, confirmed also by case law in some States, is that the Convention does not apply to interim awards.' Not all scholars agreed about the New York Convention's limits. For example, Albert Jan van den Berg, a leading scholar of the Convention, specifically criticized UNCITRAL's report because it 'does not give a source for this statement' and noted that 'there does not appear to be a "prevailing view" on this question 'since - at least as at 2000, when Mr. van den Berg voiced his critique - 'the reference to case law "in some States" is, to my knowledge,[7]. Mr. van den Berg found greater wisdom in the 'pragmatic view' exemplified by US case law, which he said recognized that 'no major obstacles to the enforcement of a "temporary" award seem to exist'.

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

Unlike the New York Convention, the original Model Law does expressly address interim relief, in that it empowers a tribunal to order interim measures. However, it does not address the implementation of such measures, instead leaving it open to national courts whether or not to provide assistance in that regard. The Model Law was updated in 2006 to address, among other things, the enforceability of arbitrator interim

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measures. The amended Model Law empowers tribunals to grant interim relief in both the form of an award as well as in "another form", and provides that such measures will be binding and enforceable as any other award. Save that, if made in the form of a preliminary order, although binding on the parties such an order will not be subject to enforcement by a court (and does not constitute an award).

The amended Model Law offers some helpful clarity. But it does not perfectly resolve all issues. Firstly, it fails to define "arbitral tribunal", which leaves open the question of whether an emergency arbitrator falls outside the definition. More importantly, the 2006 amendments have not been widely adopted. Over one hundred jurisdictions implemented domestic arbitration laws based on a version of the Model Law, but less than half of those have adopted the 2006 revisions. Among those that have are Australia, Belgium, the Canadian province of Ontario, the state of Florida, New Zealand, and several Latin American countries. Add to that, a number of domestic arbitration laws, including those in some of the leading seats of arbitration (England, France, the United States), are not based on the Model Law at all. In actuality,

In the absence of express provisions (such as those adopted in Hong Kong and Singapore), it is up to the domestic courts to determine whether an emergency arbitrator decision, be it in the form or an award or an order, is enforceable.

The revised Model Law that UNCITRAL ultimately promulgated in 2006 includes a sprawling new Article 17 on interim measures, of which subsections 17H and 17I establish an explicit right and mechanism to enforce arbitral interim measures in the national courts of any relevant jurisdiction. Article 17H requires that an arbitral interim measure, no matter how styled (as an award, an order or a decision) 'shall be recognized as binding and. . . enforced upon application to the competent court, irrespective of the country in which it was issued, subject to certain limited grounds for non-enforcement set forth in Article 17I. These include the grounds already established for non-compliance of awards on the merits under Model Law Article 36 (which derives, in turn, from Article V of the New York Convention).

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

According to UNCITRAL, of the nearly 120 jurisdictions that have adopted legislation based on the Model Law, more than 35 have done so in the past dozen or so years and thus have included the 2006 revisions (sometimes with modifications)[8]. For parties and their counsel now seeking to enforce an arbitral interim measure in a jurisdiction that has not adopted the 2006 Model Law, it will be necessary to examine national legislation to see if there are other enactments (along the lines of the various approaches previously described) that may authorise such enforcement and, if not, to consult national jurisprudence to determine whether legislation that does not expressly so provide has nonetheless been judicially so construed (such as by broadly interpreting the term 'award').

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

The United States continues to be at the forefront of the enforcement movement. For example, in CE International Resources Holdings LLC v. SA Minerals Ltd et al. (2012) (CE International Resources), a federal district court in New York City confirmed its long-standing jurisprudence that 'an award of temporary equitable relief. . . was separable from the merits of the arbitration 'and was therefore capable of immediate recognition and enforcement[9]. Although the district court did not expressly refer to the New York Convention (or its statutory implementation, under the Federal Arbitration Act)[10]as the basis for its power to enforce the interim award, the case involved foreign parties and probably constituted a 'non-domestic award' falling within the US courts' expansive application of the New York Convention. Several similar decisions have been issued in other US cases in recent years.

Other common law jurisdictions have recognized the enforceability of arbitral interim measures in recent years. For example, in 2015, the Singapore Court of Appeal confirmed that awards ordering interim relief are 'final' as to the issue they adjudicate (ie, the question of whether the requested relief is warranted) and can therefore be enforced under the Singapore Arbitration Act[11]. In this case, the 'interim relief' at stake was somewhat unusual: an arbitral order compelling one party to comply with a prior decision by a dispute

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adjudication board, constituted under the 1999 FIDIC Red Book, which ordered the party to pay an amount of money to the other party[12].

Courts in certain civil law jurisdictions also appear to have followed this trend. For example, in 2014, the commercial court in Kinshasa is reported to have accepted the enforcement of an International Chamber of Commerce emergency arbitrator decision that had granted an anti-suit injunction against one of the parties, forbidding it from commencing certain court actions in the Democratic Republic of Congo (DRC). Although the court apparently noted that the New York Convention had not yet entered into force in the DRC, it is reported to have nevertheless relied on local law to accept the enforcement of the emergency arbitrator decision[13].

Likewise, in 2016, the Supreme Court of Ukraine appeared willing to consider the implementation of the provisional relief granted by a Stockholm Chamber of Commerce arbitral tribunal in the context of an investor-state arbitration[14]. In this case, the relief had been rendered in the form of an award enjoining the state from collecting royalties on gas production from the investor at a higher rate than was previously in place. The investor sought to enforce the emergency award in Ukraine and succeeded at first instance before the Perchersk District Court, reportedly because the relief was rendered in the form of an 'award' and, thus, was enforceable pursuant to the New York Convention. Although this decision was later overturned by the Kyiv Court of Appeal, in February 2016, the Supreme Court of Ukraine quashed the Court of Appeal's decision, remanding it for reconsideration while holding that a Ukrainian court could only refuse to recognize or enforce an arbitral award on the grounds enumerated in Article V of the Convention and that the Kyiv Court of Appeal had not,

Similarly, in May 2018, the Cairo Court of Appeal was the first Egyptian court to recognize and enforce an arbitral order for interim measures issued by a foreign tribunal, which was seated in Paris[15]. The tribunal had issued an interim order enjoining one of the parties to cease and desist from the Egyptian court proceedings that sought the liquidation of a performance bond. The Court held that arbitral interim measures finally resolve the parties' dispute with respect to the provisional measures sought in the arbitration and were therefore capable of enforcement. Notably, the Court stated that enforcement of interim measure orders issued by arbitral tribunals was consistent with the objectives of the New York Convention, namely to favor the enforcement of arbitration agreements and arbitral awards, to ensure predictability in international commercial dealings and consistency among jurisdictions.

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

Despite what may be a nascent trend in some national courts towards the enforcement of arbitral interim measures, even in the absence of a statutory provision to that effect, other jurisdictions remain reluctant to embrace this path. For instance, although the Korean Arbitration Act was revised in 2016 and largely incorporated provisions on interim measures from the 2006 Model Law, it nevertheless limits enforcement of interim measures to those issued by tribunals seated in South Korea[16]. In 2010, the Chilean Supreme Court rejected the exequatur of arbitral interim measures granted abroad regarding assets located in Chile[17]. Similarly, in Russia, the Presidium of the Highest Arbitration Court reaffirmed in 2010 its position that only awards finally deciding (part of) the merits of a dispute can be enforced in the Russian Federation[18].

Conclusion.

Given the current state of enforcement of interim safeguards in international investment arbitration, some states recognize the authority of arbitral tribunals to apply interim safeguards. But there are also states that oppose it. Also, the provisions of the UNCITRAL Model Law on the obligation to enforce arbitral awards on the application of provisional safeguards are not available in all countries that have implemented them.

Nevertheless, current trends and the growing number of appeals to arbitration tribunals for the application of interim safeguards require that the issue be addressed in international instruments.

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Therefore, the obligation to recognize and enforce arbitral awards on temporary safeguards should be established by an international instrument. There are the following alternative solutions to define the 2006 amendments to the UNCITRAL Model Law in an international imperative document:

The first is the inclusion of provisions in the 1958 New York Convention on the enforcement of temporary safeguards. Obviously, most governments will not accept this. Therefore, this proposal cannot be considered as the most optimal solution.

The second is to include provisions in the ICSID Convention on the mandatory implementation of temporary safeguards. Obviously, this is likely not to be accepted by most governments either.

The third is to determine the conditions for the enforcement of decisions on temporary safeguards issued by arbitral tribunals in national courts through bilateral investment agreements (BITs) and multilateral investment agreements (MITs) between states.

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