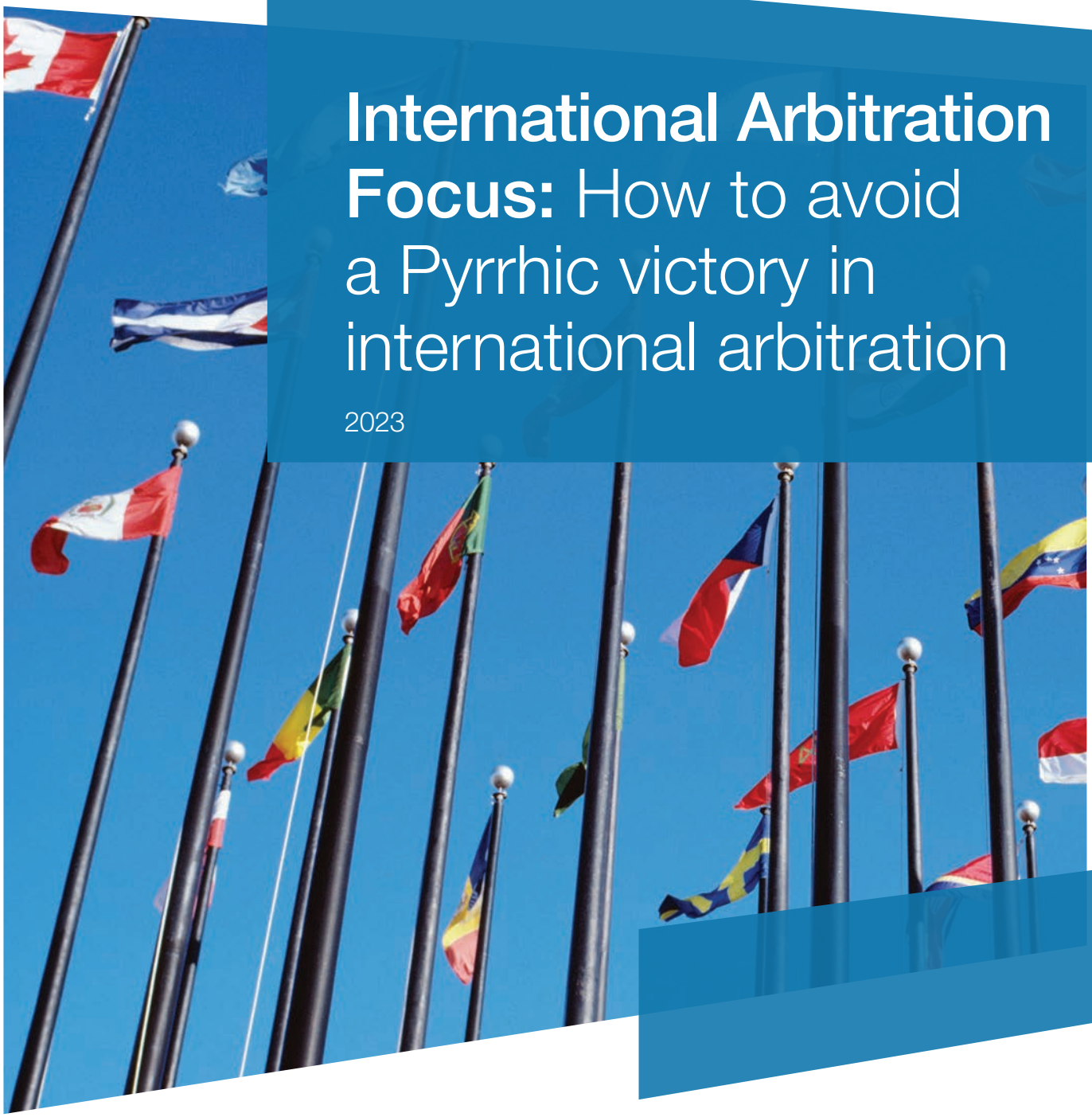

International Arbitration Focus: How to avoid a Pyrrhic victory in international arbitration

2023

ReedSmith

Driving progress
through partnership

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Welcome

Welcome to the final international arbitration newsletter of 2023. In 2023, Reed Smith has continued growing the strength and breadth of its international arbitration practice, moving up to a top 15 GAR ranking.

The firm's momentum towards the top rankings has been continuous for some years now. It has been an enjoyable and rewarding ride for the many Reed Smith lawyers involved, but also for Reed Smith's clients who have benefitted from the enthusiasm and expertise of our arbitration lawyers based around the globe.

In this newsletter, we again showcase examples of that experience and knowledge.

Our arbitration lawyers have been challenged to explain how best they can ensure their clients receive the fruit of the awards issued by arbitral tribunals.

Real lawyering requires real results for clients.

In an international context, arbitration is best positioned to achieve that for clients, but only if done right from beginning to end of the process.

As ever, we welcome feedback on this newsletter. And in the meantime, we wish you all a restful year-end break.

Peter Rosher
Global Chair of International Arbitration
prosher@reedsmith.com

Note from the Editor

A "Pyrrhic victory" is a victory gained at too great a cost. An arbitral award won, but not paid, can readily be termed a Pyrrhic victory. The term has its origins in Greek history. In more contemporary terms, an unpaid award might be described as a "dud", with the award having turned out to be ineffectual.

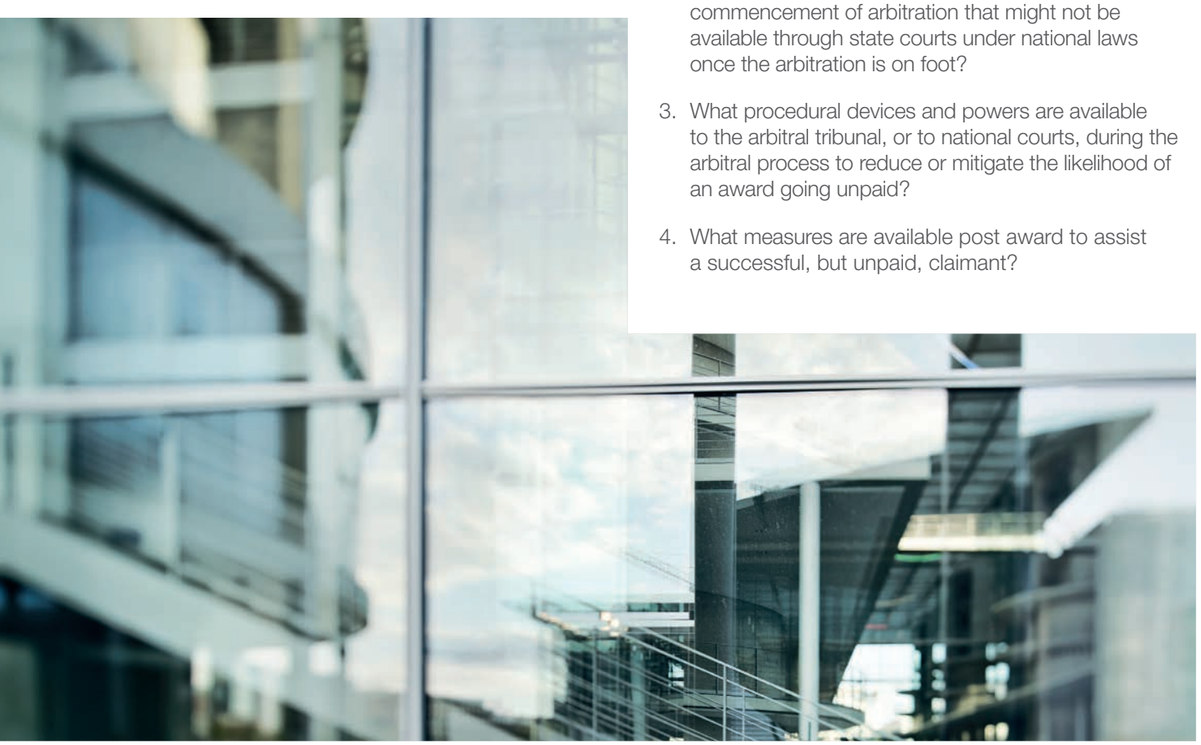
Whether termed a Pyrrhic victory or a dud, an unpaid award is something that all claimants wish to avoid.

In the early 20th century, the notion of being "honor" bound to pay awards not infrequently found its way into arbitration agreements and could be found in the rules of certain leading arbitral institutions of the day (notably the ICC). This engendered a certain amount of peer pressure to ensure that awards were paid. Peer pressure continues to this day in certain trade arbitrations, where non-payers of awards are named and shamed amongst the trade members concerned for as long as an award remains unpaid. GAFTA arbitrations and awards are an example of this. But 100 years from its founding year, the ICC Rules no longer make reference to honor. Parties are left to their own devices and a new modern legal framework to ensure that awards are in fact "honored."

That said, and happily for claimants, the present-day position is that the majority of arbitral awards are paid voluntarily without the need for any particular enforcement measures. But where one is dealing with states or state-owned entities, or operating within certain sectors of industry, or where the individual case is otherwise giving out warning signs, it is advisable for a claimant to assume the worst and prepare accordingly.

As the articles in this edition illustrate, there are broadly four stages where one might turn one's mind to matters of enforcement and how any eventual award will be paid:

1. What considerations, if any, should be given to enforcement matters at the time of drafting an arbitration clause?
2. Should interim measures be taken before the commencement of arbitration that might not be available through state courts under national laws once the arbitration is on foot?
3. What procedural devices and powers are available to the arbitral tribunal, or to national courts, during the arbitral process to reduce or mitigate the likelihood of an award going unpaid?
4. What measures are available post award to assist a successful, but unpaid, claimant?



In this edition of the newsletter, we have welcomed contributors from various common law, civil law, and hybrid jurisdictions taken from the Reed Smith network of arbitral practitioners based around the world. We asked them to comment from the perspective of their various geographies and experiences on how best to avoid a Pyrrhic victory in international arbitration. Some common themes appear, but also differences between jurisdictions. In all, we have contributions from New York, Paris, Hong Kong, the UAE, London, Singapore and Latin America.

Reading these contributions, one finds, unsurprisingly, that there is a certain core of commonality across jurisdictions in certain areas. International arbitration tends to promote this. But the real-life application of apparently similar principles can differ across jurisdictions and tribunals.

Local knowledge in an otherwise international setting still counts.

And in some areas of procedural law, notably around forced disclosure of documents, jurisdictions and tribunals may differ to a greater or lesser degree, often reflected in the rules of regional arbitral institutions and sometimes informed by local court practices.

Perhaps the most striking difference between jurisdictions is the extent to which local courts can offer support to parties where interim measures are concerned. France is perhaps the strictest here in deferring to the arbitral tribunal for almost all interim measures, whereas other jurisdictions (for example, Mexico) offer broad powers to their courts to assist parties in support of the arbitral process in their jurisdiction.

As the end of the year approaches, we hope you enjoy reading this newsletter and draw inspiration from what you read.

Andrew Tetley, Editor
Partner, Paris
atetley@reedsmith.com

Aurélie Lopez Sub Editor
Senior Associate, Paris
alopez@reedsmith.com

Focus on USA

I. Introduction

The primary objective of virtually any party that asserts claims in an international arbitration is to receive money or some other economic benefit. Indeed, even when a party seeks only declaratory relief, there is always an economic incentive behind the request.

Too often, however, parties fail to consider that merely obtaining an award entitling them to the relief they want is not the same thing as **actually** receiving it, and they ignore steps they should take to ensure that they ultimately receive the benefit they are seeking. This article examines steps that parties involved in arbitrations seated in the United States can take to ensure that they recover money or its equivalent when the arbitration is over and avoid wasting resources on a pyrrhic victory.

II. Recovery begins when the arbitration clause is drafted

The monetary recovery process begins when the arbitration clause is drafted, and one of the most important considerations from a recovery perspective is the legal seat the parties choose. To assist with recovery, parties should choose a seat with a judiciary that not only supports arbitration and readily enforces arbitral awards to avoid getting bogged down in enforcement proceedings that can delay recovery but alsoa seat that has strong laws in support of arbitration.

Luckily, virtually every major U.S. seat – such as Miami, Houston, and San Francisco, to name a few – has a judiciary (particularly at the federal level) that will readily enforce commercial arbitration awards. The most popular U.S. seat, however – New York – enjoys additional benefits that make it particularly attractive from a recovery perspective.

First, New York has a state law called CPLR § 7502(c) that allows parties to seek judicial *ex parte* attachment and injunctive relief in aid of arbitration up to thirty days before an arbitration is commenced. *Ex parte* section 7502(c) applications are incredibly powerful tools, and the ability to attach a party's assets without notice before an arbitration is even commenced provides an incredible collection advantage that not only secures assets at the outset but can encourage early settlement.

Second, New York is a global banking center through which an award creditor can gain access to an award debtor's global assets. For instance, every U.S. dollar-denominated transaction conducted worldwide ultimately gets processed through a limited number of clearing banks located in New York, which can not only assist in identifying an award debtor's global assets, but can result in assets being seized as they move through the U.S. banking system.

Third, New York has strong judgment collection laws that can aid parties seeking to recover after they have converted an arbitral award into a local court judgment. By choosing New York as the arbitral seat, parties ensure they will satisfy the personal jurisdiction requirements necessary to access those laws and take advantage of those tools.

Accordingly, choosing the right seat at the clause drafting phase is the first step to recovery, and while most U.S. seats will be good choices, New York offers recovery advantages that are simply not available elsewhere.

III. Steps to take after the arbitration is commenced

Even if parties fail to consider recovery at the clause-drafting phase, there are still numerous tools they can use in U.S.-seated arbitrations to ensure that they avoid a Pyrrhic victory. The first such tool is emergency arbitration.

A. Emergency arbitration

Emergency arbitration is a virtual process that permits applicants to quickly obtain interim or conservatory relief – usually in three weeks or less – from a sole emergency arbitrator appointed by the relevant arbitral institution, instead of from a national court or a full merits tribunal, which would not yet be appointed. Emergency arbitration therefore provides an option for parties that do not want to or cannot approach a national court for interim relief in the period after an arbitration is commenced, but before a full merits tribunal is constituted (which can take several weeks or months).

While the concept of emergency arbitration first arose in the 1980s, it did not become widely accepted until 2006, when the International Centre for Dispute Resolution ("ICDR"), which is the international arm of the AAA, introduced the first default, opt-out emergency arbitration procedures as part of its 2006 rules. Under the 2006 ICDR Rules, emergency arbitration became a default process that parties automatically accepted by agreeing to arbitrate under the ICDR Rules generally, instead of an opt-in procedure as it had previously been. Notably, after the ICDR made emergency arbitration a default option under its rules, all major arbitral institutions followed suit around the globe over the next ten years.

Despite some limitations, such as an inability to obtain relief against non-parties like banks, emergency arbitration is a powerful tool for preserving assets at the outset of an arbitral dispute for eventual recovery, particularly in the United States. First, emergency arbitration permits parties to obtain interim relief that they might not otherwise obtain from most courts, such as an injunction to freeze assets, even when money damages would compensate the applicant or specific performance of contractual obligations.

Second, with some exceptions, emergency awards issued from a U.S. seat are readily enforceable in the U.S. on grounds that they are final as to the issues they decide. Accordingly, even if a U.S. court would not grant an injunction where money damages could compensate the moving party, that same court would be likely to enforce an emergency award which granted just that relief.

Emergency arbitration is not the only tool available, however, and even merits tribunals can help secure an eventual recovery.

B. Interim and conservatory measures.

If recovery issues are not so emergent that they must be raised before the full tribunal can be constituted, or if recovery issues only become apparent during the merits phase of the arbitration itself, parties can still seek interim and conservatory measures from the full merits tribunal to aid in any eventual recovery.

For instance, under Article 24 of the ICDR Rules, a party may apply to the tribunal for "any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property." Similarly, Rule 13.1 of the CPR Administered International Rules permits a tribunal to "take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods." Article 31.1 of the JAMS International Arbitration Rules allows the tribunal to "take whatever interim measures it deems necessary, including injunctive relief and measures for the preservation of evidence or for the protection or conservation of property, including, at the Tribunal's discretion, measures to secure the payment of any award that might be rendered."

Interim measures applications can take many forms – security for costs, injunctions against the dissipation of assets, or specific performance or payment obligations, to name a few – and consistent with the pro-arbitration stance they have always displayed, U.S. courts will enforce such awards. In fact, courts in popular seats like New York will even look beyond the moniker placed on the document – for instance, "Interim Order" – and will enforce the substantive terms of the decision as an award if that is what it requires.

C. Financial and asset disclosure

While disclosure in international arbitration is typically much more limited than in U.S. court proceedings, there may nevertheless be an opportunity to seek disclosure from the counterparty in the arbitration about its financial position and the location of its assets (particularly when done in support of applications like security for costs), which can greatly facilitate recovery. Indeed, while disclosure aimed purely at financial topics might not be relevant to the dispute or material to its outcome in many instances (the more limited standard for obtaining disclosure in international arbitration), that same information may serve two purposes, and if it does, parties will generally be free to seek it.

Consequently, while it is preferable to take steps before an arbitration is commenced to ensure recovery, parties nevertheless have options during the arbitration itself for securing an eventual recovery.

IV. Steps to take after the award is issued

The final opportunity to secure recovery comes after the award is issued, which is a time when courts may be particularly willing to assist a party that prevailed in an arbitration. Again, the United States in general, and New York in particular, offers many options and advantages in that regard.

A. Quick enforcement

The first is quick enforcement. Arbitral awards are not self-enforcing – indeed, they are really nothing more than a contract to perform the relief that has been ordered – and while statistics indicate that parties voluntarily comply with awards approximately 50% of the time, if a party is not willing to voluntarily comply, then the award must be converted into a national court judgment before a party can seek judicial recovery assistance.

U.S. courts in jurisdictions that are accustomed to dealing with enforcement proceedings will typically issue an enforcement decision within three to six months from the date of filing, which is relatively quick from a global perspective. Moreover, in appropriate circumstances, enforcement courts may be willing to offer interim relief while the action is pending, if there is basis for it. Once the award is finally enforced, it becomes a judgment of that court, and parties are then free to use court collection procedures to satisfy it, which can include broad asset disclosure.

B. Broad asset disclosure

Most U.S. courts permit judgment creditors to obtain broad disclosure about a judgment debtor's assets in recovery proceedings. Indeed, in New York, parties can generally require a party to disclose assets held around the world, and New York courts impose strict penalties on judgment debtors that fail to comply with their disclosure.

C. Broad third-party asset disclosure

Courts in U.S. states like New York also permit judgment creditors to obtain broad disclosure from third parties that may be holding judgment-debtor assets. For instance, it is very easy in states like New York, which is a global banking center, to subpoena banks for information about a judgment debtor's assets, which is the first step to securing them.

Moreover, while it can no longer be used to obtain evidence to be used in commercial arbitrations, Section 1782 applications can still be used in support of non-U.S. enforcement proceedings to obtain evidence from third parties about a judgment debtor's assets. Specifically, with a few exceptions, award creditors that have judicial enforcement proceedings pending (or even contemplated) in a non-U.S. jurisdiction may apply to a U.S. federal court to order a party subject to its jurisdiction to provide evidence in support of the non-U.S. enforcement proceedings.

While a full discussion of Section 1782 is beyond the scope of this article, suffice it to say that Section 1782 applications against entities like credit card processors and other financial intermediaries can be incredibly fruitful and effective recovery tools.

Obtaining economic relief is the ultimate goal of any commercial arbitration, and can require steps to be taken from the outset to the end of a transaction to ensure recovery.

D. National judgment recognition

The last tool that parties can use to help recover on an award is registering a U.S. court judgment in any jurisdiction around the United States in which assets might exist. Specifically, even though the U.S. is a federal system in which each State is a separate legal entity whose authority ends at its borders, and in which the federal judicial system is legally distinct from each state's system, U.S. constitutional requirements obligate the courts of each state and system to recognize the judgments of the other, which takes nothing more than completing simple paperwork to file with the state or federal court in which recognition is sought. This simple, low-cost act allows judgment creditors to take advantage of collection tools in the registration state where assets might be located and helps ensure that an award is satisfied.

Accordingly, there are a panoply of recovery assistance options from which parties can benefit in the U.S., even if they wait until after the award is issued to begin those efforts.

V. Conclusion

Obtaining economic relief is the ultimate goal of any commercial arbitration, and can require steps to be taken from the outset to the end of a transaction to ensure recovery. The United States, and New York in particular, offers a variety of tools for achieving that outcome, which is ultimately what every party in a commercial arbitration really wants.

J.P. Duffy
Partner
New York
+1 (212) 549-0460
jpduffy@reedsmith.com

Focus on France

Introduction

Parties who choose international arbitration expect it to end their dispute, should an arbitral award be rendered. In practice, it is not always the case that the award is voluntarily performed, and the dispute will frequently continue to an enforcement stage. In other words, after having spent significant time and money, the prevailing party will have to continue litigation to secure the actual performance of the award without the certainty of a satisfactory outcome. To limit this risk of pyrrhic victory, litigants should consider procedural steps to safeguard their position before the award is issued, at the outset as well as during the arbitration proceedings.

Under French law, parties to proceedings before French civil courts enjoy a wide range of interim measures (including protective attachments against intangible movable property, such as receivables or judicial securities) the primary purpose of which is to safeguard the substance of the debtor's assets. Such measures may be obtained from the judge before the claimant has obtained a writ of enforcement on condition, inter alia, that the claimant's claim appears to be well-founded in principle and that there are circumstances likely to threaten its recovery (for example, the debtor's poor financial health giving rise to fears of insolvency).

Under French arbitration law, the jurisdiction to order interim measures to safeguard one party's position before the award is issued is shared between arbitral tribunals on the one hand and French courts on the other. The key distinction depends on the date of the arbitral tribunal's appointment. Before this date, parties can seek certain measures from French courts. After this date, the arbitral tribunal will have jurisdiction over the dispute between the parties and corresponding powers to issue orders. The French courts' power becomes more circumscribed and limited after appointment of the tribunal.

Under French arbitration law, the jurisdiction to order interim measures to safeguard one party's position before the award is issued is shared between arbitral tribunals on the one hand and French courts on the other.

I. Before the appointment of the arbitral tribunal: assistance by the courts

Principle. In the period before constitution of the arbitral tribunal, the key provision is Article 1449 of the French Civil Procedural Code (**CPC**). This provides that "the existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the *Tribunal judiciaire* or of the *Tribunal de commerce* who shall rule […] where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement."

Timing. The date of constitution of the arbitral tribunal is therefore essential. According to Article 1456 of the CPC, "the arbitral tribunal is constituted when the arbitrator(s) have accepted the assignment entrusted to them," the provision specifying that "the dispute is then referred to it." The *Cour de cassation* confirmed that the definitive constitution of an arbitral tribunal occurs once all of the arbitrators have accepted their appointment,[1] which constitutes a convenient single date and avoids the confusion of concurrent dates.

Urgency. Article 1449 requires that the matter for which provisional or conservatory measures are sought is urgent. In particular, the judge will be able to order any measures that are not seriously challenged or that are justified by the existence of a dispute. Even where there is a serious challenge to the requested measure, the judge may always prescribe, in interim proceedings, any protective or restoration measures that are necessary either to prevent imminent damage or to put an end to a manifestly unlawful disturbance.

Procedure. Two procedural routes can be taken when seeking measures from a court: The first route, through a petition *(requête)*, is an ex parte proceeding where the requesting party must be authorized by the judge to start proceedings on an ex parte basis. If the party against which the measure is ordered forms opposition to the measure, the subject matter is heard with both parties present. The second route, again in the form of interim proceedings *(référé)*, is done in the presence of both parties.

Apart from the référé-provision, French courts enjoy a high degree of freedom in terms of the types of measures that can be granted …

Type of measures. As to the type of measures that can be granted by French courts to safeguard enforcement of the future arbitral award, French law provides that, where the existence of the creditor's rights is not seriously disputable, the judge may award an interim payment *(référé-provision)* to the creditor (Article 835 CPC). The *référé-provision* is based essentially on the wish to provide immediate protection for the creditor and thus defeat the tactics of those who, despite the absence of any real doubt surrounding the existence of their debt, rely on their opponent's reluctance to initiate legal proceedings and on the delays inherent in any such proceedings to postpone a payment that they must know to be inevitable. Although the principle that a *référé-provision* can be granted despite the existence of an arbitration agreement has been confirmed by French courts, they have been sensitive to the fact that it involves the examination of the substantive issues that fall within the arbitrators' jurisdiction. The jurisdiction of the courts is therefore subject to the two conditions set out in article 1449 of the CPC that are specific to the context of arbitration: (i) the arbitral tribunal must not be constituted and (ii) there must be urgency, which is assessed by considering the facts of the case as well as the time limits for initiating the arbitration proceedings.[2]

Apart from the référé-provision, French courts enjoy a high degree of freedom in terms of the types of measures that can be granted including (i) a mandatory injunction (i.e., an injunction to do something[3] – measures for inspection of premises, disclosure of documents, and the appearance of a witness); (ii) a prohibitory injunction (i.e., an injunction not to do something – prohibition on submitting a resolution to a general meeting and prohibition on approving a company's financial statements); or (iii) measures aimed at safeguarding evidence, maintaining the status quo, protecting the future enforcement of the award and ensuring confidentiality, for example.

Lastly, it should be noted that the seizure of national courts for interim and conservatory measures before constitution of the arbitral tribunal does not amount to a waiver of the arbitration agreement.

II. After the appointment of the arbitral tribunal: assistance by the arbitral tribunal

French law. After the appointment of the arbitral tribunal, the arbitral tribunal will have jurisdiction over the dispute between the parties and corresponding powers to issue orders. That said, it is important to emphasize that, due to the consensual nature of arbitration, an arbitral tribunal does not have jurisdiction to issue orders against third parties (preservation of evidence and disclosure of documents, for example). To do so, a party would be required to appear before the French courts, possibly at the invitation of the arbitral tribunal, as provided in Article 1469 of the CPC[4] in a situation where a party to the arbitration proceedings requests the production of evidence held by a third party. State courts also retain residual jurisdiction, even after the appointment of the arbitral tribunal, to order protective attachments against tangible and intangible movable property within the territorial jurisdiction of the courts, such as receivables or judicial securities. This is because such measures fall into the state courts' exclusive jurisdiction regarding the most serious types of measures, which require the State's *imperium*.

Pursuant to Article 1468 of the CPC, arbitral tribunals have jurisdiction to "take any protective or provisional measure it deems appropriate under the conditions it shall determine." The wording of this provision is comprehensive enough to cover several types of measures (interim or conservatory) useful to protect a party's interests. The Paris Court of Appeal has held that the arbitrators' jurisdiction to issue such measures is an "inherent and necessary extension of the function of judging to ensure greater effectiveness of the jurisdictional power."[5] To encourage compliance, measures ordered by an arbitral tribunal can be under penalty of a daily fine *(astreinte*[6]), which will be definitively fixed by the arbitral tribunal itself if compliance with its orders is overdue. Fines, together with the consensual nature of arbitration and the fact that they are issued by the arbitral tribunal during the proceedings, means such measures are usually complied with by the parties.

There is a debate as to whether provisional measures can be requested from the arbitral tribunal by a party on an *ex parte* basis to maintain the element of surprise, (which is sometimes required to enforce provisional measures). In arbitration proceedings seated in France, the arbitral tribunal has a duty to ensure the parties respect the due process principle (equal treatment of the parties and the adversarial principle pursuant to Article 1510 of the CPC) and must act fairly regarding each party. It is therefore doubtful whether an arbitral tribunal would agree to hear one party on an *ex parte* basis when granting a measure against the other party to the arbitration proceedings.[7]

If a party elects not to comply with a measure ordered by the arbitral tribunal, can the other party obtain the court's assistance to enforce the order?[8] There is debate as to whether a arbitral tribunal's order for an interim or conservatory measure would be enforceable before national courts under French law, since only awards are enforceable. French case law has defined an award as a decision of an arbitral tribunal that finally settles, in whole or in part, the dispute submitted to it, whether on the merits, jurisdiction or a procedural issue that leads them to terminate the proceedings. Because of this, orders granting interim or conservatory measures should not be enforceable in principle because they do not qualify as a final decision on the dispute put by the parties to the arbitral tribunal. However, some authors consider that empowering the arbitral tribunal to render such orders without any possibility of them going before national courts to be enforced deprives Article 1468 of the French Code of Civil Procedure (quoted above) of part of its substance. This is because the protective measures would not produce an effect absent voluntary compliance by the party against whom the order or measure is made.[9] In 2004, the Paris Court of Appeal seemed to take this view when it considered an arbitral tribunal could issue conservatory injunctions in the form of an award (a penalty payment *(astreinte)* had been ordered in case of breach).[10] Certain commentators considered the solution to be directly linked to the nature of the *astreinte*, the imposition of which constitutes an inherent and necessary extension of the function of judging, and thus justified the decision imposed to classify the injunction as an award.[11] A recent decision, though not exactly confirming the 2004 decision, seems to confirm that an arbitral tribunal can elect to issue conservatory or interim measures in the form of an award.[12]

There is a debate as to whether provisional measures can be requested from the arbitral tribunal by a party on an ex parte basis to maintain the element of surprise, (which is sometimes required to enforce provisional measures).

Measures commonly sought by the parties include security for costs. Pursuant to this measure, a party would request the arbitral tribunal to order the other party to provide security (often an escrow or a bank guarantee) that can be called upon if the claiming party subsequently fails to cover the legal and arbitration costs incurred by the winning party. The issue then becomes the sanction imposed, should the ordered party fail to provide such a guarantee. Often, the sanction is withdrawal of the claims made by that party. This process can be viewed in parallel with the mechanism found in the ICC Rules, for example, where a party will see its counterclaims dismissed if it fails to fulfill its share of the advance on costs.[13] In 2013, the French Cour de *cassation*[14] decided that this sanction was against due process as it prevented the insolvent party from pursuing its claims. Under French law, it is doubtful that failure to provide such security would be sanctioned by the dismissal of corresponding claims.[15] More generally, in our experience, applications for security for costs are rarely granted by arbitration tribunals seated in Paris.

Other than this constraint, French law gives discretion to arbitral tribunals to order any measures they consider appropriate with the rider that they cannot order third parties or force the parties to abide by the order, thus lacking the *imperium* power of national courts.[16] Such measures can include ordering a party not to sell and store equipment or sell company shares, for example.

ICC Rules. Though not a part of French law, ICC Rules are relevant as the ICC is located in Paris and many international arbitration proceedings seated in Paris are conducted under the ICC Rules. In practice, an arbitral tribunal seated in France under the ICC Rules would therefore be subject to two sets of rules – the CPC and the ICC Rules – both of which empower the arbitral tribunal with discretion to order interim or conservatory measures.

The latest version of Article 28 of the ICC Rules[17] empowers arbitral tribunals to order "any interim or conservatory measure it deems appropriate." ICC Rules allow arbitral tribunals freedom to grant such measures either in orders or awards. ("Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.")

The ICC Rules do not define what qualifies as an "interim" or "conservatory" measure, which gives the arbitral tribunal flexibility when ordering measures sought by parties. The Secretariat Guide provides examples of such measures, which include protecting the status quo pending dispute resolution – for example, an order preventing a party from doing something; preserving the disappearance of evidence; providing security for costs; and securing enforcement of the award – for example, protection of assets or an order for an interim payment.[18]

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Clément Fouchard
Partner
Paris
+44 (0) 20 3116 2921
cfouchard@reedsmith.com

Erwan Robert
Associate
Paris
+33 (0) 1 76 70 41 17
erobert@reedsmith.com

Mathilde Adant
Associate
Paris
+33 (0) 1 76 70 40 00
madant@reedsmith.com

Focus on Hong Kong

Hong Kong SAR is a pro-arbitration jurisdiction with many favorable features for parties seeking to resolve their disputes through arbitrations seated in the territory. Hong Kong's arbitration law is based on the UNCITRAL Model Law, providing the arbitral tribunal and court with extensive powers to assist the arbitrating parties to safeguard their position pending the outcome of the dispute. Hong Kong's homegrown arbitration institution, the Hong Kong International Arbitration Centre (HKIAC), has state-of-the-art modern arbitration rules, and the courts of the region are routinely arbitration friendly.

A. Assistance by the arbitral tribunal

Both Hong Kong arbitration law and the rules of leading Hong Kong-based arbitration institutions empower the arbitral tribunal with a range of powers to assist the parties to safeguard their positions before a final award is made.

Dealing first with the 2018 HKIAC Administered Arbitration Rules (the Rules), which are the most commonly adopted rules for administered Hong Kong-seated arbitration, these empower the arbitral tribunal to do everything necessary to ensure the fair and efficient conduct of the arbitration[1] and to make every reasonable effort to ensure that an award is valid.[2] The arbitral tribunal may order any interim measures it deems necessary or appropriate at the request of either party.[3] These include powers to order relief, whether in the form of an order or award or another form, including the power to make orders:

- maintaining or restoring the status quo pending determination of the dispute;
- requiring a party to take action that would prevent, or to refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- providing a means of preserving assets out of which a subsequent award may be satisfied; and
- preserving evidence that may be relevant and material to the resolution of the dispute.[4]

(collectively, the Preservation Orders).

Where the matter is urgent, parties may also apply to the HKIAC for the appointment of an emergency arbitrator within 24 hours of such application in order to seek urgent interim or conservatory relief even before the Notice of Arbitration is filed or the arbitral tribunal is constituted.[5]

In deciding a party's request for such interim measures, the arbitral tribunal will consider the circumstances of the case as a whole, and take into account relevant factors such as whether the potential harm caused is adequately reparable by an award of damages and the merits of the requesting party's claims (the Relevant Factors).[6]

In order to protect the interests of both parties, the arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure,[7] and require any party to promptly disclose any material change in the circumstances on the basis of which an interim measure was requested or granted.[8]

Secondly, the arbitral tribunal is also empowered under the Arbitration Ordinance (Cap. 609) (the Ordinance) to make a broad variety of orders to achieve a fair result in the arbitration unless otherwise agreed by the parties. The orders which the arbitral tribunal may make include:

- requiring the claimant to give security for the costs of the arbitration;
- directing the discovery of documents or the delivery of interrogatories;
- directing evidence to be given by affidavit;
- directing the inspection, photographing, preservation, custody, detention or sale of any relevant property by the tribunal, a party to the proceedings or an expert; and
- directing samples to be taken from, observations to be made of, or experiments to be conducted on, the relevant property.[9]

In addition, the arbitral tribunal is given statutory footing to make the Preservation Orders at the request of a party, and may on the application of any party make an award to the same effect.[10] The factors to be taken into account by the arbitral tribunal in making the Preservation Orders are the same as the Relevant Factors mentioned above.

While the Rules do not expressly provide for *ex parte* requests from parties for interim measures, an arbitral tribunal has statutory power to grant interim measures on an *ex parte* basis.[11] The arbitral tribunal may also grant, on a party's *ex parte* application, a preliminary order directing the other party not to frustrate an interim measure, provided that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the measure's purpose.[12] The arbitral tribunal may modify, suspend or terminate the relevant interim measure or preliminary order upon any party's request or, in exceptional circumstances, on the arbitral tribunal's own initiative.[13]

Similar to what is provided in the Rules and to ensure fairness to all parties, the arbitral tribunal has statutory power to require a party requesting an interim measure to provide appropriate security, and to disclose any material changes in the circumstances on the basis of which the measure was requested or granted.[14]

B. Powers of the Hong Kong courts in assisting arbitration

The Hong Kong court system strongly supports international arbitration through its largely deferential and non-interventionist approach in order to facilitate arbitral proceedings, whether initiated in Hong Kong or elsewhere.

Under section 45(2) of the Ordinance, for example, the courts are granted the power to grant interim measures in arbitral proceedings, regardless of where they were commenced, on the application of any party.

Where there is an ongoing arbitration or an arbitration agreement in existence, Hong Kong courts retain the power to order interim measures regarding people or assets located in Hong Kong.[15]

Further, the Hong Kong courts can grant interim measures in relation to an overseas arbitration where the arbitral proceedings are capable of giving rise to an arbitral award that may be enforced domestically, and the measure belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.[16]

Importantly, this is a "freestanding" discretion to be exercised by the courts, in that the Hong Kong courts may grant such interim measure even where the subject matter of the overseas proceedings would not give rise to a cause of action that the courts would have jurisdiction over, and where the order is not ancillary or incidental to any Hong Kong arbitration proceedings.[17]

In practice, the Hong Kong courts will usually decline to grant an interim measure if the interim measure is the subject of the arbitral proceedings, or where such measure is more appropriately granted by the arbitral tribunal.[18]

We set out below examples of interim and/or conservatory measures that arbitral parties may apply for in the Hong Kong courts:

i. Anti-suit injunction

Put simply, an anti-suit injunction prohibits a party from initiating or continuing legal proceedings in a foreign court or tribunal that conflict with the dispute resolution forum contractually agreed upon in an arbitration agreement. The anti-suit injunction would generally be granted provided that it is sought promptly and before the foreign proceedings are too far advanced.[19]

One recent example is the case of *Linde GMBH v. Ruschemalliance LLC* [2023] HKCFI 2409, which was decided in September 2023, where the Hong Kong Court of First Instance enforced an anti-suit injunction prohibiting legal proceedings initiated in Russia in breach of the parties' agreement for Hong Kong-seated arbitration.

ii. Mareva injunction

A Mareva injunction restrains a party from dissipating or disposing of assets pending an arbitral award or further order. They are usually sought ex parte to prevent a respondent from depleting targeted assets before the order is granted. The requesting party must be "full and frank" in disclosing all relevant information in the making of the ex parte application.

The Hong Kong courts also have jurisdiction to grant a worldwide Mareva injunction to freeze a respondent's assets that are located outside of Hong Kong. In addition to domestic Mareva requirements, an applicant for a worldwide order must show that the respondent lacks sufficient Hong Kong assets and hold overseas assets to satisfy potential awards.

iii. Anton Piller order

Another interim measure available through courts is an Anton Piller order, which permits certain persons to enter a party's premises without notice to search for and seize documents or movable property temporarily. Like Mareva injunctions, Anton Piller orders are always granted ex parte, which means that the applicant must fully disclose all material facts on an exhaustive basis to the best of their knowledge.

This type of order is particularly effective in preserving evidence in support of arbitral proceedings. Since the enforcement of an Anton Piller order can intrude upon a party's rights to its property, the Hong Kong courts will insist that the applicant demonstrate, among other things, an extremely strong prima facie case, and the real possibility that the respondent may dispose of or destroy material in their possession before any *inter partes* application can be made.

Further, Hong Kong courts are empowered to recognize and enforce awards for interim measures granted by domestic and foreign arbitral tribunals.[20] The courts may even make incidental orders or directions to ensure the interim measures' effectiveness as if they were granted in aid of domestic arbitral proceedings.[21]

Lastly, specifically regarding cross-border enforcement of interim measures, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland of the Hong Kong Special Administrative Region came into force on October 1, 2019 (the Arrangement). This was an important step in ensuring the attractiveness of Hong Kong as an international arbitration hub in Asia.

The Arrangement facilitates parties to Hong Kong-seated arbitrations to apply for and benefit from interim measures directly from courts in the PRC. Parties to arbitral proceedings seated in Hong Kong and administered by the specified arbitral institutions, for example, HKIAC, HKMAG and CIETAC HK, may apply to Mainland courts directly for three types of interim measures before the making of arbitral awards, that is, property preservation, evidence preservation and conduct preservation. This is a benefit not accorded to parties to arbitration seated anywhere else outside of Mainland China.

In addition, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR, which took effect on November 27, 2020, expands the scope of the Arrangement, such that the PRC courts may also grant interim measures after an award is made in Hong Kong.

Matthew Townsend
Partner (Foreign Registered Lawyer)
Hong Kong
+852 2507 9728
matthew.townsend@reedsmith.com

Jonathan Tsang
Associate
Hong Kong
+852 2507 9784
jonathan.tsang@reedsmith.com

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Focus on United Arab Emirates

The UAE has a robust framework of arbitration laws, regulations, and rules designed to facilitate cost-effective and efficient arbitration proceedings, thereby helping parties mitigate the pitfalls of a potential Pyrrhic victory.

Arbitrations seated in the UAE are uniquely positioned within a landscape where multiple legal systems coexist, offering diverse procedural approaches and influencing the conduct and outcome of arbitration proceedings. This hybrid legal framework incorporates the "onshore" UAE jurisdictions, such as the Dubai and Abu Dhabi courts, which are grounded in a civil law system and subject to Federal Law No (6) of 2018 on Arbitration (as amended) (UAE Arbitration Law).

In contrast, the "offshore" jurisdictions within the UAE operate as autonomous legal entities that uphold a common law framework, namely the Dubai International Financial Centre (DIFC) subject to the DIFC Arbitration Law No. 1 of 2008 (DIFC Arbitration Law), and the Abu Dhabi Global Market (ADGM). This article also examines the stance pursuant to the Dubai International Arbitration Centre (DIAC) Arbitration Rules 2022 (DIAC Rules), the primary local arbitration institution.

Assistance by arbitral tribunals

Arbitrations subject to DIAC Rules

The DIAC Rules grant tribunals wide discretion to adopt appropriate procedures having regard to the relevant circumstances (Article 17.3*)*. In order to ensure that a DIAC arbitration is conducted expeditiously and in a cost-efficient manner, a tribunal may (i) make determinations of issues on a preliminary basis; (ii) make determinations on documentary evidence alone; (iii) limit disclosure or written submissions of the parties; (iv) limit the extent of expert evidence; and/or (v) encourage experts to agree on certain issues (Article 17.2). These procedural tools give tribunals extended powers to manage proceedings. Determinations on a preliminary basis, or on the basis of limited evidence, permit the arbitral process to be completed more swiftly. This can prevent the escalation of disputes, reducing the risk of a party becoming unable to comply with the final award due to changes in circumstances or prolonged disputes.

Expedited proceedings are also available for qualifying disputes, being disputes where (i) the main claim (less interest and costs) is lower than AED 1 million (approximately US$275,000); or (ii) the parties agree in writing to the procedure; or (iii) the arbitration court considers the matter exceptionally urgent; and (iv) in all cases, if considered appropriate by the arbitration court (Article 32.1). For low-value claims, expedited proceedings can be effective in guarding against a Pyrrhic victory by reducing the legal and other dispute-related costs of the parties and avoiding a situation where costs incurred are equal to or even greater than the awarded sum.

Tribunals also have wide powers to order interim measures (*Appendix II, Article 1.2*), including to order 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 preventing the dissipation of assets out of which a subsequent award may be satisfied;

d. Preserve evidence that may be relevant and material to the resolution of the dispute; or

e. Provide or procure security for the costs of the arbitration, including the fees of the legal representatives and any expenses incurred by those representatives, together with any other party's costs.

Interim measures and preliminary orders made by a tribunal are binding on the parties (Appendix II, Article 1.14), and a party can approach the relevant court to grant or enforce an interim measure or preliminary order issued by the tribunal (as considered further below).

Such a request will "not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement" (Appendix II, Article 1.13). In 2021, it was reported that the Dubai courts enforced an interim order for costs issued by a DIAC arbitral tribunal.

Most recently, the DIFC Court has confirmed that interim measures granted by the arbitral tribunal are capable of recognition in the DIFC, as long as the interim measure is passed as an "award" (*see Muhallam v. Muhaf [ARB 021/2022]*). Tribunals are therefore encouraged to grant interim measures in the knowledge that the UAE courts should enforce them.

Arbitrations seated in onshore UAE

Under the UAE Arbitration Law, arbitral tribunals are granted a variety of powers to assist with the conduct of arbitration proceedings. For example, an arbitral tribunal is permitted to issue interim or partial awards (Article 39), as well as to grant interim measures.

Such interim measures include inter alia orders to preserve evidence or assets, to maintain the status quo pending determination of the dispute, and to take action to prevent current or imminent harm or prejudice to the arbitral process itself (Article 21(1)). In particular, the unconventional power to prevent harm or prejudice to the arbitral process itself grants arbitral tribunals broad discretion to act where necessary.

Arbitrations seated in the DIFC

The DIFC Arbitration Law grants arbitral tribunals wide discretion to issue interim measures, which most commonly include orders relating to the preservation of assets and/or evidence, as well as security for costs (Article 24(1)).

Arbitrations seated in the UAE are uniquely positioned within a landscape where multiple legal systems coexist, offering diverse procedural approaches and influencing the conduct and outcome of arbitration proceedings.

Assistance by local courts

The courts in the UAE have the typical powers to assist arbitral tribunals. However, such powers are not commonly relied upon by arbitral parties.

In relation to onshore-seated arbitrations, and further to the UAE Arbitration Law, a party or arbitral tribunal may request the onshore courts to issue interim or precautionary measures for current or future proceedings, whether before or during the course of the arbitration proceedings (Article 18(2)). This option may assist parties before an arbitration has commenced, or during arbitration proceedings if, for example, the respondent is not participating and court intervention is necessary to exercise coercive powers. Onshore courts may also be requested to provide assistance with the taking of evidence in arbitration proceedings, including requiring witnesses to submit and give oral testimony or provide documents (Article 36(1)). Such powers may also be of assistance when a party refuses to comply with orders or directions of an arbitral tribunal.

With respect to offshore-seated proceedings, the DIFC Court may also assist in certain circumstances under the DIFC Arbitration Law, such as to assist with the formation of a tribunal if difficulties arise (Article 17(3)), or to provide assistance in taking evidence (Article 34). As with onshore proceedings, this may be useful where a party is not participating or complying with the arbitral process.

Both onshore and offshore courts also provide for modern and swift procedures relating to the enforcement of domestic and foreign awards.

Assistance of foreign arbitral proceedings

In the onshore courts, it is possible to obtain a payment order or a precautionary attachment order even where the onshore courts do not have jurisdiction to hear the substantive dispute (i.e. where the dispute is subject to arbitration, including foreign arbitration).

In the DIFC Court, injunctive relief can be granted in support of foreign proceedings (RDC 25.24), but only if the DIFC Court has jurisdiction under one of the statutory gateways (as confirmed in the recent decision in Sandra Holdings v. Saleh CA 003/2023). This includes UAE-seated arbitrations. Various interim measures are available under RDC 25.1, including freezing orders, disclosure orders, and interim payment orders.

Further, the DIFC Court of First Instance decision in *Muhallam v. Muhaf [ARB 021/2022]* (pursuant to which interim awards are capable of recognition in the DIFC) is also applicable to foreign-seated arbitrations.

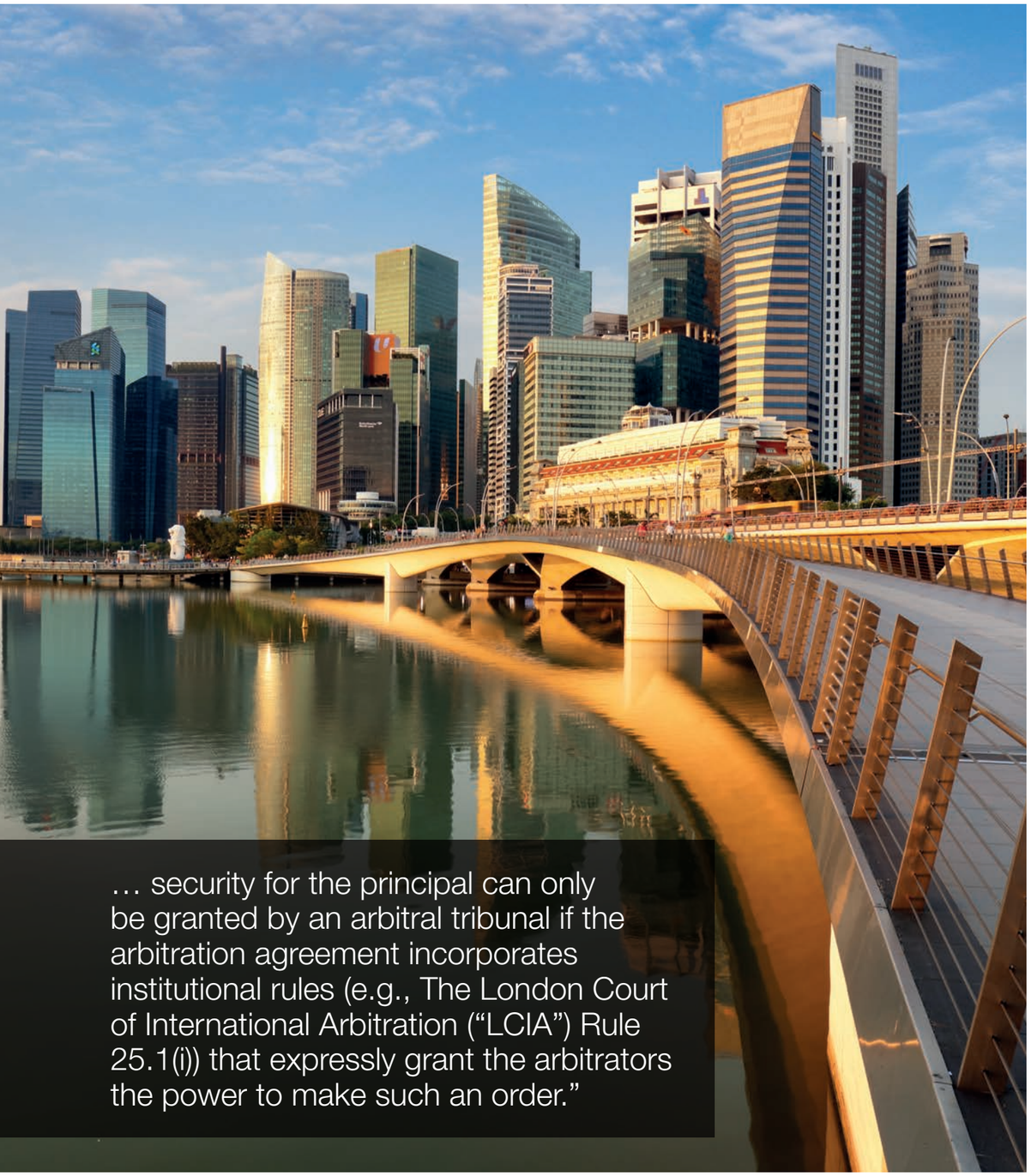
The courts in the UAE have the typical powers to assist arbitral tribunals. However, such powers are not commonly relied upon by arbitral parties.

Antonia Birt
Partner
UAE
+971 4 709 6328
abirt@reedsmith.com

Finlay Donaldson
Associate
UAE
+971 4 709 6353
fdonaldson@reedsmith.com

Alice Jones
Paralegal
Dubai
+971 4 709 6328
agjones@reedsmith.com

Focus on the UK



… security for the principal can only be granted by an arbitral tribunal if the arbitration agreement incorporates institutional rules (e.g., The London Court of International Arbitration ("LCIA") Rule 25.1(i)) that expressly grant the arbitrators the power to make such an order."

Introduction

We have yet to meet a client who would be content to succeed in arbitration if it was not able to convert that win into a tangible commercial outcome. It may be stating the obvious, but commercial arbitration is almost invariably started because the claimant wants to obtain monetary compensation. It is therefore very important for claimants to consider, throughout the arbitration, what steps they can take to reduce the risk that the final arbitration award proves to be nothing more than a very costly piece of paper.

Fortunately, English law provides claimants with a number of helpful tools that can be deployed at an early stage in arbitration proceedings with an English seat. These all help to reduce the likelihood of a Pyrrhic victory. Support is available through institutional rules, the English Arbitration Act 1996 (the Arbitration Act), and, in exceptional cases, directly through the English court.

Right to security

The ideal position for a claimant (or a respondent with a counterclaim) is to obtain security for the principal amount of its claim (or counterclaim) in advance of the final arbitration award. Equally, a party (particularly a respondent) might also consider applying for security for its legal costs (which, though challenging, is more straightforward than obtaining security for the principal).

In contrast to the position in some other jurisdictions (e.g., Singapore), it is not possible to obtain security from the English court once the arbitration has commenced, save in exceptional circumstances with the tribunal's permission.

The default position in an arbitration with an English seat is that the arbitrators' powers to grant security are limited to granting security to a respondent for its costs (section 38(4) of the Arbitration Act).

Security for costs can be granted by an arbitral tribunal in an arbitration with an English seat, regardless of whether any relevant institutional rules expressly give the tribunal that power.

But security for the principal can only be granted by an arbitral tribunal if the arbitration agreement incorporates institutional rules (e.g., The London Court of International Arbitration ("LCIA") Rule 25.1(i)) that expressly grant the arbitrators the power to make such an order.

Security for costs can be granted by an arbitral tribunal in an arbitration with an English seat …

If security for costs and/or for the principal claimed are potentially available before an arbitral tribunal, an application for security should be made at an early stage. Success in obtaining security is usually dependent on evidence that the other party is experiencing financial difficulties, is at risk of insolvency, has a history of failing to pay arbitration awards, or is likely to refuse to pay. This requires far more than merely showing that the counterparty is based overseas. However, it is more common than popularly imagined for security for costs (though not security for the principal) to be awarded where the other party is cagey about its financial position or where there is some evidence that the party has been involved in transferring assets around the world.

Security might be awarded in the form of a bank guarantee, a parent company guarantee, or funds paid into a solicitors' client account or to an account held by an arbitral institution. Where security has been granted, the party that has received the security can rest secure in the knowledge that it can enforce against that security if successful in the final award.

Security is therefore an important tool in avoiding Pyrrhic victory. Particularly for the claimant, when trying to obtain security for the principal of its claim. But also, in the case of security for costs, for a respondent facing a claim it expects to defeat, where the main concern is that it might successfully defend the claim but not be able to recover its legal costs of doing so.

Freezing orders – a "nuclear weapon" of English law

Freezing orders are one of the key tools English law offers to claimants concerned about the prospects of converting a successful arbitration award into monetary recovery. A freezing order is an interim injunction that restrains the respondent's ability to dispose of, or otherwise deal with, its assets. Where there is a risk that a respondent might disappear, a freezing order is often the only way to keep open the possibility of enforcing against a respondent's assets. Affected assets might include cash in bank accounts, bonds, shares, real estate, and movable goods (e.g., cargoes of commodities). They can include assets in England (where they are sufficient to satisfy the claim) or worldwide.

Freezing orders place strict limits on the respondent's freedom to deal with its assets. They therefore have the potential to be very disruptive to the respondent's operations, meaning that obtaining a freezing order can sometimes bring about a swift settlement. The potential consequences of failure to comply with a freezing order are very severe and can include custodial sentences for individuals, including company directors, enforceable against anyone living in or visiting the UK. This is why freezing injunctions have been described as the "nuclear weapon" of English law.

Freezing orders should be considered by claimants who are concerned that the respondent may deliberately hide, or dissipate, its assets before the claimant obtains, and enforces, an award. In England, freezing orders can be granted either in support of ongoing substantive arbitration or after the award has been made. That said, because the consequences of a freezing order are so serious for the respondent, it is challenging to obtain a pre-award freezing order.

As for whether to apply to the court or the arbitral tribunal for a freezing injunction: in the case of most arbitrations with an English seat, there are significant limits on the ability of arbitration tribunals to grant effective freezing injunctions. In particular:

1. In the time that it takes for an arbitral tribunal to be formed, and make an interim order, assets can be dispersed before they are frozen. Although some institutional rules (e.g., LCIA Rules) permit an emergency arbitrator to be appointed, or the tribunal to be constituted on an expedited basis, it still takes time for an emergency arbitrator to be appointed. That might mean a delay of around 14 days between applying for emergency arbitration and the appointment of the emergency arbitrator. In cases worthy of a freezing order, where there is a real risk of dissipation of assets, a 14-day delay would usually be too long. In contrast, a freezing injunction can be obtained from the English court within one or two days of applying.

2. It is not possible to apply to an arbitral tribunal on an *ex parte* basis. However, applications for a freezing order can be made to the English court without advance notice to the other party. That reduces the risk of dissipation of assets before the order can be enforced.

3. Unlike freezing injunctions issued by the English court, freezing orders issued by arbitral tribunals do not contain a penal notice. That is, only freezing injunctions from the English court result in a finding of contempt of court, and potentially imprisonment, if they are ignored. Freezing orders in arbitration therefore often do not have the same impact as those granted by the court.

4. An arbitral tribunal only has jurisdiction over the parties to the arbitration. Unlike the English court, arbitrators therefore do not have the power to issue orders affecting third parties (e.g., banks) to preserve or freeze a respondent's property.

Freezing orders should be considered by claimants who are concerned that the respondent may deliberately hide, or dissipate, its assets before the claimant obtains, and enforces, an award.

5. There is sometimes a suggestion that under section 38 of the Arbitration Act, tribunals can only grant freezing orders over the respondent's property that is the subject of the proceedings, not its general assets.

6. The rules of the main arbitral institutions based in England – including, for example, LCIA, LMAA, and other trade-specific bodies – do not typically provide arbitrators with significant additional powers to grant freezing orders.

Claimants in need of freezing injunctions can, however, apply to the English court, which fills the lacunae that can result from the arbitrators' inability to grant effective freezing relief. The English court has the power to grant worldwide freezing injunctions to freeze the assets of respondents pending the outcome of an arbitration. That arbitration must either have an English seat or a sufficiently close connection to England (such as the respondent or particular assets being located in England).

In either case, the applicant needs to satisfy certain strict conditions before the English court presses the "nuclear button" and grants a freezing injunction. In particular, the applicant must demonstrate: (i) that the respondent has assets that are capable of being captured by the freezing order, (ii) that the applicant has at least a good arguable case in the underlying arbitration, (iii) that there is a real risk the respondent will otherwise dissipate its assets, and (iv) that it is just and reasonable to grant the relief. The requirement to demonstrate a real risk of dissipation is often the most challenging, as it requires showing something beyond a general concern about the respondent's creditworthiness or intention lawfully to resist the claim and enforcement.

There is one more important procedural hurdle – a claimant seeking a freezing order is typically required to provide a cross-undertaking to compensate the respondent for any losses suffered as a result of the freezing order if it is later established that the relief should not have been granted or the claimant's claim fails. Depending on factors including the applicant's own financial standing and country of incorporation, the English court may even require such an undertaking to be supported (or "fortified") by a payment into court or other security (e.g., a bank guarantee).

A note of caution: despite their "nuclear weapon" status, freezing orders still have some notable limitations. They almost invariably include exceptions allowing the respondent to use and dispose of its assets in the "ordinary course of business" and to fund its legal costs and, in the case of individuals, its living expenses. Most significantly, freezing orders do not provide the applicant with any security or proprietary rights over the frozen assets. The claimant's ability eventually to enforce against the frozen assets may still be thwarted by the respondent's insolvency (in which the applicant will rank as a regular unsecured creditor) or by the rights of anyone who purchased the respondent's assets in good faith and without the knowledge of the freezing order.

Going beyond "nuclear" – asset preservation orders and receivership

Given the limitations discussed above, in some situations, it is necessary for the claimant to seek interim relief in addition to or instead of a standard freezing order. Two potential weapons in the claimant's armoury beyond the "nuclear option" of a freezing order are asset preservation orders and receivership orders, both of which can in limited circumstances be obtained from the English court in support of arbitration.

An asset preservation order ensures that the respondent is prevented from using, or disposing of, certain specific assets. In contrast to a classic freezing order, there is no exception for use, or disposal, in the ordinary course of business or to fund legal fees and living expenses. However an asset preservation order can be obtained only in very particular circumstances, that is, to preserve property or funds which are the traceable proceeds of the claimant's property.

A receivership order involves appointing an independent person – the receiver – to "step in" and take control of the assets in question in order to preserve them or their value (e.g., by selling the assets but then holding the resulting proceeds). Unlike most other interim relief, including freezing orders, the effectiveness of this remedy does not rely on the respondent, or other third parties, complying with the terms of the order. However, it is an intrusive remedy and its effects are typically difficult to reverse. The English court will not be prepared to appoint a receiver unless satisfied that a standard freezing order would not suffice. A successful applicant therefore needs to demonstrate that there is a measurable risk that the respondent would breach a standard freezing order and still take steps to put the assets in question beyond the future reach of the claimant's enforcement efforts. That is an extremely high bar to satisfy. In any event, receivership is rarely appropriate where the respondent's assets comprise funds in banks and/or immovable property (for which freezing orders are usually sufficiently effective).

The English court has the power to grant worldwide freezing injunctions to freeze the assets of respondents pending the outcome of an arbitration.

Knowledge is power – asset disclosure orders

Another helpful possibility may be to apply to the arbitral tribunal for a disclosure order. Asset disclosure orders are by default granted alongside freezing orders but can also be obtained on their own in support of arbitration. Typically, a disclosure order requires the respondent to provide (within a short period of time) a list of all its assets worldwide. It is also possible to seek disclosure of information about specific assets known to the claimant, and ongoing rolling disclosure (e.g., providing regular bank statements). In addition, the court or the arbitral tribunal can order the respondent to provide specific documents, witness affidavits, or even attend a cross-examination. If the respondent fails to provide the required information about its assets, this can be seen as evidence of a risk of dissipation, which can potentially allow the applicant to obtain a freezing order in due course. In any event, obtaining evidence about assets can help a claimant assess the merits of continuing with an arbitration.

Asset disclosure orders can be obtained from an arbitral tribunal with an English seat, and in some cases from the English court exercising its powers in aid of arbitration. There is, however, more scope to obtain an asset disclosure order from the English court before the arbitral tribunal is formed.

Obtaining information from third parties

In certain limited circumstances, it may also be possible to obtain disclosure orders from the English court against third parties, such as banks, for information to be used in an arbitration. Such orders typically require a demonstration that the third party in question is likely to have relevant documents or information about the respondent's wrongdoing or the whereabouts of the proceeds of such wrongdoing. They can therefore be a useful tool in paving the way for enforcement action. It is not possible for the arbitral tribunal to issue orders compelling third parties (who are not parties to the arbitration) to make a disclosure.

There has been uncertainty for some years as to whether, under section 44 of the current Arbitration Act, the English court can make orders for disclosure by third parties in support of arbitration. That question has been addressed by the Law Commission in the context of considering recommendations for updates to the Arbitration Act. The Law Commission's answer is that the English court can make orders against third parties for disclosure of information to be used in an arbitration.

Prohibiting court applications for interim relief – *Scott v Avery* clauses

Those remedies discussed above which require the English court's intervention have one common potential weakness – they are not available where the arbitration agreement prohibits the parties from taking any action in the local courts, including by way of interim applications, before an arbitration award is obtained. Such clauses, known as *Scott v Avery* clauses after the first case that discussed them, effectively prevent the claimant from seeking pre-award freezing orders, asset preservation orders, or receiverships. Notably, the Federation of Oilseeds and Fats Associations (FOSFA), based in England, includes a *Scott v Avery* clause in its standard arbitration agreement, which is widely used in that industry.

Where such clauses are included in the arbitration agreement, the claimant's pre-award options are limited to the relief that can be granted by the arbitral tribunal, whether through the powers granted by the Arbitration Act, the procedural rules of the institution chosen by the parties, or – less frequently – through the parties' express agreement.

Conclusions and practical recommendations

Virtually no claimant is interested in obtaining an arbitration award if it cannot be enforced. Thankfully, the English court has tools that can be deployed to reduce the risk of Pyrrhic victories.

Prudent claimants consider these tools at all relevant stages of arbitration, starting from the point an arbitration agreement is first negotiated in a contract. We set out below some basic practical recommendations for claimants:

1. Consider whether the proposed arbitration agreement is more likely to support or hinder your recovery efforts if your counterparty becomes evasive. Specific points worth thinking about include:

    b. Do the laws of the chosen seat of arbitration provide adequate support to claimants seeking interim relief?

    c. How about the rules of the selected arbitration institution? Do they convey any additional powers on the tribunal (e.g., in the way LCIA rules allow tribunals to order general security for claims)?

    d. Does the arbitration agreement include any express exclusions or limitations on the types of interim relief that can be obtained, such as a Scott v. Avery clause or exclusion of sections 38 and/or 44 of the Arbitration Act? If so, consider negotiating to remove such clauses.

2. Think of eventual enforcement issues early and often. It may be important to monitor the respondent's conduct for signs of potential intention to evade enforcement (e.g., by dissipating assets).

3. Investigate the respondent's financials and understand the geographical spread of the potential assets. Consider which of the "weapons" offered to arbitration claimants may be effective in the relevant jurisdictions before making any applications in England.

4. If you are concerned about the risk that the respondent will remove its assets from the reach of enforcement, consider applying to the English court for a freezing order in advance of commencing arbitration or before the arbitral tribunal is appointed.

Virtually no claimant is interested in obtaining an arbitration award if it cannot be enforced. Thankfully, the English court has tools that can be deployed to reduce the risk of Pyrrhic victories.

Elizabeth Farrell
Partner
London
+44 (0) 20 3116 2921
efarrell@reedsmith.com

Bartek Rutkowski
Associate
London
+44 (0) 20 3116 3698
brutkowski@reedsmith.com

Focus on Singapore

The Singapore courts have concurrent powers to order the same type of relief as an arbitral tribunal, subject to certain exceptions.

Applications for urgent or interim protection, pending the final resolution of arbitration proceedings, are an important tool in the international arbitration lawyer's armory to guard against a Pyrrhic victory. Often, a party cannot wait until the arbitration process has run its course before obtaining the relief it needs: crucial evidence may decompose or disappear, or a recalcitrant party may dissipate assets to make enforcement of the final award impossible. A party can obtain interim relief from a court or an arbitral tribunal to guard against a worthless award.

In this article, we examine the practicalities of obtaining interim relief from Singapore-seated international arbitral tribunals and the Singapore courts.

What sort of interim relief do you need?

Powers to grant interim relief

The powers of arbitral tribunals and the Singapore courts to grant interim relief are broadly similar but not the same.

Arbitral tribunals have broad powers under the International Arbitration Act 1994 (IAA) and the prevailing rules of leading Singapore arbitral institutions such as the Singapore International Arbitration Centre (SIAC) and the Singapore Chamber for Maritime Arbitration (SCMA) to make interim orders such as for security for costs, for preservation of assets, to secure the amount in dispute, freezing orders, and other interim injunctions.

The Singapore courts have concurrent powers to order the same type of relief as an arbitral tribunal, subject to certain exceptions. However, a party can only apply to the Singapore courts in certain circumstances, as we discuss below.

Nature of relief

How should a party decide whether to approach an arbitral tribunal or the Singapore courts for interim relief? The answer can usually be found in the nature of the interim relief sought.

Broadly speaking, a party may seek an order to prevent a party from doing something, for example, to stop a party disclosing confidential information (a prohibitory injunction), or it may seek an order requiring a party to take a step, such as continuing to provide goods or services pursuant to a contractual arrangement (a mandatory injunction). Both arbitral tribunals and the Singapore courts may grant interim mandatory and prohibitive injunctive relief.

Freezing and search and seizure orders

If a claimant learns that a respondent is about to transfer assets out of its name in order to frustrate potential enforcement proceedings, the claimant will need urgent assistance to prevent that transfer. In such a situation, the claimant can seek to freeze the assets to stop them being transferred. Alternatively, where a claimant intends to start an arbitration against a respondent dealing in goods or data stolen from the claimant, there is a risk that once the respondent is notified of the claim, it will destroy the evidence and try to frustrate the claim. The claimant can apply for a search and seizure (or *Anton Piller*) order, which allows it to enter the respondent's premises to inspect and preserve evidence. Both orders can and may need to be made against or served on third parties. For example, banks or other entities holding assets on their owners' behalf may need to be notified of an order to ensure that the injunction against the respondent is effective. For search and seizure orders, the evidence in question may be located on the premises of innocent third parties.

An arbitral tribunal seated in Singapore has no jurisdiction to make an order against third parties such as banks or other innocent third parties. An arbitral tribunal also cannot grant relief without first giving notice to the parties over whom it has jurisdiction. As a result, applications for freezing orders or search and seizure orders should be made directly to the Singapore courts. The Singapore courts can hear an application for such orders on an *ex parte* basis (i.e., without the respondent initially being made aware) and can ensure that its orders are served on third parties.

Security for costs and document production

There are other situations, such as where a party in an arbitration may want to obtain certain documents from the other party or where a party may want to obtain security for its costs in defending a claim brought by the other party, where only an arbitral tribunal has jurisdiction to make such orders.

Should relief be sought from an arbitral tribunal or the Singapore courts?

Save in the situations described above, a party can, in theory, choose to approach an arbitral tribunal or the Singapore courts for interim relief. Sometimes, a party will need the assistance of both.

The Singapore courts

The Singapore courts will intervene only sparingly and in very narrow circumstances to grant relief in relation to a Singapore-seated arbitration, such as where the arbitral tribunal cannot be constituted expediently enough, where the Singapore court's coercive enforcement powers are required, or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.

The Singapore courts are therefore likely to intervene only in certain specific situations:

A. **Where the arbitral tribunal has no jurisdiction.** This would include circumstances where the parties have restricted a tribunal's powers in the arbitration agreement itself. This situation would also include relief being sought against a non-party to the arbitration agreement, such as in examples of the freezing or search and seizure orders discussed above.

B. **Where the arbitral tribunal is unable for the time being to act effectively.** This would include when the arbitral tribunal has yet to be fully or properly constituted. The likelihood of the Singapore courts intervening in such a situation has arguably become narrower in light of emergency arbitration procedures that exist in many arbitral rules.

C. **Where the Singapore court's coercive enforcement powers are required.** This would include the situation where relief must be sought without notice to the party against whom the interim relief is directed, or when entry onto premises and seizure of evidence is required.

The Singapore courts are also empowered to order interim relief in respect of arbitration proceedings seated outside Singapore where appropriate. There is no guidance in the case law or the IAA itself as to when it would be "inappropriate" for the Singapore courts to make an order for interim relief in such circumstances. It may be "inappropriate" for the Singapore courts to grant interim relief because of factors such as whether another local court is better placed to supervise the order for interim relief, the location of the subject matter of the dispute, or the location of the parties affected by the order.

Any order for interim relief by the Singapore courts will cease to have effect in whole or in part if an arbitral tribunal makes an order that expressly relates to the whole or part of the order. This is consistent with the deferential and residual role of the Singapore courts in the context of arbitration proceedings.

Case law developed over many years provides clear guidance to parties on the test for obtaining interim relief from the Singapore courts. The Singapore courts will consider various factors when deciding whether to grant relief, including urgency, necessity, prospects of success of the applicant's claims, whether damages are an adequate remedy for the applicant or the respondent, and whether the balance of convenience lies in favor of granting the relief sought. Whilst every case will turn on its own facts, the threshold for seeking interim relief from the Singapore courts is generally high. The more the relief intrudes on the rights of the respondent (such as a freezing or search and seizure order, or an order for the respondent to post security for a claim), the more compelling the application needs to be.

Arbitral tribunal

As explained above, the Singapore courts will only intervene to consider interim relief applications in narrow circumstances. The expectation is that parties will apply to an arbitral tribunal. If the matter is not urgent (but nevertheless needs to be determined before a final arbitration award), a party should consider making the application for relief to the merits tribunal once constituted. If the matter is too urgent and cannot await the constitution of a tribunal, a party may apply to an emergency arbitrator, assuming provision for this is made in the parties' chosen institutional arbitration rules.

Many leading arbitral institutions have enacted emergency arbitration provisions in their rules. See, for example, the rules of the SIAC, the International Chamber of Commerce, and the Australian Centre for International Commercial Arbitration.

Emergency arbitration provisions provide for a fast-track procedure for considering urgent applications. An emergency arbitrator is typically appointed at very short notice (usually within one day) and will render a written decision within 14 days of their appointment.

Unlike the guidance to be gleaned from case law when applying to the Singapore courts, the applicable test for interim relief in international arbitration is not clear. There is no guidance from the IAA or indeed many of the institutional arbitration rules as to the factors to be considered in such an application. Some rules, however, do provide some guidance such as requiring arbitral tribunals to take into account certain factors when deciding whether to grant interim relief, such as whether the harm that would result if the interim measure is not granted is irreparable, whether that harm substantially outweighs the harm that is likely to result to the party against whom the interim relief is directed, and whether there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

There are advantages to obtaining interim relief from an arbitral tribunal. The parties may have chosen arbitration because of the knowledge and expertise of arbitrators in a particular field, which may also make them better suited to deal with a request for interim measures. There is also no right of appeal against an interim measure granted by an arbitral tribunal. Parties can therefore save on the time and costs that they might otherwise have had to incur in dealing with an appeal by the respondent against a successful application for interim relief to the Singapore courts.

A possible downside of applying to an arbitral tribunal for interim relief is that the arbitral tribunal's order for interim relief would have to be subsequently enforced by the local courts to have full effect. However, to be weighed against that is the fact that a party who ignores the interim order of a tribunal (whether the merits tribunal or an emergency arbitrator) is unlikely to be viewed positively by the merits tribunal. There is therefore a strong incentive for a respondent to comply with an order for interim relief made by an arbitral tribunal.

How do you enforce an order for interim relief?

Obtaining an order from the Singapore court for interim relief permits the party that succeeded in obtaining the interim relief to demand compliance, failing which the party against whom the orders are directed will be in contempt of court. The punishment for contempt of court under Singapore law is a fine of up to S$100,000, imprisonment for up to three years, or both.

Obtaining an order for interim relief from an arbitral tribunal is, however, only part of the battle won. If the respondent does not comply voluntarily, the applicant would still have to apply to the Singapore courts (or possibly a foreign court) to enforce tribunal-issued interim relief in order for it to have the same "bite" as a court order.

That said, enforcement of interim relief ordered by an arbitral tribunal is usually relatively swift and straightforward. The Singapore courts may refuse to grant permission to enforce in limited circumstances, namely where (i) the granting of the interim measure would have been in excess of the Singapore courts' powers; (ii) the enforcement of the interim measure would be against public policy; and (iii) the enforcement application is brought in abuse of process.

It should be noted, however, that this threshold may not necessarily apply to the enforcement of interim measures ordered by a foreign-seated arbitral tribunal: the Singapore courts may take into account other factors in deciding whether or not to grant the interim relief. For instance, in *CVG v. CVH* [2022] SGHC 249, the Singapore High Court acknowledged that foreign interim awards by emergency arbitrators were enforceable under Singapore law but ultimately refused enforcement in that case on the ground that the circumstances in which the emergency award was made did not give the respondent an opportunity to present its case such that the respondent had been prejudiced as a result. The Indian courts have also been prepared to grant interim relief in terms of orders made by foreign-seated arbitral tribunals upon a review of the order in question and having independently decided whether the relief should be granted. Their willingness to enforce emergency awards made in Singapore has arguably contributed to the success of emergency arbitration procedures in the region over the past decade.

Conclusion

The Singapore international arbitration regime, coupled with the most popular international arbitration rules, has developed and adapted to help parties avoid winning a Pyrrhic victory. A party can seek interim relief from, in most cases, an emergency arbitrator or the merits tribunal once constituted. The Singapore courts will also come to a party's aid in narrow circumstances to ensure that effective relief can be granted. By considering the nature of interim relief required, to whom the application should be made, and what further enforcement steps may be required, a party can maximize its chances of obtaining effective interim relief.

Timothy Cooke
Partner
Singapore
+65 6320 5351
tcooke@reedsmith.com

Anand Tiwari
Associate
+65 6805 7323
atiwari@resourcelawasia.com

Melissa Lim
Associate
Singapore
+65 6320 5383
mlim@reedsmith.com

Focus on Latin America

Arturo Muñoz, Daniel Ávila II, and Isabella Lorduy[1]

Introduction

This article addresses interim measures in Latin America – both through local courts and arbitral tribunals. The article is divided into three parts: (i) measures that arbitral tribunals may take under regional and international arbitration rules; (ii) measures that local courts may take in Mexico, Colombia, Chile, Peru, and Brazil; (iii) and a summary of practical considerations to protect arbitral awards and avoid Pyrrhic victories.

In some cases, the outcome of an arbitration or the ultimate efficacy of an arbitral award depends on an interim measure. Preserving the status quo ante, preventing the removal or transfer of property, compelling the disclosure of evidence, or requiring a witness to appear at an evidentiary hearing may be the key to a dispute. Both institutional rules – regionally and internationally – as well as local arbitration laws empower a litigant to seek measures during an arbitration to protect a future award. This article addresses the available tools in Latin America.

Measures available in arbitration

Although international institutions such as the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) have continued to register the majority of the international arbitration disputes in Latin America, local institutions have expanded and are now credible alternatives to traditional international arbitration institutions.[2] Today, regional arbitration centers are administering significant international disputes and have rosters that include leading international arbitrators from outside the region. This section will analyze the types of interim measures explicitly provided in the rules of some of the most popular arbitration institutions in Latin America.

Emergency arbitrator proceedings

Emergency arbitrator proceedings are an efficient tool to protect the claimant against a Pyrrhic victory. They allow for the prompt appointment of an arbitral tribunal with the relevant powers to order interim measures. They also give rise to final awards in a timely fashion, limiting legal costs and the risk of the dissipation or reorganization of assets in the course of long arbitration proceedings.

Emergency arbitrator proceedings have become a regular feature of complex disputes in Latin America. The ICC's Commission on Emergency Arbitrator Proceedings noted that most emergency arbitrator requests have been made in arbitrations seated in Latin America.[3] International institutions such as, for example, the ICC and the ICDR, have responded to the demand with rules that permit the appointment of emergency arbitrators and applications for provisional measures. A review of the rules of some of the most popular regional centers in Latin America shows that many – but not all – provide for the possibility of an emergency arbitrator. For example, the rules of the Camara Nacional de Comercio (CANACO) in Mexico, the Lima Chamber of Commerce Rules in Peru, and the rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) all provide for the appointment of an emergency arbitrator.[4] No emergency arbitrator provisions have been identified in the rules of the Center for Arbitration and Conciliation of Panama (CeCAP) or the Bogotá Chamber of Commerce (BCC) in Colombia.

This year, the Centro de Arbitraje y Mediación (CAM) Santiago in Chile issued new emergency arbitrator procedures that are effective for all disputes filed after September 1, 2023. This shows that regional centers in Latin America continue to adapt, creating tools for parties to resolve their disputes in a prompt and effective manner.

Provisional measures

Most regional centers in Latin America have rules that allow parties to seek provisional measures.[5] Some institutions list examples of interim measures; others outline relevant factors. For example, the rules of the BCC in Colombia and the CANACO in Mexico explicitly mention interim measures aimed at: (i) maintaining or reestablishing the status quo; (ii) protecting the arbitral process; (iii) securing assets necessary to satisfy a later award; and (iv) preserving evidence, among other actions. The rules of the CAM Santiago, Lima Chamber of Commerce (LCC) in Peru, and CAM-CCBC in Brazil allow parties to seek interim measures but do not list examples of the types of measures available for the parties.

The rules of the BCC in Colombia, the LCC in Peru, and the CANACO in Mexico all list factors to be considered when evaluating applications for interim measures. These include the traditional factors that are well known to practitioners, such as whether: (i) the requesting party is likely to be harmed if a provisional measure is not granted; (ii) any damage can be adequately compensated through a subsequent monetary award; (iii) there is a more serious risk of damage to the requesting party than the opposing party if the relief is granted; (iv) there is a "reasonable" probability that the claim will succeed on the merits; and (v) the determination on interim measures would require a pronouncement on the merits.

The rules of the CAM Santiago in Chile and the CAM-CCBC in Brazil are less specific. For example, the CAM-CCBC provides that a provisional measure may be granted "at the discretion of the arbitral tribunal" subject to the requesting party providing adequate security. The CAM Santiago in Chile simply provides in general terms that the arbitral tribunal "may…order cautionary or provisional measures it deems suitable against any of the parties."[6]

Disclosure of documents
Documents in the possession of the opposing side may be critical to the outcome of a case. The rules of the LCC in Peru, the BCC in Colombia, and the CANACO in Mexico all expressly provide for the disclosure of documents in support of the points in dispute or otherwise. However, they are in the minority among regional centers. Of the Latin America regional arbitration centers analyzed by the authors, the majority do not specifically address the exchange of information aside from providing generally that the tribunal may order the disclosure of documents to the other party within a given deadline.[7] In practice, however, the authors can confirm that parties routinely use Redfern-style information exchange schedules when arbitrating international disputes under the rules of regional centers. This is facilitated by the fact that practitioners and experienced arbitrators are familiar with information exchange and can tailor procedures case-by-case.

Third-party subpoenas
Documents in the possession of third parties may also be vital to a case. Such documents may be more challenging to obtain because tribunals ordinarily cannot directly compel third parties to participate in an arbitration or turn over evidence in their possession. While the rules of regional arbitration centers do no expressly provide for third-party subpoenas or disclosure orders, parties may seek assistance from local courts as discussed below.

Measures available in local courts

Many Latin American jurisdictions have empowered their domestic courts to assist arbitral tribunals. The authority of arbitral tribunals under international arbitration statutes is generally broad, although there are limitations in the context of the enforcement of interim measures as explained in more detail below.

Mexico[8]
Under Mexican law, interim relief can be granted by both the arbitral tribunal and the courts.

Domestic courts may grant interim relief prior to or during arbitration proceedings under article 1425 of the Mexican Commerce Code.[9] Article 1478 of the Mexican Commerce Code[10] provides the court with "full discretion" to adopt the provisional and precautionary measures deemed necessary. Because courts have broad discretion and article 1478 does not explicitly define the specific measures that may be granted, measures can be adapted to fit the case and may include measures to maintain or restore the status quo, orders to preserve assets, and injunctions.[11]

Domestic courts can also play a role in obtaining evidence under article 1444 of the Mexican Commerce Code,[12] which establishes that, during an arbitration proceeding, the parties may request assistance from an appropriate court to obtain evidence, either through a petition to the arbitral tribunal or by a direct request to the court by any of the parties. Additionally, local courts may also enforce interim measures issued by an arbitral tribunal under article 1479 of the Mexican Commerce Code[13] and may only refuse enforcement on limited grounds under article 1480. These grounds include the reversal of a measure ordered by an arbitral tribunal, inadequate notification to the parties, and the measure being incompatible with a court's powers, among others.

Chile[14]
Under article 17[15] of the International Commercial Arbitration Act (ICAL) No. 19.971, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order interim measures of protection. The requesting party also has the ability to seek its enforcement before a local court. The ICAL does not provide what kinds of provisional measures can be ordered.

Alternatively, parties can directly seek interim measures from local courts without compromising the jurisdiction of the arbitral tribunal. Article 9[16] of the ICAL clarifies that seeking protection from a court before or during arbitral proceedings, and obtaining such protection, does not conflict with an existing arbitration agreement. As a matter of practice, the national courts apply the Civil Procedural Code when analyzing the issuance of provisional measures by a tribunal. Pursuant to articles 291[17] to 296[18] and 298[19] of the Civil Procedural Code, a court may grant an injunction provided that two conditions are satisfied: periculum in mora and fumus bonus iuris. That is, to obtain injunctive relief, the requesting party must show that its claim prima facie has a good possibility of success and that if the injunctive relief is not granted without delay, the efficacy of the eventual judgment may be adversely impacted.

Pursuant to article 279[20] of the Civil Procedural Code, an injunction may also be granted by courts or arbitral tribunals prior to the commencement of a proceeding by satisfying the same conditions stated above and by providing sufficient security (financial or assets). If the preliminary injunction is granted, the requesting party has 10 days (starting from the day of the injunction), which can be extended to a maximum of 30 days, to commence proceedings before the competent court or tribunal.

Courts and domestic arbitral tribunals can issue injunctions ordering parties to the proceedings as well as ordering third parties to undertake or refrain from certain actions. By way of example, a court or a domestic arbitral tribunal can order a bank to refrain from paying an on-demand bond, or it can order a public registry to leave an annotation prohibiting the transfer of certain assets.

Pursuant to article 27[21] of the ICAL, the arbitral tribunal, or the parties with the approval of the arbitral tribunal, can request judicial assistance in obtaining evidence from third parties, such as obtaining a document production order. The national courts will apply the Civil Procedural Code in order to provide this assistance. Pursuant to article 349[22] of the Civil Procedural Code, a party can seek the assistance of a court to obtain disclosure of documents in the possession of the counterparty or a third party, provided they directly relate to the dispute and are not protected from disclosure. If a party does not disclose the document as ordered, the party may be sanctioned. As a matter of practice, the arbitral tribunals do not resort to this measure, that is, the sanctions do not apply.
Pursuant to article 380[23] of the Civil Procedural Code, if a witness refuses to testify despite the arbitral tribunal's order, the recalcitrant witness can be compelled to appear before the arbitral tribunal by state officials. As a practical matter, however, domestic arbitral tribunals seated in Chile almost never require the testimony of the recalcitrant witnesses. That same trend should apply in international arbitration as well.

Peru[24]
Per article 48 of the Peruvian arbitration statute (Legislative Decree No. 1071), Peruvian courts are required to assist arbitral tribunals in the enforcement of interim measures. Paragraphs 2[25] and 3[26] of article 48 expressly provide that the court must enforce the interim measure issued by the arbitral tribunal, based solely on documentation evidencing the existence of the arbitration and the interim decision of the tribunal, without considering any objections and without interpreting the content and scope of the interim measure. Any clarification must be requested from the arbitral tribunal itself. Furthermore, before the arbitral tribunal is established, the parties may request interim measures before the court, which will transfer all the proceedings to the arbitral tribunal as soon as it is appointed.

Article 45[27] of the Peruvian arbitration statute gives the local courts the authority to compel the taking of evidence before a judge to be used in support of an arbitration. Under article 45, Peruvian courts are required to provide assistance when requested by the arbitral tribunal or one of the parties unless it is manifestly contrary to public policy. Judicial assistance may consist in the taking of evidence before a local court, as mentioned above, or it may consist of measures necessary for the evidence to be taken before the arbitral tribunal itself. A court may also perform the examination of a witness, where the transcript is later submitted to the arbitration tribunal as evidence.

With respect to arbitrations seated outside of Peru, Peruvian judges must cooperate in the enforcement of interim measures issued by arbitral tribunals constituted abroad, provided that the interim order is recognized under the procedure established in the arbitration law for the recognition of awards issued abroad (section 4 of article 48 of the arbitration law, in accordance with articles 75, 76, and 77 of the arbitration law[28]).

Colombia[29]
Arbitration in Colombia is governed by law 1563 of July 12, 2012. The Colombian Arbitration Statute distinguishes between national and international arbitration. Under the international arbitration section, interim relief can be granted by both the arbitral tribunal and the national courts. Article 71[30] establishes that either party, prior to or during the course of the arbitration proceedings, may request the adoption of interim measures of protection from a judicial authority, which may order such measures without being deemed to have waived the arbitration agreement. Article 90[31] specifies that, regardless of whether the proceeding takes place in Colombia or abroad, any of the parties may resort to the judicial authorities to seek injunctive relief. The judicial authorities shall exercise such jurisdiction in accordance with their own procedural law and taking into account the distinctive features of an international arbitration.

With respect to the powers of the arbitral tribunal, article 81[32] establishes that the applicant shall demonstrate the appropriateness, relevance, reasonableness, and timeliness of the interim measure meant to prevent any present or imminent harm, or the hindering of the arbitration proceedings. Further, article 88[33] establishes that any interim measure issued by an arbitral tribunal shall be binding without the need for any recognition procedure by the local courts, and, unless the arbitral tribunal provides otherwise, its enforcement may be requested before a judicial authority, regardless of the State where it has been issued. For this purpose, the judicial authority shall proceed with the enforcement in the same manner as provided by law for the enforcement of judgments rendered by Colombian judicial authorities, and only the exceptions provided for in article 89 of this section may be invoked as exceptions in such proceedings.

Section b (ii) of article 89[34] establishes that the enforcement of precautionary measures may be refused if it is against the "Colombian Public International Order." This concept has both procedural and substantive dimensions, according to Colombian courts. From the procedural perspective, the judge would have to consider whether there was a violation of the defendant's guarantees in the proceedings, such as a reasonable opportunity for defense, adequate notice, and equal treatment of the parties.[35] From the substantive perspective, the highest Colombian courts have interpreted this notion as to whether the decision was limited to a decision only affecting the particular interest of the parties and did not transcend to matters that could "compromise essential or fundamental values and principles of the State."[36]

Another interesting point to consider is how emergency arbitration decisions can be enforced under the Colombian Arbitration Statute. The uncertainty stems from article 88,[37] which focuses on local courts enforcing measures from an "arbitral tribunal." It remains unclear whether an "Emergency Tribunal" falls under this definition and if its decisions can be enforced akin to an award (subject to recognition) or considered as non-award decisions.

Brazil[38]
Pursuant to article 22,[39] paragraph 2,[40] and article 22-C[41] of Brazilian Arbitration Act (Law No. 9.307/96, as amended in 2015), arbitral tribunals may issue "arbitral letters" to request the assistance of local courts in securing compliance with their decisions, including interim or conservatory measures and the taking of evidence. The possibility of resorting to "arbitral letters" may apply to tribunals seated both in and outside the Brazilian territory, provided that Brazilian law is applicable to the arbitral proceedings.

Judicial cooperation is widely accepted and encouraged under Brazilian law. Pursuant to part IV of article 237[42] of the Brazilian Code of Civil Procedure, "The following letters shall be issued: '[in] order for the court to perform or order the performance, within its territorial jurisdiction, of the act which is the subject of the request for judicial cooperation formulated by an arbitral tribunal, including those that bring about the enforcement of provisional remedies.'" Further, article 267 of the Brazilian Code of Civil Procedure[43] sets out the following limited circumstances where the judge shall refuse to enforce an arbitral letter: (i) the letter does not fulfill the legal requirements; (ii) the judge does not have jurisdiction by virtue of the subject matter or hierarchy; or (iii) the judge has doubts regarding the authenticity of the letter.

On September 9, 2021, the National Council of Justice issued Resolution No. 421, which establishes guidelines and procedures for national judicial cooperation in arbitration matters.

Professor Selma Lemes, one of the authors of the Brazilian Arbitration Act, conducts an annual survey called "Arbitragem em Números,"[44] which analyzes the data provided by eight of the most well-established Brazilian arbitral institutions.[45] In 2021, it was noted that arbitral tribunals submitted 15 arbitral letters, eight of which were enforced by local courts. In 2022, 11 arbitral letters were submitted, four of which were successful.

Article 22, paragraph 2 of the Brazilian Arbitration Act prescribes that should a witness fail to comply with a request to testify without good cause, "the arbitrator or the chairman of the arbitral tribunal may request the state court to compel the appearance of the defaulting witness, upon evidence of the existence of an arbitration agreement."

In practice, Brazilian arbitrators have issued subpoenas for witnesses requested by the parties. In case the witness fails to comply, the arbitral tribunal may rely on the assistance of local Brazilian courts to compel the recalcitrant witness to appear at the hearing, although our experience demonstrates that it is not common to do so.

Practical considerations

Arbitration rules and laws governing regional centers and courts in Latin America provide for the issuance of preliminary and interim measures aimed at protecting the efficacy of the ultimate award and securing evidence that may be necessary for a party to prosecute its case. Although arbitral tribunals may issue interim measures or order the disclosure of evidence, if a party or a third party is recalcitrant, it will generally be necessary to involve the local courts for enforcement. Given the amount of time and resources required to involve local courts, practitioners would do well to identify any matters on which judicial assistance may be required as early as possible.

Arturo Muñoz
Partner
Huston
+1 713 469 3841
amunoz@reedsmith.com

Daniel Ávila II
Associate
Houston
+1 713 469 3896
davila@reedsmith.com

Isabella Lorduy
New Associate
New York
+1 212 549 0247
ilorduy@reedsmith.com

Endnotes

Paris

1. *Cour de cassation*, 25 April 2006, 05-13.749.
2. Paris, July 6, 2023, no. 23-08.064; *Cour de cassation*, March 20, 1989, no. 86-17.204; *Cour de cassation*, April 2, 1997, no. 94-14.223, L.Degos, Rev, Arb. 1997, pp. 675–679.
3. Cour de cassation, October 11, 1995, no. 92-20.496; Article 143 of the CPC.
4. "If a party to the arbitral proceedings intends to refer to an authentic or private document to which it was not a party or to a document held by a third party, it may, at the invitation of the arbitral tribunal, summon this third party before the president of the 'judicial court' for the purposes of obtaining issuance of an official copy or production of the act or document." *(« Si une partie à l'instance arbitrale entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut, sur invitation du tribunal arbitral, faire assigner ce tiers devant le président du «tribunal judiciaire » aux fins d'obtenir la délivrance d'une expédition ou la production de l'acte ou de la pièce. »)*
5. *Société Otor Participations v. société Carlyle Holdings*, Paris, October 7, 2004, C. Jarrosson, Rev. arb. 2004, pp. 982–983.
6. Article L. 131-11 of the Code of Civil Enforcement Procedures.
7. Y. Derains, "*L'arbitre et l'octroi de mesures provisoires ex parte*," *Cah. arb. Gaz. Pal.* 2004, p. 74.
8. A similar issue arises in relation to foreign interim orders: Would French courts recognize/enforce interim orders issued by an arbitral tribunal seated overseas? The answer is likely to be the same as the one with orders rendered by arbitral tribunals seated in France.
9. C. Seraglini and J. Ortscheidt, *Droit de l'arbitrage interne et international*, 2019, Montchrestien, p. 855, n°862.
10. *Société Otor Participations v. société Carlyle Holdings*, Paris, October 7, 2004, C. Jarrosson, *Rev. Arb*. 2004, pp. 982–983: "The arbitral tribunal made a final decision on the request for interim measures submitted to it, and the limitation of the measures ordered to the duration of the proceedings did not undermine the res judicata effect of its decision, which the arbitrators were able to express in the form of an award."
11. M. de Boisséson, C. Fouchard, J. Madesclair, *Le droit français de l'arbitrage, 2023*, L.G.D.J., no. 795.
12. Paris Court of Appeal, May 11, 2021, no. 18-06076 stating that "with regard to the interim award issued on 8 April 2016 and notified to Asperbras on 30 September 2016, the fact that the award is described as interim and that it orders a provisional payment, together with a penalty payment [*astreinte*], does not deprive it of its status of award, even as a partial one, since it settles the dispute, even on an interim basis, it can therefore be the subject of setting aside proceedings […]."
13. ICC Rules article 37.6.
14. *Cour de cassation*, March 28, 2013, no. 11-27.770.
15. Philippe Pinsolle, *« L'impact décisif des mesures provisoires (et sa justification théorique),"* *Rev. Arb*. 2021, pp. 1007–1048.
16. Société Torno SpA v. Société Kagumai Gumi, Paris, 19 May 1998, C. Debourg, *Rev. Arb*, 1999, pp. 601–622.
17. **Article 28 Conservatory and Interim Measures** 1. "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."

    2. "Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof."
18. J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication 729 (Paris, 2012), para. 3-1036, p. 289.

Hong Kong

1. Article 13.5 of the Rules.
2. Article 13.10 of the Rules.
3. Article 23.2 of the Rules.
4. Article 23.3 of the Rules.
5. Article 23.1 and Schedule 4 of the Rules.
6. Article 23.4 of the Rules.
7. Article 23.6 of the Rules.
8. Article 23.7 of the Rules.
9. Section 56 of the Ordinance.
10. Section 35 of the Ordinance (equivalent to Article 17 of the UNCITRAL Model Law).
11. Section 37 of the Ordinance (equivalent to Article 17B of the UNCITRAL Model Law).
12. Ibid.
13. Section 39 of the Ordinance (equivalent to Article 17D of the UNCITRAL Model Law).
14. Sections 40 and 41 of the Ordinance (equivalent to Articles 17E and 17F of the UNCITRAL Model Law respectively).
15. Section 21 of the Ordinance.
16. Section 45(5) of the Ordinance.
17. Section 45(6) of the Ordinance.
18. Section 45(4) of the Ordinance.
19. *Giorgio Armani Spa and Others v. Elan Clothes Co Ltd* [2019] HKCFI 530, applying *The Angelic Grace* [1995] 1 Lloyd's Rep 87.
20. Section 84 of the Ordinance and O. 73, r.10 Rules of the High Court (Cap. 4A).
21. Section 45(8) of the Ordinance.

Latin America

1. Arturo Muñoz is a partner, and Daniel Ávila II and Isabella Lorduy are associates at Reed Smith in Houston, Texas. The authors thank counsel from five different jurisdictions who provided valuable input. They are identified in each relevant section.
2. See 2023 ITA Latin American Arbitral Institutions Guide and Scoreboard, available at www.cailaw.org.
3. See, e.g., ICC's Commission on Emergency Arbitrator Proceedings (2019).
4. See id.
5. See, e.g., CANACO Rules, article 31; CeCAP Rules, article 33; LCC Rules, article 34; CAM Rules, article 17; BCC Rules, article 3.17.
6. It should be noted that although these rules do not outline expressly the factors for the approval of a provisional measure, it is common practice that tribunals under these rules apply some of the similar factors outlined in the other rules.
7. For example, there are none in the CeCAP Rules. But see LCC, Rule 28; BCC Rules, article 3.24; and CANACO Rules, article 29(3).
8. This section was completed with the assistance of Francisco González de Cossío of González de Cossío Abogados in Mexico City, Mexico.
9. "Artículo 1425. Aun cuando exista un acuerdo de arbitraje las partes podrán, con anterioridad a las actuaciones arbitrales o durante su transcurso, solicitar al juez la adopción de medidas cautelares provisionales." [Article 1425. Even when there is an arbitration agreement, the parties may, prior to the arbitration proceedings or during the course thereof, request the judge to adopt interim measures of protection.]
10. "Artículo 1478. El juez gozará de plena discreción en la adopción de las medidas cautelares provisionales a que se refiere el artículo 1425." [Article 1425. The judge shall have full discretion in the adoption of the provisional precautionary measures referred to in article 1425.]
11. Francisco González De Cossío, "El Arbitraje y la Judicatura," Porrúa S.A. de C.V. Editorial, January 2007, pp. 19-23.
12. "Artículo 1444. El tribunal arbitral o cualquiera de las partes con la aprobación de éste, podrá solicitar la asistencia del juez para el desahogo de pruebas." [Article 1444. The arbitral tribunal or any of the parties with the approval of the arbitral tribunal may request the assistance of the judge for the presentation of evidence.]
13. "Artículo 1479. Toda medida cautelar ordenada por un Tribunal Arbitral se reconocerá como vinculante y, salvo que el Tribunal Arbitral disponga otra cosa, será ejecutada al ser solicitada tal ejecución ante el juez competente, cualquiera que sea el estado en donde haya sido ordenada, y a reserva de lo dispuesto en el artículo 1480." [Article 1479. An interim measure issued by an Arbitral Tribunal shall be recognized as binding and, unless the Arbitral Tribunal orders otherwise, shall be enforced upon application to the competent court, irrespective of the state in which it was ordered, and subject to the provisions of article 1480.]
14. This section was completed with the assistance of Elina Mereminskaya of Wagemann Arbitration in Santiago, Chile.
15. "Artículo 17. Facultad del tribunal arbitral de ordenar medidas provisionales cautelares. Salvo acuerdo en contrario de las partes, el tribunal arbitral podrá, a petición de una de ellas, ordenar a cualquiera de las partes que adopte las medidas provisionales cautelares que el tribunal arbitral estime necesarias respecto del objeto del litigio. El tribunal arbitral podrá exigir de cualquiera de las partes una garantía apropiada en conexión con esas medidas." [Article 17. Power of arbitral tribunal to order interim measures. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal considers necessary with respect to the subject matter of the dispute. The arbitral tribunal may require appropriate security from any party in connection with such measures.]
16. "Artículo 9. Acuerdo de arbitraje y adopción de medidas provisionales por el tribunal. No será incompatible con un acuerdo de arbitraje que una parte, ya sea con anterioridad a las actuaciones arbitrales o durante su transcurso, solicite de un tribunal la adopción de medidas cautelares provisionales ni que el tribunal conceda esas medidas." [Article 9. An arbitration agreement and adoption of interim measures by the court. It shall not be incompatible with an arbitration agreement for a party, either prior to the arbitration proceedings or during the course thereof, to request the court to adopt interim measures of protection or for the court to grant such measures.]
17. "Artículo 291. Habrá lugar al secuestro judicial en el caso del artículo 901 del Código Civil, o cuando se entablen otras acciones con relación a cosa mueble determinada y haya motivo de temer que se pierda o deteriore en manos de la persona que, sin ser poseedora de dicha cosa, la tenga en su poder." [Article 291. There shall be judicial sequestration in the case of article 901 of the Civil Code, or when other actions are brought in relation to a specific movable thing and there is reason to fear that it will be lost or damaged in the hands of the person who, without being the possessor of said thing, has it in his possession.]
18. "Artículo 296. La prohibición de celebrar actos o contratos podrá decretarse con relación a los bienes que son materia del juicio, y también respecto de otros bienes determinados del demandado, cuando sus facultades no ofrezcan suficiente garantía para asegurar el resultado del juicio." [Article 296. The prohibition to enter into acts or contracts may be decreed in relation to the assets that are the subject matter of the suit, and also with respect to other specific assets of the defendant, when his powers do not offer sufficient guarantee to ensure the result of the suit.]
19. "Artículo 298. Las medidas de que trata este Título se limitarán a los bienes necesarios para responder a los resultados del juicio; y para decretarlas deberá el demandante acompañar comprobantes que constituyan a lo menos presunción grave del derecho que se reclama. Podrá también el tribunal, cuando lo estime necesario y no tratándose de medidas expresamente autorizadas por la ley, exigir caución al actor para responder de los perjuicios que se originen." [Article 298. The measures referred to in this title shall be limited to the assets necessary to respond to the results of the trial; and in order to decree them, the plaintiff must provide evidence that constitutes at least a serious presumption of the right claimed. The court may also, when it deems it necessary and not in the case of measures expressly authorized by law, require security from the plaintiff to cover the damages arising therefrom.]
20. "Artículo 279 (269). Podrán solicitarse como medidas prejudiciales las precautorias de que trata el Título V de este Libro, existiendo para ello motivos graves y calificados, y concurriendo las circunstancias siguientes: 1a. Que se determine el monto de los bienes sobre que deben recaer las medidas precautorias; 2a. Que se rinda fianza u otra garantía suficiente, a juicio del tribunal, para responder por los perjuicios que se originen y multas que se impongan." [Article 279. Preliminary injunctions may be requested as precautionary measures under title V of this book, if there are serious and qualified grounds for them, and if the following circumstances exist: 1a. That the amount of the assets to be subject to the precautionary measures be determined; 2a. That a bond or other guarantee sufficient, in the court's judgment, to cover the damages that may arise and the fines that may be imposed, be given].
21. "Artículo 27. Asistencia de los tribunales para la práctica de pruebas. El tribunal arbitral o cualquiera de las partes con la aprobación del tribunal arbitral podrá pedir la asistencia de un tribunal competente de Chile para la práctica de pruebas. El tribunal podrá atender dicha solicitud dentro del ámbito de su competencia y de conformidad con las normas que le sean aplicables sobre medios de prueba." [Article 27. Assistance of courts for the taking of evidence. The arbitral tribunal or any party with the approval of the arbitral tribunal may request the assistance of a competent court of Chile for the taking of evidence. The court may comply with such request within the scope of its jurisdiction and in accordance with the applicable rules of evidence.]
22. "Artículo 349. Podrá decretarse, a solicitud de parte, la exhibición de instrumentos que existan en poder de la otra parte o de un tercero, con tal que tengan relación directa con la cuestión debatida y que no revistan el carácter de secretos o confidenciales." [Article 349 (338). At the request of a party, the production of instruments in the possession of the other party or of a third party may be ordered, provided that they are directly related to the matter in dispute and that they are not of a secret or confidential nature.
23. "Artículo 380. El testigo que legalmente citado no comparezca podrá ser compelido por medio de la fuerza a presentarse ante el tribunal que haya expedido la citación, a menos que compruebe que ha estado en imposibilidad de concurrir." [Article 380. A witness who is legally summoned but does not appear may be compelled by force to appear before the court that issued the summons, unless he proves that he has been unable to attend.]
24. This section was completed with the assistance of Hugo Forno Flórez of Garrigues in Lima, Peru.
25. "Para. 2. En los casos de incumplimiento de la medida cautelar o cuando se requiera de ejecución judicial, la parte interesada recurrirá a la autoridad judicial competente, quien por el solo mérito de las copias del documento que acredite la existencia del arbitraje y de la decisión cautelar, procederá a ejecutar la medida sin admitir recursos ni oposición alguna." [Para. 2. In cases of noncompliance with the precautionary measure or when judicial enforcement is required, the interested party shall appeal to the competent judicial authority, who, on the sole basis of the copies of the document evidencing the existence of the arbitration and of the precautionary decision, shall proceed to enforce the measure without admitting any appeal or opposition whatsoever.].
26. "Para. 3. La autoridad judicial no tiene competencia para interpretar el contenido ni los alcances de la medida cautelar. Cualquier solicitud de aclaración o precisión sobre los mismos o sobre la ejecución cautelar, será solicitada por la autoridad judicial o por las partes al tribunal arbitral. Ejecutada la medida, la autoridad judicial informará al tribunal arbitral y remitirá copia certificada de los actuados." [Para. 3. The judicial authority is not competent to interpret the content or scope of the interim measure. Any request for clarification or precision on the same or on the interim measure shall be requested by the judicial authority or by the parties to the arbitral tribunal. Once the measure has been executed, the judicial authority shall inform the arbitral tribunal and shall send a certified copy of the proceedings.]
27. "Artículo 45, para. 1. El tribunal arbitral o cualquiera de las partes con su aprobación, podrá pedir asistencia judicial para la actuación de pruebas, acompañando a su solicitud, las copias del documento que acredite la existencia del arbitraje y de la decisión que faculte a la parte interesada a recurrir a dicha asistencia, cuando corresponda." [Article 45, para. 1. The arbitral tribunal or any of the parties, with its approval, may request judicial assistance for the taking of evidence, attaching to its request copies of the document evidencing the existence of the arbitration and of the decision authorizing the interested party to resort to such assistance, where appropriate].
28. "Toda medida cautelar ordenada por un tribunal arbitral cuyo lugar se halle fuera del territorio peruano podrá ser reconocida y ejecutada en el territorio nacional, siendo de aplicación lo dispuesto en los artículos 75, 76, y 77."
29. This section was completed with the assistance of Isabella Lorduy of Reed Smith, licensed in Colombia.
30. "Artículo 71. Cualquiera de las partes, con anterioridad a las actuaciones arbitrales o durante el transcurso de las mismas, podrá solicitar de una autoridad judicial la adopción de medidas cautelares y esta podrá decretarlas, sin que por ello se entienda que ha renunciado al acuerdo de arbitraje." [Article 71. Either party, prior to the arbitration proceedings or during the course thereof, may request the adoption of interim measures of protection from a judicial authority, which may order such measures, without being deemed to have waived the arbitration agreement.]
31. "Artículo 90. Con anterioridad a la iniciación del trámite arbitral o en el curso del mismo, e independientemente que el proceso se adelante en Colombia o en el exterior, cualquiera de las partes podrá acudir a la autoridad judicial para que decrete medidas cautelares. La autoridad judicial ejercerá dicha competencia de conformidad con su propia ley procesal y teniendo en cuenta los rasgos distintivos de un arbitraje internacional." [Article 90. Prior to the initiation of the arbitration proceedings or during the course thereof, and regardless of whether the proceedings take place in Colombia or abroad, any of the parties may apply to the judicial authority to order interim measures of protection. The judicial authority shall exercise such jurisdiction in accordance with its own procedural law and taking into account the distinctive features of international arbitration.]
32. "Artículo 81. El solicitante de alguna medida cautelar prevista en el inciso segundo del artículo 80 deberá mostrar al tribunal arbitral la conducencia, pertinencia, razonabilidad y oportunidad de la medida cautelar. La determinación del tribunal arbitral al respecto de dicha posibilidad no implica prejuzgamiento en cuanto a cualquier determinación posterior que pueda adoptar." [Article 81. The applicant for an interim measure under the second paragraph of article 80 shall demonstrate to the arbitral tribunal the appropriateness, relevance, reasonableness, and timeliness of the interim measure. The determination of the arbitral tribunal with respect to such possibility shall be without prejudice to any subsequent determination it may make.]
33. "Artículo 88. Toda medida cautelar decretada por un tribunal arbitral será vinculante sin necesidad de procedimiento alguno de reconocimiento y, salvo que el tribunal arbitral disponga otra cosa, su ejecución podrá ser solicitada ante la autoridad judicial, cualquiera que sea el Estado en donde haya sido decretada. Para este efecto, la autoridad judicial procederá a la ejecución en la misma forma prevista por la ley para la ejecución de providencias ejecutoriadas proferidas por autoridades judiciales colombianas y dentro de dicho proceso solo podrán invocarse como excepciones las previstas en el artículo 89 de esta sección." [Article 88. Any interim measure decreed by an arbitral tribunal shall be binding without the need for any recognition procedure, and, unless the arbitral tribunal provides otherwise, its enforcement may be requested before the judicial authority, regardless of the State where it has been decreed. For this purpose, the judicial authority shall proceed with the enforcement in the same manner as provided by law for the enforcement of enforceable judgments rendered by Colombian judicial authorities, and only the exceptions provided for in article 89 of this section may be invoked as exceptions.]

34. “Artículo 89. Sección b, numeral ii. Para la denegación de la ejecución de medidas cautelares decretadas por el tribunal, se aplicarán las siguientes reglas: …b. ii. La ejecución de la medida sería contraria al orden público internacional colombiano.” [Article 89. section b, numeral ii. For the denial of the execution of precautionary measures decreed by the tribunal, the following rules shall apply: …b. ii. The execution of the measure would be contrary to Colombian international public order.]

35. Consejo de Estado. Sección Tercera. Sentencia April 17, 2020. Rad. 11001-03-26-000-2019-00015-00(63266). Isolux Ingenieria v. Bioenergy Zona Franca S.A.S. M.O. María Adriana Marín.

36. Id.

37. “Artículo 88. Toda medida cautelar decretada por un tribunal arbitral será vinculante sin necesidad de procedimiento alguno de reconocimiento.” [Article 88. Any interim measure decreed by an arbitral tribunal shall be binding without the need for any recognition procedure.].

38. This section was completed with the assistance of Eliana Baraldi and Caio Ramos of Eliana Baraldi Advogados in Brazil.

39. “Artículo 22. Poderá o árbitro ou o tribunal arbitral tomar o depoimento das partes, ouvir testemunhas e determinar a realização de perícias ou outras provas que julgar necessárias, mediante requerimento das partes ou de ofício.” [Article 22. The arbitrator or arbitral tribunal may take the depositions of the parties, hear witnesses, and order expert opinions or other evidence it deems necessary, at the request of the parties or on its own initiative.]

40. “Artículo 22, para. 2. Em caso de desatendimento, sem justa causa, da convocação para prestar depoimento pessoal, o árbitro ou o tribunal arbitral levará em consideração o comportamento da parte faltosa, ao proferir sua sentença; se a ausência for de testemunha, nas mesmas circunstâncias, poderá o árbitro ou o presidente do tribunal arbitral requerer à autoridade judiciária que conduza a testemunha renitente, comprovando a existência da convenção de arbitragem.” [Article 22, para. 2. In the event of failure, without just cause, to comply with the summons to give personal testimony, the arbitrator or arbitral tribunal shall take into account the conduct of the defaulting party when making its award; if the absence is that of a witness, in the same circumstances, the arbitrator or the president of the arbitral tribunal may request the judicial authority to bring the reluctant witness, proving the existence of the arbitration agreement.]

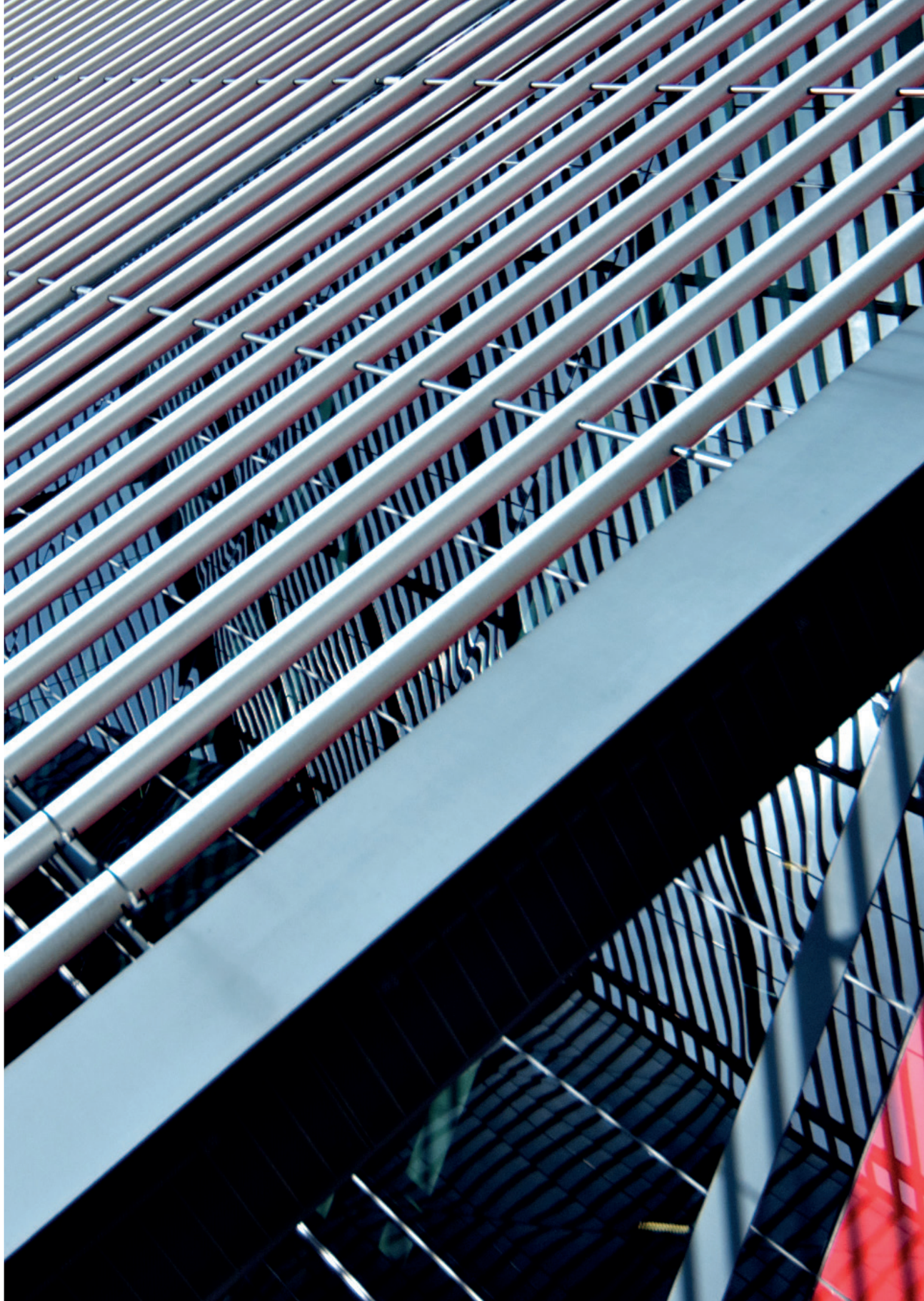
41. “Artículo 22-C. O árbitro ou o tribunal arbitral poderá expedir carta arbitral para que o órgão jurisdicional nacional pratique ou determine o cumprimento, na área de sua competência territorial, de ato solicitado pelo árbitro.” [Article 22-C. The arbitrator or the arbitral tribunal may issue an arbitral letter for the national court to perform or order the performance, within its territorial jurisdiction, of an act requested by the arbitrator.]

42. “Artículo 237. Será expedida carta: I – de ordem, pelo tribunal, na hipótese do section. 2º do article 236; II – rogatória, para que órgão jurisdicional estrangeiro pratique ato de cooperação jurídica internacional, relativo a processoem curso perante órgão jurisdicional brasileiro; III – precatória, para que órgão jurisdicional brasileiro pratique ou determine o cumpri-mento, na área de sua competência territorial, de ato relativo a pedido de cooperação judiciária formulado por órgão jurisdicionalde competência territorial diversa; IV – arbitral, para que órgão do Poder Judiciário pratique ou determine o cum-primento, na área de sua competênciaterritorial, de ato objeto de pedido decooperação judiciária formulado por juízo arbitral, inclusive os que importem efeti-vação de tutela provisória. Parágrafo único. Se o ato relativo a processo em curso na justiça federal ou em tribunal superior houver de ser praticado em local onde não haja vara federal, acarta poderá ser dirigida ao juízo estadual da respectiva comarca.” [Article 237. The following letters shall be issued: I – mandates, issued by the court, in the case mentioned in section 2 of article 236; II – letter rogatory for a foreign court to perform an act of international legal cooperation in relation to an action pending before a Brazilian court; III – letter of request, for a Brazilian court to perform or order the performance, within its territorial jurisdiction, of an act relative to a request for judicial cooperation formulated by a court from a different territorial jurisdiction; IV – “arbitral letter,” in order for the court to perform or order the performance of, within its territorial jurisdiction, the act which is the subject of the request for judicial cooperation formulated by an arbitral tribunal, including those that bring about the enforcement of provisional remedies. Sole paragraph. Should an act, related to proceedings pending before a federal court or superior court, have to be performed in a place where there is no federal court, the letter may be addressed to the state court of the respective judicial district].

43. “Artículo 267. O juiz recusará cumprimento a carta precatória ou arbitral, devolvendo-acom decisão motivada quando: I – a carta não estiver revestida dos requisitos legais; II – faltar ao juiz competência em razãoda matéria ou da hierarquia; III – o juiz tiver dúvida acerca de sua autenticida. Parágrafo único. No caso de incompetência em razão da matéria ou da hierarquia, o juiz deprecado, conforme o ato a ser praticado, poderá remeter a carta ao juiz ou ao tribunal competente.” [Article 267. A judge shall refuse the execution of a letter of request or of an arbitral letter, returning it with a reasoned decision, when :I – the letter does not fulfil the legal requirements; II – the judge does not have jurisdiction byvirtue of the subject matter or hierarchy; III – the judge has doubts regarding its authenticity. Sole paragraph. In the case of lack of jurisdiction by virtue of subject matter or hierarchy, the judge to whom the requesthas been made may, in accordance withthe act that is to be performed, forward the letter to the judge or court with jurisdiction].

44 Lemes, Selma (Coord.). “Arbitragem em Números: Pesquisa 2021/2022.” Canal Arbitragem. São Paulo, 2023.

45 Amcham-Brasil Arbitration Center, Center for Arbitration and Mediation of the Chamber of Commerce – Brazil-Canada, Ciesp/Fiesp Chamber of Conciliation, Mediation and Arbitration, Market Arbitration Center, International Court of Arbitration from the International Chamber of Commerce (Brazilian office).



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Reed Smith is strongly positioned to provide the highest level of service in dispute resolution to our clients. With offices in the world's leading arbitration centers, including London, Paris, New York, Singapore, Hong Kong, Dubai, Miami, and Houston, we have one of the largest and most diverse international arbitration practices in the world, with the ability to represent clients in every significant arbitral center and seat around the globe.

We are a recognized leader in international arbitration, and are ranked in the elite GAR 30, *Global Arbitration Review*'s ranking of the world's leading international arbitration practices. We have substantial experience representing both claimants and respondents, and a strong track record of obtaining successful results. Our deep knowledge of industry sectors including energy, natural resources, life sciences, transportation, telecoms, insurance, and banking enables us to understand the industry-specific factors and environments affecting our clients' disputes. This combination of deep arbitration experience, our lawyers' advocacy skills, and industry knowledge gives us a competitive advantage when representing our clients.

Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London

ABU DHABI
ASTANA
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
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