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INTERIM RELIEF UNDER INTERNATIONAL ARBITRATION RULES AND GUIDELINES: A COMPARATIVE ANALYSIS

Peter J.W. Sherwin and Douglas C. Rennie∗

I. INTRODUCTION

Interim relief is critical in any form of dispute resolution. Parties must have the option to seek interim measures, such as preliminary injunctions and attachments, where their adversaries threaten to take action that cannot be undone by after-the-fact damages. Parties in international arbitrations are no exception. For those parties, the institutional arbitration rules that they choose will have a determinative impact on whether they will be able to obtain meaningful interim relief.

The international business community has long considered international arbitration preferable to litigation in national courts for a variety of reasons, including neutrality of forum, privacy, speed, lower costs, and enforcement.[1] There are a number of factors, however, that complicate a party's ability to obtain meaningful interim relief in international arbitration proceedings. Among these are the time needed to get a decision maker in place to hear the application, the powers of that decision maker to award interim relief, and the likelihood that an adverse party will comply with such an award.[2] For these reasons, the lack of meaningful interim relief has been justifiably called the "Achilles' heel" of international arbitration.[3] Although parties could instead resolve their disputes in national courts, where interim relief is generally available, in doing so, they would sacrifice the advantages of international arbitration.

In recent years, international arbitration institutions have sought to respond to this problem by enacting rules, procedures, and other textual guidelines to provide parties with various means of obtaining interim or other emergent relief within the arbitral process.[4] In this article, we analyze how several different sets of international arbitration rules address the issues associated with interim relief and how a tribunal would treat several common scenarios involving an application for interim relief under those rules.

∗ Peter J.W. Sherwin is a partner at Proskauer Rose LLP, where he is the head of the International Arbitration Group. Douglas C. Rennie is the Visiting Legal Skills Fellow at New York Law School. We thank Anne Goldstein, Michael Botein, Amy Newcombe, Amanda Foster, Noah Gitterman, Anthony Wladyka, and Kevin Maillard for their helpful comments and suggestions. We are also indebted to M. Todd Mobley, J.D. candidate 2010, University of California, Berkeley Boalt Hall School of Law, for his invaluable assistance.

[1] *See* notes 14-15 *infra*.

[2] *See* Part II *infra*.

[3] David E. Wagoner, *Managing International Arbitration: A Shared Responsibility of the Parties, the Tribunal, and the Arbitral Institution*, 54 DISP. RESOL. J. 15, 19 (May 1999).

[4] *See* 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1960-61 (2009).

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Our analysis considers the rules applicable to international commercial arbitration (referred to here as "Rules") and other relevant guidelines issued by the United Nations Commission on International Trade Law ("UNCITRAL"), the International Chamber of Commerce ("ICC"), the International Centre for Dispute Resolution ("ICDR"), the Swiss Chambers' Court of Arbitration and Mediation ("SCCAM"), the London Court of International Arbitration ("LCIA"), the Singapore International Arbitration Centre ("SIAC"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), the Japan Commercial Arbitration Association ("JCAA"), the International Centre for Settlement of Investment Disputes ("ICSID"), the World Intellectual Property Organization Arbitration and Mediation Center ("WIPO"), the China International Economic and Trade Arbitration Commission ("CIETAC"), and Judicial Arbitration and Mediation Services ("JAMS").

Others have analyzed how various sets of Rules address interim relief, but none have previously attempted to evaluate as wide a variety of institutions and Rules as we do here.[5] The twelve institutions are headquartered in eight countries across three continents. These institutions include the six largest international arbitration institutions,[6] three other significant international arbitration institutions (JCAA, SCCAM, and JAMS[7]), two highly respected specialized institutions (ICSID and WIPO[8]), and an institution that does not administer arbitrations, but whose rules are nonetheless very influential and often used in arbitrations administered by the other institutions or in ad hoc proceedings[9] (UNCITRAL[10]). Unlike prior studies, we also test the Rules "in action" by comparing the results under the various sets of Rules in different hypothetical scenarios where a party

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[5] *See, e.g.*, William Wang, Note, *International Arbitration: The Need For Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1061-62 (2003) (referring to the ICC, UNCITRAL, American Arbitration Association [hereinafter AAA], and LCIA Rules and guidelines); Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENTS: INT'L TRADE L.J. 55, 55-57 (2003) (discussing the ICC, AAA, LCIA and UNCITRAL Rules and guidelines); Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA & UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 126-27 (1999).

[6] *See* SIAC, Facts and Figures: Statistics, http://www.siac.org.sg/facts-statistics.htm (last visited Feb. 6, 2010) (listing the AAA/ICDR, ICC, CIETAC, LCIA, SCC, and the SIAC as the largest international arbitration institutions by volume of cases in 2008).

[7] Notably, JAMS and SCCAM issued their Rules relatively recently, and JCAA is the only permanent commercial arbitration institution in Japan. *See* notes 206, 281, & 361 *infra*, and accompanying text.

[8] *See* notes 294 & 312-14 *infra*, and accompanying text.

[9] An "ad hoc" arbitration, in contrast to an institutional arbitration, is one where the arbitration is organized by the parties for the purposes of a single dispute and run without the supervision of or assistance from a continuously functioning arbitral institution. *See, e.g.,* Wang, *supra* note 5, at 1063.

[10] *See* notes 134-36 *infra*, and accompanying text.

might seek interim relief.[11] We also consider expedited proceedings, overlooked by other studies, as an alternative to interim relief in certain circumstances.[12]

We conclude that, although no single set of rules provides the full range of possible options that a party might want, the arbitral institutions that have attempted to address these problems have come up with several viable procedures that other institutions should consider incorporating into their rules. Most significantly, pre-tribunal referee procedures appear to provide a practical solution for parties who need emergent relief but want to take advantage of the traditional benefits of international arbitration. Similarly, procedures to expedite the formation of the tribunal and the final resolution of the dispute may also be useful options in certain circumstances. However, there will remain some truly dire situations where parties still must seek interim relief from a national court, particularly as ex parte relief is not a realistic alternative in international arbitration.

This article is divided into five parts. Part II discusses the problems identified in prior research and the significance of some of the key provisions found in the Rules. Part III summarizes how each set of Rules and other guidelines address the interim relief problems in international arbitration. Part IV then analyzes how those Rules would treat an application for some form of interim relief in four hypothetical scenarios. Part V explains our conclusions.

II. BACKGROUND

Arbitration has been the preferred method of resolving international business disputes for many years, and its popularity appears to be growing.[13] Factors like speed of resolution, lower costs, privacy, and neutrality of forum are often invoked when describing its advantages over litigation in national courts.[14] One additional – and critical – reason for international arbitration's continuing popularity is that enforcing foreign arbitral awards is considerably easier than

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[11] *See* Part IV *infra*.

[12] *Cf.* Ira M. Schwartz, *Interim & Emergency Relief in Arbitration Proceedings*, 63 DISP. RESOL. J. 56, 61 (Apr. 2008) (noting that in some cases, "expediting the arbitration hearing may be a viable alternative to seeking interim relief").

[13] Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 337-38 (2008) ("For many years, international arbitration has been the preferred method of resolving transnational business disputes. Klaus Berger, citing sources from the 1980s, estimated that 90 percent of international economic contracts provide for arbitration of disputes. In recent years, the use of international commercial arbitration has further intensified. Between 1993 and 2003, for example, the number of international arbitrations administered by leading arbitral institutions increased by almost 100 percent; those administered by the American Arbitration Association increased by over 200 percent. And a recent survey of in-house counsel at multinational corporations found that 73 percent of those with international experience preferred arbitration over litigation as a means of resolving transnational disputes.").

[14] *See, e.g.,* Ferguson, *supra* note 5, at 55.

enforcing foreign judgments in most nations.[15] This is largely thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which provides that signatory nations must recognize arbitral awards issued in foreign signatory nations, subject to several very narrow exceptions.[16]

As the popularity of international arbitration has grown, so have requests for interim relief in arbitral proceedings.[17] Interim relief – occasionally referred to as "provisional" or "conservatory" relief – protects a party's rights pending the final resolution of the dispute.[18] Interim relief can include orders or awards requiring a party to preserve evidence, preserve the status quo, or take (or refrain from) other

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[15] Cross, *supra* note 13, at 356. This is at least partially explained by the fact that "the enforceability of arbitral awards is governed by international treaty to a much greater extent than foreign judgments." *Id.* at 359. *Accord* Houston Putnam Lowry, *Recent Developments In International Commercial Arbitration*, 10 ILSA J. INT'L & COMP. L. 335, 335 (2004) ("Arbitration is the preferred method of settling commercial disputes internationally. While there are many reasons, a large body of practice and law provide a certainty and finality that are missing even in transnational judicial determinations. The United States is not a party to any treaty on the enforcement of judgments. Not only is the United States not a party to any multilateral convention on the enforcement of judgments, it is not even a party to any bilateral convention on the enforcement of judgments."). This problem may be even more troublesome in the context of pre-judgment remedies, which are even less likely to be recognized outside of the issuing jurisdiction. Lowry, *supra*, at 340.

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention], Art. V; Wang, *supra* note 5, at 1069-70 ("The New York Convention has been described as 'the single most important pillar on which the edifice of international arbitration rests' and as a convention which, perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law"); Kieran Robert Hickie, *The Enforceability of Interim Measures of Protection Granted by Arbitral Tribunals Outside the Seat of Arbitration: A New Approach*, 12 VINDOBONA J. INT'L COM. L. & ARB. 221, 223 (2008) ("[T]he New York Convention is today the primary legal basis for enforcing foreign awards in arbitration"); *but see* Christopher Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 9 VINDOBONA J. INT'L COM. L. & ARB. 69, 84 (2005) ("Unfortunately, not all countries are signatories and many courts evade their responsibilities under the New York Convention").

[17] Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57 DISP. RESOL. J. 62, 64 (Jan. 2003) ("In a recent survey of international arbitrators by the Global Center for Dispute Resolution Research, 64 respondents identified 50 separate arbitration cases in which interim relief was sought either to restrain or stay an activity, order specific performance, or provide security for costs. These figures are consistent with earlier reports to the United Nations Commission on International Trade Law (UNCITRAL), which indicated that parties are seeking interim measures in an increasing number of cases.").

[18] David E. Wagoner, *Interim Relief In International Arbitration: Enforcement Is a Substantial Problem*, 51 DISP. RESOL. J. 68, 69 (Oct. 1996); *see also* 2 BORN, *supra* note 4, at 1944-45.

action necessary to ensure that a final award will be enforceable.[19] The two most popular forms are attachments and injunctions.[20]

The basis for any international arbitration is the arbitration agreement, which usually consists of a provision in an underlying commercial contract.[21] Arbitration clauses typically specify the place of arbitration, the governing law, and the rules that will apply to the arbitration.[22] The applicable substantive law and arbitral rules determine the scope of options available to a party seeking an interim remedy in arbitration.[23] A party might seek relief from the arbitral tribunal or, depending on the applicable Rules, a referee appointed by an arbitral institution to hear such applications prior to the constitution of the arbitral tribunal.[24]

At this point, nearly all international arbitration rules provide for some form of interim relief.[25] However, there are significant variations in when a party may seek interim relief, the amount of time it will take an applicant to obtain that relief, the types of relief available, and the standards for obtaining that relief.[26] Additionally, although UNCITRAL favors ex parte applications for interim relief, other institutions do not.[27] As an alternative to seeking interim relief through arbitration, a party might also apply to a national court, where permitted to do so under the applicable law and Rules.[28] Indeed, national courts are generally in a superior position to provide interim relief.[29] Depending on the urgency of the

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[19] Hickie, *supra* note 16, at 225.

[20] *See* Wagoner, *supra* note 18, at 69.

[21] *See, e.g.*, 1 BORN, *supra* note 4, at 197-98.

[22] *See, e.g., id.*

[23] *Cf.* 2 *id.* at 1946. Notably, many of the Rules may be amended by agreement of the parties. *See, e.g.*, International Centre for Dispute Resolution, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Art. 1, *available at* http://www.adr.org/sp.asp?id=33994 (last visited Feb. 9, 2010) [hereinafter ICDR RULES].

[24] *See, e.g.*, ICDR RULES, *supra* note 23, Arts. 21 & 37.

[25] *See generally* Part III *infra*. Many of them also provide that the tribunal may order the applicant to proffer security in the event that the relief is granted. *See, e.g.*, SWISS CHAMBERS' COURT OF ARBITRATION AND MEDIATION, SWISS RULES OF INT'L ARBITRATION, Art. 26(2), *available at* https://www.sccam.org/sa/download/SRIA_english.pdf (last visited Feb. 9, 2010) [hereinafter Swiss RULES].

[26] *See, e.g.*, Ferguson, *supra* note 5, at 55, 58 ("When parties agree to handle any dispute arising from a contract with arbitration there are a number of decisions that should be made and included in the arbitration clause. Perhaps the most important decision is which arbitration rules will govern the dispute . . . . Although most arbitration rules currently allow arbitrators to order interim measures of protection, each set of rules addresses interim measures in a unique way.").

[27] *See* United Nations Commission on International Trade Law, UNCITRAL MODEL LAW, Art. 17B, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Feb. 9, 2010) [hereinafter UNCITRAL MODEL LAW].

[28] *See, e.g.*, ICDR RULES, *supra* note 23, Art. 21(3).

[29] *See* Cross, *supra* note 13, at 371-72 ("In contrast to arbitration, where the need to select the arbitrators may delay for weeks or months the commencement of arbitral

matter, a party might also seek an expedited final decision on the merits as an alternative to seeking interim relief.[30]

A. *Timing*

The first hurdle to obtaining interim relief through arbitration is having a decision maker (*e.g.*, the tribunal or pre-tribunal referee) in place to hear the application. Many of the procedures for the constitution of an arbitral tribunal – particularly those that include more than one arbitrator (usually three) – can be complicated and time consuming.[31] Additionally, even when the decision maker is in place, there must be a schedule for submissions on the application so that the decision maker may hear from both parties on the issue.[32] Then, once submissions on the application are complete, the decision maker must review them and issue a decision, usually in the form of an interim award or order.[33] These procedural deadlines can have a significant impact on whether a party is able to obtain interim relief within the necessary time frame.

B. *Availability of Relief*

Most sets of Rules provide for some form of interim relief.[34] Some Rules specifically delineate the types of interim relief that the decision maker may award.[35] Others generally provide that the decision maker may award any form of relief that the decision maker deems "necessary"[36] or "appropriate."[37] These nuances can have far reaching consequences: if the decision maker is not empowered to award the type of relief that an applicant is seeking, the applicant

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proceedings, a court can respond immediately to a request for interim relief, such as an order of prejudgment attachment of the debtor's assets. Additionally, arbitrators may lack the power to order interim relief. Finally, unlike a court, in fashioning provisional relief, arbitrators do not have authority over non-parties to the arbitration. For these reasons it may be necessary to the effectiveness of arbitration that parties have the ability to turn to a court to obtain provisional relief.").

[30] *See* Part II.H *infra*.

[31] *Cf.* Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT'L ARB. 45, 46-47 (1998) ("Most arbitration practitioners have experience of ad hoc and institutional arbitration cases in which much more than 16 weeks have elapsed before all arbitrators have been appointed").

[32] *See, e.g.*, ICDR RULES, *supra* note 23, Art. 37(4).

[33] *See* note 51 *infra*.

[34] *See* 2 BORN, *supra* note 4, at 1960-61 (noting CIETAC as a possible exception).

[35] *See* note 165 *infra*.

[36] *See, e.g.*, ICDR RULES, *supra* note 23, Art. 21(1).

[37] *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION, Art. 23(1), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (last visited Feb. 9, 2010) [hereinafter ICC RULES].

may be in the undesirable position of having nowhere to apply for an appropriate remedy.[38]

C. *Standard*

The standard that the decision maker applies will also play an important role in determining whether the decision maker will grant interim relief. Standards can vary widely from court to court and tribunal to tribunal, even within the same jurisdiction.[39] Although courts in the United States typically require a showing of likelihood of success on the merits and irreparable harm, other legal systems may require showings of "probable cause" or "exigent circumstances."[40] As noted above, most of the Rules do not provide any guidance other than that the decision maker "may" grant interim relief where the decision maker deems it "necessary" or "appropriate."[41]

Some commentators have criticized this lack of specificity,[42] arguing that defined standards will help overcome arbitrators' traditional reluctance to grant requests for interim relief.[43] Consequently, one commentator has argued that an applicant should be required to demonstrate that it is "possible" (not "probable") that it will prevail on the merits and that it will suffer irreparable harm if the relief is not granted.[44] This is the approach that UNCITRAL has adopted.[45] Others have argued that these standards, although vague, necessarily incorporate other requirements, such as irreparable harm, urgency, and some consideration of the strength of the parties' claims and defenses.[46]

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[38] *Cf.* Island Creek Coal Sales Co. v. Gainesville, Fla., 729 F.2d 1046, 1048 (6th Cir. 1984), *abrogated on other grounds by* Cortez Byrd Chips, Inc. v. Bill Harbet Constr. Co., 529 U.S. 193 (2000).

[39] Lowry, *supra* note 15, at 340; Wagoner, *supra* note 18, at 71 (noting that the standards have varied widely in published awards and the literature, alternatively requiring "'urgency,' 'imminent harm,' 'prevention of aggravation,' 'maintenance of status quo,' and 'likelihood of success on the merits'").

[40] *See* Lowry, *supra* note 15, at 340.

[41] *See* notes 36-37 *supra*.

[42] Jarrod Wong, *The Issuance of Interim Measures In International Disputes: A Proposal Requiring a Reasonable Possibility of Success on the Merits*, 33 GA. J. INT'L & COMP. L. 605, 616 (2005); Ferguson, *supra* note 14, at 57 (noting that "the discretionary term 'may' . . . is used in all but the LCIA articles, and the lack of factors for guiding arbitral tribunals as to when interim measures of protection are appropriate, tend to introduce doubt as to whether arbitral tribunals should order interim measures of protection").

[43] Ferguson, *supra* note 5 , at 57; *see also* Wagoner, *supra* note 18, at 71 (noting that the "reluctance to grant interim relief may be a reflection of an unwillingness to prejudge the merits of a case which may be required by the application for the interim relief").

[44] Wong, *supra* note 42, at 616.

[45] UNCITRAL MODEL LAW, *supra* note 27, Art. 17A(1).

[46] *See* 2 BORN, *supra* note 4, at 1980-93; Huntley, *supra* note 16, at 75 (noting that "[t]he Iran-U.S. Claims Tribunal . . . has found that implicit within the term 'necessary' is

D. *Enforceability*

Voluntary compliance with interim awards may be high[47] (likely due to the fact that the parties fear that the tribunal will draw a negative inference on the merits from their refusal to comply[48]), but there is still a significant percentage of parties who refuse to comply with interim measures.[49] Accordingly, parties must have the ability to enforce interim awards in those situations.[50]

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the notion that the party requesting a measure faces a harm to the rights it is pursuing in the arbitration and that harm is so imminent that the requesting party cannot await the tribunal's final decision on the merits").

[47] *See* David L. Zicherman, *The Use of Pre-Judgment Attachments & Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British & American Approaches*, 50 U. PITT. L. REV. 667, 667 (1989) ("The [ICC] estimates that there are problems with enforcement or execution of the award in fewer than ten percent of the cases resolved by its Court of Arbitration"); Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239, 1242 (N.Y. 1982) ("Voluntary compliance with arbitral awards may be as high as 85%"), *overruled on other grounds by* N.Y. C.P.L.R. 7502(c) (2010).

[48] *See* Hickie, *supra* note 16, at 234 ("It is expected that parties will comply with interim measures ordered by the arbitral tribunal. Voluntary compliance is not uncommon, as parties will not want to risk offending the arbitral tribunal resolving their dispute. In addition, the persuasive powers of the arbitral tribunal to compel voluntary compliance can also be effective. A party may risk an adverse inference being drawn against it by the tribunal where it destroys evidence relevant to the proceedings. It may also risk liability for costs or damages arising out of non-compliance of an arbitral order."); Marchac, *supra* note 5, at 133 (noting that a refusal to apply interim measures "may be interpreted as expressing [a party's] bad faith"); *but see* Wagoner, *supra* note 18, at 69 ("Lacking the power to hold a party in contempt, the tribunal's coercive power is limited to the suggestion that an adverse factual inference may be drawn against the recalcitrant party when adjudicating the merits of the dispute. In most cases, this is a hollow threat.").

[49] *See* Zicherman, *supra* note 47, at 690 ("[E]ighty-five percent of all awards are paid without controversy . . . . [T]he statistics point out exactly why pre-judgment attachment is necessary: fifteen percent of all awards are not paid voluntarily."); Ferguson, *supra* note 5, at 57 ("There are some obvious problems with the[] theories [suggesting that parties will voluntarily comply with interim relief ordered by the tribunal]. First, if a party has a good idea the arbitral tribunal will not make a final award in their favor, the favorable impression theory is diminished because favorable impressions are unlikely to overcome substantive or willful breaches of contract. Second, even if a party has a doubt about the likely outcome of the arbitration, they may decide to take actions against the interim measure of protection order to minimize their exposure to a negative final award . . . . The numerous cases where parties fail to comply with interim measures of protection seriously weaken the argument that enforceability clauses are not necessary in arbitration rules."); *cf.* Hickie, *supra* note 16, at 222 ("While international arbitration has many benefits such as procedural flexibility, confidentiality and the avoidance of recourse to the Courts for determination of substantive issues, this consensual system of dispute resolution nonetheless has inherent limitations. Most significant of the limitations is the lack of

The language that the rules use to characterize interim relief can have a significant impact on whether it will be enforceable.[51] In the United States, a number of courts have refused to recognize interim measures where they determined that the measures were not "final" awards.[52] This line of authority holds that non-final awards – awards that fail to decide completely an issue submitted to the arbitral tribunal – are neither confirmable nor enforceable.[53]

Other American courts have held that interim measures are judicially confirmable and enforceable.[54] These courts have explained that, because temporary equitable relief may be "necessary to prevent the final award from becoming meaningless," such relief serves a distinct function, and, accordingly,

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coercive power. Unlike domestic Courts of the sovereign, the arbitral tribunal has no power to enforce its own awards.").

[50] *See* Ferguson, *supra* note 5, at 57-58.

[51] *Provisional Remedies in International Arbitration – Part II: Perspectives from the ICC & Germany*, 6 WORLD ARB. & MEDIATION REP. 52, 55 (1995) [hereinafter *Provisional Remedies*] ("There is also a question as to the form that an interim order should take. Should it take the form of an award or is it simply a procedural order of the arbitral tribunal? This is related to the question of whether and to what extent such orders are enforceable as awards.").

[52] *See*, *e.g.*, In re Michaels v. Mariform Shipping, S.A., 624 F.2d 411, 413-15 (2d Cir. 1980) (finding that an "interim award" was not "final" and could not be confirmed under the Federal Arbitration Act); Mitsubishi Heavy Indus., Ltd. v. Stone & Webster, Inc., No. 08 Civ. 00509 (JGK), 2009 U.S. Dist. LEXIS 91199, at *13-20 (S.D.N.Y. Sept. 29, 2009) (finding that "partial" award on liability issues was not "final"); *see also* Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1022-23 (9th Cir. 1991) (discussing cases); Island Creek Coal Sales Co. v. Gainesville, Fla., 729 F.2d 1046, 1048 (6th Cir. 1984) (similar), *abrogated on other grounds by* Cortez Byrd Chips. Inc. v. Bill Harbet Constr. Co., 529 U.S. 193 (2000); Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362, 368 (S.D.N.Y. 2002) (similar), *aff'd* 344 F.3d 255 (2d Cir. 2003); Fluor Daniel Intercont'l, Inc. v. Gen. Elec. Co., No. 06 Civ. 3294 (GEL), 2007 U.S. Dist. LEXIS 17588, at *4-5 (S.D.N.Y. Mar. 13, 2007) (citing *Michaels* and explaining that an award would be non-final in situations where "the arbitrators had resolved only some of the many liability issues at hand, had not addressed damages at all, and were still actively receiving testimony"). While a number of these cases were decided under the Federal Arbitration Act, as explained by the court in *Publicis Commc'n* v. *True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000), decisions under the Federal Arbitration Act "may guide the interpretation of the" New York Convention.

[53] *See* note 52 *supra.*

[54] *See Publicis Commc'n*, 206 F.3d at 728-30 (finding that interim order was "final" and could be confirmed under the New York Convention); Metallgesellschaft A.G. v. Constante, 790 F.2d 280, 282-83 (2d Cir. 1986); Great E. Sec., Inc. v. Goldendale Invs., Ltd., No. 06 Civ. 667, 2006 U.S. Dist. LEXIS 94271, at *9-13 (S.D.N.Y. Dec. 20, 2006) (confirming interim award under the Federal Arbitration Act); *see also Pacific Reins.*, 935 F.2d at 1022-23 (discussing cases); Yonir Tech., Inc. v. Duration Sys., Ltd., 244 F. Supp. 2d 195, 204-05 (S.D.N.Y. 2002) (similar).

such awards are "final and thus could be immediately challenged."[55] Thus, these authorities suggest that, regardless of whether the form of the arbitral measure (*e.g.*, an award or order) resembles a final award, if the substance of the measure serves a discrete function and effects a final disposition of a particular issue, the interim measure is confirmable and enforceable.[56] Additionally, some courts have bypassed the issue and held that, where parties have agreed to be bound by arbitration rules that provide the tribunal with the specific authority to grant interim relief, or "any" relief generally, interim relief awarded by the tribunal is enforceable.[57]

Outside the United States, the situation is murkier. Many courts and commentators have sharply disagreed with the "results-oriented" approach of the American courts, taking the position that interim measures cannot be confirmed under the New York Convention.[58] Moreover, in countries like Italy and

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[55] *Publicis Commc'n.*, 206 F.3d at 729; *see also Pacific Reins.*, 935 F.2d at 1022-23; *Yonir Tech.*, 244 F. Supp. 2d at 204.

[56] *Publicis Commc'n.*, 206 F.3d at 729; *see also* James M. Gaitis, *The Federal Arbitration Act: Risks & Incongruities Relating to the Issuance of Interim & Partial Awards in Domestic & International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 67-68 (2005) ("[T]he general manner in which an arbitral tribunal's decision is labeled or characterized will not alone serve to determine whether it is 'final' and thus subject to confirmation and vacatur or recognition and enforcement . . . ."); Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure In Action Part II: Enforcing Emergency Arbitrator Decisions*, 63 DISP. RESOL. J. 66, 68-69 (Jan. 2009).

[57] *See* Island Creek Coal Sales Co. v. Gainesville, Fla., 729 F.2d 1046, 1048-49 (6th Cir. 1984) (finding that the AAA Commercial Arbitration Rules provided the tribunal with the authority to grant interim equitable relief), *abrogated on other grounds by* Cortez Byrd Chips. Inc. v. Bill Harbet Constr. Co., 529 U.S. 193 (2000); *see also* Green v. Short, No. 06 CVS 22085, 2007 NCBC LEXIS 8, at *24-25 (N.C. Sup. Ct. Mar. 9, 2007) (similar).

[58] *See, e.g.*, Hickie, *supra* note 16, at 236-48 (accusing the pro-enforcement courts of "creative stretching" and noting that the Supreme Court of Queensland's "conclusion that the drafters of the New York Convention did not intend an award to apply to anything other than an award determining all or some of the issues submitted to arbitration appears a correct result on a strict reading of the language of the Convention"); Li Jing, *Preservation of Evidence in China's International Commercial Arbitration: Several Considerations*, 10 VINDOBONA J. INT'L COM. L. & ARB. 145, 162 (2006) (concluding that it is unlikely "that China will recognize and enforce an interim arbitral award to preserve evidence" as these awards "are essentially interlocutory and 'modifiable by the arbitral tribunal in accordance with changes in circumstances,' while New York Convention awards should dispose of one or more issues in dispute between the parties and be final"); Victoria M. Fraraccio, *Ex Parte Preliminary Orders in the UNCITRAL Model Law on International Commercial Arbitration*, 10 VINDOBONA J. INT'L COM. L. & ARB. 263, 271-72 (2006) ("The authors of the New York Convention did not intend that it apply to preliminary or interim measures, as it is a Convention for the enforcement of arbitral awards, not orders"); Huntley, *supra* note 16, at 92 ("[T]he prevailing view of commentators and the case law of Model Law States is that the New York Convention does not include interim measures within the definition of arbitral award"); Lowry, *supra* note 15, at 339 (stating that the New York Convention does not "provide a mechanism for

Argentina, arbitral tribunals do not have the power to order interim measures at all.[59] In contrast, under Swiss law, the parties *must* seek interim relief from the arbitral tribunal in the first instance.[60] England also has a statutory scheme that favors enforcing arbitral interim measures.[61]

In light of these conflicting authorities,[62] some rules have characterized interim measures as "final awards" or use even more expansive language to avoid a finding that such measures are unenforceable, non-final orders.[63]

E. *Pre-Tribunal Relief*

In addition to interim relief, in general, some rules also address the availability of interim relief prior to the formation of the tribunal – a process that

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enforcing interim measures of protection"); Ferguson, *supra* note 5, at 58 ("One drawback to the existing New York Convention is that it only requires courts to enforce certain arbitral tribunal awards and does not apply to orders of interim measures of protection"); *see also* Gaitis, *supra* note 56, at 64 (suggesting that the courts have been engaged in "creative reasoning" to avoid determinations that interim awards are not "final"); *contra* 2 BORN, *supra* note 4, at 2023 ("The better view is that provisional measures should be and are enforceable as arbitral awards under the generally applicable provisions for the recognition and enforcement of awards").

[59] 2 BORN, *supra* note 4, at 1951-52 (noting that "in Italy, China, Quebec, and Argentina . . . local legislation provides that the granting of provisional measures is reserved exclusively to the local courts, which are authorized to issue provisional relief in aid of arbitration"); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 922 (2d ed. 2001); Wang, *supra* note 5, at 1059; Marchac, *supra* note 5, at 136-37; Werbicki, *supra* note 17, at 66 (noting that Italy and Quebec only allow courts to issue interim measures); Murray Lee Eiland, *The Institutional Role in Arbitrating Patent Disputes*, 9 PEPP. DISP. RESOL. L.J. 283, 315 (2009) ("Some countries, like Sweden, will not enforce orders for interim relief from arbitrators"); *see also Provisional Remedies*, *supra* note 51, at 54 ("[U]ntil recently, the laws in many European countries did not permit arbitrators to order interim measures . . . . [T]hat is, you had to go to the courts; you couldn't go to the arbitrators for certain kinds of interim relief.").

[60] Werbicki, *supra* note 17, at 67.

[61] *Id.* at 66.

[62] *Cf.* Gaitis, *supra* note 56, at 36 (noting that courts considering whether an interim or partial award is sufficiently final to be reviewed "thus placed varying degrees of emphasis on the following relevant factors: (1) the arbitrator's intent in issuing the interim or partial award; (2) whether the interim or partial award purported to finally resolve an issue or, alternatively, whether the award was 'preliminary' in nature; (3) how the interim or partial award was labeled; (4) whether the language of the interim or partial award indicates it is final and subject to confirmation; and (5) whether the interim or partial award required enforcement in order to be meaningful."). James Gaitis is very critical of the "undesirable nuances" in this area of the law and their impact on litigants' behavior. *See, e.g., id*. at 97-99.

[63] *Cf.* 2 BORN, *supra* note 4, at 2013-24 (noting that while awards may "enjoy greater enforceability in national courts," orders generally have fewer technical requirements, so decision makers can issue them more promptly than awards).

can take months.[64] Indeed, it is at this crucial point that a party will likely be most desperate to obtain interim relief, creating the most significant interim relief problem in international arbitration.[65] Arbitral institutions have developed two procedures to address this situation: (1) expediting the formation of the tribunal;[66] and (2) appointing a pre-tribunal referee specifically authorized to hear the application before the tribunal is formed.[67]

Initially, it makes a significant difference whether these procedures are generally applicable as part of an institution's rules or whether they must be explicitly invoked in the arbitration agreement in order to apply.[68] Parties, who are likely to be consumed by the negotiation of other more contentious contractual terms at the outset of a business relationship, are unlikely to opt-in to optional procedures that they have little reason to anticipate will ever be invoked.[69]

Of course, regardless of the procedure, time is of the essence, and there are a number of considerations that may weigh in favor of one procedure versus the other. A party seeking interim relief might prefer to have the same decision maker who will decide the merits of the dispute hear the interim relief application, particularly where that application is part of a strategic attempt to put pressure on

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[64] Ferguson, *supra* note 5, at 58 ("Most arbitration rules do not provide parties with procedures to request arbitral interim measures of protection prior to the formation of the arbitral tribunal. This often creates a problem among parties trying to request interim measures of protection because it can take months for an arbitral tribunal to be established."); *see also* note 31 *supra*.

[65] Wang, *supra* note 5, at 1098; BORN, *supra* note 59, at 934-35.

[66] London Court of International Arbitration, RULES OF THE LONDON COURT OF INT'L ARBITRATION, Art. 9, *available at* http://www.lcia.org/ARB_folder/arb_english_main.htm (last visited Feb. 9, 2010) [hereinafter LCIA RULES]; JAMS, JAMS INTERNATIONAL ARBITRATION RULES, Art. 21.2, *available at* http://www.jamsadr.com/international-arbitration-rules (last visited Feb. 10, 2010) [hereinafter JAMS RULES].

[67] ICDR RULES, *supra* note 23, Art. 37; ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, App. II, *available at* http://www.sccinstitute.com/filearchive/3/30366/2010_Arbitration_Rulesl.pdf (last visited Aug 4, 2010) [hereinafter SCC RULES]; International Chamber of Commerce, RULES FOR A PRE-ARBITRAL REFEREE PROCEDURE, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf (last visited Feb. 9, 2010) [hereinafter ICC PRE-ARBITRAL REFEREE PROCEDURE]; Singapore International Arbitration Centre, ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE, Sched. 1, *available at* http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=210&Itemid=130 (last visited Aug. 28, 2010) [hereinafter SIAC RULES]; *Appendix: WIPO Emergency Relief Rules*, 9 AM. REV. INT'L ARB. 317, 317-25 (1998) [hereinafter Proposed WIPO EMERGENCY RELIEF RULES]; *see also* 2 BORN, *supra* note 4, at 1971-72.

[68] *Compare* SCC RULES, *supra* note 67, App. II *and* ICDR RULES, *supra* note 23, Art. 37 *with* ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67.

[69] *See* Ferguson, *supra* note 5, at 58-59.

the other party.[70] However, if the resulting tribunal is not properly equipped to deal with the dispute because it was assembled hastily, that might prejudice the applicant's case on the merits. Accordingly, that applicant might prefer a referee who will *not* be part of the tribunal that decides the case on the merits.

Nor are the choices clear for the party opposing an interim relief application. The opposing party might welcome the application as an opportunity to demonstrate that the applicant's case is without merit at an early stage of the proceedings.[71] The opposing party, however, is also likely to be at a strategic disadvantage; even if it had reason to suspect that the other party would make the application, it probably would not know the precise timing of that application and would not have the same opportunity to marshal its case as the applicant.

Once the interim measure has been issued, the next question is how the tribunal will treat it. A tribunal with the power to grant interim relief also implicitly has the power to reconsider its own ruling, either prior to or when issuing the final award.[72] Similarly, where a referee has granted the relief, that decision is generally not binding upon the tribunal when it decides the merits of a claim or counterclaim.[73] But questions remain. May the tribunal reconsider the referee's decision on the interim measure?[74] If so, may it reconsider that decision immediately after it is constituted (akin to an appeal) or only at some later point if circumstances change? Most institutions that offer pre-tribunal referee procedures give the tribunal broad powers to reconsider the referee's decision.[75]

F. *Ex Parte Relief*

"Ex parte" applications are those made without notice to the opposing party.[76] Some have argued that ex parte procedures are essential in order to protect a party from an opposing party's bad faith attempt to remove assets or destroy evidence

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[70] *See* Marchac, *supra* note 5, at 136 ("In practice, attachments are often requested, as they constitute powerful weapons capable of paralyzing the opposing party's activities"); *see also* 2 BORN, *supra* note 4, at 1972 (praising the LCIA's procedure for expediting the formation of the tribunal as "very sensible").

[71] Wong, *supra* note 42, at 613.

[72] *Cf.* UNCITRAL MODEL LAW, *supra* note 27, Art. 17D (providing the tribunal with the power to modify, suspend or terminate interim measures in certain circumstances).

[73] Wong, *supra* note 42, at 615 ("[I]n the case of international arbitration, because arbitrators for the most part sit by appointment on the consent of the parties, their perceived ability to decide disputes impartially is an aspect of their professional reputation that they zealously guard. They may tend, therefore, to be more sensitive to avoiding the appearance of prejudging any dispute."); Marchac, *supra* note 5, at 130 ("[M]ore formal interim awards may appear close to a decision on the merits of the dispute, and not totally compatible with the provisional and temporary nature of interim measures").

[74] *See, e.g.*, SCC RULES, *supra* note 67, App. II, Art. 9(4) (providing that the tribunal may determine that an emergency arbitrator's decision "ceases to be binding").

[75] *See, e.g., id.*

[76] *Cf.* UNCITRAL MODEL LAW, *supra* note 27, Art. 17B.

after receiving notice of an interim application.[77] Opponents have noted that ex parte procedures contradict the nature of arbitration, which is a product of the parties' consent, and are otherwise practically unfeasible.[78]

Most Rules require that the opposing party receive notice and an opportunity to be heard before a decision maker can grant any interim relief and, accordingly, appear not to permit ex parte interim measures.[79] Some commentators have, nonetheless, suggested that these measures may be available in exigent circumstances.[80] Even in such exceptional situations, however, a decision maker's natural tendency toward caution[81] would only be reinforced where it appeared that the applicable Rules prohibit such an application.

In any event, another problem with ex parte procedures is that any resulting order would not be enforceable under the New York Convention.[82] Article V(1)(b) requires the parties to have been given proper notice and an opportunity to present their case.[83] Indeed, even UNCITRAL, which has adopted the view that ex parte relief should be available, also explicitly provides that ex parte orders "shall not be subject to enforcement by a court."[84]

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[77] Wang, *supra* note 5, at 1095; Ferguson, *supra* note 5, at 59 ("[S]ome practitioners believe ex parte interim measures of protection are necessary in certain circumstances when there is a sense of urgency and surprise is necessary to avoid the possibility of harm to a party. They feel issuance of ex parte interim measures of protection are justified to ensure effectiveness of the future order.").

[78] Fraraccio, *supra* note 58, at 265 (arguing that "ex parte measures in international arbitration are contradictory to the consensual nature of arbitration; offend the basic arbitral principle of equality between the parties . . . ; are difficult to enforce; make prejudiced arbitrators; and are unable to meet the timely demands of the parties. As a result of these problems . . . ex parte provisions . . . run[] the risk of adversely affecting the proper development of international arbitration."); 2 BORN, *supra* note 4, at 2017-19 (suggesting that ex parte relief in arbitration "virtually never makes any sense or accomplishes any serious purpose" since an arbitral tribunal cannot issue immediately effective coercive relief); *see also* Hickie, *supra* note 16, at 231 (noting the arguments on both sides and remarking that the issue is "highly controversial").

[79] BORN, *supra* note 59, at 934.

[80] *See* Marchac, *supra* note 5, at 131; *Provisional Remedies, supra* note 51, at 54-55 (noting that even where the rules require both parties to be present, "lawyers in some countries – Switzerland is an example – argue that arbitrators are not prevented from proceeding ex parte, provided that they subsequently give the parties an opportunity to appear together before them").

[81] *See* Wong, *supra* note 42, at 611, 613, & 615.

[82] *See* Wang, *supra* note 5, at 1095; Li Jing, *supra* note 58, at 168 (noting that "in international arbitration it might be difficult to obtain judicial recognition and enforcement of an ex parte award under the New York Convention").

[83] New York Convention, *supra* note 16, Art. V(1)(b).

[84] UNCITRAL MODEL LAW, *supra* note 27, Art. 17C(5).

G. *The National Court Option*

Although it may be more efficient to seek interim relief from an arbitral tribunal,[85] parties have traditionally had the option of seeking such relief in a national court in aid of arbitration. Given the potential problems associated with seeking interim relief through arbitration,[86] this may appear to be an attractive option. Moreover, there are several situations where – despite recent revisions of the applicable Rules – recourse to a national court will be absolutely necessary. One, as discussed above, is where a party urgently needs enforceable ex parte relief because of a legitimate concern about the other party's bad faith.[87] A second problem that cannot be resolved through the arbitral process is where a third party possesses information or assets that are implicated by the arbitration.[88] In such instances, the option to apply to a national court for interim relief is critical. Indeed, as noted above, in some countries that is the only option parties have.[89] Whether the national court option is available to a party is a question that must be addressed under both the applicable law and Rules.

Some American courts have interpreted Article II(3) of the New York Convention to prohibit them from entertaining requests for interim relief in aid of arbitration.[90] Article II(3) provides that a national court within a nation that is

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[85] *See* Ferguson, *supra* note 5, at 58.

[86] *See, e.g.*, Cross, *supra* note 13, at 371-72 ("[I]nterim relief is more readily available in litigation than in arbitration. In contrast to arbitration, where the need to select the arbitrators may delay for weeks or months the commencement of arbitral proceedings, a court can respond immediately to a request for interim relief, such as an order of prejudgment attachment of the debtor's assets. Additionally, arbitrators may lack the power to order interim relief. Finally, unlike a court, in fashioning provisional relief, arbitrators do not have authority over non-parties to the arbitration. For these reasons it may be necessary to the effectiveness of arbitration that parties have the ability to turn to a court to obtain provisional relief.").

[87] *See* Part II.F *supra*.

[88] *See* 2 BORN, *supra* note 4, at 1965-66; Wang, *supra* note 5, at 1079 ("[O]ne significant problem of international arbitration is that a third party, who may possess necessary information or vital assets, cannot be subject to interim measures because that third party has not agreed to be bound by the arbitration"); Lowry, *supra* note 15, at 340 ("It is hornbook law that third parties cannot be bound by an arbitrator's decision. This means an interim measure of protection issued by an arbitral tribunal (without more) is often useless (especially against the taxman and the bankruptcy trustee)."); Cross, *supra* note 13, at 371-72.

[89] *See* note 59 *supra*, and accompanying text.

[90] *See, e.g.*, BORN, *supra* note 59, at 945 (stating that the "plain language" of McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974) and Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239, 1242-43 (N.Y. 1982) indicates "that Article II(3) divests a national court of jurisdiction to order attachment in aid of arbitration, or to do anything else other than compel arbitration"). The New York state legislature has attempted to legislatively overrule *Cooper*, N.Y. C.P.L.R. 7502(c) (McKinney 2010); however, it is unclear whether a state legislature can overrule a court's

party to the Convention "shall" refer the parties to arbitration at the request of one of the parties.[91] The courts viewed the applications in those cases as attempts to "bypass" or "circumvent" the arbitration agreement completely.[92]

Other courts, however, have rejected that reasoning.[93] Notably, in those cases it appears that the applicants did not dispute that they had to pursue arbitration as provided in their agreements.[94] Most observers regard this latter line of authority as more persuasive.[95] Indeed, it appears that no court outside of the United States has found court-ordered interim relief in aid of arbitration to be inconsistent with the New York Convention.[96] At least one commentator has attempted to

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interpretation of a treaty. *See,* BORN, *supra* note 59, at 959 ("[I]f the New York Convention prohibits court-ordered provisional measures in aid of arbitration, then it preempts inconsistent state law providing that such measures are available").

[91] New York Convention, *supra* note 16, Art. II(3).

[92] *McCreary*, 501 F.2d at 1038 (determining that a request for an attachment sought "to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention . . . . The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate."); *Cooper*, 442 N.E.2d at 1243 (noting that a request for attachment was an attempt to "circumvent" an earlier order denying the applicant's request to stay the arbitration).

[93] *See, e.g.*, Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d. 822, 826 (2d Cir. 1990); Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1049-51 (N.D. Cal. 1977).

[94] *Borden*, 919 F.2d at 826; *Carolina Power*, 451 F. Supp. at 1049.

[95] *See* BORN, *supra* note 59, at 945-46, 948 ("[T]he Cooper rational threatens, rather than furthers, the arbitral process, by denying what is often the only realistic means of preserving the status quo. That view is shared by the overwhelming majority of commentators . . . . [I]t is more likely that, absent contrary agreement, the parties intended, and justice would be served by, the availability of court-ordered provisional measures that are genuinely in aid of arbitration . . . . Absent express contrary language, the presumption should be that court-ordered provisional relief in aid of arbitration is permitted, but efforts to circumvent arbitration are not.") (citations omitted); Fraraccio, *supra* note 58, at 271-72 ("[N]on-US decisions and academic commentary almost unanimously reject the view that Art. II(3) forecloses court-ordered preliminary or interim relief in aid of arbitration"); T. Barry Kingham, *Enforcement of Forum Selection and Arbitration Clauses*, *in* 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 11:49 (2d ed. Robert L. Haig, ed., 2009) (stating that the *Cooper* decision was legislatively overruled, and that "[t]here was virtually no support for Cooper in either the Convention, the interpretation of the Convention in other signatory countries, or international arbitral practice").

[96] BORN, *supra* note 59, at 946 ("Virtually all non-U.S. authorities reject the conclusion that Article II(3) of the New York Convention precludes court-ordered provisional measures in aid of arbitration"); Zicherman, *supra* note 47, at 681 ("Significantly, of the seventy-five nations that had signed the New York Convention by 1988, only the United States has developed case law which finds incompatibility between the Convention and pre-judgment attachment in an international arbitration setting"); Wagoner, *supra* note 18, at 71-72 (noting that the House of Lords rejected the reasoning of *McCreary* and its progeny and stating that "[e]xcept for the aberration in the U.S. resulting from an erroneous interpretation of the New York Convention, it is generally recognized in other jurisdictions that the local courts have power to grant interim

harmonize the two positions by explaining that, in cases where the courts have found interim relief inconsistent with the New York Convention, the applicant was seeking that relief in lieu of the arbitration, not in aid of it.[97] Regardless, the resulting confusion is such that some have suggested that the United States Supreme Court, by interpretation, or the United States Congress, through legislation, must resolve the issue.[98]

Due to these uncertainties, the Rules that parties choose may be particularly significant where American law may control (either as provided in the arbitration clause, as the place of arbitration or as the location of one of the parties). Indeed, some of the language in the decisions that have found Article II(3) inconsistent with court-ordered interim relief suggests that those courts would reach a different conclusion if the parties explicitly provided otherwise in their arbitration agreements.[99] Parties could incorporate such an agreement by adopting Rules that explicitly condone the national court option.[100]

Many of the Rules explicitly permit applications to national courts in aid of the arbitration generally, or for the purposes of obtaining interim relief in aid of the arbitration specifically.[101] Some explicitly provide that interim relief may be sought from a national court when it is being sought to preserve or protect certain interests.[102] Others, such as the LCIA, provide that the national court option is

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measures in aid and support of an arbitration"); *see also* Charles H. Brower, II, Note, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT'L L. 971, 1005 (1995) ("English courts have never conceived that the Convention might deprive them of jurisdiction to order interim measures").

[97] *See* BORN, *supra* note 59, at 946-48; 2 BORN, *supra* note 4, at 2031.

[98] Zicherman, *supra* note 47, at 692-93.

[99] *See* Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239, 1242 (N.Y. 1982), *overuled by* N.Y. C.P.L.R. 7502(c) (McKinney 2010); *see also* Brower, *supra* note 96, at 1002-03; BORN, *supra* note 59, at 946 (discussing *Cooper*); Zicherman, *supra* note 47, at 690-91 (same); *but see Provisional Remedies, supra* note 51, at 53 ("[T]he ICC rules . . . expressly empower[] the parties to go to the courts. One of the surprising aspects of *Cooper* . . . is that it involved an ICC arbitration. Yet I could find no reference in Cooper to [the provision in the ICC Rules authorizing the national court option], nor any attempt on the part of the court to deal with [the ICC Rules] and the implications of its having thereby been contained in the parties arbitration agreement.").

[100] *Cf.* 2 BORN, *supra* note 4, at 2040 (suggesting that "[a] correct resolution of any dispute over the propriety of court-ordered provisional relief calls for a parsing of the parties' arbitration agreement and any institutional rules incorporated by that agreement . . . .").

[101] *See, e.g.*, SCC RULES, *supra* note 67, Art. 32(5) (authorizing a request to "a judicial authority" for interim measures).

[102] *See* CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, ARBITRATION RULES, Arts. 17 & 18, *available at* http://www.cn.cietac.org/english/rules/rules.htm (last visited April 2, 2010) [hereinafter CIETAC RULES]; *cf.* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, Rule 39(6), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (last visited Feb. 10, 2010)

only available prior to the formation of the tribunal or in other "exceptional circumstances."[103]

Although some might favor having the option of seeking interim relief from either a tribunal or a national court, others have pointed out that this choice may lead to "conflicting obligations" potentially imposed by courts and tribunals with concurrent authority.[104] Moreover, where only one avenue for such relief is available, it has the benefit of increasing predictability (which may be particularly beneficial to a party faced with the prospect of responding to an application for interim relief).

H. *Expedited Procedures*

Expediting the final resolution of an arbitration may be a viable alternative to interim measures in some circumstances.[105] Indeed, expedited procedures may even be preferable to interim relief where the parties need issues resolved relatively quickly, but not immediately, as an application for interim relief may delay the overall resolution of a dispute.

Some Rules contain separate sets of expedited procedures that are either automatically applicable in certain circumstances (such as where the amount in dispute falls below a given monetary threshold) or when explicitly agreed to by the parties (in their agreement or after the commencement of the arbitration).[106] Other Rules more generally allow the parties to agree on time limits or to shorten the default time limits.[107] In some instances, the arbitral tribunal has the power to set or modify those time limits.[108]

Even where formal expedited procedures are available, it is not hard to imagine that an opposing party might not agree to them. Consequently, a party might prefer to have the option to request that the tribunal – or potentially some other decision maker prior to the constitution of the tribunal – directly order that

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[hereinafter ICSID RULES] (authorizing parties to seek interim relief from national courts to preserve their rights and interests where they have explicitly consented to it).

[103] LCIA RULES, *supra* note 66, Arts. 22(2) & 25(3); *cf.* 2 BORN, *supra* note 4, at 2065 (noting that under the LCIA and ICC Rules, "the expectation is that requests for provisional measures will be presumptively addressed to the arbitral tribunal once it has been constituted, rather than the national courts").

[104] Huntley, *supra* note 16, at 88, 97 (arguing that arbitral tribunals should have the "final say" on interim measures); Werbicki, *supra* note 17, at 64, 69.

[105] Schwartz, *supra* note 12, at 61.

[106] *See, e.g.*, CIETAC RULES, *supra* note 102, Art. 50; Swiss RULES, *supra* note 25, Art. 42; JAPAN COMMERCIAL ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, Rule 59, *available at* http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e_shouji.pdf (last visited Feb. 10, 2010) [hereinafter JCAA RULES].

[107] *See, e.g.,* ICSID RULES, *supra* note 102, Rules 13(1) & 26.

[108] *See, e.g.,* WORLD INTELLECTUAL PROPERTY ORGANIZATION, ARBITRATION AND MEDIATION CENTER, ARBITRATION RULES, Art. 4(f), *available at* http://www.wipo.int/amc/en/arbitration/rules (last visited Feb. 10, 2010) [hereinafter WIPO RULES].

expedited procedures apply. Unfortunately, only the SIAC Rules explicitly provide for such a procedure.[109]

III. THE RULES

A. *UNCITRAL*

The United Nations established UNCITRAL as a subsidiary body of the General Assembly in 1966 "to further the progressive harmonization and unification of the law of international trade."[110] UNCITRAL currently is composed of 60 nations and has promulgated models for legislative (*e.g.*, model laws) and non-legislative (*e.g.*, arbitration rules) texts.[111] In 1976, UNCITRAL adopted its Arbitration Rules as a suggested guide "to govern the conduct of an arbitration intended to resolve a dispute or disputes between" private parties.[112] In 1985, UNCITRAL adopted the Model Law on International Commercial Arbitration ("Model Law") "as a suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation."[113] UNCITRAL revised the Model Law in 2006 and the Arbitration Rules in 2010.[114]

1. *UNCITRAL Model Law*

The UNCITRAL Model Law has been adopted by over 60 jurisdictions, including several American states.[115] It provides that the tribunal may grant interim measures at the request of one of the parties unless the parties have otherwise agreed.[116] It defines "interim measure" as a "temporary" measure, "whether in the form of an award or in another form" sought prior to the final

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[109] SIAC RULES, *supra* note 67, Art. 5.1: *cf.* LCIA RULES, *supra* note 66, Art. 22.1(b) (giving the tribunal the power to abbreviate any time limit on the application from a party or on its own motion).

[110] UNCITRAL, What Is the Mandate of UNCITRAL? (WTO)?, http://www.uncitral.org/uncitral/en/about/origin_faq.html#mandate (last visited Feb. 12, 2010).

[111] UNCITRAL, FAQ – UNCITRAL Texts, http://www.uncitral.org/uncitral/en/uncitral_ texts_faq.html (last visited Sept. 18, 2009).

[112] UNCITRAL, FAQ – UNCITRAL and Private Disputes/Litigation, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html (last visited Sept. 18, 2009); Ferguson, *supra* note 5, at 60.

[113] UNCITRAL, FAQ – UNCITRAL Texts, http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last visited Sept. 18, 2009); Ferguson, *supra* note 5, at 60.

[114] UNCITRAL, FAQ – UNCITRAL Texts, http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last visited Sept. 18, 2009); United Nations Information Service, Revised UNCITRAL Arbitration Rules Adopted, http://www.unis.unvienna.org/unis/pressrels/2010/unisl139.html (last visited Aug. 27, 2010).

[115] *See* UNCITRAL Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Aug. 4, 2010).

[116] UNCITRAL MODEL LAW, *supra* note 27, Art. 17(1).

resolution of the dispute that does one of four things: (1) maintains or restores the status quo while the dispute is pending; (2) prevents harm or imminent harm to the arbitral process; (3) preserves assets related to the dispute; or (4) preserves evidence relevant to the dispute.[117] The Model Law further provides that national courts generally shall enforce interim measures and explicitly permits applications to national courts for interim measures.[118]

In order to obtain interim relief, an applicant must show irreparable harm that "substantially outweighs" any harm that may result to the opposing party and that there is a reasonable "possibility" that the applicant will succeed on its claim.[119] One commentator has argued that this standard requires a party seeking interim relief to establish: "imminent danger or risk of serious prejudice," which incorporates an implied element of "urgency," and "that the risk of harm to their legal interests is so great that any resulting damage cannot be properly compensated by a monetary award, or that it cannot be financially compensated by virtue of its very nature."[120] Thus, the standard encompasses a balancing test, whereby the benefit to the applicant "must outweigh its prejudicial effect on the party against whom it is directed."[121] However, the tribunal has discretion to determine whether or not to apply this standard where the applicant is merely seeking to preserve evidence.[122] Notably, the Model Law previously permitted the tribunal to award interim measures that it deemed "necessary."[123] UNCITRAL revised the Model Law standard to provide more clarity after conducting a survey on the power of various courts to order interim measures in support of arbitration.[124]

The Model Law also provides that a party may make an ex parte application for an interim measure where there is a risk that the opposing party will "frustrat[e] the purpose" of the measure.[125] Any ex parte order expires after twenty days and "shall not be subject to enforcement by a court."[126] The tribunal may, however, issue an interim measure after notice to the opposing party before the twenty-day period expires.[127] The other requirements for "interim measure[s]," noted above, also apply to ex parte orders.[128]

The tribunal may require the applicant to post security for an interim measure and presumably will require the applicant to post security for an ex parte order (unless the tribunal considers it to be "inappropriate" or "unnecessary").[129]

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117 *Id*. Art. 17(2).
118 *Id*. Arts. 17H, 17I, 17J; *see also id*. Art. 9.
119 *Id.* Art. 17A(1).
120 Hickie, *supra* note 16, at 230.
121 *Id.*
122 UNCITRAL MODEL LAW, *supra* note 27, Art. 17A(2).
123 Wong, *supra* note 42, at 617-19.
124 *Id.*
125 UNCITRAL MODEL LAW, *supra* note 27, Art. 17B.
126 *Id*. Art. 17C(4)-(5).
127 *Id*. Art. 17C(4).
128 *Id*. Art. 17B(3).
129 *Id*. Art. 17E.

Notably, however, the Model Law provides no procedure for pre-tribunal relief.[130] One commentator has suggested that "by omission," the Model Law therefore directs parties to seek interim relief from national courts before the tribunal has been established.[131]

The Model Law is generally vague on timing. It appears that it could take up to 60 days to constitute an arbitral tribunal of three, as (unless otherwise agreed) each party has 30 days to nominate an arbitrator (after receiving a request to do so) and the two arbitrators then have 30 days to nominate a third.[132] The Model Law does not provide specifics on the timing of the selection of a sole arbitrator, particular procedures of the arbitration, or the final award.[133]

2. *UNCITRAL Rules*

Unlike many of the other bodies that have issued Rules, UNCITRAL is not an association that administers arbitrations, and cannot "perform any function related to individual arbitration proceedings, or any other system of public or private dispute settlement."[134] Nonetheless, the UNCITRAL Rules may be adopted by parties in an ad hoc proceeding or, where permitted, in the context of an arbitration supervised by other arbitral institutions.[135] Indeed, the UNCITRAL Rules are widely used throughout the world.[136]

Under the UNCITRAL Rules, the tribunal may issue multiple awards "on different issues at different times."[137] Article 26 provides that the tribunal may, upon request, grant an "interim measure" requiring a party to, for example: (a) maintain the status quo pending a final resolution of the dispute; (b) take or refrain from action that would cause imminent harm or prejudice to the arbitral process; (c) preserve assets necessary to satisfy an award; or (d) preserve evidence.[138] The tribunal generally may only grant an interim measure where the requesting party has demonstrated irreparable harm and a reasonable possibility of success on the merits.[139] The Rules also explicitly authorize applications to "a judicial authority"

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[130] Ferguson, *supra* note 5, at 62-63.

[131] Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 497 (2009).

[132] UNCITRAL MODEL LAW, *supra* note 27, Art. 11(3).

[133] *See id*. Arts. 19, 23, 24, 31, & 32.

[134] Wang, *supra* note 5, at 1065; UNCITRAL, FAQ - UNCITRAL Texts, http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last visited Sept. 18, 2009).

[135] Wang, *supra* note 5, at 1065.

[136] Zicherman, *supra* note 47, at 687.

[137] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), UNCITRAL ARBITRATION RULES, Art. 32(1), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Aug. 27, 2010) [hereinafter UNCITRAL RULES].

[138] *Id.* Art. 26(1-2).

[139] *Id.* Art. 26(3). The only exception is for requests to preserve evidence, where the tribunal may apply the standard at its discretion. *See id.* Art. 26(4).

for interim relief.[140] Additionally, in contrast to the ex parte procedure authorized by the Model Law, the Rules provide that the parties must generally share communications to the tribunal with all other parties.[141]

The Rules are silent on pre-tribunal relief and do not contain a separate set of expedited procedures. Although the Rules do contain some set time periods for the response to the notice of arbitration and the appointment of the tribunal, they vest the tribunal with a great deal of discretion concerning the timing of the proceedings.[142]

B. *ICC*

The ICC is one of the oldest and best known arbitral institutions.[143] Indeed, the ICC Rules may be the most widely used in international arbitration.[144] The ICC Rules provide that, at the request of a party, the tribunal may order "any interim or conservatory measure it deems appropriate."[145] The measure may take the form of an order or award, but in either instance, the tribunal must explain its reasoning.[146] Prior to the constitution of the tribunal, and "in appropriate circumstances" thereafter, the parties may apply to a national court for interim relief.[147]

Although the ICC Rules do contain some default time limits for the parties to appoint arbitrators, even if the parties comply with those time limits, the arbitrators are subject to confirmation by the ICC.[148] If the parties fail to comply with the time limits, the ICC nominates the arbitrator.[149] The ICC also nominates the chairman of a tribunal where the parties have agreed on a three-arbitrator tribunal, unless the parties have agreed upon another procedure and timely complied with it.[150] The ICC's appointments and confirmations are not subject to time limits.[151]

Once the tribunal is constituted, the ICC Rules provide that the parties and the tribunal are to agree on a procedural timetable memorialized in the "Terms of Reference."[152] The tribunal and the parties are to sign the Terms of Reference and transmit them to the ICC within two months of the tribunal's constitution.[153]

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140 *Id.* Art. 26(9).
141 *Id.* Art. 17(4).
142 *Compare id*. Arts. 4, 6 & 8-10 *with id.* Arts. 17(1-2), 20(1), 21(1) & 25.
143 Wang, *supra* note 5, at 1066.
144 Marchac, *supra* note 5, at 125.
145 ICC RULES, *supra* note 37, Art. 23(1).
146 *Id*. Arts. 23(1) & 25(2).
147 *Id*. Art. 23(2).
148 *Id*. Arts. 7, 8, & 9.
149 *Id*. Art. 8.
150 *Id*. Art. 8(4).
151 *See id*. Art. 9.
152 *Id.* Art. 18.
153 *Id*. Art. 18(2).

The tribunal is to render a final award within six months of the Terms of Reference being signed.[154] However, both of these time periods may be extended by the ICC.[155] The Rules also allow the parties to agree to shorten the time limits, but any such agreement must be approved by the tribunal, if it has been constituted.[156]

The ICC also has a separate "Pre-Arbitral Referee Procedure" which only applies where the parties explicitly agree to it in writing.[157] Inspired by the French courts, the Pre-Arbitral Referee Procedure represents one of the first attempts by an arbitral institution to provide a mechanism for obtaining urgent interim remedies before the constitution of the tribunal.[158] Under that procedure, the applicant must send the request to the ICC and simultaneously notify the other party of the request.[159] Accordingly, the procedure does not provide for the possibility of ex parte relief.

The other party then has eight days to respond to the request.[160] The ICC then appoints a referee "in the shortest time possible" after the expiration of the eight-day time limit.[161] The referee then conducts proceedings as the referee "considers appropriate,"[162] and issues an order, including the referee's reasoning, within 30 days of receiving the file.[163] Consequently, it may take 38 days from the time that an application is made to the date of a ruling on the application.[164]

The referee has the power to order: (a) conservatory measures or restorative measures necessary to prevent irreparable harm; (b) a party to make "any payment which ought to be made"; (c) a party to "take any step which ought to be taken" under the parties' contract; or (d) measures necessary to preserve evidence.[165] The referee may not act as an arbitrator unless otherwise agreed by the parties in writing.[166] Although the referee's order is not binding on the tribunal or a national court[167] (either of whom may order any further interim measures[168]), the procedure

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[154] *Id*. Art. 24(1).

[155] *Id*. Arts. 18(2) & 24(2).

[156] *Id*. Art. 32(1).

[157] ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 3.1; *see also* Wang, *supra* note 5, at 1093.

[158] *Provisional Remedies*, *supra* note 51, at 52-53.

[159] ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 3.2.

[160] *Id*. Art. 3.4.

[161] *Id*. Art. 4.2. The parties may also agree on a referee. *See id*. Art. 4.1.

[162] *Id*. Art. 5.3.

[163] *Id*. Arts. 6.1 & 6.2

[164] *Cf.* Werbicki, *supra* note 17, at 65 (noting that a similar procedure would "not help in cases in which the need for interim relief is absolutely immediate, as at least a few days will be required to appoint an arbitrator, establish a schedule and obtain submissions from the parties").

[165] ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 2.1.

[166] *Id*. Art. 2.3.

[167] *Id*. Arts. 6.3 & 1.1.

[168] *Id*. Art. 2.4.1.

provides that the parties agree not to appeal or oppose the order in a national court.[169] Commentators have dismissed the procedure because it does not apply unless the parties explicitly agree to it and because of the amount of time that may pass before the referee is appointed.[170] The procedure has been used very rarely.[171]

C. *ICDR*

The American Arbitration Association ("AAA") was established in 1926 to provide mediation and arbitration services for domestic commercial disputes.[172] In 1996, the AAA founded the ICDR to provide international access to the services that it had offered in the United States.[173] The ICDR now administers all of the AAA's international matters,[174] and the ICDR Rules "apply to international arbitrations whenever the parties' agreement calls for AAA arbitration but does not choose a particular set of AAA rules."[175]

Under the ICDR Rules, on a party's request, the tribunal "may take whatever interim measures it deems necessary."[176] These measures may come in the form of an interim award,[177] and they may provide for injunctive relief or include measures to protect or conserve property.[178] Additionally, the tribunal may make "interlocutory or partial orders and awards."[179] The tribunal must state its reasoning in any awards.[180] The ICDR Rules also provide that once parties incorporate the Rules into their agreement, they have agreed to be bound by the

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[169] *Id*. Art. 6.6.

[170] *See* Wang, *supra* note 5, at 1093 ("In most cases, if the agreement has not been made in advance, it is unlikely that disputing parties will agree to an expedited referee procedure"); Ferguson, *supra* note 5, at 58-59 (referring to the ICC Pre-Arbitral Referee Procedure as a "failure").

[171] *See* 2 BORN, *supra* note 4, at 1971 n.154 ("As of 2008, the ICC had registered only 9 requests under the pre-arbitral referee rules, the first being in 2001"); BORN, *supra* note 59, at 932 ("[A]lthough the ICC's Pre-Arbitral Referee Procedure has attracted substantial commentary, [as of 2001,] it has not yet been tested in a single case"); *Provisional Remedies*, *supra* note 51, at 53 (noting that as of 1994, "[a]lthough [the ICC Pre-Arbitral Referee Procedure] rules went into force in 1990, there ha[d] not yet been a reference to the ICC under them").

[172] American Arbitration Association, About The American Arbitration Association, http://www.adr.org/about_aaa (last visited Sept. 21, 2009).

[173] American Arbitration Association, About the International Centre for Dispute Resolution, http://www.adr.org/about_icdr (last visited Feb. 12, 2010).

[174] ICDR RULES, *supra* note 23, Introduction.

[175] Lemenez & Quigley, *supra* note 56, at 64.

[176] ICDR RULES, *supra* note 23, Art. 21(1).

[177] *Id.* Art. 21(2).

[178] *Id.* Art. 21(1).

[179] *Id.* Art. 27(7).

[180] *Id.* Art. 27(2).

arbitral award and to carry out the award immediately.[181] Additionally, the ICDR Rules appear to preclude ex parte relief.[182]

The ICDR Rules do provide time limits for the submission of the statement of defense,[183] appointment of the tribunal,[184] and further written statements,[185] but do not set a deadline for the completion of the proceedings. The ICDR Rules also lack explicit procedures for the expedited formation of a tribunal. Indeed, the Rules do not provide for expedited proceedings. However, the Rules do provide the parties with the option of applying to a national court for interim relief.[186]

Notably, the ICDR also provides a procedure whereby parties may, in urgent situations, apply to the ICDR to seek relief prior to the formation of the tribunal.[187] This emergency procedure, outlined in Article 37, is automatically available to parties who entered into their arbitration agreements on or after May 1, 2006, regardless of whether those parties specifically incorporated Article 37 into their agreements.[188] Some have suggested that this feature "favorably distinguishes" the ICDR procedure "from other opt-in mechanisms for obtaining interim relief, which are seldom used."[189]

To initiate an emergency proceeding, a party must submit a written emergency relief application to the ICDR that must specify the type of emergency relief that it is seeking, why that relief is necessary, and why the party is entitled to that relief.[190] Once the administrator receives the request, it must appoint a referee within one business day.[191] Should a party wish to object to that appointment, it must notify all parties involved in the proceedings of the reasons for its objection.[192] The Rules do not specify the procedures that the administrator must follow in considering objections to the referee's appointment.

Within two days of being appointed, the referee must produce an agenda for considering the emergency relief application.[193] This agenda must provide an opportunity for all parties to address the issues raised in the application.[194] The Rules do not set any time limit for the referee to decide the application; however,

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[181] *Id.* Art. 27(1).

[182] *See id.* Art. 16.1.

[183] *Id.* Art. 3(1).

[184] *Id.* Art. 6.

[185] *Id.* Art. 17(2).

[186] *Id.* Art. 21(3).

[187] *Id.* Art. 37.

[188] *Id.* Art. 37(a). For all agreements created prior to May 1, 2006, the parties must specifically agree to Article 37's emergency procedure in order for it to apply. *Id.*

[189] Mark Friedman et al., *International Legal Developments in Review: 2006 Disputes*, 41 INT'L LAW. 251, 286-87 (2007).

[190] ICDR RULES, *supra* note 23, Art. 37(b).

[191] *Id.* Art. 37(c).

[192] *Id*.

[193] *Id.* Art. 37(d).

[194] *Id*.

a study of several applications for relief under the procedure found that all applications were resolved within two weeks.[195]

Like the authority granted to the tribunal, the referee may award any interim or conservatory measures that the referee "deems necessary."[196] These measures may come in the form of an order or an award, "including injunctive relief and measures for the protection or conservation of property."[197] The referee must provide reasons for granting any orders or awards.[198] Article 37 also explicitly provides that the parties may apply to a national court for interim relief.[199] Article 37 does not, however, appear to permit applications for ex parte relief.[200]

Once the tribunal has been constituted, the referee has no further power.[201] The tribunal "may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator."[202] The referee may not serve as a member of the tribunal unless the parties agree otherwise.[203]

D. *Swiss Rules*

SCCAM consists of the Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.[204] Two of SCCAM's members (Zurich and Geneva) are among the oldest providers of international arbitration services.[205] In 2004, SCCAM adopted the Swiss Rules of International Arbitration ("Swiss Rules"),[206] which are based on the UNCITRAL Rules.[207]

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[195] Lemenez & Quigley, *supra* note 56, at 66-67.

[196] ICDR RULES, *supra* note 23, Art. 37(e).

[197] *Id.*

[198] *Id.*

[199] *Id.* Art. 37(h).

[200] *Id.* Art. 37(d); *cf.* Lemenez & Quigley, *supra* note 56, at 70 (noting that the speed of the procedure, "in itself does not appear to give rise to fairness concerns [implicated by Article V of the New York Convention] because, as others have noted, there is no ex parte relief available under Article 37").

[201] ICDR RULES, *supra* note 23, Art. 37(f).

[202] *Id.*

[203] *Id.*

[204] *See* Swiss Chambers' Court of Arbitration and Mediation: International Arbitration, https://www.sccam.org/sa/en/ (last visited Feb. 12, 2010).

[205] Chambers of Commerce & Industry of Basel, Berne, Geneva, Lausanne, Lugano, and Zurich: The Swiss Rules of International Arbitration of the Swiss Chambers of Commerce Tradition – Innovation – Cost Effectiveness: Twelve Reasons to Choose Arbitration Under the Swiss Rules, *available at* https://www.sccam.org/sa/download/Promotion_Swiss_Rules.pdf (last visited Feb. 12, 2010) (noting that Zurich was founded in 1873 and Geneva was founded in 1865).

[206] Swiss Chambers' Court of Arbitration and Mediation, https://www.sccam.org (last visited Feb. 11, 2010).

[207] Swiss RULES, *supra* note 25, Introduction.

The Swiss Rules are used in proceedings supervised by the Swiss Chambers of Commerce.[208]

Under the Swiss Rules, at either party's request, the tribunal may "take any interim measures it deems necessary or appropriate."[209] Interim measures may take the form of interim awards.[210] The tribunal must state its reasons for granting any such awards; however, the parties may agree that the tribunal need not do so.[211] By incorporating the Swiss Rules into an agreement, the parties agree "to carry out the award without delay."[212] Notably, approximately 18% of all awards issued under SCCAM's supervision from 2004 to 2008 were interim awards.[213]

The Swiss Rules do not appear to permit ex parte applications for interim relief.[214] They also do not provide any mechanism for obtaining relief prior to the constitution of the tribunal. However, the Rules do explicitly permit applications to national courts for interim relief.[215]

The Swiss Rules do also provide some deadlines for submission of written statements;[216] however, the tribunal otherwise has a wide degree of discretion in structuring the timing of the proceedings.[217] Article 42 provides parties with the option to engage in an expedited arbitration procedure.[218] That article only applies if the parties agree to expedited arbitration or where the total amount at issue is less than one million Swiss francs.[219] The expedited procedure attempts to streamline the arbitral process by: (1) reducing the time limits for appointing arbitrators; (2) reducing the number of submissions by the parties; (3) limiting the number of hearings; and (4) limiting the time period for an overall disposition to six months (which may be extended in "exceptional circumstances") from the date that the file is sent to the tribunal.[220]

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[208] Swiss Rules of International Arbitration, https://www.sccam.org/sa/en/rules.php (last visited Feb. 12, 2009). Participating Chambers of Commerce include those of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich. *Id*.

[209] Swiss RULES, *supra* note 25, Art. 26(1).

[210] *Id.* Art. 26(2); *see also id*. Art. 32.

[211] *Id.* Art. 32(3).

[212] *Id.* Art. 32(2).

[213] Swiss Chambers Court of Arbitration & Mediation: Arbitration Statistics 2008, *available at* https://www.sccam.org/sa/download/statistics_2008.pdf (last visited Feb. 12, 2010) [hereinafter SCCAM 2008 Statistics] (showing that 17 interim awards were issued and 77 final awards were issued in the years 2004 through 2008).

[214] *See* Swiss RULES, *supra* note 25, Art. 15(1).

[215] *Id.* Art. 26(3).

[216] *Id.* Arts. 3(7) & 23.

[217] *See, e.g., id.* Arts. 15(3), 18(1), 19(1), 23, 24(2)-(3), & 25(1).

[218] *Id.* Art. 42.

[219] *Id.* Art. 42(1) & (2).

[220] *Id.* Art. 42.

The expedited procedure has been used in approximately one-third of all cases heard by the Swiss Chambers of Commerce.[221] On average, cases conducted under the expedited procedure have been resolved within eight months, while those conducted under the standard procedure are resolved within eleven.[222]

E. *LCIA*

Formed in 1892, the LCIA is among the "longest-established international institutions for commercial dispute resolution."[223] The LCIA Rules permit the tribunal "to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration."[224] The tribunal may order any interim measures of relief that are within the scope of the tribunal's authority to issue a final award.[225] However, such orders are "subject to final determination" in the form of an award.[226] Because the Rules use the term "order" when discussing interim relief, it does not appear that the tribunal may issue an interim "award" that would be binding on the parties.[227] The Rules do not specify a standard for the tribunal to evaluate requests for interim relief.

Although the LCIA Rules do not impose strict time limits on the constitution of the tribunal, according to the LCIA, it generally attempts to constitute the tribunal within approximately 44 calendar days, or about six weeks.[228] Depending on when the response is received, however, that time period may be longer.[229]

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[221] SCCAM 2008 Statistics, *supra* note 213 (showing that the expedited procedure was used in 32% of cases from 2004 to 2008).

[222] Swiss Chambers Court of Arbitration & Mediation: Newsletter 1/2009, *available at* https://www.sccam.org/sa/download/newsletter_2009_1.pdf (last visited Feb. 12, 2010) (stating that, on average, cases heard under the expedited procedure were resolved in 240 days and cases heard under ordinary procedures were resolved in 320 days).

[223] LCIA Arbitration & ADR Worldwide, History of the LCIA, http://www.lcia-arbitration.com (lasted visited Sept. 21, 2009); LCIA Arbitration & ADR Worldwide, About the LCIA, http://www.lcia-arbitration.com (lasted visited Sept. 21, 2009).

[224] LCIA RULES, *supra* note 66, Art. 25.1(b).

[225] *Id.* Art. 25.1(c).

[226] *Id.*

[227] *Id.* Art. 26.9. Note, however, that the Rules also allow the tribunal to issue "separate awards on different issues at different times." *See id.* Art. 26.7.

[228] *Compare id.* Art. 2.1 (providing that a respondent must serve a response to a request for arbitration within 30 days of receiving the request) *with* LCIA Arbitration & ADR Worldwide, Frequently Asked Questions: How quickly does the LCIA appoint a Tribunal?, http://www.lcia-arbitration.com (last visited Feb. 6, 2010) (indicating that the LCIA "would hope to constitute the Tribunal within 10 working days of the Response").

[229] Email from Adrian Winstanley, Director General, LCIA, to Doug Rennie, Visiting Legal Skills Fellow, New York Law School (Feb. 17, 2010) (indicating that the LCIA takes much less time to constitute a tribunal than it did in the past, and that it typically takes the LCIA four to five weeks after receiving the response to constitute the tribunal)(Email on file with author).

Regardless, however, it appears that the LCIA does not take nearly as long as it used to in order to form a tribunal.[230] The Rules do provide that in the event of an "exceptional urgency," a party may request the LCIA to expedite the formation of the tribunal.[231] A party making such a request must provide an explanation of the specific circumstances of the exceptional urgency.[232] Even in such "exceptional" cases, however, the Rules do not provide stringent time limits for the LCIA to form the tribunal. Rather, it is within the LCIA's discretion to create a schedule to form the tribunal.[233] The LCIA has indicated, however, that a tribunal "may be appointed within as short a time as 48 hours from the date of the" application.[234]

The LCIA Rules do not contain a separate set of expedited procedures; however, they do provide the tribunal with the power to modify any time limits in the Rules.[235] Thus, according to the LCIA, the Rules do allow for "fast-track procedures."[236] The tribunal must provide the parties with an opportunity to present any objections they may have to such a modification.[237]

Apart from permitting a request for the expedited formation of the tribunal, the LCIA Rules do not provide a means of requesting interim relief prior to the constitution of the tribunal. The Rules also do not appear to permit ex parte requests for interim relief.[238] Although the LCIA Rules do permit parties to apply to national courts for relief prior to the establishment of the tribunal, they prohibit parties from doing so, absent "exceptional circumstances," once the tribunal has been constituted.[239]

F. *SIAC*

The SIAC was established in 1991 to meet the growing demand for dispute resolution services in Asia.[240] Under the SIAC Rules, the parties may seek interim measures from the tribunal, an emergency arbitrator prior to the constitution of the tribunal, or a judicial authority prior to the constitution of the

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[230] *Compare id. with* Wagoner, *supra* note 3, at 22 (indicating that "[i]n . . . LCIA[] practice the average time to form a tribunal is currently 16 weeks").

[231] LCIA RULES, *supra* note 66, Art. 9.1.

[232] *Id.* Art. 9.2.

[233] *Id.* Art. 9.3.

[234] LCIA Arbitration & ADR Worldwide, Frequently Asked Questions: What if a Claimant needs urgent conservatory measures?, http://www.lcia-arbitration.com (last visited Feb. 6, 2010).

[235] LCIA RULES, *supra* note 66, Art. 22.1(b); *see also id.* Art. 4.7.

[236] LCIA Arbitration & ADR Worldwide, Cost Effectiveness & Speed, http://www.lcia-arbitration.com (last visited Sept. 21, 2009).

[237] LCIA RULES, *supra* note 66, Art. 22.1(b).

[238] *See id.* Art. 13.3.

[239] *Id.* Art. 25.3.

[240] Singapore International Arbitration Centre, About Us, http://www.siac.org.sg/aboutus.htm (last visited Sept. 21, 2009).

tribunal and in "exceptional circumstances thereafter."[241] The tribunal may issue "an order or award granting an injunction or any other interim relief it deems appropriate."[242] The SIAC Rules also define the term "Award" to include all decisions "on the substance of the dispute . . . includ[ing] a partial or final award, or an award by an Emergency Arbitrator."[243]

The Rules set some default deadlines but also provide the parties and the tribunal with considerable discretion in fashioning the procedural timeline.[244] They do provide that a party may request expedited proceedings where the amount in dispute falls below a monetary threshold, where the parties have agreed to them, or "in cases of exceptional urgency."[245] The expedited procedure shortens time limits, streamlines other procedures, and requires the tribunal to issue an award within six months of its formation, absent "exceptional circumstances."[246]

The latest version of the SIAC Rules also includes a pre-tribunal emergency arbitrator procedure. After a party seeking pre-tribunal emergency relief files an application with the SIAC explaining the relief it is seeking and the reasons that it needs the relief, the SIAC will appoint an emergency arbitrator within one business day of receiving the application, if accepted.[247] The emergency arbitrator must then establish a schedule to consider the application within two business days, but the Rules do not establish a deadline for the emergency arbitrator to issue a decision.[248] The emergency arbitrator may grant "any interim relief that he deems necessary," providing the reasons for the award in writing.[249] An emergency award is binding on the parties. However, either the emergency arbitrator, before the formation of the tribunal, or the tribunal, itself, may modify or vacate the emergency award.[250] The emergency arbitrator may not act as an

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[241] SIAC RULES, *supra* note 67, Art. 26.

[242] *Id.* Art. 26.1. The Rules also specifically authorize the tribunal to "order the preservation, storage, sale or disposal of any property or item which is or forms part of the subject-matter of the dispute[,]" order any party to take steps "to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party[,]" and post security for costs or the amount in dispute. *Id.* Arts. 24.f, 24.j, 24.k & 24.l.

[243] *Id.* Art. 1.3.

[244] *Compare, e.g., id.* Arts. 4.1, 7.2, 8.2 & 9 *with id.* Arts. 16.1, 16.3-4, 17.2-6, 21.2 & 24.c.

[245] *Id.* Art. 5.1.

[246] *Id.*

[247] *Id.* Sched. 1.1-2.

[248] *Id.*

[249] *Id.* Sched. 1.6.

[250] *Id.* Sched. 1.6-7. The emergency award also becomes ineffective if the tribunal is not constituted with 90 days of the award, when the tribunal issues a final award, or if the claim is withdrawn. *Id.* Sched. 1.7.

arbitrator unless the parties otherwise agree.[251] Both the general Rules and the emergency arbitrator procedure preclude ex parte applications for interim relief.[252]

G. *SCC*

The SCC "is part of, but independent from, the Stockholm Chamber of Commerce and was established in 1917."[253] The SCC hears cases brought under its rules, its expedited rules, and the UNCITRAL Rules.[254] The SCC Rules provide tribunals with the power to grant any interim measures that they deem "appropriate,"[255] and these measures may take the form of an interim order or award.[256]

Unlike most other sets of Rules, the SCC Rules do not provide explicit time limits for the arbitration to proceed.[257] The Rules do set an overall time limit of six months from the date the arbitration is referred to the tribunal, but that can be extended "upon a reasoned request" from the tribunal or where "otherwise deemed necessary."[258]

The SCC's Rules for Expedited Arbitrations ("SCC Expedited Rules") apply where explicitly agreed to by the parties.[259] In both 2008 and 2009, more than 25% of the cases that the SCC administered were brought under the Expedited Rules.[260] The Expedited Rules are similar to the SCC Rules, but shorten the time

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[251] *Id.* Sched. 1.4.

[252] *Id.* Arts. 10.7, 16.6 & Sched. 1.1.

[253] Arbitration Institute of the Stockholm Chamber of Commerce, About the SCC, http://www.sccinstitute.com/hem-3/om-oss-3.aspx (last visited Sept. 21, 2009).

[254] Arbitration Institute of the Stockholm Chamber of Commerce, Statistics, *available at* http://www.sccinstitute.com/hem-3/statistik-2.aspx (last visited Sept. 21, 2009).

[255] SCC RULES, *supra* note 67, Art. 32(1).

[256] *Id.* Art. 32(3).

[257] *See, e.g.*, *id.* Arts. 5, 7, & 23.

[258] *Id.* Art. 37.

[259] *See* RULES FOR EXPEDITED ARBITRATIONS OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, *available at* http://www.sccinstitute.com/filearchive/3/30367/2010_Expedited_Rules.pdf (last visited Feb. 11, 2010) [hereinafter SCC EXPEDITED RULES]. The SCC also suggests that the parties may agree, in their arbitration agreement, to have the amount in controversy dictate whether the Expedited Rules apply or allow the SCC to decide. *See* Arbitration Institute of the Stockholm Chamber of Commerce, Expedited Rules, http://www.sccinstitute.com/?id=23720 (last visited Sept. 21, 2009); *see also* Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration > Model Clauses > Combined – Expedited > English, http://www.sccinstitute.com/?id=24570 (last visited Sept. 21, 2009); Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration > Model Clauses > Combined – Amount in Dispute > English, http://www.sccinstitute.com/?id=24663 (last visited Sept. 21, 2009).

[260] Arbitration Institute of the Stockholm Chamber of Commerce, Statistics 2008, http://www.sccinstitute.com/?id=31103 (last visited Feb. 11, 2010) (indicating that 48 of 176 cases in 2008 proceeded under the Expedited Rules); Arbitration Institute of the

limit for the overall resolution to three months from the date that the matter is referred to the tribunal.[261] The Expedited Rules also provide that there shall only be one arbitrator, precluding the possibility of a three-arbitrator tribunal.[262]

Notably, both the SCC Rules and SCC Expedited Rules were recently revised to incorporate an "Emergency Arbitrator" procedure in Appendix II.[263] The procedure provides that a party may apply to the SCC to appoint an emergency arbitrator before the case has been referred to the tribunal.[264] The emergency arbitrator has the same powers that the tribunal has to grant interim relief.[265] To seek the appointment of an emergency arbitrator, a party must submit an application to the SCC that includes a description of the interim relief that the party is seeking and the reasons the party is seeking that relief.[266] The applicant must also pay for the costs of the emergency proceedings when filing the application.[267]

The Rules indicate that the SCC "shall seek to appoint" the emergency arbitrator "within 24 hours of" receiving the application and "promptly refer the application" to the emergency arbitrator thereafter.[268] Any challenge to the emergency arbitrator must be made "within 24 hours from when the circumstances giving rise to the challenge . . . became known to the party."[269] The emergency arbitrator has the authority to conduct the proceeding "in the manner" he or she "considers appropriate" while "taking into account the urgency inherent in" the proceeding.[270]

The emergency arbitrator must make "[a]ny emergency decision" on the application "not later than 5 days" after the reference from the SCC.[271] The SCC "may extend this time limit upon a reasoned request from the Emergency Arbitrator, or if otherwise deemed necessary."[272] The emergency decision must

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Stockholm Chamber of Commerce, Statistics, http://www.sccinstitute.com/hem-3/statistik-2.aspx (last visited Feb. 10, 2010) (indicating that 60 of 215 cases in 2009 proceeded under the Expedited Rules).

[261] *Compare* SCC EXPEDITED RULES, *supra* note 259, Art. 36 *with* SCC RULES, *supra* note 67, Art. 37.

[262] *Compare* SCC EXPEDITED RULES, *supra* note 259, Art. 13 *with* SCC RULES, *supra* note 67, Art. 12.

[263] Arbitration Institute of the Stockholm Chamber of Commerce, News in the SCC Rules as of 1 January 2010, http://www.sccinstitute.com/?id=23696&newsid=30371 (last visited Feb. 11, 2010) (noting that both sets of Rules were revised effective January 1, 2010, to incorporate the Emergency Arbitrator procedure); SCC RULES, *supra* note 67, App. II; SCC EXPEDITED RULES, *supra* note 259, App. II.

[264] SCC RULES, *supra* note 67, App. II, Art. 1(1).

[265] *Id.* App. II, Art. 1(2).

[266] *Id.* App. II, Art. 2(iii).

[267] *Id.* App. II, Art. 10(1).

[268] *Id.* App. II, Art. 4(1) & App. II, Art. 6.

[269] *Id.* App. II, Art. 4(3).

[270] *Id.* Art. 19 & App. II, Art. 7.

[271] *Id.* App. II, Art. 8(1).

[272] *Id.*

be written, signed by the emergency arbitrator, and set forth its date, reasoning, and the "seat of the emergency proceedings."[273] Any emergency decision will be binding on the parties, who agree to comply with the decision "without delay" by virtue of agreeing to arbitrate under the SCC Rules.[274] Either the tribunal or the emergency arbitrator can determine when the decision expires, and the tribunal is not bound by it or its reasoning.[275] The emergency decision will also expire: (a) when the tribunal makes a final award; (b) if the arbitration is not commenced within 30 days of the decision; or (c) if the case is not referred to the tribunal within 90 days of the decision.[276] The emergency arbitrator may not act as a member of the tribunal unless otherwise agreed by the parties.[277]

The SCC Rules do not explicitly address whether interim relief is available on an ex parte basis; however, the notice requirements appear to preclude it.[278] Both the Rules and Expedited Rules permit applications to national courts for interim relief.[279]

H. *JCAA*

The JCAA is an independent, non-profit organization that provides international commercial dispute resolution services for disputes arising under agreements governed by its Rules.[280] The JCAA is "the only permanent commercial arbitral institution in Japan."[281] The JCAA Rules provide that the tribunal may "order any party to take such interim measures of protection as [it] may consider necessary in respect of the subject matter of the dispute."[282] The tribunal is also permitted to "make an interlocutory award to decide a dispute arising during the course of the arbitral proceedings" where it deems it to be "appropriate."[283] The tribunal need not provide its reasons for issuing an interlocutory award.[284]

The Rules provide firm deadlines for the submission of the respondent's answer and counterclaim.[285] The parties may agree to extend many of the other applicable time limits; however, the Rules do not appear to contemplate that the

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[273] *Id.* App. II, Art. 8(2).
[274] *Id.* App. II, Art. 9.
[275] *Id.* App. II, Art. 9(4); *see also id.* App. II, Art. 9(2).
[276] *Id.* App. II, Art. 9(4).
[277] *Id.* App. II, Art. 4(4).
[278] *See id.* Art. 8 & App. II, Art. 3.
[279] *Id.* Art. 32(5), SCC EXPEDITED RULES, *supra* note 259, Art. 32(5).
[280] APRAG, Member Profile: JCAA, http://www.aprag.org/members/JCAA.html (last visited Sept. 21, 2009).
[281] *Id.*
[282] JCAA RULES, *supra* note 106, Rule 48(1).
[283] *Id.* Rule 46.
[284] *Id.*
[285] *Id.* Rules 12(1), 18(1), & 19(1).

parties may agree to shorten them.[286] The tribunal has the power to set the schedule of the proceedings "by consultation with the parties," and may extend nearly all time limits.[287] The Rules also provide that the JCAA "may" determine the overall length of time for the proceedings prior to the establishment of the tribunal.[288]

The JCAA's Rules also provide for expedited procedures.[289] The procedures apply if the value of the claims is twenty million yen or less, unless the parties agree otherwise or have agreed that the tribunal will consist of more than one arbitrator.[290] Under the expedited procedure, the tribunal is to make an award within three months after it is established.[291] Where applicable, the parties may not alter the expedited deadlines.[292] The Rules do not provide a procedure, however, for a party to request the expedited formation of the tribunal.

The Rules appear to preclude a party from seeking interim relief on an ex parte basis.[293] They also do not provide a procedure for seeking interim relief prior to the formation of the tribunal. The Rules also do not appear to explicitly authorize or preclude an application to a national court for interim relief.

I. *ICSID*

ICSID was established by the World Bank in the 1960's pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") as a neutral arbitral institution to resolve international investment disputes between signatory nations and foreign investors.[294] While detached from any system of national law, ICSID awards – unlike awards subject to confirmation under the New York Convention – are directly enforceable in the nations that are parties to the ICSID Convention.[295]

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[286] *Id.* Rule 12(1).

[287] *Id.* Rules 32(5) & 12(2).

[288] *Id.* Rule 12(3).

[289] *Id.* Rules 59-67.

[290] *Id.* Rule 59.

[291] *Id.* Rule 65.

[292] *Id.* Rule 12(2).

[293] *See, e.g., id.* Rules 15, 35, & 37(3).

[294] International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Feb. 12, 2010); Cross, *supra* note 13, at 344-45.

[295] Cross, *supra* note 13, at 361 ("[I]n contrast to foreign arbitral awards under the New York Convention, which require recognition and enforcement by courts of the enforcing forum (thereby subjecting the award to challenge in court on the basis of public policy, lack of an enforceable agreement to arbitrate, etc.), an ICSID award is directly enforceable in the courts of member states 'as if it were a final judgment of a court in that State'").

ICSID has become increasingly relevant since the approval of NAFTA and various bilateral investment treaties between parties to the ICSID Convention.[296]

Under ICSID Rule 39, the parties may apply to the tribunal at any point for a "recommendation" of interim relief to preserve any of their rights.[297] Parties may seek interim relief to protect either their substantive or procedural rights.[298] When applying for interim relief, a party must ensure that any request enumerates the rights the party is attempting to preserve, what measures are necessary to preserve those rights, and the circumstances that require those measures.[299] The tribunal may also "recommend" interim relief at its own initiative[300] and "call upon the parties to produce documents, witnesses, and experts."[301]

In other provisions, the ICSID Rules refer to "awards" and "orders."[302] This suggests that the use of the term "recommend" in Rule 39 means that any such "recommendations" of interim relief are not meant to be final such that they could not be confirmed or enforced in a national court.[303] In practice, however, this language does not appear to have deterred tribunals from ordering "binding" interim relief in appropriate cases.[304] Significantly, however, the ICSID Rules provide that parties may seek interim relief from national courts only where they have explicitly agreed in their arbitration agreement.[305]

Under the Rules, the tribunal cannot act on an ex parte application seeking interim relief because it must allow each party an opportunity to address the application prior to making an award.[306] The ICSID Rules also do not provide a procedure for a party to seek relief prior to the formation of the tribunal. However, the ICSID Rules do provide that if a party requests interim relief prior to the establishment of the tribunal, ICSID will set deadlines for the parties to present their "observations on the request" so that the tribunal can consider the request "promptly upon its constitution."[307] There is no provision, however, that

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[296] *Id.* at 345.

[297] ICSID RULES, *supra* note 102, Rule 39(1).

[298] Friedman et al., *supra* note 189, at 275 (citing the ICSID tribunal's decision in *Biwater Gauff Ltd. v. United Republic of Tanzania*).

[299] ICSID RULES, *supra* note 102, Rule 39(1).

[300] *Id.* Rule 39(3).

[301] *Id.* Rule 34(2)(a).

[302] *See, e.g.*, *id.* Rules 19, 37(1), & 46-48.

[303] *See, e.g.*, *supra* Part II.D.

[304] *See* 2 BORN, *supra* note 4, at 1947.

[305] ICSID RULES, *supra* note 102, Rule 39(6); *see also* BORN, *supra* note 4, at 2042 (noting that this is consistent with decisions interpreting the ICSID Convention).

[306] ICSID RULES, *supra* note 102, Rule 39(4).

[307] *Id.* Rule 39(5). *Cf.* Friedman et al., *supra* note 189, at 288 (noting that ICSID's "revised Arbitration Rules allow parties to seek interim relief before an arbitral tribunal is constituted. A party can seek provisional measures for the preservation of its rights 'at any time after the institution of the proceeding,' although requests will not be considered until after the tribunal is constituted. Albeit a step forward, the new ICSID framework on

explicitly provides that the parties may request an expedited formation of the tribunal.

The Rules provide a default procedure for the appointment of the tribunal and provide that the tribunal must hold its first session within 60 days of its formation, unless agreed otherwise.[308] The Rules give the tribunal the power to create a schedule and set deadlines (in some cases after consultation with the parties and ICSID)[309] and the power to alter those deadlines, if appropriate.[310] These rules suggest that the parties may request that the tribunal set an expeditious schedule. However, the ICSID Rules do not separately provide for expedited procedures. The Rules also state that the tribunal may take up to 120 days after the closure of proceedings to issue an award, and may extend this by another 60 days.[311]

J. *WIPO*

WIPO is an agency of the United Nations that was created in 1967 "to promote the protection of [intellectual property] throughout the world through cooperation among states and in collaboration with other international organizations."[312] WIPO has established an Arbitration and Mediation Center in Geneva, Switzerland, to offer arbitration and mediation services "for the resolution of international commercial disputes between private parties."[313] The WIPO Rules "are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property."[314]

Under the WIPO Rules, "[a]t the request of a party," the tribunal has the authority to "issue any provisional orders or take any other interim measures it deems necessary."[315] Any such measures may take the form of an "award."[316] Interim measures may include "injunctions and measures for the conservation of goods which form part of the subject matter in dispute . . . ."[317] In granting such awards, the tribunal may consult with WIPO to discuss the form of the award "to ensure" that it will be enforceable.[318] Certified copies of the awards are also

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interim relief still leaves a very serious deficiency in ICSID arbitration, especially given the length of time it often takes ICSID to constitute a tribunal.").

[308] ICSID RULES, *supra* note 102, Rules 2, 4, & 13(1).

[309] *Id.* Rules 13 & 26(1).

[310] *Id.* Rule 26(2).

[311] *Id.* Rule 46.

[312] World Intellectual Property Organization, About WIPO, What Is WIPO?, http://www.wipo.int/about-wipo/en/what_is_wipo.html (last visited Feb. 12, 2010).

[313] World Intellectual Property Organization, IP Services, WIPO Arbitration & Mediation Center, http://www.wipo.int/amc/en/ (last visited Feb. 12, 2010).

[314] *Id.*

[315] WIPO RULES, *supra* note 108, Art. 46(a).

[316] *Id.* Art. 62(a).

[317] *Id.* Art. 46(a).

[318] *Id.* Art. 62(e); *see also* WORLD INTELLECTUAL PROPERTY ORGANIZATION, ARBITRATION & MEDIATION CENTER, EXPEDITED ARBITRATION RULES, Art. 55(e),

deemed to comply with the New York Convention,[319] and the parties agree to waive any right to appeal the award to a national court.[320] The Rules also explicitly allow parties to apply to a national court for interim relief, or to enforce interim relief awarded by the tribunal.[321]

The Rules set forth deadlines for the appointment of the tribunal[322] and the "communication" of the Statement of Claim,[323] Statement of Defense,[324] and any counterclaims.[325] They further provide that proceedings should be completed within nine months of the establishment of the tribunal or the filing of the Statement of Defense, whichever is later.[326] The tribunal should issue the final award within three months of the completion of the proceedings.[327] The Rules also provide that the parties may agree to reduce or extend certain time periods.[328] WIPO may also extend certain deadlines at the request of a party or on its own initiative.[329] The tribunal, while having a more general duty to ensure an expeditious resolution, may extend any deadlines in "urgent cases."[330]

WIPO has also issued a set of Expedited Arbitration Rules ("WIPO Expedited Rules"), which apply where explicitly referenced in the parties' arbitration agreement.[331] The Expedited Rules are very similar to the general Rules, except they impose shorter time limits.[332] The Expedited Rules provide that the proceedings should close within three months of the establishment of the tribunal or the filing of the Statement of Defense, whichever is later, and that the tribunal should issue the final award within one month of the end of the proceedings.[333] Additionally, while neither the Rules nor the Expedited Rules set forth a procedure explicitly permitting a request for the expedited formation of the tribunal, the Expedited Rules do provide a shorter and more streamlined process for the constitution of the tribunal.[334]

The WIPO Rules are silent on whether a party may make an ex parte application for interim relief, although there does not appear to be any explicit bar

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available at http://www.wipo.int/amc/en/arbitration/expedited-rules/ (last visited Feb. 9, 2010) [hereinafter WIPO EXPEDITED RULES].

319 WIPO RULES, *supra* note 108, Art. 62(g).

320 *Id.* Art. 64(a).

321 *Id.* Art. 46(d); *see also* WIPO EXPEDITED RULES, *supra* note 318, Art. 40(d).

322 WIPO RULES, *supra* note 108, Arts. 16-19.

323 *Id.* Art. 41(a).

324 *Id.* Art. 42(a).

325 *Id.* Art. 42(c).

326 *Id.* Art. 63(a).

327 *Id.*

328 *Id.* Art. 4(f).

329 *Id.* Art. 4(g).

330 *Id.* Art 38(c).

331 WIPO EXPEDITED RULES, *supra* note 318, Art. 2.

332 *See*, *e.g.*, *id.* Art. 56(a).

333 *Id.*

334 *Id.* Art. 14.

to ex parte applications. The WIPO Rules do not contain any procedure for requesting interim relief prior to the formation of the tribunal. WIPO had previously proposed a set of "Emergency Relief Rules,"[335] setting forth a procedure similar to that provided in the SCC Rules, ICDR Rules and the ICC Pre-Arbitral Referee Procedure, but never adopted them.[336]

K. *CIETAC*

CIETAC, also known as the Arbitration Court of the China Chamber of International Commerce, is one of the most prominent permanent arbitration institutions in China.[337] It may be the most important forum for foreign investors in China,[338] as it has a better reputation for fairness than the Chinese courts.[339] Indeed, according to at least one study, CIETAC is the third most popular international arbitration institution, behind only the ICDR and the ICC.[340]

Under the CIETAC Rules, the tribunal may grant an interlocutory or partial arbitral award "on any issue of the case at any time during the arbitration before the final award is made" that it considers "necessary" or that a party requests.[341] The Rules appear to contemplate that any such awards would be enforceable under the New York Convention.[342] The Rules also explicitly authorize the tribunal to "issue procedural directions" and other similar instruments if it deems them necessary.[343]

The Rules provide that CIETAC will "forward" any party's requests "for the preservation of property" or "protection of evidence" to a "competent court" where the property, owner of the property, or evidence is located.[344] The language of the provision suggests that it applies prior to or after the constitution of the tribunal.[345] This process also does not appear to be discretionary, and, as the more specific provision, with respect to the preservation of property or evidence, would appear to override the more general power of the tribunal to issue interlocutory and partial awards.[346] The Rules do not otherwise discuss applications to national

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[335] Proposed WIPO EMERGENCY RELIEF RULES, *supra* note 67, at 317-25.

[336] Email from Annick Regard, Information and External Relations Section, WIPO Arbitration and Mediation Center, to M. Todd Mobley, Summer Associate Law Clerk, Proskauer Rose LLP (July 16, 2009).

[337] China International Economic Trade & Arbitration Commission, Introduction, http://www.cietac.org/index.cms (last visited Feb. 12, 2010); Li Jing, *supra* note 58, at 146.

[338] Li Jing, *supra* note 58, at 146.

[339] *See* Stefania Bondurant, *A Practitioner's Guide: An Overview of the Major International Arbitration Tribunals*, 3 S.C. J. INT'L L. & BUS. 21, 53 (2006).

[340] *See* note 6 *supra*.

[341] CIETAC RULES, *supra* note 102, Art. 44.

[342] *Id.* Art. 49(2).

[343] *Id.* Art. 29(5).

[344] *Id.* Arts. 17 & 18.

[345] *See id.*

[346] *Compare* note 341 *supra*, *with* note 344 *supra*.

courts for interim relief.[347] Notably, Chinese courts have been notoriously reluctant to order interim relief in aid of arbitration.[348]

This structure mirrors Chinese law which does not provide arbitrators with the power to issue orders preserving evidence.[349] Indeed, some have suggested that where Chinese law applies, the parties may not provide the tribunal with such powers in their arbitration agreement or by adopting other sets of Rules.[350] To add to this discomfort, it is also questionable whether Chinese courts would recognize interim measures issued by a foreign tribunal under the New York Convention.[351]

The Rules provide deadlines for the filing of the Statement of Defense, any counterclaims, and the appointment of the tribunal.[352] The Rules then provide that once the tribunal has been constituted, it has six months to render an award.[353] However, in the event the arbitral tribunal needs more time to issue an award, it may request an extension from CIETAC.[354] The Rules do also contain an expedited "Summary Procedure."[355] The Summary Procedure automatically applies if "the amount in dispute does not exceed 500,000 yuan" or if the parties otherwise agree.[356] Under the Summary Procedure, the tribunal must make an arbitral award within three months of its formation.[357] However, CIETAC may also extend this deadline upon request.[358]

The CIETAC Rules generally appear to preclude ex parte applications for interim relief.[359] They also do not contain a procedure allowing parties to seek relief prior to the formation of the tribunal or request an expedited formation of the tribunal.

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[347] *Cf.* 2 BORN, *supra* note 4, at 1961 ("[T]he CIETAC Rules provide that the arbitral tribunal may not order provisional measures, which must be sought instead only from national courts"). Gary Born's otherwise excellent treatise appears to contain a mis-citation for this proposition, citing CIETAC Article 23, which discusses the procedure for appointing a sole arbitrator. *See id.* at 1961, n.97.

[348] Li Jing, *supra* note 58, at 153-54.

[349] *Id.* at 149-50 ("Unlike many developed legal systems, Chinese law does not grant arbitrators with the power to order measures for evidence preservation; all relevant power still rests with the people's courts.").

[350] *Id.* at 152 (concluding that "the arbitrators and the parties of international arbitrations must comply with Art. 68 [of China's Arbitration Law] and cannot agree to exclude its application by express wording in the arbitration agreement or by incorporating other institutional rules").

[351] *Id.* at 162 (concluding that it is unlikely "that China will recognize and enforce an interim arbitral award to preserve evidence").

[352] CIETAC RULES, *supra* note 102, Arts. 12(1), 13(1), 22, & 23.

[353] *Id.* Art. 42(1).

[354] *Id.* Art. 42(2).

[355] *Id.* Art. 50.

[356] *Id.* Art. 50(1).

[357] *Id.* Art. 56(1).

[358] *Id.* Art. 56(2).

[359] *See id.* Arts. 15, 29(1), 39, & 68.

L. *JAMS*

JAMS is a United States-based association founded in 1979 that claims to be "the largest private alternative dispute resolution . . . provider in the world."[360] JAMS recently issued its own set of international arbitration rules.[361] Additionally, in May 2009, JAMS announced the creation of the JAMS International ADR Center, which is a partnership with the ADR Center in Italy, as part of an effort to expand its presence in Europe.[362]

Under the JAMS Rules, the tribunal has the authority, upon request, to grant any interim relief that it deems "necessary."[363] Such interim relief may come in the form of a partial or interim award,[364] and may include injunctive relief, protective measures to conserve property, and "measures to secure the payment of any award that might be rendered."[365] The parties agree to carry out any such awards "without delay" and the awards are "deemed" to comply with the requirements of New York Convention.[366] The tribunal also has the power to summon witnesses and compel the production of documents.[367]

The Rules set default deadlines for the appointment of the tribunal.[368] After formation, the tribunal is to "promptly" hold an initial pre-hearing conference.[369] The Rules provide that the arbitration should be submitted to the tribunal for decision within nine months of the initial pre-hearing conference, and that the tribunal should render a final award within three months thereafter.[370] The parties may agree to shorten the default deadlines prior to the formation of the tribunal, but the tribunal must approve the agreement if it is made after the tribunal is formed.[371] The tribunal also has the power to impose reasonable deadlines in each phase of the proceedings.[372] Although JAMS does provide a set of "Streamlined

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[360] JAMS The Resolution Experts, About JAMS, http://www.jamsadr.com/aboutus_overview (last visited Feb. 12, 2010).

[361] JAMS The Resolution Experts, JAMS International Rules, http://www.jamsadr.com/international-arbitration-rules (last visited Feb. 12, 2010) (noting that the Rules were effective as of April 2005).

[362] JAMS The Resolution Experts, About JAMS, http://www.jamsadr.com/aboutus_overview (last visited Feb. 12, 2010); JAMS The Resolution Experts, International Practice, http://www.jamsadr.com/international-practice (last visited Feb. 12, 2010).

[363] JAMS RULES, *supra* note 66, Art. 26.1.

[364] *Id.* Arts. 26.2 & 30.3.

[365] *Id.* Art. 26.1.

[366] *Id.* Arts. 32.1 & 32.6.

[367] *Id.* Art. 24.2

[368] *Id.* Art. 7.

[369] *Id.* Art 22.1.

[370] *Id.* Art. 31.1.

[371] *Id.* Art. 21.1.

[372] *Id.* Art. 20.6.

Arbitration Rules & Procedures" for domestic arbitrations, JAMS does not appear to offer currently a set of "streamlined" international arbitration rules.[373]

The Rules do provide that a party may make an application for the expedited formation of the tribunal in "exceptionally urgent circumstances."[374] The applicant "must set out the specific grounds for exceptional urgency in the formation of the Tribunal."[375] JAMS may then, "in its discretion, abridge or curtail any time-limit under these Rules to enable the expedited formation of the Tribunal . . . ."[376] The Rules also suggest that the parties may raise any applications for interim relief at the initial pre-hearing conference with the tribunal, once it is formed.[377]

The Rules also do not explicitly permit or preclude the parties from applying to national courts for interim relief.[378] The Rules do not appear to permit ex parte requests for interim relief,[379] and explicitly prohibit ex parte requests for the expedited formation of the tribunal.[380] JAMS also does not offer a procedure for the parties to seek relief prior to the formation of the tribunal.

M. *Summary*

A table summarizing various procedures for obtaining emergent relief under the different sets of Rules appears below. An affirmative response is only indicated where the applicable Rules contain a provision explicitly addressing the subject.

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[373] *See* JAMS The Resolution Experts, JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, Art. 1(a), *available at* http://www.jamsadr.com/rules-streamlined-arbitration (last visited Feb. 12, 2010) (indicating that the streamlined rules would not apply where "other rules [*e.g.*, the international rules] are prescribed").

[374] JAMS RULES, *supra* note 66, Art. 21.2.

[375] *Id.* Art. 21.3.

[376] *Id.* Art. 21.4.

[377] *Id.* Art. 22.

[378] *Id.* Art. 26.3.

[379] *Id.* Art. 20.1.

[380] *Id.* Art. 21.3

Table: Summary of Interim Measures Available Under the Rules

Rules	***Ex Parte Relief***	***Pre-Tribunal Referee***	***Expedited Formation of Tribunal***	***Interim Relief***	***Expedited Proceedings***
UNCITRAL	Yes, Model Law Art. 17B	No	No	Yes, Model Law Art. 17; Rules Art. 26	No
ICC	No	Yes*	No	Yes, Art. 23	No
ICDR	No	Yes, Art. 37	No	Yes, Art. 21	No
Swiss Rules	No	No	No	Yes, Art. 26	Yes, Art. 42*
LCIA	No	No	Yes, Art. 9	Yes, Art. 25	No
SIAC	No	Yes, Sched. 1	No	Yes, Art. 26	Yes, Art. 5
SCC	No	Yes, App. II	No	Yes, Art. 32	Yes*
JCAA	No	No	No	Yes, Rules 46 & 48	Yes, Rules 59-67*
ICSID	No	No	No	Yes, Rule 39	No
WIPO	No	No	No	Yes, Art. 46	Yes*
CIETAC	No	No	No	Yes, Art. 44**	Yes, Arts. 50-58*
JAMS	No	No	Yes, Art. 21.2	Yes, Art. 26	No

* Generally only applies when explicitly agreed to, or in some cases, where the total value of the claims falls under a threshold level.
** Articles 17 and 18 provide that CIETAC will forward requests for the preservation of evidence or protection of property to a competent court.

IV. ANALYSIS OF THE RULES IN FOUR SCENARIOS

As the discussion in Part III demonstrates, there are numerous material differences between how the various sets of Rules treat interim relief. In this section, we analyze four hypothetical scenarios where a party might be prompted to seek emergent relief and the options that the party would have under the various sets of Rules.

A. *Scenario I: Seizure of Property Related to the Dispute*

Our first scenario presents a classic case where a party believes emergency relief is immediately necessary to prevent the other party from removing disputed property. Here, the parties are part of a joint venture that has developed an electric car that is able to run several thousand miles without having to be recharged. The first entity is a Swedish company that developed the battery technology, and the second is a Chinese auto manufacturer. The joint venture has developed a prototype at a plant owned by the Chinese company in the United States. After a few initial milestones in the agreement are missed, disagreements arise between the parties. Then, as part of a larger decision to move all of its manufacturing and distribution facilities to China, the Chinese company announces that it will move the prototype to China. The joint venture agreement has an arbitration clause providing that the laws of the United States control. The Swedish company fears that the Chinese company is acting in bad faith and may move the prototype out of the United States within a matter of days or even hours.

Which set of Rules gives the Swedish company the best options? Plainly, the Swedish company would like to obtain an attachment of the prototype or an equivalent injunction (often termed a Mareva injunction under English law)[381] prohibiting the Chinese company from moving the prototype out of the United States. As discussed above, however, the law in the United States is, unfortunately, unsettled as to whether this type of relief is available in aid of arbitration.[382]

Ex parte procedures, while potentially useful in the abstract, are not practical here. The UNCITRAL Model Law does allow for an ex parte application, but that text also explicitly provides that such an order would not be enforceable.[383]

Similarly, even the most efficient and expeditious pre-tribunal referee procedure is also not going to be sufficient in these circumstances. The SCC Rules offer, perhaps, the quickest pre-tribunal referee procedure – promising to have a referee in place within 24 hours and a resolution within approximately one week.[384] Similarly, the ICDR Rules would have a decision maker in place within one business day[385] and history suggests that the application would be decided within two weeks.[386] However, in such an emergent situation, even that may not be quick enough. The SIAC Rules, which have no deadline for a decision, and the ICC Rules, which provide a pre-tribunal referee procedure only where previously agreed to, would be unlikely to produce a resolution within the necessary time frame.[387]

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381 *See, e.g.*, Brower, *supra* note 96, at 1006; Zicherman, *supra* note 47, at 669-71.
382 *See* Part II.G *supra*.
383 UNCITRAL MODEL LAW, *supra* note 27, Art. 17C(5).
384 *See* SCC RULES, *supra* note 67, App. II, Arts. 4(1), 6, & 8(1).
385 ICDR RULES, *supra* note 23, Art. 37(3).
386 Lemenez & Quigley, *supra* note 56, at 66-67.
387 *See* notes 157, 159-64 & 248 *supra*, and accompanying text.

Rules providing for an expedited formation of the tribunal (the LCIA Rules[388] and JAMS Rules[389]) or quick consideration by the tribunal of the issue, once formed (the ICSID Rules[390]), also appear to be insufficient. Although the LCIA suggests that it would potentially appoint the tribunal within 48 hours of receiving an application,[391] there is no firm deadline in the Rules and that appears to be the most expeditious possibility.[392] Moreover, there are no firm deadlines in the LCIA Rules for the tribunal to decide such an application.[393]

Even if there were a set of Rules that provided an adequate procedure in these circumstances, there would still be the question of whether the type of relief is available. Many sets of Rules, such as the ICDR's Article 37, give the decision maker a fairly broad set of powers.[394] However, others, which are more specific, such as the ICC Pre-Arbitral Referee Procedure, may limit the decision maker's powers.[395] Indeed, the CIETAC Rules arguably foreclose this type of relief.[396] In those instances, something akin to a Mareva injunction (if not specifically enumerated) may not be available, although in all likelihood it would qualify as a "conservatory measure" under the ICC Pre-Arbitral Referee Procedure.[397]

Consequently, the Swedish company's best option would appear to be a national court. Here, that court would most likely be in the United States, where the case law on the availability of attachments in aid of arbitration is notoriously unsettled.[398] While it may not be dispositive, where the Rules explicitly provide that a national court may issue such a remedy, that fact may increase the likelihood that an American court would be willing to do so.[399] Most Rules, such as those of UNCITRAL,[400] the ICC,[401] the ICDR,[402] SCCAM,[403] the LCIA,[404] the

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[388] LCIA RULES, *supra* note 66, Art. 9.

[389] JAMS RULES, *supra* note 66, Art. 21(2).

[390] ICSID RULES, *supra* note 102, Art. 39(5).

[391] *See* note 234 *supra*.

[392] *See* note 233 *supra,* and accompanying text; *see also* notes 228-30 *supra*, and accompanying text.

[393] *See* note 233 *supra*, and accompanying text.

[394] *See, e.g.*, ICDR RULES, *supra* note 23, Art. 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservatory measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property . . . .").

[395] ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 2.1.

[396] *See* notes 344-47 *supra*, and accompanying text.

[397] *See* ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 2.1.

[398] Gaitis, *supra* note 56, at 63-64. The other likely option would be China, where courts are somewhat reluctant to grant provisional relief in aid of arbitration. *See* note 348 *supra*, and accompanying text.

[399] *See* note 99 *supra*.

[400] *See* note 140 *supra*.

[401] ICC RULES, *supra* note 37, Art. 23(2).

[402] ICDR RULES*, supra* note 23, Arts. 21(3) & 37(8).

[403] SWISS RULES, *supra* note 25, Art. 26(3).

[404] LCIA RULES, *supra* note 66, Art. 25(3).

SCC,[405] WIPO,[406] and JAMS,[407] explicitly authorize applications to national courts, at least prior to the constitution of the arbitral tribunal. The CIETAC Rules appear to be more limited, authorizing applications to national courts to preserve property or evidence.[408] Others, such as the JCAA Rules, are discomfortingly silent. Even worse, the ICSID Rules only allow a party to seek interim relief from a national court if the agreement explicitly permits it.[409]

Accordingly, given that the only viable option would appear to be a national court – putting the vagaries in the American case law to one side – most of the Rules discussed here are adequate to address the application in Scenario I. However, the ICSID, CIETAC, and JCAA Rules could potentially be improved by adding a more general authorization of applications to national courts, at least prior to the constitution of the tribunal.

B. *Scenario II: Termination of an Exclusive Licensing Agreement*

Our second scenario involves two parties to an exclusive licensing agreement for the manufacture of a new drug. The licensor is an English pharmaceutical company that developed a proprietary drug that it licensed to a Canadian company for manufacture and distribution in North America. The Canadian company does not manufacture anything other than the drug that it licenses from the English company. The English company decides to terminate the agreement and manufacture and distribute the drug itself. The Canadian company insists that the termination was improper and continues to manufacture the drug. The English company then forms a North American subsidiary which begins distributing the drug at a lower price. The Canadian company's market share and sales are significantly depleted by the English subsidiary's activities and it fears it will be run out of business within months, or perhaps even weeks. The Canadian company believes that it must enjoin the English company's manufacturing and distribution of the drug or else it will go out of business.

Which set of Rules gives the Canadian company the best options? Here, an expedited resolution is still critical, but not quite as pressing as in Scenario I. Ex parte relief is probably not necessary. The SCC and ICDR Rules, promising the appointment of a pre-tribunal referee within a day and resolution within a week or two, provide strong options.[410] The SIAC Rules, which are vague on timing,[411] and the ICC Pre-Arbitral Referee Procedure, if agreed to,[412] might also be an option, although a resolution in those cases might end up pushing the limits

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405 SCC RULES, *supra* note 67, Art. 32(4).
406 WIPO RULES, *supra* note 108, Art. 46(d).
407 JAMS RULES, *supra* note 66, Art. 26(3).
408 CIETAC RULES, *supra* note 102, Arts. 17 & 18.
409 ICSID RULES, *supra* note 102, Art. 39(6).
410 *See* notes 384-86 *supra*, and accompanying text.
411 *See* note 248 *supra*, and accompanying text.
412 *See* note 387 *supra*, and accompanying text.

of the Canadian company's timeline. Additionally, if court proceedings are necessary to enforce the interim award, that could stretch out the process.

A request to expedite the formation of the tribunal under the LCIA or JAMS Rules might also work in this scenario, but it is hard to say, as those Rules do not provide a specific time limit for the expedited formation of the tribunal.[413] Indeed, even if a tribunal is formed in an "expedited" fashion, mere expedited formation is probably not going to be sufficient given that the tribunal, once formed, must still hear the parties and issue a ruling. Similarly, expedited proceedings are also not going to present a realistic alternative in this scenario.

As discussed in Scenario I, the national courts still probably present a strong option here.[414] Here, however, unlike Scenario I, the SCC Rules, ICDR Rules, SIAC Rules, and perhaps, the ICC Pre-Arbitral Referee Procedure (if applicable) might provide realistic alternatives to an application in a national court. If feasible, the pre-tribunal referee procedures would allow the Canadian company to take advantage of the traditional benefits of international arbitration, unlike the national court option.

C. *Scenario III: Threat to Walk Off a Construction Site*

In our third scenario, a French company is the general contractor at a construction site in the United States. The other party is a Swedish structural subcontractor. Once the project is in progress, the owner makes various changes to it, and the subcontractor incurs expenses due to delays and changes of materials. The parties are unable to agree on the change order and delay costs. The Swedish subcontractor commences an arbitration against the French contractor under the parties' agreement.

Several weeks pass. The French company responds, asserting counterclaims, but the tribunal is not yet fully constituted. The Swedish subcontractor, becoming increasingly frustrated and low on cash, threatens to walk off the job. It stops work and announces that it will demobilize its equipment and ship it back to Sweden. None of the other construction trades can continue working for very long if the structural subcontractor is not making progress, and work at the site will grind to a halt within weeks, if not days. Notably, some of the machinery was specially designed for this particular job. It will take weeks, however, for the Swedish company to fully demobilize. The French contractor wants to make an application to stop the subcontractor from demobilizing and force it to return to work before causing further delays.

Which set of Rules gives the French contractor the best options? As in Scenarios I and II, the national courts remain a viable alternative under most sets of Rules.[415] Additionally, as in Scenario II, the SCC, ICDR, SIAC and ICC (where agreed to) pre-tribunal referee procedures would provide good options for

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[413] *See* notes 388-89 & 391-93 *supra*, and accompanying text.
[414] *See* Part IV.A *supra*.
[415] *See* Part IV.A-B *supra*.

seeking interim relief through the arbitral process.[416] However, unlike Scenario II, here, the provisions in the LCIA and JAMS Rules permitting requests for expedited formation of the tribunal might also provide a realistic possibility, although because those Rules do not set forth any deadlines for the expedited formation of the tribunal, they may not be an ideal solution.[417]

Under the UNCITRAL framework, the French contractor would have the option of seeking an ex parte order once the tribunal is formed, but given the passage of time and the apparent lack of bad faith, ex parte relief is probably not warranted here.[418] Moreover, the French contractor does not want to wait for the tribunal to be formed.

The French contractor might also consider making a request for expedited proceedings. Under most Rules, expedited procedures automatically apply if the amount in dispute falls below a given threshold,[419] or apply where the parties or tribunal agree to it.[420] Most sets of Rules also provide that the parties or tribunal can agree to set or adjust the schedule.[421] Notably, the SIAC and LCIA Rules are broader and may permit one party to request expedited proceedings even where the other party objects.[422] Here, it appears that the Swedish subcontractor may have an interest in expeditiously resolving the matter and saving the underlying relationship, so it is not out of the question that it might agree to an interim compromise (agreeing not to remove the equipment and continuing to work) that includes expedited proceedings. Barring that type of agreement, however, expedited proceedings are probably not a realistic option under most sets of Rules (except perhaps the LCIA Rules), particularly given that in this scenario, the tribunal has not yet been formed.

D. *Scenario IV: Termination of a Supply Agreement for Seasonal Products*

In our fourth and final scenario, an Indian manufacturer has a non-exclusive distribution agreement with an American company for the distribution of artificial Christmas trees in North America. The holiday season ends with slow sales. The American distributor reassesses its agreements in light of lower-than-expected profits. It determines that most of its unsold stock consists of the trees manufactured by the Indian company and that the Indian manufacturer's trees are of an inferior quality to the trees manufactured by its other suppliers. Under the

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[416] *See* notes 410-12 *supra*, and accompanying text.

[417] *See* note 413 *supra*, and accompanying text.

[418] *See* note 125 *supra*, and accompanying text.

[419] *See, e.g.*, Swiss RULES, *supra* note 25, Art. 42; SIAC RULES, *supra* note 67, Art. 5.1.a; JCAA RULES, *supra* note 106, Rule 59; CIETAC RULES, *supra* note 102, Art. 50.

[420] *See, e.g.*, ICC RULES, *supra* note 37, Art. 32(1); SIAC RULES, *supra* note 67, Art. 5.1.b; WIPO EXPEDITED RULES, *supra* note 318, Art. 2; JAMS RULES, *supra* note 66, Art. 21(1).

[421] *See, e.g.*, note 249 *supra*, and accompanying text.

[422] *See* notes 109, 235-37 & 245 *supra*.

agreement, it must purchase a guaranteed minimum amount of trees for the next season. Shipment is scheduled for September.

Believing the Indian manufacturer is in breach of its agreement due to the inferior quality of its products and hoping to avoid the minimum purchase requirement, the American distributor declares the Indian manufacturer in default and terminates the agreement in February. The Indian manufacturer believes that it has satisfied all of the requirements of the agreement and that the default declaration is just a pretextual excuse for the American distributor to avoid taking on stock that it cannot sell. The Indian manufacturer wants to resolve the dispute before the shipment date.

Which set of Rules gives the Indian manufacturer the best options? Here, it would appear that there is no basis for seeking ex parte relief, even if available, given the fact that neither of the parties will incur any harm for months. The Indian manufacturer would have the option of seeking a declaration from a pre-tribunal referee under the SCC Rules, ICDR Rules, SIAC Rules or ICC Pre-Arbitral Referee Procedure.[423] However, under the ICDR Rules and SIAC Rules the applicant must explain why the relief is necessary on an expedited basis.[424] In this scenario, the Indian manufacturer may not be able to meet that requirement. Notably, there does not appear to be an explicit requirement in either the ICC Pre-Arbitral Referee Procedure or the SCC Rules "emergency arbitrator" procedure that the applicant demonstrate that the relief is necessary on an emergent basis.[425] However, the lack of such a need may make the referee reluctant to order any such relief, particularly where the referee's decision will not be binding on the tribunal[426] which will, in all likelihood, be formed prior to the shipment date seven months into the future.

While the Indian manufacturer could also request expedited formation of the tribunal under the LCIA and JAMS Rules, similar to the ICDR pre-tribunal referee procedure, both of those sets of Rules require that the applicant demonstrate urgency, which the Indian manufacturer probably cannot satisfy here.[427]

Here, the Indian manufacturer's best option is probably to commence the arbitration and then seek interim relief, which is available under nearly all Rules. The Indian manufacturer could also commence a lawsuit in a national court seeking interim relief, however, the standards for such relief are likely to be more stringent there (*e.g.,* requiring a probability of success on the merits and

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[423] *Cf.* notes 384-87, 410-12, & 416 *supra*, and accompanying text.

[424] *See* ICDR RULES, *supra* note 23, Art. 37(2); SIAC RULES, *supra* note 67, Sched. 1.1.

[425] *See* ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 6.3; SCC RULES, *supra* note 67, App. II. Furthermore, under the ICC Pre-Arbitral Referee Procedure, the referee is specifically authorized to order "a party to take any step which ought to be taken according to the contract between the parties." ICC PRE-ARBITRAL REFEREE PROCEDURE, *supra* note 67, Art. 2(1)(c).

[426] *See, e.g.*, SCC RULES, *supra* note 67, App. II, Art. 9(5).

[427] LCIA RULES, *supra* note 66, Art. 9(2); JAMS RULES, *supra* note 66, Art. 21(2).

irreparable harm).[428] Moreover, the Indian manufacturer would probably prefer a neutral arbitral forum over a court in the United States with jurisdiction over the distributor. This is particularly true given the American case law suggesting that interim relief may not be available from an American court where there is an agreement to arbitrate.[429]

Given the seven-month time frame, the Indian company might also consider pursuing expedited proceedings. Expedited proceedings would appear to be an even more realistic option here than in Scenario III. Indeed, the American distributor might prefer an expedited resolution on the merits to fighting a threshold battle over an interim measure. This option might be even more appealing when combined with a request to expedite the formation of the tribunal. The LCIA Rules are notable, in this respect, because they offer both of these options.[430] Even if the various sets of Rules do not have specific provisions permitting such a request, however, some do appear to be sufficiently flexible that they would permit the parties to agree to expedite the formation of the tribunal.[431]

V. CONCLUSION

A thorough review of the options available to parties seeking interim or expedited relief under the international arbitration rules developed by twelve institutions leads to several conclusions. First, a viable pre-tribunal referee procedure is a very useful option. At this time, only the SCC, ICDR, SIAC and ICC provide for such a procedure.[432] Of the three, the SCC and ICDR procedures are preferable as the parties do not need to agree specifically to "opt-in" to them, and they promise results faster than the seldom-used ICC procedure.[433]

Second, because the New York Convention does not appear to permit the enforcement of an ex parte arbitral award, an arbitral ex parte procedure is probably not going to be very effective in emergency situations where bad faith is suspected.[434] Moreover, an ex parte procedure makes even less sense when not paired with some means of seeking pre-tribunal relief. Intuitively, most scenarios necessitating ex parte relief will occur at the outset of a dispute. Indeed, that is the point when most temporary restraining orders are sought. In these situations, a party's best option would remain the national courts.[435]

Third, Rules providing for the expedited formation of an arbitral tribunal and expedited proceedings, in general, may provide parties with a good alternative to seeking interim relief where a resolution is necessary in a short time frame, but the

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428 *See* note 40 *supra*, and accompanying text.
429 *See* Part II.D *supra*.
430 *See* notes 231-37 *supra*, and accompanying text.
431 *See* note 184 *supra*.
432 *See* notes 67 & 336 *supra*.
433 *See* notes 157, 170, 187-89, & 263 *supra*, and accompanying text.
434 *See* Part II.F *supra*.
435 *See* Part IV.A *supra*.

matter is not so urgent as to require an immediate, interim resolution. More institutions, however, should consider adopting rules that allow a party to seek expedited proceedings in the absence of an agreement with the opposing party.[436]

Fourth, there are certain situations where a national court will still be the only viable option for a party to obtain interim relief.[437] Although seeking relief in a national court necessarily sacrifices many of the advantages of international arbitration, there are certain truly pressing scenarios – particularly where bad faith is suspected – where no arbitral procedure is likely to be adequate. Accordingly, Rules that explicitly authorize the national court option – at least prior to the formation of the tribunal – are preferable to those which are silent or expressly preclude the option.[438]

Overall, contracting parties will probably prefer to have more options on the table. Some may also prefer some limitations, such as the approach in the LCIA Rules, where applications to national courts are explicitly permitted prior to the constitution of the tribunal and limited thereafter.[439] These types of limitations may provide the parties with more certainty that they will be able to take advantage of many of the traditional benefits of arbitration and not have to engage in multiple, simultaneous proceedings.

Although no single set of Rules provides for every means of seeking interim or expedited relief, many explicitly invite the parties to agree to alter the Rules as they see fit. While most companies probably do not avail themselves of this option, companies across the globe should seriously consider doing so, lest they be left without a viable avenue for the relief they need, when they need it. Even so, however, active consideration of arbitration clauses will only solve part of the problem, as the parties cannot simply agree to put a pre-tribunal referee procedure in place if the arbitral institution they are before does not offer one. Arbitral institutions should also continue to consider their procedures and measures, and draw on the success of the ICDR's Article 37 procedure and other procedures that provide the parties with flexibility to seek interim or expedited relief in a variety of circumstances and maintain the traditional benefits of international arbitration.

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436 *Cf.* notes 109, 235-37 & 422 *supra*, and accompanying text.
437 *See* Part IV.A *supra*.
438 *See* Part IV.A *supra*.
439 *See* note 103 *supra*, and accompanying text.