

INTERIM MEASURES TO PREVENT IRREPARABLE HARM: WHAT CAN BE DONE BY THE ARBITRAL TRIBUNAL?

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As a Chinese proverb says:
“Distant waters won’t quench your thirst...”

i.e. in international arbitration, due to the lapse of time between commencement of arbitral proceedings and issuance of the final award, interim measures often constitute a key tool to prevent irreparable and non-compensatory harm to one party.

So, to satisfy your thirst of interim measures, what can be done by the Arbitral Tribunal?

Brief Historical Background:

For many years, in many jurisdictions, an Arbitral Tribunal did not have the powers to order interim measures, as these powers were exclusively vested in national courts.

Nowadays, in the majority of modern laws (but not all...), such powers are granted to the Arbitral Tribunals, or at least, the parties are given the right to agree that such powers be vested in the Arbitral Tribunal. This trend is explained by the recognition that in most cases, the Arbitral Tribunal, once appointed and confirmed, is best placed to assess the factual and legal details of a case, the purposes of a request -whether legitimate or dilatory- and subsequently to decide whether and which interim measures shall be ordered.

So, to satisfy your thirst of interim measures, what can be done by the Arbitral Tribunal (cont'd)?

- **Measures to take/preserve evidence** (ex. measures to preserve goods for expertise)
- **Measures to provide security for costs** (ex. in the event a party is suspected to have financial difficulties and/or to be a shell company from which recovery will be unlikely – an Anglo-Saxon more than a continental approach?)
- **Measures aimed at preserving the *status quo*** (ex. dispute on termination of trademark license agreement)
- **Injunctions and other measures to secure enforcement** (ex. Setting up an escrow account, issuing freezing orders)

What limits to the interim measures issued by Arbitral Tribunals?

The now widely accepted power of Arbitral Tribunals to issue interim measures is defined and/or limited by:

- **National laws** – see Italian civil code, Argentine code of civil procedure, which prohibit Arbitral Tribunals to grant interim measures; see English Arbitration Act, which only allows certain types of interim measures; see Model Law which limits the interim measures to “the subject matter of the dispute”; see French or Belgian laws which prohibit Arbitral Tribunals to issue orders for attachment
- **International Arbitration Rules** – see subtle differences between LCIA, ICC, UNCITRAL, ICDR...
- **The consensual nature of arbitration** - i.e. interim measures could only concern parties to the arbitration agreement
- **No *ex parte* applications**

What form for Orders for Interim Measures?

The form of Orders for Interim Measures is usually left at the discretion of the Arbitral Tribunal. Such orders can either be:

- A Recommendation
- A Procedural Order
- An Interim Award

The Form of Orders for Interim Measures matters principally because of **enforceability** questions.

Enforcement of Interim Measures issued by Arbitral Tribunals

- Voluntary compliance by the Parties
- Use of penalties - and related difficulties (liquidation)
- Resort to State courts