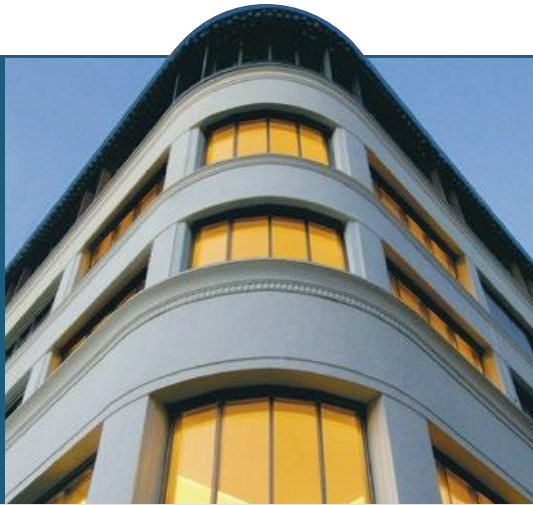


LALIVE



Protecting your client's interests through court-ordered interim relief

ASA Below 40 Seminar – Court Assistance in
International Arbitration

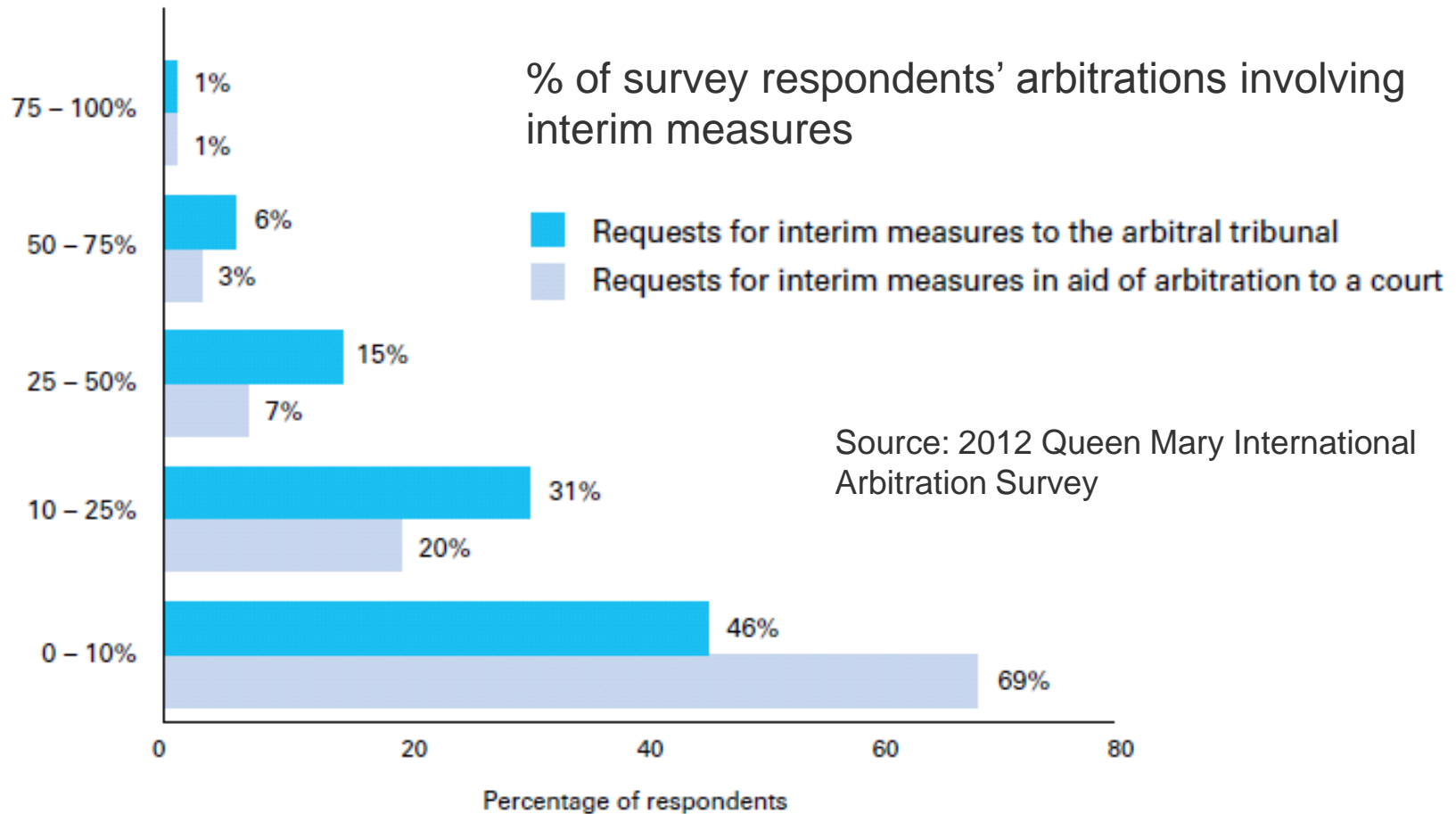
Sam Moss

Geneva, 23 May 2014

Post-lunch double-espresso



Is this a tool we should be using more?



Are the courts always an option?

- Some jurisdictions impose limitations on the courts' powers
- In some places, the courts are your only option
- Limitations (?) imposed by arbitral rules
- Have the parties agreed to exclude recourse to the courts?

What type of relief can you obtain?

- Focus on two major categories of interim relief:
 1. Injunctions or orders either to do or to refrain from doing something
 2. Attachments / Freezing orders
- *Ex parte* relief
- Interim measures against third parties

Injunctions – Examples of typical situations

- Injunction preventing a change of circumstances – e.g. blocking the calling of a bank guarantee
- Order to comply with certain obligations – e.g. to continue making deliveries

Injunctions – what do you need to show?

England & Wales <i>(American Cyanamid)</i>	Switzerland (Art. 261 CPC-ZPO)
<ul style="list-style-type: none">(1) Serious question to be tried(2) Award of damages not adequate compensation(3) Balance of convenience	<p>Likelihood of:</p> <ul style="list-style-type: none">(1) Existence of a valid cause of action on the merits(2) Risk of imminent harm(3) Injury that can only be remedied with difficulty <p>Proportionality + balance of interests</p>

Attachments / Freezing Orders

- Security for claim / to prevent unscrupulous party from dissipating assets to frustrate enforcement of an award
- *Ex parte*

Attachments/Freezing orders – what do you need to show?

England & Wales	Switzerland (Arts. 271-272 LP – SchKG)
<ol style="list-style-type: none">(1) A good arguable case(2) Some grounds for believing that the defendant has assets in England & Wales(3) Solid evidence of a real risk that defendant may dissipate assets(4) Balance of convenience	<p>Likelihood that:</p> <ol style="list-style-type: none">(1) There is a valid claim(2) Debtor has assets in CH(3) There is a case for attachment, e.g. debtor:<ul style="list-style-type: none">• intends to dissipate assets• is resident abroad and claim has sufficient link to CH

What court to apply to?

- Not necessarily the court at the seat of arbitration
- What type of measure are you seeking?
- Where will the measure need to be enforced?
- Advantages/disadvantages in a given forum?

Thank you!

More stats!!! (for discussion)

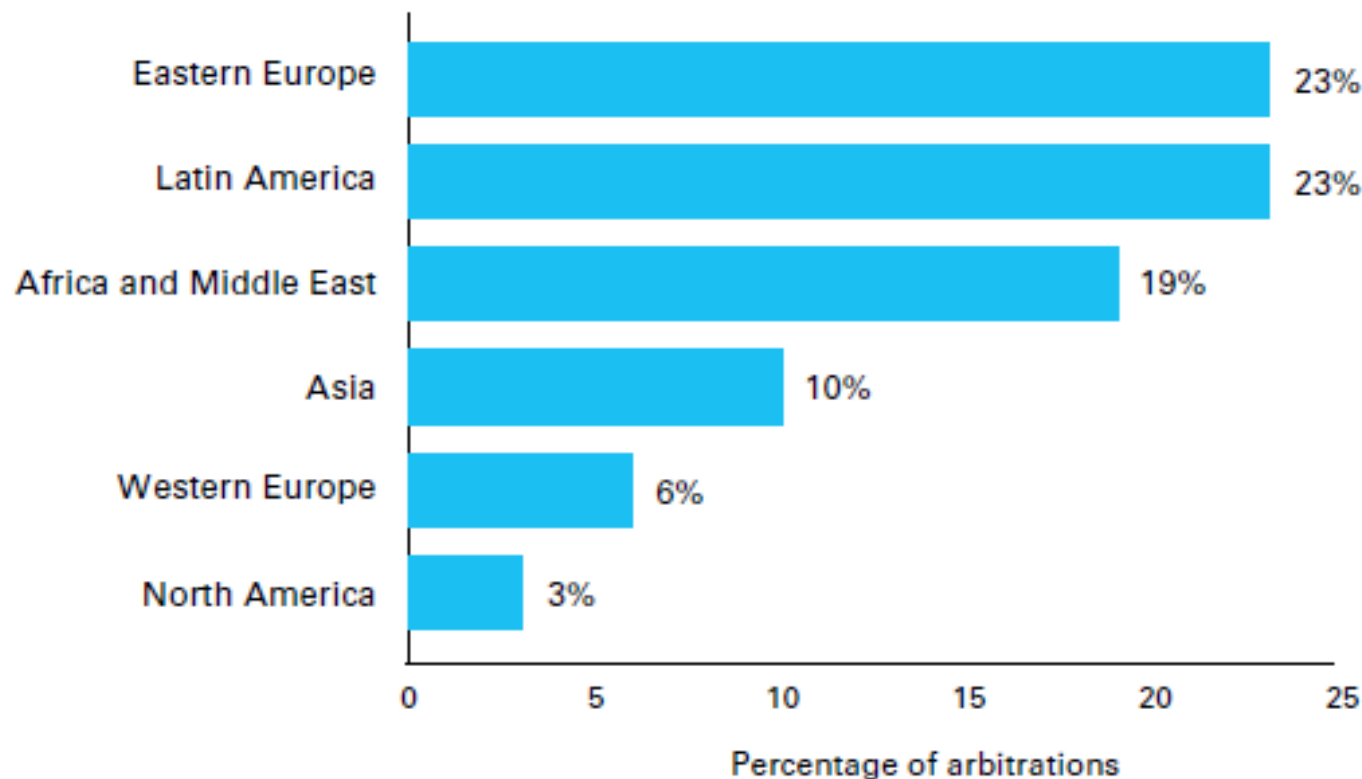
Source: 2012 Queen Mary International Arbitration Survey

- 62% of tribunal-ordered interim measures are complied with
 - Highest rate: North America and Western Europe (68%)
 - Lowest rate: Eastern Europe (39%)
- Parties seek court enforcement of only 10% of tribunal-ordered measures

More stats!!!

Source: 2012 Queen Mary International Arbitration Survey

Chart 14: In what % of arbitrations did a party seek enforcement by a court of tribunal-ordered interim measures?



More stats!!!

Source: 2012 Queen Mary International Arbitration Survey

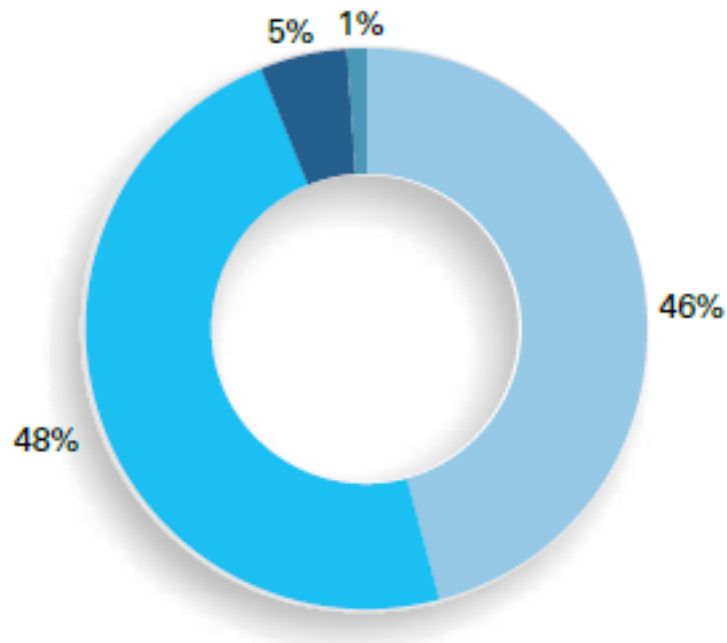


Chart 15: Over the past 5 years, how many of your arbitrations have involved an application for security for costs?

0	46%
1-5	48%
6-10	5%
10+	1%

More stats!!!

Source: 2012 Queen Mary International Arbitration Survey

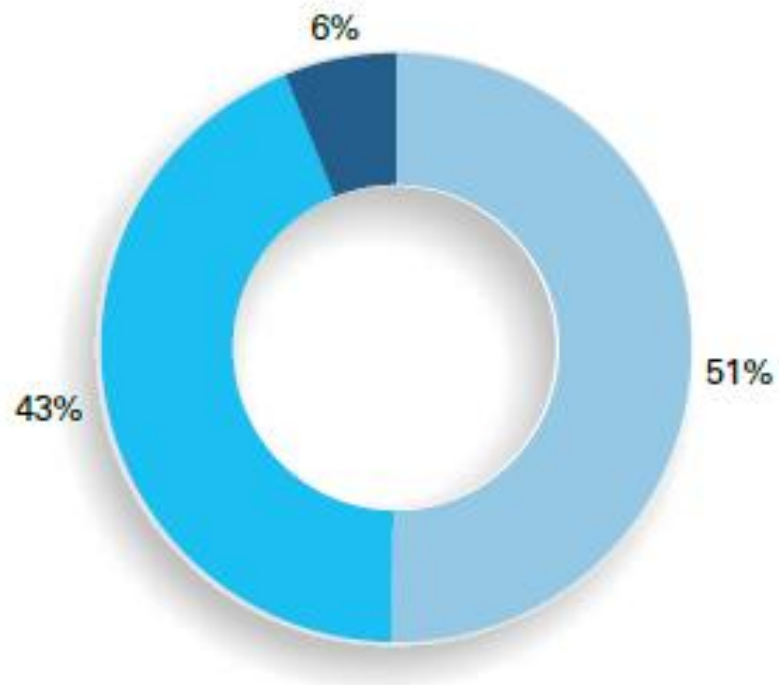


Chart 16: Should arbitrators in certain circumstances have the power to order interim measures *ex parte*?

Yes	51%
No	43%
Unsure	6%

More stats!!!

Source: 2012 Queen Mary International Arbitration Survey

Chart 17: Should arbitrators in certain circumstances have the power to order interim measures *ex parte*? Private practitioners v. arbitrators v. in-house counsel perspectives:

