

# **UNIVERSITY OF CAPE TOWN**

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Interim measures in international commercial arbitration with  
seat in Zurich (Switzerland)

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Cape Town

2007

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Baden, 13 September 2007

Ulrich Marti

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## Abbreviations

art	article
ASA	Association suisse de l'arbitrage (Swiss Arbitration Association)
ASA Bull	ASA Bulletin, The Hague
CAS	Court of Arbitration of Sport, based in Lausanne
CCP	Code of Civil Procedure of the canton Zurich (Gesetz über den Zivilprozess des Kantons Zürich)
cf	confer
cit	cited
CJO	Code on Judicial Organisation of canton Zurich (Gerichtsverfassungsgesetz des Kantons Zürich)
Arbitration Concordat	Concordat on Arbitration, 27 March 1969 (Konkordat über die Schiedsgerichtbarkeit)
DFT	Decision of the Federal Tribunal (= Swiss Federal Supreme Court)
ed(s)	editor(s)
eg	for example
et al	et alii (and others)
f(f)	and the following one(s)
FN	footnote
ICC	International Chamber of Commerce, located in Paris
ICC Rules	ICC Rules of Arbitration effective as from 1 January 1998
ICC Bull	The ICC International Court of Arbitration Bulletin, Paris

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Lugano Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988
N	note
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958
p.	page
para	paragraph
SDEBA	Swiss Debt Enforcement and Bankruptcy Act, 11 April 1889 (Bundesgesetz vom 11. April 1889 über Schuldbetreibung und Konkurs [SchKG])
SPC	Swiss Penal Code of 21 December 1937 (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937)
SPILA	Swiss Private International Law Act of 18 December 1987 (Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [IPRG])
Swiss Rules	Swiss Rules of International Arbitration in force as from 1 January 2004
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules from 15 December 1976
Vol	volume

## I. Introduction

### 1 Outline of the thesis

Parties to international commercial transactions choose to refer potential disputes to arbitration instead of litigation for different reasons. In most of the cases an important factor for a decision in favour of arbitration is that they want to have a potential dispute settled quickly. Even if the dispute resolution through arbitration is often speedier than court proceedings, it still takes a fair amount of time until a final award is rendered. Thus, it might become necessary to obtain interim measures to regulate the terms of an ongoing relationship for the duration of the arbitral proceedings, to stabilize matters on a provisional basis or to avoid frustration of the final award.<sup>1</sup> If the need for interim measure arises, the concerned party will be confronted with a bundle of complex legal and tactical questions (see II.1).

The second chapter deals with the question which judicial authority has jurisdiction to order interim measures in international arbitral proceedings conducted in Switzerland, respectively with the legislative and contractual framework that must be considered in order to determine the competent authority. As will be explained, arbitral tribunals and state courts may have concurrent jurisdiction to order interim measures and thus, the parties will have to decide which authority to apply to. To determine which possibility will be more advantageous in the concrete circumstances they have to compare the two options.

Thus, the third chapter is concerned with interim measures available to arbitral tribunals, whereas the fourth chapter deals with those available to state courts. In these two chapters the focus is particularly on the variety of interim measures, some procedural aspects and on questions with regard to enforcement.

In chapter five some selected questions and problems caused by the concurrent jurisdiction of the arbitral tribunal and the state court will be addressed.

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<sup>1</sup> Von Segesser/Kurth, p. 69.

I will conclude with the question whether or not one can determine a general rule that it is more advantageous for parties to international arbitration to address either the state court or the arbitral tribunal with a request for interim measure.

## **2 Limitation of the scope**

In Switzerland since 1989 international and domestic arbitration are governed differently.<sup>2</sup> This thesis will focus on international commercial arbitration with seat in Zurich (Switzerland). References to domestic arbitration will only be made occasionally.

Furthermore, in Switzerland procedural law is a cantonal (state) matter. Thus, there are 26 differing cantonal Codes of Civil Procedures. However, with regard to the judge's assistance for enforcement (see III.4.2) and the issuing of interim measures by a state authority (see IV) only the Code of Civil Procedure of the canton Zurich will be considered in this thesis.

As far as references are made to arbitration rules only the ICC Rules and the Swiss Rules will be covered.

## **3 Terminology**

In international commercial arbitration, differing terms are used for interim measures, for instance, 'interim measures of protection', 'provisional and protective measures', 'preliminary injunctive measures', 'interlocutory measures' and so on. The terms are often used interchangeably.<sup>3</sup> Whereas the terms 'interim', 'preliminary' and 'provisional' are references to the nature of these measures, the terms 'protective' and 'conservatory' are references to the purpose.<sup>4</sup>

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<sup>2</sup> See II.2.

<sup>3</sup> Yesilirmak, N 1-8 f, p. 9.

<sup>4</sup> Cf Yesilirmak, N 1-9, p. 9.

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In this thesis, the term 'interim measures' is used, because it is common in Swiss legal doctrine on international arbitration and furthermore, also the new<sup>5</sup> art 17 – 17J UNCITRAL Model Law refer to the term 'interim measures'.

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<sup>5</sup> Art 17 – 17 J UNCITRAL Model Law has been approved by the UN Commission on International Trade Law at its 39th annual session in New York (19 June – 7 July 2006).

## II. Authority to order interim measures in arbitration proceedings in Switzerland

### 1 Introduction

As mentioned above various considerations must be taken into account if a party wants to obtain interim measures. One of the first questions a party will be confronted with is who has the power to grant the required interim measures. Is it the arbitral tribunal, the courts at the seat of arbitration or the courts at the place of enforcement? Does one of these institutions have exclusive jurisdiction or is it the party's choice where to apply for interim relief? To find the answers to these questions, different sources must be considered and analysed. First, the party must consult the arbitration law at the place where the arbitral tribunal has its seat. Second, the party must give regard to the agreements between the parties. Third, where the parties have referred potential disputes to institutional arbitration, the arbitration rules of the respective institution must be taken into account. Finally, a party should always consider whether it is also possible to obtain interim measures at the place of enforcement according to the national law at the place of enforcement.

### 2 Swiss arbitration law

#### 2.1 *Legislative development with regard to domestic and international arbitration in Switzerland*

In Switzerland substantive private law is a federal whereas procedural law was traditionally a cantonal (state) matter.<sup>6</sup> Furthermore, in Switzerland arbitration was and is still considered a procedural matter<sup>7</sup>. This led to the situation that until 1969 arbitration (domestic and international) was governed

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<sup>6</sup> Art 121 of the Swiss Federal Constitution now states that the procedural law is a federal matter, but so far the federal state has not yet made use of this competence. However, there are endeavours for a uniform civil procedure law in Switzerland, which shall substitute the 26 differing cantonal codes (draft of Swiss Federal Code of Civil Procedure).

Cf the statement of the Federal Office of Justice with regard to the harmonization of the civil procedure law in Switzerland. ([http://www.ejpd.admin.ch/ejpd/en/home/themen/staat\\_und\\_buerger/ref\\_gesetzgebung/ref\\_zivilprozessrecht.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/staat_und_buerger/ref_gesetzgebung/ref_zivilprozessrecht.html)).

<sup>7</sup> Blessing, N 389, p. 156. See eg decision of the Swiss Federal Supreme Court 103 II 75.

by differing rules in the 26 cantonal Codes of Civil Procedures. In 1969 various cantons entered in an intercantonal arbitration convention, the so called 'Arbitration Concordat', in order to achieve unification of the arbitration law<sup>8</sup>. As of today, all cantons have joined the Arbitration Concordat. At first the Arbitration Concordat governed both, domestic and international Arbitration. However, in the 1970's and 1980's the Arbitration Concordat encountered criticism, because it not longer appeared to satisfy the requirements of a modern arbitration law, especially with regard to international arbitration.<sup>9</sup> As a result, in 1989 when the Swiss Private International Law Act ('SPILA') came into force a separate chapter (the 'Chapter Twelve') was included within the act which governs *international* arbitration.

Thus, since 1989 in Switzerland it must be distinguished between domestic and international arbitration in order to determine the applicable arbitration law. In terms of art 176 (1) SPILA an arbitration with seat in Switzerland qualifies as international if at the time of the conclusion of the arbitration agreement at least one party had neither its domicile nor its habitual residence in Switzerland. This purely objective test based on domicile, giving no regard to the (international) nature of the transaction<sup>10</sup>, bears the advantage of legal predictability whether an arbitration proceeding will be considered domestic or international.

As of today, the Arbitration Concordat remains in force for purely domestic arbitration, but has practically no further significance in international arbitration.<sup>11</sup> However, art 176 (2) SPILA contains an option-clause which allows parties to a per se international arbitration to exclude Chapter Twelve of the SPILA by an express opting-out agreement and to choose the Arbitration Concordat instead to govern potential arbitration proceedings, but this option is hardly ever used.<sup>12</sup> For this reason no further regard will be given to the Arbitration Concordat in this thesis.

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<sup>8</sup> Blessing, N 390, p. 156.

<sup>9</sup> Blessing, N 395 f, p.157.

<sup>10</sup> Karrer/Straub, N 8, p. 1048.

<sup>11</sup> Blessing, N 412, p. 160.

<sup>12</sup> Blessing, N 411, p. 160.

Thus, to determine the authority to order interim measures in international arbitration in Switzerland one must refer to the SPILA.

## 2.2 *Concurrent authority of arbitration tribunals and courts to order interim measures in international arbitration*

The various national arbitration acts adopt different systems to deal with the question who should have the power to order interim measures in international arbitration.<sup>13</sup> Some of them provide that national courts shall have exclusive jurisdiction<sup>14</sup>, but most of them empower arbitral tribunals in one way or another.<sup>15</sup> However, no national law grants arbitral tribunals exclusive jurisdiction.<sup>16</sup>

In Switzerland interim measures in arbitration proceedings in general and the arbitral tribunals' power to order such measures are dealt with in art 183 SPILA, which provides:

1. *Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order interim relief or protective measures.*

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<sup>13</sup> Blessing, N 848, p. 259.

<sup>14</sup> Eg Austria, Italy and Greece; see Blessing, N 849, p. 260 and Di Pietro/Platter, p. 37 f.

<sup>15</sup> Cf Blessing, N 849, p. 259 f for a summary of the different approaches with regard to the powers of the arbitral tribunals to order interim measures. He distinguish between situations

(i) where the arbitral tribunal has jurisdiction and its decisions are binding on the parties (eg United States of America, Switzerland and Belgium),

(ii) where arbitral tribunal has jurisdiction but the decisions are not binding (parties can voluntary submit to provisional orders by the tribunal; eg Arbitration Concordat in Switzerland) and

(iii) situations where the arbitral tribunal is only empowered if and when the parties have specifically agreed so ('opting-in clause'; eg England).

<sup>16</sup> Yesilirmak, N 3-16, p. 61. Di Pietro/Platter, p. 38, with reference to *McCreary Tire & Rubber Co. vs CEAT, SpA.*, 501, F.2d 1032 (3d Cir. 1974) seem to be of the opinion that in certain cases a 'lack of jurisdiction of national courts' may result if the courts consider an application for interim relief incompatible with the arbitration agreement. However, Di Pietro/Platter criticise the decision in *McCreary Tire & Rubber Co. vs CEAT*, because the respective court based its reasoning on the New York Convention, which is silent on interim measures and not concerned with such orders. But see also II.2.3.

2. *If the party so ordered does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court shall apply its own law.*
3. *The arbitral tribunal or the court may make the granting of interim relief or protective measures subject to provision of appropriate security.*

Para 1 of art 183 SPILA affirms the power of arbitral tribunals to order interim measures, unless the parties have agreed otherwise.<sup>17</sup> The parties' possibilities to modify or remove the statutory authority by agreement will be dealt with later (see II.3). Save any modifications by the parties, the decisions of the arbitral tribunal are binding on the parties.

With regard to the court's jurisdiction one must distinguish between the powers to adjudicate and to enforce interim measures.<sup>18</sup> The wording of art 183 SPILA does not state whether the national courts have the power to grant interim measures or not. Para 2 only mentions the courts in connection with the enforcement of interim measures ordered by arbitral tribunals, but does not expressly empower them to order such measures. Notwithstanding the wording of art 183 SPILA the prevailing view in Swiss legal doctrine is that courts have concurrent jurisdiction to grant respectively adjudicate interim measures.<sup>19</sup> The main argument to support this view is that arbitral tribunals, because of their lack of imperium, cannot provide legal protection in the same effective way as national courts and therefore parties per se shall have access to the national court.<sup>20</sup>

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<sup>17</sup> In contrary to the SPILA, the Arbitration Concordat provides the courts with exclusive jurisdiction to order interim measures (art 26 (1) Concordat). Para 2 of art 26 of the Arbitration Concordat, which states that the parties can voluntarily submit to provisional measures proposed by the arbitral tribunal, must be qualified as purely descriptive. Arbitral tribunals can in any case 'propose' interim measures as long as the parties are willing to voluntarily comply. However, where such measures can not be enforced (neither by the arbitral tribunal nor by national courts) this does not contemplate a legal remedy in a strict sense.

<sup>18</sup> Berti, art 183 N 9, p. 430.

<sup>19</sup> Segesser/Kurth, p. 84; Berti, art 183 N 5, p. 429; Blessing, N 532, p.185; Sangiorgio, p. 128 ff; Besson, p. 191 f, with further references. But see Rüde/Hadenfeld, p. 252; Frank/Sträuli/Messmer, § 239 N 17, p. 820 f, who are of the opinion that after the arbitral tribunal is established the latter has exclusive jurisdiction.

<sup>20</sup> Vischer, art 183 N 3, p. 2017.

Hence, the legislative framework under Swiss law provides for concurrent authority of the arbitral tribunal and the courts and leaves the parties with a free choice. However, as already mentioned this framework may be modified by agreement (see II.3).

### 2.3 *Doctrine of compatibility of requests to courts with the agreement to arbitrate*

A logical consequence of acceptance of the concurrent jurisdiction is that a request to courts for interim measures is compatible with the agreement to arbitrate (so called doctrine of compatibility).<sup>21</sup> In other words, the request is not a waiver of the right to arbitrate nor does the existence of an arbitration agreement allow the court to deny its jurisdiction.<sup>22</sup> However, some courts in the United States of America have taken the view that art II of the New York Convention prevents the assistance of the courts to order interim measures.<sup>23</sup> However, the decision was criticised and challenged by other courts in the United States of America and not followed internationally.<sup>24</sup>

In Switzerland the doctrine of compatibility is accepted. Furthermore the doctrine is also expressed in most of the arbitration rules.<sup>25</sup>

## **3 Agreements with regard to arbitral tribunals' and courts' authority to order interim measures**

### 3.1 *Arbitration agreement*

The arbitration agreement is the basic source of the arbitral tribunal's power.<sup>26</sup> The arbitral tribunal may exercise such powers as the parties are entitled to confer and do confer upon it, together with any additional or sup-

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<sup>21</sup> Yesilirmak, N 3-25, p. 75.

<sup>22</sup> Yesilirmak, N 3-25, p. 75.

<sup>23</sup> Yesilirmak, N 3-26, p. 76 f, with reference to *McCreary Tire & Rubber Co. vs CEAT, SpA.*, 501, F.2d 1032 (3d Cir. 1974).

<sup>24</sup> Yesilirmak, N 3-27, p. 77.

<sup>25</sup> Blessing, N 854, p. 261.

<sup>26</sup> See for instance Redfern et al, N 1-13, p.5.

plementary powers conferred by the arbitration law.<sup>27</sup> The parties are (within the limits set by the applicable arbitration law) masters of the proceeding and can determine the procedure to an extent impossible in court procedures.<sup>28</sup> This leads to the question, whether under Swiss law the principle of party autonomy in arbitration allows the parties to exclude either the arbitral tribunal's or the courts' authority to order interim measures.

### 3.2 *Agreements to exclude arbitral tribunals' authority*

Para 1 of art 183 SPILA expressively states that '*[u]nless the parties have agreed otherwise, the arbitral tribunal may [...] order interim relief or protective measures*'. The parties may therefore, respectively must if they wish to do so, deprive the arbitral tribunal from its power to order interim measures. Such an agreement is not subject to any specific requirements as to form, but must be explicit.<sup>29</sup> A mere reference to arbitration rules which are silent about the power of the arbitral tribunal to order interim measures is not considered sufficient to demonstrate the parties' intent to deprive the arbitral tribunal of the power presumed under art 183 SPILA.<sup>30</sup> On the other hand, if the applicable set of procedural rules explicitly state that the parties have to turn to the national courts to obtain interim measures; this must be considered sufficient to deprive the arbitral tribunal's power.<sup>31</sup>

The parties can enter into such an agreement before or after the commencement of arbitral proceedings.<sup>32</sup> However, a party who wants to exclude the arbitral tribunal from ordering interim measures is well advised to state

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<sup>27</sup> Redfern et al, N 1-13, p. 5.

<sup>28</sup> Redfern et al, N 1-13, p. 5.

<sup>29</sup> Von Segesser/Kurth, p. 70.

<sup>30</sup> Von Segesser/Kurth, p. 70 and Rüede/Hadenfeldt, p. 252, argue that even a reference to procedural rules '*which do not provide for such authority [the arbitral tribunals power to order interim measures]*' is not sufficient. In my opinion a reference to procedural rules, which must be interpreted that the arbitral tribunal shall have no authority to order interim measures, is sufficient. However, as most of the frequently agreed on arbitration rules empower the arbitral tribunal to order interim measures, the question is not of great practical relevance.

<sup>31</sup> Vischer, art 183 N 2, p. 2017. No matter which set of arbitration rules the parties refer to, an exclusion of the arbitral tribunal may be achieved in Switzerland by opting in writing into cantonal arbitration law (the Arbitral Concordat; see art 176 SPILA). However, this 'nostalgic' solution is very rarely exercised. Cf Karrer/Straub, N 7, p. 1048.

<sup>32</sup> Berti, art 183 N 3, p. 428.

this explicitly in the arbitration agreement, because it might be difficult to find consensus on this matter after the dispute has arisen.

### 3.3 *Agreements to exclude courts' authority*

The parties are the ones who lend any power to the arbitral tribunal by agreeing on arbitration. Consequently, they shall also have the right to limit the power of the arbitral tribunal, for instance by depriving the arbitral tribunal from its power to order interim measures. Another question is, whether they shall have the possibility to deprive the national courts from their jurisdiction.

The prevailing view in Swiss legal doctrine is that the parties can validly agree to exclude the national courts' jurisdiction.<sup>33</sup> Arguments given for the admissibility of such agreements are the parties' interest to have the authority concentrated on one specific judicial body only<sup>34, 35</sup>, their interest in the confidentiality of the proceeding and the assumption that parties to international arbitral proceeding are usually sophisticated enough to fully comprehend the consequences of such a waiver.<sup>36</sup>

As for the exclusion of the arbitral tribunal's authority the agreement to deprive the national courts from their powers does not have to fulfil any requirement as to form and can be concluded at any time, but must also be explicit.<sup>37</sup> However, parties should consider the consequences of such a waiver very carefully. Because of the arbitral tribunal's lack of power to enforce interim measures without the assistance of the courts, it might be more convenient to directly apply for interim measures by the courts, rather than to face a separate enforcement proceeding. Another issue to consider is, that before the arbitration tribunal is established only courts are able to order in-

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<sup>33</sup> Vischer, art 183 N 3, p. 2017; Berti, art 183 N 5, 429; Segesser/Kurth, p. 85; Wirth, p. 40 f.

<sup>34</sup> The parties may wish to have all the matters related with a certain dispute handled by the arbitral tribunal, instead of facing several proceedings before different national courts (at the place of arbitration and in foreign countries). Cf Wirth, p. 41.

<sup>35</sup> However, this goal may only be achieved, if the national laws of all countries potentially concerned (eg at place of enforcement) recognise the validity of such an agreement.

<sup>36</sup> Wirth, p. 41.

<sup>37</sup> Wirth, p. 41. See also II.3.2.

terim measures and by excluding the latter, a party first must induce the establishment of the arbitral tribunal, which can be very time consuming.

Another question is whether the parties can also validly deprive the national courts' power to assist in the enforcement of interim measures ordered by arbitral tribunals. WIRTH<sup>38</sup> correctly points out, that such an agreement would in effect constitute a waiver of any legal protection by means of interim measures. Given the arbitral tribunal's lack of enforcement power, the party facing an opponent who does not voluntarily comply with the ordered interim measures, would be left in the cold.<sup>39</sup> It is at least arguable, that such an agreement may be deemed incompatible with art 27 (2) Swiss Civil Code which prohibits or annuls excessive self-restrictions by a party on its legal rights.<sup>40</sup>

#### 4 Arbitration rules

As mentioned above, parties may and in fact often do alter or modify the jurisdiction of arbitral tribunals and courts by choosing a set of arbitration rules to govern the arbitration proceeding.<sup>41</sup> Most institutional arbitration rules are not connected with or designed to fit a law of a specific country. Hence, first it must be analysed whether by referring to the rules a modification of the national arbitration law is effectuated. Secondly, the question arises whether such a modification is valid under the applicable arbitration law.

##### 4.1 ICC Arbitration Rules<sup>42</sup>

Art 23 ICC Arbitration Rules ('ICC Rules') reads:

*'(1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measures it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any*

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<sup>38</sup> Wirth, p. 41.

<sup>39</sup> The only exception would be some rare self-executing declaratory interim measures. Cf Wirth, p. 41.

<sup>40</sup> Wirth, p. 41.

<sup>41</sup> Berti, N 4, p. 428.

<sup>42</sup> Cf [www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf).

*such measure shall take the form of an order, giving reasons, or of an Award as the Arbitral Tribunal considers appropriate.*

*(2) Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to the competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall be deemed not to be an infringement or waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.'*

At the first sight, art 23 ICC Rules is in line with art 183 SPILA. However, there are some differences and additional regulations:

The provision determines as from which point in time the arbitral tribunal is competent to rule on interim measures. This point in time ('when the file is transmitted to the arbitral tribunal'<sup>43</sup>) was chosen cautiously. By not making the power to order interim measures subject to the fact that Terms of Reference<sup>44</sup> have been drawn up or that the cost to cover the arbitration have been advanced, the rules reduce the parties' possibilities to frustrate or delay the ordering of the requested measures.<sup>45</sup> Prior to the transmission of the file no mechanism, outside the courts, is provided.<sup>46</sup> However, it might be worth mentioning that in this regard the ICC in 1990 published, separate from its arbitration rules, the so called ICC Rules for a Pre-Arbitral Referee Procedure.<sup>47</sup> If agreed on by the parties (eg in the arbitration agreement) the referee has the authority to order interim measures before the arbitral tribunal is established. However, the Pre-Arbitral Referee Procedure is seldom used in practice and will therefore not be considered any further in this thesis.<sup>48</sup>

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<sup>43</sup> See art 13 ICC Rules.

<sup>44</sup> See art 18 ICC Rules.

<sup>45</sup> Schäfer et al, p. 115.

<sup>46</sup> Derains/Schwartz, p. 297.

<sup>47</sup> [www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_pre\\_arbitral\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf).

<sup>48</sup> Cf Bühler/Webster, N 23-11a f, p. 288 f and Derains/Schwartz, p. 297, with references to further literature on the Pre-Arbitral Referee Procedure.

Furthermore, it might be questioned whether the jurisdiction of the courts is restricted by the term, that after the file has been transmitted parties may only apply to the courts for interim relief '*in appropriate circumstances*'.<sup>49</sup> The intent of this term is to establish the presumption that any requests for interim measures are normally to be addressed to the arbitral tribunal.<sup>50</sup> However, the expression 'appropriate circumstances' is subject to interpretation and may lead to uncertainty in which 'circumstances' a party may still directly address the national court. This question can be of great importance to a party, because lacking 'appropriate circumstances', an action initiated before the court may constitute a waiver or infringement of the agreement to arbitrate.<sup>51</sup> Except in cases of extreme urgency or where the arbitral tribunal is unable to order certain measures at all<sup>52</sup> the parties should first apply to the arbitral tribunal.<sup>53</sup> Hence, by referring to the ICC Rules parties narrow the authority of the courts in so far, as after the file has been transmitted to the arbitral tribunal parties are only allowed to directly address the courts for interim measures in 'appropriate circumstance'. As set out above (see II.3.3), such restriction is valid under Swiss arbitration law.

#### 4.2 *Swiss Rules of International Arbitration*<sup>54</sup>

Art 26 of the Swiss Rules of International Arbitration ('Swiss Rules') reads:

*'1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary or appropriate.*

*2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to order the provision of appropriate security.*

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<sup>49</sup> The reference 'appropriate circumstances' replaces the wording 'exceptional circumstances' in the ICC Rules prior to 1998. The new language is seemingly less restrictive. Cf Derains/Schwartz, p. 300.

<sup>50</sup> Derains/Schwartz, p. 300.

<sup>51</sup> Derains/Schwartz, p. 300.

<sup>52</sup> Eg if a party seeks an attachment of the other party's account with a bank that is not a party to the arbitration proceedings.

<sup>53</sup> Derains/Schwartz, p.300; Schäfer et. al., p. 116 f.

<sup>54</sup> Cf [http://www.swissarbitration.ch/pdf/SRIA\\_english.pdf](http://www.swissarbitration.ch/pdf/SRIA_english.pdf).

3. *A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.*

4. *The arbitral tribunal shall have discretion to apportion the costs relating to a request for interim measures in the interim award or in the final award.'*

The Swiss Rules only deal indirectly with the question whether parties can turn to national courts to obtain interim measures. By stating in art 26 (3) Swiss Rules that an application to the court shall not be deemed incompatible with or as a waiver of the agreement to arbitrate, it is obvious that the parties shall have the right to address the national court for interim measures. Under the Swiss Rules, contrary to art 23 (2) ICC Rules, even after the arbitral tribunal has been established, the parties' access to the courts to obtain interim measures is unlimited. Hence, by choosing the Swiss Rules parties do not alter or modify the authorities of the arbitral tribunal or the courts as contemplated by Swiss arbitration law.

## **5 Law at place of enforcement**

International arbitrations conducted in Switzerland often do not have any connection with Switzerland other than the place of arbitration. In contrary, most of the parties agree on a place of arbitration in a neutral venue.<sup>55</sup> Thus, often no party will have its domicile or any assets in Switzerland nor will the underlying contract require the performance or omissions of any actions within the territory of Switzerland.

The parties will therefore be tempted and in certain circumstances well advised to apply for interim measures directly at the place of enforcement. Whether the courts at the place of enforcement have the power to grant the requested interim measures must be analyzed for every case individually according to the applicable law at the place of enforcement. However, as mentioned above no national law knows a system, which grants with regard to interim measures exclusive jurisdiction to the arbitral tribunal, parties will therefore in most of the cases have the possibility to directly address the national courts at the place of enforcement.

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<sup>55</sup> Von Segesser/Kurth, p. 69 f.

### **III. Interim measures by arbitral tribunals with seat in Switzerland**

#### **1 Introduction**

After having determined who has got the power to order interim measures, other aspects have to be taken into account in order to reach a decision whom to address with a request for interim measures. What kind of interim measure shall be requested? May both, the arbitral tribunal and the courts order this kind of interim measures according to the law they have to apply? Are there any differences in the procedures before the arbitral tribunal and the court, for instance the possibility to obtain *ex parte* orders? May and how will the interim measure be enforced, in case the opponent does not voluntarily comply? Are there any strategic or tactical concerns, which must be considered? Will the tribunal with regard to its final award be influenced by a decision on interim measures by a court?

In this chapter the arbitral tribunal's possibilities to order interim measures will be analysed. The courts' possibilities will be dealt with in the next chapter (IV). First, I am going to have a closer look at what kind of interim measures are available to an arbitral tribunal with seat in Switzerland (III.2), secondly some procedural aspects will be outlined (III.3) and finally questions with regard to the enforcement will be addressed (III.4).

#### **2 Interim measures available to arbitral tribunals with seat in Zurich**

##### *2.1 Definition of interim measures in general*

'Although "[t]he interim protection of rights is no doubt one of those general principles of law common to all legal systems", there is no widely accepted definition of interim measures'.<sup>56</sup> 'An interim measure is, broadly speaking, a remedy or a relief that is aimed at safeguarding the rights of par-

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<sup>56</sup> Yesilirmak, N 1-6, p. 4; Sangiorgio, p. 130.

ties to a dispute pending its final resolution'.<sup>57</sup> Thus, a fundamental characteristic to interim measures is that they are temporary in nature.<sup>58</sup> Interim measures may include everything from preserving evidence to seizure of assets. However, categories of interim measures are not closed. As new problems arise, new ways of dealing with them will need to be devised.<sup>59</sup> Notwithstanding this broad variety, parties are well advised to consider very carefully whether or not the type of interim relief they want to obtain, may be ordered by the arbitral tribunal according to the law the latter has to apply.

## 2.2 Sources to determine the available types of interim measures

Swiss arbitration law respectively art 183 SPILA does not specify the types of interim measures a tribunal may grant and is thus, not of great help with regard to this question.<sup>60</sup> As a general rule, arbitral tribunals may order whatever measures they deem necessary to protect the rights of the requesting party from harm that cannot be remedied by the final award or to regulate the relationship between the parties during the arbitral proceedings.<sup>61</sup>

The arbitral tribunal may, within this framework, consider different kind of sources in evaluating the appropriate interim measure.<sup>62</sup> Obviously the arbitral tribunal will at first consult the relevant contract to examine whether there are mechanisms provided for interim protection or not.<sup>63</sup> However, parties hardly ever address these matters in detail in their agreements. According to Swiss legal doctrine, details regarding the content and type of the available interim measures are primarily defined by the applicable procedural law (with regard to the relevant provisions of the ICC Rules and the Swiss Rules see III.2.3).<sup>64</sup> In a next step, the arbitral tribunal may have regard to

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<sup>57</sup> Yesilirmak, N 1-6, p. 5, with further references; Sangiorgio, p. 130; Berger/Kellerhans, N 1139 f, p. 400 f.

<sup>58</sup> Bühler/Webster, N 23-5, p. 287; Berger/Kellerhans, N 1139 f, p. 400 f.

<sup>59</sup> Redfern, p. 219.

<sup>60</sup> Sangiorgio, p. 130.

<sup>61</sup> Wirth, p. 32; Von Segesser/Kurth, p. 72.

<sup>62</sup> Von Segesser/Kurth, p. 72.

<sup>63</sup> Wirth, p. 32 ; Von Segesser/Kurth, p. 72; Berger/Kellerhans, N 1139 f, p. 400 f.

<sup>64</sup> Vischer, art 183 N 5, p. 2017; Wirth, p. 32.

types of interim measures provided for by the *lex causae*.<sup>65</sup> Finally, the arbitral tribunal may order interim measures known to the law where the measure is to be enforced.<sup>66</sup>

Thus, arbitral tribunals generally have a wider variety of interim measures than the Swiss courts, which can only order interim measures provided for by Swiss law.<sup>67</sup> However, the variety of interim measures which can be ordered by arbitral tribunals is not unlimited. It will be shown later, that there are some restrictions, for instance, because of the lack of the tribunal's power to enforce the interim measure<sup>68</sup> and also with regard to some specific interim measures<sup>69 70</sup>.

### 2.3 *No specification of available types of interim measures in ICC Rules and Swiss Rules*

Both, art 23 (1) ICC Rules and art 26 (1) Swiss Rules are formulated in a very broad way, by stating that the arbitral tribunal may order any interim measures that it '*deems appropriate*'.

The term '*necessary or appropriate*' in the Swiss Rules does not constitute an additional requirement. The requirement of '*appropriateness*' was added in comparison to the text of the UNCITRAL Rules when the '*new*' Swiss Rules came into force on 1 January 2004.<sup>71</sup> Thus, also under the Swiss Rules neither the arbitral tribunal nor the parties have to establish necessity; appropriateness is sufficient.<sup>72</sup> Also under the Swiss Rules an interim measure is '*necessary or appropriate*' if it is required or apt in order to pre-

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<sup>65</sup> Vischer, art 183 N 5, p. 2017; Wirth, p. 33; Walter/Bosch/Brönnimann, p. 133; Berti, art 183 N 7, p. 430.

<sup>66</sup> Vischer, art 183 N 5, p. 2017; Wirth, p. 33; Walter/Bosch/Brönnimann, p. 132.

<sup>67</sup> Wirth, p. 33.

<sup>68</sup> The tribunal should – if possible – always consider whether the interim measure is enforceable under the *lex fori* at the place of enforcement. Thus, this may theoretically restrict the variety. Cf also Berger/Kellerhans, N 1151, p. 205.

<sup>69</sup> For instance with regard to attachment orders, antisuit injunction or freezing injunctions.

<sup>70</sup> See III.2.6.

<sup>71</sup> Oetiker, Swiss Rules, art 26 N 7, p. 232.

<sup>72</sup> Oetiker, Swiss Rules, art 26 N 7, p. 232.

vent imminent harm or injury which is not easily reparable.<sup>73</sup> From this, however, might follow that if more than one type of interim measures would fulfil the purpose, a tribunal should always choose the kind of measure which constitutes the 'mildest' intervention for the other party.

Whereas the Swiss Rules speak about '*interim measures*' the ICC Rules uses the term '*interim or conservatory measures*'. However, the term '*conservatory*' does neither limit nor broaden the variety of measures available to the arbitral tribunal compared to the Swiss Rules<sup>74</sup> nor with regard to art 183 SPILA. Although not mentioned specifically, the drafters of art 23 ICC Rules considered the wording for instance broad enough to embrace applications for security for cost.<sup>75</sup>

Thus, a comparison of these two provisions does not establish any significant differences as to the variety of interim measures available to arbitral tribunals. Both sets of rules do not contain any restrictions as for example the UNCITRAL Rules (art 26), which requires that the measures concern 'the subject-matter of the dispute'. Thus, provided that there is a sufficient connection with the arbitration, the arbitral tribunals' authority to order interim measures may extend to other matters of an interim nature.<sup>76</sup>

On the other hand, neither set of rules provides for any specific guidelines with regard to which kind of interim measures may be ordered. However, this makes sense, because it is not possible to enumerate all the different types of interim measures.

## 2.4 Categorisation of interim measures

As seen above (III.2.1), there is no widely accepted definition of interim measures. However, there are various approaches in legal doctrine to categorize the types of measures. There are different legal and other criteria ac-

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<sup>73</sup> Oetiker, Swiss Rules, art 26 N 7, p. 232.

<sup>74</sup> Art 26 (1) does not in any way restrict a possible content of the interim measures to be ordered. Cf Oetiker, Swiss Rules, art 26 N 9, p. 232.

<sup>75</sup> Derains/Schwartz, p. 297.

<sup>76</sup> Derains/Schwartz, p. 297; Oetiker, Swiss Rules, art 26 N 8, p. 232.

ording to which such a categorisation can be done.<sup>77</sup> Normally, the criteria to categorise the interim measures are chosen with regard to factual or legal differences which are to be pointed out. However, I consider it useful in this thesis, to give first an overview on the most common categorisation in Swiss legal doctrine (see a, b and c) and in a second step, to analyse some selected types of interim measures of which the availability has been subject to various discussions (2.5).

a) *Protective measures*

Protective measures aim to ensure the effectiveness of the final arbitral award by preserving the status quo during the proceeding.<sup>78</sup> Such measures typically require a party to perform or refrain from performing certain specific acts, for instance by ordering a party to refrain from disposing of or modifying the object in dispute.<sup>79</sup> Other protective measures often issued are orders to deposit goods in dispute or to refrain from drawing on a letter of credit or a guarantee.

Furthermore, orders preventing evidence from being altered, destroyed or rendered unavailable are ascribed to protective measures.<sup>80</sup> Such measures may become necessary, for instance, in disputes concerning ongoing building and construction contracts prior to impending changes.<sup>81</sup> Other examples are orders appointing an expert to report on the status of facts or

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<sup>77</sup> Swiss legal doctrine typically distinguishes the types of interim measures according to their purpose: (i) protective measures ('Sicherungsmassnahmen'), regulatory measures ('Regelungsmassnahmen') and performance measures ('Leistungsmassnahmen'). Cf for instance Wirth, p. 33; references on Swiss legal doctrine in Sangiorgio, p. 133 f; Walter/Bosch/Brönnimann, p. 133 f; Berger/Kellerhans, N 1149, p. 404.

Sangiorgio, p.135, who distinguishes between (i) interim measures aiming at securing monetary claims ('Geldforderungen') and (ii) interim measures aiming at securing non-monetary claims ('Realansprüche').

Cf Art 17 UNCITRAL Model Law or Redfern et al, N 7-23 for further categorizations.

<sup>78</sup> Von Segesser/Kurth, p. 72; Wirth, p. 33; Sangiorgio, p. 133 f, with further references.

<sup>79</sup> Wirth, p. 33 f, Von Segesser/Kurth, p. 72.

<sup>80</sup> Cf for instance Wirth, p. 33. However, sometimes this kind of interim measures are considered a separate category, because the requirements which must be fulfilled in order to obtain such a measure might differ from other protective measures. Normally, the requesting party has only to provide prima facie evidence that the taking of the evidence at a later stage is endangered, but not the reasonable possibility of success on the merits. See IV.5.1.

<sup>81</sup> Von Segesser/Kurth, p. 73.

events at a particular time or an order that a diseased witness shall be heard before the hearing.

*b) Regulatory measures*

Regulatory measures aim to regulate the parties' conduct and their (legal) relationship during the arbitral proceeding.<sup>82</sup> In certain circumstances, as for instance in disputes involving long-term contracts or corporate settings, a party might have a legitimate interest to request a specific conduct of the opponent during the arbitral proceeding.<sup>83</sup> Such orders may for instance require a manufacturer to continue supplying a distributor, authorize the suspension of the performance of certain contractual obligations or suspend the effect of a corporate resolution.<sup>84</sup>

*c) Provisional/temporary performance measures*

The purpose of this kind of interim measures is, to provisionally enforce a relief sought so that when the relief is eventually granted by the final award it has not already become obsolete.<sup>85</sup> Such measures are often requested in proceedings in which questions related to intellectual property rights are at stake.<sup>86</sup> Temporary performance measures include for instance orders prohibiting the sale or the manufacturing of products which are subject of disputed patent rights or the use of disputed trademarks.<sup>87</sup>

## *2.5 Selected types of interim measures of which the availability has been subject of various discussions*

*a) Measures aimed at securing the enforceability of monetary claims*

A party may face the risk that the respondent might not be willing or able to pay the amount awarded by the time the final award is rendered. To minimize this risk a party could request for measures aimed at securing the enforceability of monetary claims. Most common are measures, such as the

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<sup>82</sup> Cf for instance Sangiorgio, p. 134, with further references.

<sup>83</sup> Wirth, p. 33 f; Von Segesser/Kurth, p. 73.

<sup>84</sup> Von Segesser/Kurth, p. 73; Sangiorgio, p. 134.

<sup>85</sup> Wirth, p. 34; Sangiorgio, p. 134 f.

<sup>86</sup> Sangiorgio, p. 135.

<sup>87</sup> Wirth, p. 34; Sangiorgio, p. 134 f.; Berger/Kellerhans, p. 404.

attachment or freeze of the respondent's assets (so-called 'Arrest' or 'séquestre').

Undisputed in Swiss legal doctrine is that arbitral tribunals have the power to order interim measures aimed at securing non-monetary claims ('Realansprüche').<sup>88</sup> But whether or not, arbitral tribunals with seat in Switzerland have authority to order the freeze of the respondent's assets – which in fact often are unrelated to the dispute – or to order other measures aimed to secure the enforcement of monetary claims, is a broadly and controversially discussed issue in Swiss legal doctrine.<sup>89</sup>

Starting point for an analysis of this topic is, that arbitral tribunals will or at least should always be concerned that their orders or awards are binding on the parties and enforceable in case that a party does not voluntarily comply with the ordered measures. Due to the fact, that arbitral tribunals lack the power to enforce their interim measures and thus, depend on the assistance of the courts, arbitrators ordering such measures must have regard to the applicable law at the place of enforcement. This means that first it must be determined where the requested measure might finally be enforced.

The arbitral tribunal – requested to order the attachment or freeze of assets – has to distinguish between requests related to assets located in Switzerland and requests related to assets located abroad. With regard to assets abroad, an arbitral tribunal has the competence to issue whatever kind of measure is provided for and enforceable under the applicable foreign law, including for instance freezing injunctions (Mareva type injunctions).<sup>90</sup> More complicated is the situation, when the concerned assets are located in Switzerland.

Under Swiss law art 271 ff of the Swiss Debt Enforcement and Bankruptcy Act ('SDEBA') exclusively governs the proceeding and the requirements to obtain attachment orders (so-called 'Arrestverfahren').<sup>91</sup> Particulari-

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<sup>88</sup> Sangiorgio, p. 137.

<sup>89</sup> Wirth, p. 34; Von Segesser/Kurth, p. 74; Besson, p. 63 N 71 ff; Sangiorgio, p. 145, FN 386, with further references.

<sup>90</sup> Wirth, p. 34 f.

<sup>91</sup> Wirth, p. 34; Besson, p. 63 N 72.

ties of this proceeding are that *not* the court (respectively the judge) having jurisdiction in the underlying dispute is competent to issue an attachment order, but exclusively the judge at the place where the concerned assets are located (so-called 'Arrestrichter').<sup>92</sup> Furthermore, the Arrestrichter does not only adjudicate whether or not the claimant has a valid claim for an attachment (so-called 'Arrestbewilligung'), but also orders the enforcement of the attachment within the same procedure respectively the same decision (so-called 'Arrestbefehl').<sup>93</sup> Last but not least, art 271 SDEBA enumerates five different reasons a request for an attachment order can be based on. Both, these five reasons and the enforcement measures provided for by the SDEBA are exhaustive.<sup>94</sup> Because Swiss law does not know other measures to secure the enforcement of monetary claims, the Swiss Federal Supreme Court declared that other measures (not based on art 271 ff SDEBA) but aimed at securing the enforcement of monetary claims violate Swiss federal law. The Swiss Federal Supreme Court stated that – beside an attachment in terms of art 271 ff SDEBA ('Arrest') – there is no space for other measures, for instance provided for by cantonal law and that such measures are considered an evasion of the requirements of art 271 ff SDEBA (so-called 'verkappter Arrest').<sup>95</sup>

Based on this legislative background a majority of scholars deny the competence of arbitral tribunals to order the attachment of assets located in Switzerland.<sup>96</sup> Main arguments for this traditional view are, that an attachment order with the effect of an 'Arrest' in terms of art 271 ff SDEBA may not be considered an interim measure in terms of art 183 SPILA, because the former includes not only the adjudication but also the enforcement of the attachment. Furthermore, it is argued, that in the majority of the cases assets would be subject to the attachment which are unrelated to the dispute and

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<sup>92</sup> Art 272 SDEBA. Cf Sangiorgio, p. 143.

<sup>93</sup> Cf Sangiorgio, p. 143.

<sup>94</sup> Sangiorgio, p. 144.

<sup>95</sup> Cf DFT 86 II 295; Vogel/Spühler, chapter 12 N 194; Sangiorgio, p. 144.

<sup>96</sup> Cf Berger/Kellerhans, p. 401; Besson, p. 63 N 72; Von Segesser/Kurth, p. 74, with further references; Walter/Bosch/Brönnimann, p. 130 f.

therefore not covered by the arbitration agreement.<sup>97</sup> However, some authors<sup>98</sup> are of the opinion that even if an arbitral tribunal, because of its lack of power to enforce interim measures, may not oblige a state authority to enforce the attachment of assets, it still can adjudicate that a party has a valid claim for an attachment. However, the state court's assistance to enforce such a measure in Switzerland could only be obtained if all the requirements provided for by the SDEBA are fulfilled (see also III.4).<sup>99</sup> As of today, it can not be said, whether or not Swiss courts would follow the latter approach and enforce an attachment order issued by an arbitral tribunal. However, one can not think of many circumstances which lead to the conclusion that to request an attachment order before the arbitral tribunal is more advantageous than to do so directly before the competent judge ('Arrestrichter'). A party might probably not want to offend the counterparty because of an ongoing business relationship and therefore chose the milder option in a first step.<sup>100</sup> However, the main disadvantage of the proceeding before the arbitral tribunal is that the assistance of the state court in accordance with art 183 (2) SPILA can not be requested in an ex parte proceeding. Thus, the party will lose the effect of surprise which is inherent to the procedure under art 271 ff SDEBA.

Freezing orders respectively attachments of assets are not the only measurements available to secure the enforceability of monetary claims. There are alternative measures – not known to the SDEBA – an arbitral tribunal may issue, such as orders requesting a party to furnish a bank guarantee, to provisionally deposit the amount in dispute with a custodian or to pay the amount claimed to the requesting party on a provisional basis.<sup>101</sup> However, as long as such measures are requested to secure a monetary claim, the same distinction applies: if the measures will have to be enforced outside Switzerland, the admissibility depends on the applicable law and the law at the place of the enforcement. If the order will have to be enforced in Switzerland, the arbitral tribunal is factually bound by art 271 ff SDEBA, because the

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<sup>97</sup> Rüede/Hadenfeldt, p. 253.

<sup>98</sup> Cf Sangiorgio, p. 152 ff, with further references.

<sup>99</sup> Wirth, p. 34; Berti, art 183 N 12 p., 430 f; Sangiorgio, p. 163 ff.

<sup>100</sup> Sangiorgio, p. 165 f.

<sup>101</sup> Von Segesser/Kurth, p. 74; Besson, p. 67 N 79.

assisting court might consider a measure other than provided for by the SDEBA as an evasion of the SDEBA and declare the order unenforceable. Still, these alternative measures might often be an attractive option, because mostly those measures do not need to be enforced in Switzerland or can at least be construed<sup>102</sup> in a way that they do not have to be enforced Switzerland.

*b) Antisuit injunctions*

An antisuit injunction may be defined as an interim measure in form of an order prohibiting a party to continue a proceeding or to sue before a court or judicial instance other than that agreed in the arbitration clause.<sup>103</sup> A failure to comply with such measures could result in a finding of contempt of court.<sup>104</sup>

Originally, antisuit injunctions were granted exclusively in common law jurisdictions.<sup>105</sup> In contrast civil law jurisdictions traditionally dealt with the problem of concurrent proceedings in different jurisdiction by applying the principle of *lis pendens*.<sup>106</sup> Antisuit injunctions have been considered to be 'an indirect interference with the process of [the foreign] court.'<sup>107</sup>

However, in recent years antisuit injunctions have become more frequent in international commercial arbitration. Arbitral tribunals (at least in Switzerland) often have some reservations when confronted with a request for an antisuit injunction, because such measures may conflict with the principle of Kompetenz-Kompetenz, according to which each court and arbitration tribunal decides on its own jurisdiction. Furthermore, an antisuit injunc-

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<sup>102</sup> With regard to certain measures as the provisional deposition of the amount in dispute with a custodian, the arbitral tribunal may construe the interim measure in a way that the deposit has to be paid to a bank situated in a place other than Switzerland, thus, in a country, where such measures will be enforced. Furthermore, the party obliged to pay the said amount will often have its domicile in a country other than Switzerland. Thus, such measures would have to be enforced outside Switzerland. However, whether the enforcement of interim measures ordered by an arbitral tribunal is possible depends on the law applicable at the place of enforcement.

<sup>103</sup> Wirth, p. 36; Von Segesser/Kurth, p. 74; Stacher, p. 2.

<sup>104</sup> Von Segesser/Kurth, p. 75.

<sup>105</sup> Von Segesser/Kurth, p. 74 f; Stacher, p. 1.

<sup>106</sup> Von Segesser/Kurth, p. 75, FN 22.

<sup>107</sup> Von Segesser/Kurth, p. 75, with further references.

tion may lead to a restriction of a party's right of free access to courts. Last but not least, arbitral tribunals sometimes might fear that such an order causes damages to the enjoined party (for instance where court proceedings are necessary to extend a prescription period).<sup>108</sup>

There is no consistent approach of arbitral tribunals in Switzerland with regard to antisuit injunction. There are few unpublished decisions with regard to this topic. VON SEGESSER/KURTH<sup>109</sup> refer to an unreported procedural order No. 3 of September 2003, in which the arbitral tribunal denied an application for an order requiring one party to request the stay of parallel arbitral proceedings on the basis that it was not 'empowered to interfere in another arbitration procedure'. On the other hand, WIRTH<sup>110</sup> discusses two unpublished cases, where 'Swiss arbitral tribunals have been willing to grant interim orders prohibiting a party from bringing an action before a foreign court, or respectively participate in foreign legal proceedings'. According to WIRTH<sup>111</sup> in one case the order was based on the argument that the arbitration clause imposes an obligation not to seek judicial relief outside of arbitration, whereas the arbitral tribunal in the other case based its decision on a specific confidentiality provision contained in the relevant contract.

Summarised, it can be said that within the last few years arbitral tribunals with seat in Switzerland have been willing to grant antisuit injunctions, but there is not (yet) a consistent practice with regard to such measures. Thus, parties requesting such measures must be aware of the risk, that an arbitral tribunal might find the instrument of antisuit injunctions incompatible with the general principle of Kompetenz-Kompetenz.

As a result of the concurrent jurisdiction of courts and the arbitral tribunal a party could theoretically apply for an antisuit injunction before the courts. However, Swiss courts – bound by Swiss law – may not order antisuit injunctions (see IV.4 and IV.4).<sup>112</sup>

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<sup>108</sup> Von Segesser/Kurth, p. 75.

<sup>109</sup> Von Segesser/Kurth, p. 75.

<sup>110</sup> Wirth, p. 37.

<sup>111</sup> Wirth, p. 37.

<sup>112</sup> Stacher, Prozessführungsverbote, p. 61 ff and p. 78 N 56.

c) *Security for parties' legal costs*

Another broadly discussed issue in Swiss legal doctrine is, whether or not an arbitral tribunal may on a party's request order the opposing party to furnish security for costs to be incurred in the arbitral proceedings, including the party's legal fees and other expenses.<sup>113</sup> Such orders to provide security for party's legal cost must be distinguished from the parties' obligation to advance the costs for the arbitration proceedings.<sup>114</sup> Some authors only acknowledge the right to request security for legal costs of the respondent, arguing that the claimant can choose whether or not to file a claim and incur the costs it entails. It is thus, the claimant's free decision to take the risk of suing a party which might not be able to reimburse the former for their legal costs.<sup>115</sup> The respondent, on the other hand, does not have such a free choice, but is rather forced to finance its defence, even if the claimant might not be able to compensate the former's legal costs.<sup>116</sup> However, there might be situations in which also the claimant has a legitimate interest to obtain security for their legal costs. For instance, if the respondent – after the procedure has been initiated – makes disposition with the mere intention to downsize their financial ability to reimburse the claimant.

The traditional view in Swiss legal doctrine held that, subject to an explicit agreement to the contrary, an arbitral tribunal has *no* authority to order security for party's legal costs.<sup>117</sup> However, such an authorization can also be achieved by way of reference to institutional rules which contain an explicit authorisation.<sup>118</sup> The modern view in Swiss legal doctrine<sup>119</sup> and the arbitral

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<sup>113</sup> Von Segesser/Kurth, p. 76 f.; Berger/Kellerhans, N 1460 ff, p. 516 ff.; Wirth, 35 f.; Rüede/Hadenfeldt, p. 241.

<sup>114</sup> Such deposit or advances cover the cost for the arbitral proceedings including the fees of the arbitral tribunal, expenses incurred by the arbitrators and experts etc, but do not include the parties legal fees and other expenses.

<sup>115</sup> Stacher, Swiss Rules, art 41 N 23.

<sup>116</sup> Also the draft for the Swiss Federal Code on Civil Procedure – which will beside the civil procedure also govern domestic arbitration in Switzerland – only provides the respondent with such right (see art 337).

<sup>117</sup> Cf Rüede/Hadenfeldt, p. 241 with further references.

<sup>118</sup> Wirth, p. 36.

<sup>119</sup> Wirth, p. 36; Berger/Kellerhans, N 1464, p. 517; with regard to art 23 ICC Rules cf Derains/Schwarz, p. 297.

practice<sup>120</sup> is, that the authority granted to the arbitral tribunal by art 183 SPILA to order interim measures also includes the power to order a party to provide security for legal costs in exceptional circumstances. On the other hand, STACHER<sup>121</sup> and some other authors derive the tribunal's authority from the tribunal's duty and authority to secure that the arbitration is carried out in good faith. As also the latter scholars acknowledge the tribunal's authority to order a party to provide security for legal costs only under (similar) exceptional circumstances, the differences with regard to the legal consequences between the two approaches are minor. Nevertheless, if the duty and authority to secure that the arbitration is carried out in good faith is the legal basis to issue such an order, the tribunal might and must act on its own motion. In my opinion, this approach – which could lead to situations in which the arbitral tribunal has to act without a prior request of a party – overstretches the arbitral tribunal's duty to secure that the proceeding is carried out in good faith. Furthermore, it is the parties' and not the tribunal's risk of not getting paid for their expenses. Thus, it should be the parties' decision to request such order, by applying for a respective interim measure.

Correspondingly, to obtain an order obliging the opposing party to furnish security for the petitioner's legal costs the latter has to establish that all general requirements to obtain an interim measure are fulfilled (see III.3.2).<sup>122</sup> However, an arbitral tribunal will only consider the applicant's entitlements or rights to be compensated for his legal costs endangered in extraordinary circumstances. Circumstances considered sufficient to establish a real endangerment are for instance:<sup>123</sup>

(i) If the opposing party is evidentially illiquid. But, the mere initiation of bankruptcy proceedings will not per se suffice. Rather, it must be assessed, that the applicant's claim for compensation of the legal costs is actually and substantially endangered (for instance, under Swiss bankruptcy law, in case

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<sup>120</sup> Cf Berger/Kellerhans, p. 517, FN 47, with references to decisions of arbitral tribunals in Switzerland.

<sup>121</sup> Stacher, Swiss Rules, p. 347 Art 41 N 24, with further references.

<sup>122</sup> Berger/Kellerhans, N 1465, p. 518.

<sup>123</sup> Berger/Kellerhans, p. 518 f; Stacher, Swiss Rules, Art 41 N 25 ff; Von Segesser/Kurth, p. 76 f; Wirth, p. 35 f.

the meeting of the creditors decides to continue an arbitration proceeding, the costs of the arbitration proceeding<sup>124</sup> which have not yet been finally allocated are qualified as preferential debts).<sup>125</sup> However, an order for security for legal costs will be justified, if the bankruptcy proceeding has been stayed due to lack of assets<sup>126</sup> or if the applicant holds a certificate of loss ('Verlustschein') from a former debt enforcement proceeding against the opposing party.<sup>127</sup>

(ii) Another valid reason might be, if the claimant – for reasons to evade their obligation to reimburse the respondent – assigned their claim to an impecunious or low capitalized party (for instance a Special Purpose Vehicle).<sup>128</sup> A similar situation may arise, if a third party which will benefit from a successful outcome of the arbitration proceeding funds the proceeding of a financially weak claimant, but is under no obligation to compensate the respondent if the claimant loses.<sup>129</sup> Furthermore, alike endangerment of the respondent's rights to be reimbursed could be seen in the fact that a claimant disposes of a large part of its assets for the main reason to evade their respective obligations.<sup>130</sup>

(iii) Unlike in civil proceedings, the mere fact that the claimant has their domicile or habitual residence not in Switzerland<sup>131</sup>, never constitute a claim to obtain security for legal costs.<sup>132</sup> On the other hand, an endangerment could be considered sufficient, if the claimant – with the mere intention to evade its obligations in case of an unsuccessful outcome – relocates their

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<sup>124</sup> The costs include the opposing party's legal costs.

<sup>125</sup> Stacher, Swiss Rules, Art 41 N 27 with further references; Berger/Kellerhans, N 1468, p. 518.

<sup>126</sup> Arbitral decision of 20 November 2001 in [2002] ASA Bull 467.

<sup>127</sup> Berger/Kellerhans, N 1468, p. 518.

<sup>128</sup> Berger/Kellerhans, N 1469, p. 518 f; Stacher, Swiss Rules, art 41 N 25.

<sup>129</sup> Stacher, Swiss Rules, art 41 N 25.

<sup>130</sup> Berger/Kellerhans, N 1470, p. 519.

<sup>131</sup> Respectively not in the country where the arbitral tribunal has its seat.

<sup>132</sup> Berger/Kellerhans, N 1472, p. 519.

domicile to a country, where the enforcement of arbitral awards is not guaranteed or substantially more problematic.<sup>133</sup>

Summarized, it can be said that except in circumstances of the claimant's bankruptcy, the applicant has to establish the opposing party's intention to evade the latter's potential obligation to reimburse the applicant's legal costs.

## 2.6 *Limitation of the arbitral tribunal's power to order interim measures*

Beside the already mentioned lack of power to enforce interim measures, which may in practice in certain circumstances exclude the arbitral tribunal as a valid alternative to the state courts, there are other aspects which may lead to a limitation of the power to order interim measures or of the variety of types of interim measures available to an arbitral tribunal.

Obviously, an arbitral tribunal cannot issue interim measures until the tribunal itself has been established. Even if this point is evident, it is important and often overlooked in practise until a crisis arises.<sup>134</sup> It takes time to establish an arbitral tribunal, time which might be of great importance to a party. While the tribunal establishes itself, evidence might disappear or a long-term contract relationship may come to a standstill. Parties facing such a situation have to address the state courts for interim measures. However, this might not be possible in every jurisdiction, but in Switzerland the parties do have this option subject to any agreement (see II.3.3) or any provision in the applicable arbitration rules to the contrary. Neither the ICC Rules nor the Swiss Rules exclude the court's jurisdiction to rule on interim measures prior the arbitral tribunal has been established. However, in this regard the ICC Rules for a Pre-Arbitral Referee Procedure might be worth mentioning, but the parties have to agree separately on them. By merely referring potential disputes to arbitration according to the ICC Rules the ICC Rules for a Pre-Arbitral Referee Procedure is *not* included (see II.4.1).

Another very important factor, which may restrict the availability of the interim measures to arbitral tribunals, is that the arbitral tribunal's power is

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<sup>133</sup> Berger/Kellerhans, N 1471, p. 519.

<sup>134</sup> Redfern et al, N 7-14; Walter/Bosch/Brönnimann, p.140.

generally limited to the parties involved in the arbitration itself, respectively being party to the arbitration agreement.<sup>135</sup> An order obliging a third party would not be enforceable against this third party. An arbitral tribunal therefore does not have the power to, for instance, order a bank to freeze an account of one of the parties to the arbitration proceeding.<sup>136</sup>

### **3 Procedural aspects**

Beside the question whether a specific kind of interim measures might be ordered by the arbitral tribunal, there are other aspects determined by the applicable procedural law, which can influence a party's decision to apply for interim measures before the arbitral tribunal or the state court.

#### *3.1 Constitution of the arbitral tribunal*

As mentioned above (see III.2.6) the arbitral tribunal can only order interim measures after it has been established.

#### *3.2 General requirements which must be fulfilled*

First of all, an arbitral tribunal does not order an interim measure on its own motion, thus, a respective request of a party is necessary. Which further requirements must be fulfilled is determined by the applicable substantive and procedural law. If the applicable substantive law does not contain any provisions with regard to the requirements<sup>137</sup>, the tribunal shall have regard to the agreed set of rules. However, most of the institutional arbitration rules do not regulate the requirements in detail, but rather in a very rudimentary way. Neither art 23 ICC Rules nor art 26 Swiss Rules do provide for detailed requirements which must be fulfilled (see also II.4). Thus, according to art 182 (2) SPILA, if the parties failed to set forth the procedural rules, the arbitral tribunal has to do so either directly, or by referring to a specific law or to a set of arbitration rules. One possibility is to refer to the wording of art 17 A UNCITRAL Model Law as an expression of international consensus with re-

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<sup>135</sup> Redfern et al, N 7-15.

<sup>136</sup> Von Segesser/Kurth, p. 74; Redfern et al, N 7-15.

<sup>137</sup> Berger/Kellerhans, N 1146, p. 403.

gard to the requirements which must be fulfilled.<sup>138</sup> The conditions set out in art 17 A UNCITRAL Model Law are in line with the requirements as postulated by Swiss legal doctrine.

Accordingly, arbitral tribunals with seat in Switzerland requested to order an interim measure will usually<sup>139</sup> consider, whether the following requirements are satisfied:<sup>140</sup>

*a) Prima facie jurisdiction of the arbitral tribunal*

The arbitral tribunal must have prima facie jurisdiction. This means that the parties did not validly deprive the tribunal of its power to order interim measures (see II.3.2). Furthermore, the requested measure must be related to the subject-matter of the dispute, because otherwise the arbitral tribunal, which derives its authority from the arbitration agreement, does have to deny its jurisdiction.<sup>141</sup> Additionally, the proceedings might have to be stayed, if the same request has been brought before a state court prior to the application to the arbitral tribunal (see V.2).<sup>142</sup>

*b) Reasonable possibility of success on the merits*

If the arbitral tribunal considers itself competent to rule on the request for interim measures, it must be satisfied that there is a reasonable possibility that the applicant will succeed on the merits on the claim. In other words, the applicant must hold with reasonable probability the entitlement or right which the requested interim measure is intended to protect.<sup>143</sup>

The tribunal has for this purpose to investigate both the factual basis of the claim and the entitlements of the applicant.<sup>144</sup> However, the provisional

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<sup>138</sup> Berger/Kellerhans, N 1146, p. 403. Art 17 A UNCITRAL Model Law has been approved by the UN Commission on International Trade Law at its 39th annual session in New York (19 June – 7 July 2006).

<sup>139</sup> The requirements and conditions may vary depending on the type of the requested interim measure. The hurdles to obtain an interim measure aimed at preserving evidence might, for instance, be less difficult to take than those for measures ordering a party to refrain from selling the goods in dispute.

<sup>140</sup> Wirth, p. 37; Berger/Kellerhans, N 1142 ff, p. 402; Von Segesser/Kurth, p. 71; Walter/Bosch/Brönnimann, p. 140;

<sup>141</sup> Berger/Kellerhans, N 1143, p. 402.

<sup>142</sup> Walter/Bosch/Brönnimann, p. 140.

<sup>143</sup> Wirth, p. 38.

<sup>144</sup> Berger/Kellerhans, N 1145, p. 402.

nature of interim measures justifies a mere summary assessment of the facts and the entitlements.<sup>145</sup> To decide on a potential entitlement of the applicant the arbitral tribunal needs first to determine the applicable substantive law (*lex causae*). According to BERGER/KELLERHANS<sup>146</sup> the arbitrators may in cases, in which the applicable substantive law has not yet been determined and the urgency of the requested interim measure does not allow time-consuming and complex investigations as to which substantive law is applicable, decide whether or not to grant the interim measure based on general principles in international trade (*lex mercatoria*).

*c) Prima facie evidence of risk of irreparable harm or injury*

The applicant must provide *prima facie* evidence that there is an injury or harm which is likely to result if the interim measure is not ordered. As a further condition the potential detriment, resulting if no interim measure is granted, must be irreparable or at least not easily remediable.<sup>147</sup> Thus, the harm must for instant not be adequately reparable by an award for damages.<sup>148</sup> However, considering the arguments of the applicant the tribunal must always also take into account the harm that is likely to result to the party against whom the measure is directed and analyse whether the harm of the applicant outweighs the one of the opponent.<sup>149</sup>

*d) Urgency requirement*

The harm to the applicant's right or interests must furthermore be imminent in the sense, that a potential harm is irreparable<sup>150</sup> and will, with a reasonable possibility, come true before the final award will be issued. However, arbitral tribunals generally tend to take a more lenient approach with regard to the 'urgency' requirement than state courts and might in practice even

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<sup>145</sup> Walter/Bosch/Brönnimann, p. 140.; Wirth, p. 38.

<sup>146</sup> Berger/Kellerhans, N 1145, p. 402.

<sup>147</sup> Berger/Kellerhans, N 1146, p. 402 f.

<sup>148</sup> Von Segesser/Kurth, p. 71.

<sup>149</sup> Berger/Kellerhans, N 1147, p. 403. Cf art 17 A. (1) lit a UNCITRAL Model Law.

<sup>150</sup> Berger/Kellerhans, N 1146, p. 402 f.

grant interim measures notwithstanding the fact that 'urgency' has not been established or alleged.<sup>151</sup>

e) *Appropriate security if requested*

Under certain circumstances the arbitral tribunal may make the granting of the interim measures subject to appropriate securities to be furnished by the requesting party (see III.3.5).

### 3.3 *Decision on the arbitral tribunal's jurisdiction to order interim measures*

Both, the ICC Rules<sup>152</sup> and the Swiss Rules<sup>153</sup> state that the arbitral tribunal rules on its own jurisdiction (principle of 'Kompetenz-Kompetenz'). This principle of Kompetenz-Kompetenz is also granted by art 186 (1) SPILA<sup>154</sup> which is considered a mandatory provision of the lex arbitri in Switzerland.<sup>155</sup> However, the competence of the arbitral tribunal is not absolute, because its jurisdiction decision can be set aside by the Swiss Federal Supreme Court on a party's motion (art 190 (2) lit b SPILA<sup>156</sup>).<sup>157</sup> Furthermore, the tribunal's ju-

<sup>151</sup> Stacher, Swiss Rules, art 41 N 6; Von Segesser/Kurth, p. 71 with references to the CAS Arbitration Rules for the Olympic Games, which do not list 'urgency' among the conditions for interim measures.

<sup>152</sup> Cf art 6 (2) ICC Rules.

<sup>153</sup> Cf art 21 (1) Swiss Rules.

<sup>154</sup> Art 186 SPILA states:

1. *The arbitral tribunal shall itself decide on its jurisdiction.*
2. *A plea of lack of jurisdiction must be raised prior to any defence on the merits.*
3. *The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.'*

<sup>155</sup> Wenger, art 186 N 3, p. 461; Berger/Kellerhans, N 609, p. 215; Karrer/Straub, N 30, p. 1052.

<sup>156</sup> Art 190 (2) lit b SPILA states:

- [...]
2. *The award may only be annulled: [...]*
    - b) *if the arbitral tribunal wrongly accepted or declined jurisdiction; [...]*
  3. *Preliminary awards can be annulled on the grounds of the above paras 2(a) and 2 (b) only; the time limit runs from the notification of the preliminary award.'*

<sup>157</sup> Karrer/Straub, N 30, p. 1052; Berger/Kellerhans, N 608, p. 214, state that more precisely one should talk of 'relative Kompetenz-Kompetenz'.

However, if neither party has its domicile, habitual residence or place of business in Switzerland, the right to file an appeal can be waived by agreement (art. 192 (1) SPILA).

jurisdiction decision may be tested by state courts in recognition and enforcement proceedings. Closely related with the principle of Kompetenz-Kompetenz is the principle of severability which is granted by art 178 (3) SPILA.<sup>158</sup>

However, the arbitral tribunal normally<sup>159</sup> is only obliged to decide upon its jurisdiction if a party raises the plea of non-jurisdiction (art 186 (2) SPILA).<sup>160</sup> According to art 186 (2) SPILA the plea of non-jurisdiction must be raised prior to any pleadings on the merits. The party raising such plea does not have to give reasons for its plea, rather it is the claimant with whom lies the onus of proof for the requirements for the arbitral tribunal's jurisdiction.<sup>161</sup> According to art 186 (3) SPILA it is in the arbitral tribunal's discretion at what time to deal with the question of its jurisdiction, but the statute points out that as a 'recommended rule' the issue of jurisdiction should be dealt with at a preliminary stage. However, the tribunal could wait to decide the issue until the final award. But according to the Swiss Federal Supreme Court<sup>162</sup> the arbitral tribunal should only delay its decision until the final award or a partial award on points of substance, if questions of facts or law relevant to jurisdiction are closely related with the substance of the dispute. If the arbitral tribunal issues a preliminary decision and the decision is challenged before the Swiss Federal Supreme Court, the tribunal has to decide – taking practicabil-

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<sup>158</sup> Art 178 (3) SPILA states:

[...]

3. *The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.*

<sup>159</sup> Exceptionally, if a party remains completely passive, the arbitral tribunal has to decide upon its jurisdiction on its own motion. Cf Berger/Kellerhans, N 629, p. 223.

<sup>160</sup> Wenger, art 186 N 33, p 472.

<sup>161</sup> Cf Wenger, art 186 N 35, p. 172. The requirements are: (i) the matter in dispute is arbitrable, (ii) the agreement to arbitrate is valid with regard to both formal aspects and substantive requirements, (iii) the dispute is within the objective and subjective scope of the arbitration agreement and (iv) that the parties had the capacity and authority to conclude the arbitration agreement. Cf Berger/Kellerhans, N 624, p. 221.

<sup>162</sup> Decision of Swiss Federal Supreme Court from 12.11.1991, reported in ASA Bull 1992, p. 264 ff.

ity into prudent consideration – whether the arbitral proceedings shall be stayed or continued until the Federal Supreme Court's decision.<sup>163</sup>

Obviously, the arbitral tribunal's jurisdiction to order interim measures derives from its jurisdiction to rule on the merits. Thus, the tribunal may only order interim measures if it has jurisdiction to rule on the merits. Beside the plea, that the requested interim measure is not connected to the subject-matter of the dispute (see III.3.2a), the respondent may also raise the plea of non-jurisdiction to rule on the merits. However, normally this plea can only be raised up to a certain point in time, like the first defence on the merits by the respondent. Nevertheless, in certain circumstances, the respondent might use the plea of non-jurisdiction to rule on the merits as a defence against a request for interim measures. This might for instance be the case if the tribunal has been established and the claimant requests interim measures prior to any defence on the merits by the respondent. Requesting interim measures, time is normally an issue of great concern to the petitioner and the plea of non-jurisdiction might give the respondent a welcome option for delay. Contrary to a decision on interim measures (see III.3.9) the respondent furthermore has got the possibility to challenge the decision with regard to question of jurisdiction. The tribunal might have serious concerns to order interim measures which can be enforced against the opposing party if the respondent's argumentation with regard to the alleged lack of jurisdiction is not obviously unfounded and only aimed at delaying the proceedings. Thus, in this early stage of a proceeding, if a party knows that the jurisdiction of the arbitral tribunal will become an issue, the party might be well advised to address the state court instead.

Beside the additional requirement, that the requested interim measure must be connected to the subject-matter of the dispute, the fact that the courts have concurrent jurisdiction with regard to interim measures may lead to further complications with regard to questions of jurisdiction (see V).

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<sup>163</sup> Wenger, art 186 N 48, p. 476.

### 3.4 *Ex parte orders*

Different situations may cause a party's need to obtain interim measures on an *ex parte* basis, meaning without the adverse party having the opportunity to present its position prior the order being granted. The two main scenarios are: (i) in cases of extreme urgency, that means if there is simply no time to hear the opposing party and (ii) if the very purpose of the interim measure could be defeated by notifying the other party in advance of the request.<sup>164</sup>

According to the prevailing view in Swiss legal doctrine arbitral tribunals may grant interim measures on an *ex parte* basis.<sup>165</sup> Most of the authors only mention cases of '*utmost urgency*' as a reason for *ex parte* proceedings, but do not explicitly refer to the ground of a possible endangerment of the measure's purpose.<sup>166</sup> This might be, because of the tribunal's lack of power to enforce interim measures. Due to this lack of power, the tribunal might need to apply the state court's assistance (art 183 (2) SPILA). However, precondition for such a request is that a party opposes to comply with the granted measure (see III.4.2).<sup>167</sup> The adverse party must therefore be notified of the granted measure prior to a request for enforcement. Correspondingly, with the exception of self-executing orders<sup>168</sup>, *ex parte* orders will be deprived of their surprising effect.

In order to comply with the requirements of due process, *ex parte* orders should only be granted in situations of utmost urgency and the adverse party should be notified of the order immediately after it is granted.<sup>169</sup> The

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<sup>164</sup> Von Segesser/Kurth, p. 77 f.

<sup>165</sup> Berger/Kellerhans, N 1153, p. 405; Berti, art 183 N 8, p. 430; Blessing, N 866, p. 262; Wirth, p. 31 and 38; Vischer, art 183 N 4, p. 2017.

<sup>166</sup> Oetiker, art 26 N 14, p. 234, does explicitly refer to both grounds. However, one can hardly think of constellations in which the purpose of the measure is endangered without the granting of the measure being also urgent.

<sup>167</sup> Walter/Bosch/Brönnimann, p. 148; Frank/Sträuli/Messmer, § 239 N 18, p. 821.

<sup>168</sup> These are orders which do not need to be enforced, for instance an order suspending the effect of a corporate resolution or stating that a party has the right to discontinue contractual works.

<sup>169</sup> Von Segesser/Kurth, p. 78 with further references.

adverse party must be given the chance to be heard at the first possible opportunity.

Furthermore, the interim measure should only continue in force until the arbitral tribunal has heard the adverse party. After the other party had the opportunity to present its own prima facie case and accordingly to apply for a modification or reversal of the order, the arbitral tribunal will then have to decide whether or not to order an extension or a modification of the interim measure.<sup>170</sup>

A different concept was adopted in the UNCITRAL Model Law. Pursuant to art 17 B UNCITRAL Model Law a party may, together with a request for interim measures, apply for a so-called preliminary order directing the other party not to frustrate the purpose of the requested interim measure. The tribunal may issue such preliminary orders without prior notice to the other party. According to art 17 C UNCITRAL Model Law the arbitral tribunal shall immediately after having made the determinations inform all parties on the request for the interim measure, the application for the preliminary order and the preliminary order<sup>171</sup>, if any. At the same time the adverse party shall be given the opportunity to present its case and the tribunal shall decide promptly on any objection to the preliminary order. The preliminary order shall expire twenty day after the date of issue and the tribunal then may issue an interim measure adopting or modifying the preliminary order. Such preliminary orders shall be binding on the parties but shall *not* be subject to enforcement by a court. They do not constitute an award.

However, parties requesting an interim measure on an ex parte basis do not only have to consider the lex arbitri, but also have to take into account whether the arbitration rules provide for such a possibility. Neither the ICC Rules nor the Swiss Rules explicitly provides for ex parte orders. According to DERAIS/SCHWARTZ<sup>172</sup> the issuing of ex parte orders is discussed and disputed, but in the view of most ICC arbitration practitioners it is not consistent

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<sup>170</sup> Wirth, p. 38; Von Segesser/Kurth, p. 78.

<sup>171</sup> Furthermore, the arbitral tribunal shall inform the parties on the content of any further communication between the requesting party and the tribunal (art. 17 C (1) UNCITRAL Model Law).

<sup>172</sup> Derains/Schwartz, p. 299 and FN 213, p. 273, with further references.

with the ICC Rules to hear a party on an ex parte basis. With regard to the Swiss Rules it is also unclear whether the arbitral tribunal shall have the respective power or not. As pointed out above, prominent Swiss authors affirm this power under art 183 SPILA. On the other hand, the discussion in connection with the amendment of the UNCITRAL Model law showed that the former UNCITRAL Rules on the basis of which the Swiss Rules were drafted did not intend to include ex parte orders.<sup>173</sup>

In practice, however, arbitral tribunals very seldom grant interim measures on an ex parte basis and if so, only in exceptional circumstances in which such an order is absolutely necessary to secure the effectiveness of the interim measure.<sup>174</sup> Arbitral tribunals also hesitate to issue ex parte orders because they fear that the affected party might lose confidence in the arbitration proceeding, especially if such an order is issued at a very early stage.<sup>175</sup>

However, these are not the only reasons which may lead to a party's decision to apply for interim measures before a state court, in case an ex parte order is desired. It might often be the case that such orders could be obtained in a shorter time period from a court or state judge. Contrary to the state court, the arbitral tribunal is not permanently appointed and the arbitrators are often even located in different countries. Thus, it might take some time for the tribunal to organise itself.<sup>176</sup> In addition, the fact that arbitral tribunals' decisions are only binding on the parties but can not be enforced against third parties excludes a variety of measures which in court proceedings are granted on an ex parte basis.<sup>177</sup>

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<sup>173</sup> Oetiker, art 26 N 16, p. 235.

<sup>174</sup> Blessing, N 865, p. 263; Von Segesser/Kurth, p. 78 f.

<sup>175</sup> Von Segesser/Kurth, p. 79.

<sup>176</sup> Subject to the applicable arbitration rules and agreements to the contrary, the arbitrators may according to Swiss legal doctrine agree that the chairman shall have the authority to grant ex parte interim relief. This might make it possible to obtain an ex parte order from an arbitral tribunal more quickly. Cf von Segesser/Kurth, p. 78 FN 42, with further references.

<sup>177</sup> Ex parte measures are often directed at a third party, such as banks keeping an account of the adverse party. Von Segesser/Kurth, p. 78 FN 42.

### 3.5 Security

Art 183 (3) SPILA states that the arbitral tribunal may make the granting of interim measures subject to appropriate securities. The purpose of this provision is to facilitate the enforcement of potential claims for damages if the ordered interim measures later on, upon full and complete assessment of the case turn out to be unjustified.<sup>178</sup> Whether the arbitral tribunal may order security for interim measures *ex officio* or whether a respective request of the potentially affected party is necessary is disputed in Swiss legal doctrine.<sup>179</sup> However, in most cases the party, against whom the interim measure shall be directed, will anyway request the tribunal to oblige the other party to furnish security.<sup>180</sup> In *ex parte* proceedings the tribunal will in any case on its own motion consider whether it is appropriate to order security for the requested interim measure. This is in line with the new art 17 E (2) UNCITRAL Model Law which states that the arbitral tribunal shall require the party applying for a preliminary order to provide security unless the tribunal considers it inappropriate or unnecessary to do so.

To make the granting of interim measures subject to securities is, however, only appropriate if the requested measures are capable of causing damages.<sup>181</sup> Furthermore, the amount of the security must not exceed the maximum possible loss that could be sustained by the other party.<sup>182</sup> However, when determining whether or not security has to be furnished *no* regard may be given to the financial situation of the requesting party.<sup>183</sup>

Furthermore, the arbitral tribunal is only empowered to order security if the applicable arbitration rules or other agreements by the parties do not

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<sup>178</sup> Wirth, p. 38; Berti, art 183 N 14, p. 431; Von Segesser/Kurth, p. 79.

<sup>179</sup> Von Segesser/Kurth, p. 79 are of the opinion that the tribunal may act *ex officio*. Berger/Kellerhans, N 1177, p. 413 support the view that art 183 SPILA does not answer the question, but that at least in arbitrations with inexperienced parties, who are not represented, it is part of the tribunal's duty to care with due diligence to act on its own motion.

<sup>180</sup> Berger/Kellerhans, N 1177, p. 413.

<sup>181</sup> Von Segesser/Kurth, p. 79; Walter/Bosch/Brönnimann, p. 151.

<sup>182</sup> Von Segesser/Kurth, p. 79; Walter/Bosch/Brönnimann, p. 151 f.

<sup>183</sup> Thus, it does not matter whether the party requesting interim measures is solvent or not. Von Segesser/Kurth, p. 79; Walter/Bosch/Brönnimann, p. 152; Berti, art 183 N 14, p. 431.

state something to the contrary. Both, the ICC Rules<sup>184</sup> and the Swiss Rules<sup>185</sup> do provide for the tribunal's power to make the granting of interim measures subject to securities.

Related with the issue of security ordered by the arbitral tribunal is the question, whether or not the arbitral tribunal has jurisdiction to decide on claims for damages arising out of interim measures which prove to be unjustified. This issue is discussed and disputed in Swiss legal doctrine.<sup>186</sup> While some authors<sup>187</sup> deny the jurisdiction of the tribunal subject to an explicit agreement to the contrary, others<sup>188</sup> are of the opinion that the tribunal's jurisdiction to rule on claims for damages caused by interim measures derives from its power to order interim measures. BERGER/KELLERHANS<sup>189</sup> further distinguish between damages caused by unjustified interim measures ordered by arbitral tribunals and such ordered by courts. To ensure that the same substantive and procedural law will be applied to the ordering of the interim measure on one side and to potential damages resulting from such measures on the other side, they state that the same institution that ordered the interim measure has to decide on possible damages resulting from this measure. However, it can be said, that the main view acknowledges the arbitral tribunal's jurisdiction, which is in line with both art 17 G UNCITRAL Model law and art 372 (4) of the draft for a Swiss Federal Code of Civil Procedure<sup>190</sup> which also assume the parties' right to claim such damages in the arbitral proceedings.

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<sup>184</sup> Art 23 (1) ICC Rules. Cf Derains/Schwartz, p. 299.

<sup>185</sup> Art 26 (2) Swiss Rules. Cf Oetiker, art 26 N 23, p. 237. Under the Swiss Rules the security may also encompass the costs for the interim measures.

<sup>186</sup> Walter/Bosch/Brönnimann, p. 152 f.; Vischer, art 183 N 18, p. 2020 f.; Von Segesser/Kurth, p. 79; Berger/Kellerhans, N 1181, p. 414.

<sup>187</sup> Walter/Bosch/Brönnimann, p. 152 f. Unclear Berti, art 183 N 15, p. 431, who states that 'the deposit of security at the seat of the arbitral tribunal founds a forum for an action for damages against the party which sought and obtained an unjustified interim order.'

<sup>188</sup> Vischer, art 183 N 18, p. 2020 f.; Von Segesser/Kurth, p. 79.

<sup>189</sup> Berger/Kellerhans, N 1181, 414. Consenting Besson, N 459, p. 273.

<sup>190</sup> As already stated above, the Swiss Federal Code of Civil Procedure will only govern domestic arbitrations in Switzerland. Chapter 12 of SPILA governing international arbitration will stay in force.

### 3.6 Sanctions

Closely related with the question of enforcement of interim measures (see III.4) is the issue whether the arbitral tribunal may order a sanction for failure to comply with the interim measure. As the tribunal lacks of power to enforce interim measures, the question is, whether its power to adjudicate on interim measures includes the imposing of sanctions which have to be enforced by the state court.<sup>191</sup> In the centre of the discussion in Swiss legal doctrine are two kinds of sanctions: the so-called 'astreintes' and penal sanctions according to art 292 Swiss Penal Code<sup>192</sup> ('SPC').

'Astreintes' are penalties for failure to comply with orders granting interim measures. They are typically payable to the other party and are characterised as private fines, rather than as a compensation for damages.<sup>193</sup> Mainly developed in French law this sanction is also recognised in Dutch and Belgian law.<sup>194</sup> In Switzerland, there is no consensus in legal doctrine on this issue and so far no case law. Some authors deny the competence of the tribunal<sup>195</sup>, others do only assume the tribunal's competence if the parties explicitly authorised the tribunal to do so<sup>196</sup> or the *lex causae* provides for this kind of sanction<sup>197</sup>. Whereas some scholars<sup>198</sup> demand that the tribunal's competence to order *astreintes* is explicitly stated in the arbitration agreement, others<sup>199</sup> consider a reference to arbitration rules which provide for

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<sup>191</sup> Art 372 (2) of the draft for the Swiss Federal Code on Civil Procedure which will govern domestic arbitration, states that in case a party does not voluntarily comply with the ordered interim measure, the arbitral tribunal or the other party may apply to the competent state court. However, it is the state court that will decide and order the appropriate sanctions to enforce the interim measure.

<sup>192</sup> Art 292 Swiss Penal Code states:

*'Who ever does not comply with an order of a competent authority or a competent official which explicitly imposes a penalty according to this provision in the case of non-compliance will be punished with a fine.'*

<sup>193</sup> Von Segesser/Kurth, p. 77.

<sup>194</sup> Von Segesser/Kurth, p. 77.

<sup>195</sup> Cf Besson, N 539, p. 319.

<sup>196</sup> Berger/Kellerhans, N 1156 p. 406; Levy, p. 21 ff; Von Segesser/Kurth, p. 77.

<sup>197</sup> Berger/Kellerhans, N 1156 p. 406.

<sup>198</sup> Poudret/Besson, N 540.

<sup>199</sup> Von Segesser/Kurth, p. 77.

such penalties sufficient. However, neither the ICC Rules nor the Swiss Rules explicitly provide the tribunal with a basis to impose such fines.<sup>200</sup>

With regard to a sanction in accordance with art 292 SPC, the majority of the Swiss legal doctrine supports the view that arbitral tribunals do not have the power to order such penal sanctions.<sup>201</sup> Main argument for the inadmissibility of such sanctions is that the arbitral tribunal does not have the power to issue 'official orders' in the sense of the penal code<sup>202</sup> and that a penal sanction itself is an enforcement measure and thus, does not fall under the restricted jurisdiction of the arbitral tribunal.

### 3.7 Form of decision on interim measures

The SPILA is silent as to what form a decision on interim measures ought to take.<sup>203</sup> Both, art 26 (2) Swiss Rules and art 23 (1) ICC Rules leave it to the arbitral tribunal to decide whether the interim measure shall be established in the form of an order or an (interim) award. The form of the decision may be relevant with regard to enforcement under the New York Convention (see III.4) and in an ICC arbitration to determine whether the decision is subject to scrutiny by the ICC Court (art 27 ICC Rules).<sup>204</sup> Thus, the arbitrators should give consideration to the nature of the requested interim measure and the laws applicable at the place of arbitration and in the country where the measure is to be carried out.<sup>205</sup> There are different concepts in different jurisdictions of what constitutes an order or an award.<sup>206</sup> It is widely accepted in Switzerland that decisions that do not result in a final determination of the

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<sup>200</sup> With regard to the Swiss Rules: Oetiker, art 26 N 18, p. 235. With regard to the ICC Rules: Von Segesser/Kurth, FN 37, p. 77.

<sup>201</sup> Berti, art 183 N 11, p. 430; Berger/Kellerhans, N 1155, p. 406; Vischer, art 183 N 7, p. 2018. Whereas Walter/Bosch/Brönnimann are of the opinion that the arbitral tribunal may impose penal sanctions but the state judge has to enforce them.

<sup>202</sup> Berti, art 183 N 11, p. 430; Vischer, art 183 N 7, p. 2018.

<sup>203</sup> Von Segesser/Kurth, p. 80.

<sup>204</sup> Von Segesser/Kurth, p. 80; Derains/Schwartz, p. 298 f; Bühler/Webster, N 23-25 ff, p. 293; Besson, Swiss Rules, art 31 N 10, states that art 26 (2) Swiss Rules which provides for the possibility to issue an 'interim award' does not have any effect in Switzerland, because the decision will be characterised as procedural order and thus, will irrespective of its titling not be subject to court review under art 190 SPILA.

<sup>205</sup> Derains/Schwartz, p. 298.

<sup>206</sup> Derains/Schwartz, p. 30.

claim should not be considered to be an award.<sup>207</sup> Also the ICC Working Party on the subject of 'Interim and Partial Awards' stated that interim measures should generally be issued as orders, rather than awards, adding that there might be cases where an award is desired in the hope that it will enhance the possible enforcement of the decision.<sup>208</sup> With regard to ICC arbitration it must be considered, that awards are subject to scrutiny by the ICC Court, which of course might be time consuming and detrimental with the need for speed which is normally of the essence for a party requesting interim measures.

However, normally the characterization of a decision as a procedural order or an arbitration award will be determined by the courts according to its substantive content and not according to its titling.<sup>209</sup>

### 3.8 Costs

The SPILA does not contain any provisions as to costs for interim measures. Neither does it state at what time or what stage of the proceeding the cost shall be awarded nor does it address the question how the costs for interim measure proceedings shall be appointed. Subject to the applicable arbitration rules and any agreement to the contrary, it is the arbitral tribunal's free decision to award the costs in its decision on the interim measures or with the final award. However, in most cases the costs are awarded with the final award.<sup>210</sup> The same principles apply under both, the ICC Rules<sup>211</sup> and the Swiss Rules<sup>212</sup>.

With regard to the allocation of the costs there are some differences between the Swiss Rules and the ICC Rules. Unlike the Swiss Rules<sup>213</sup> the ICC

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<sup>207</sup> Derains/Schwartz, p. 30, with further references.

<sup>208</sup> Cf 'Final Report on Interim and Partial Awards' of the ICC Working Party on this subject, ICC Ct. Bull Vol. 1. No. 2 (1990), p. 26. The commission stated that interim measures, by definition, are not intended to be final and irreversible.

<sup>209</sup> Von Segesser/Kurth, p. 80.

<sup>210</sup> Berger/Kellerhans, N 1491, p. 525.

<sup>211</sup> Art 31 and art 23 (3) ICC Rules. Cf Bühler/Webster, N 31-34 – 31-39 and 31-41, p. 367 f.

<sup>212</sup> Art 26 (4) Swiss Rules. Cf Oetiker, art 26 N 34, p. 240.

<sup>213</sup> Art 40 (1) Swiss Rules.

Rules<sup>214</sup> do not provide the principle that the unsuccessful party usually has to bear the costs.<sup>215</sup> Thus, arbitrators in ICC proceedings do have a broader discretion when allocating the costs.<sup>216</sup> However, according to YESILIRMAK<sup>217</sup> the costs for the interim measure proceeding should in principle be borne by the unsuccessful party in those proceedings. The argument supporting this principle is that liability as to costs may be used as a deterrent factor to avoid vexatious applications aimed at delaying the arbitral proceeding.<sup>218</sup> However, the concrete circumstances of a case might justify different allocation of the costs. For instance, if at a later stage an interim measure granted proves to be unjustified.

It is hardly possible to compare the costs to obtain interim measures before an arbitral tribunal with the costs for a request before the courts. With regard to arbitration in general it can be said, that in a first step the costs for arbitration are by tendency higher than in litigation. Considering that arbitral decisions are final respectively can only be challenged on very limited grounds whereas in litigation the decision is subject to an appeal on the merits, the total costs often do not differ substantially. However, with regard to interim measures this is not true to the same extent. Because of the arbitral tribunal's lack of power to enforce interim measures the parties must be aware that it might be necessary to request the state court for assistance (art 183 (2) SPILA) and thus, a further proceeding before the state judge can be necessary.

### 3.9 Remedies

Whether a decision on interim measures may be challenged or appealed is determined by the *lex arbitri*. Prevailing view in Swiss legal doctrine is that there is no remedy against an order for interim measures in accor-

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<sup>214</sup> Art 31 ICC Rules.

<sup>215</sup> Derains/Schwarz, p. 371.

<sup>216</sup> Cf Derains/Schwarz, p. 371 for a further illustration of the different approaches on how the costs are allocated in ICC proceedings ('all costs are borne by the losing party', 'costs follow the event', etc).

<sup>217</sup> Yesilirmak, N 5-101 ff, p. 228 f.

<sup>218</sup> Cf Yesilirmak, N 5-101 ff, p. 228 f., who refers to two unreported ICC awards in which this approach was followed.

dance with art 183 (1) SPILA.<sup>219</sup> According to art 190 (1) and (2) SPILA in principle only final awards are subject to an appeal and only on very limited grounds. However, pursuant to art 190 (3) SPILA also preliminary decisions may be subject of a setting aside proceeding, but only based on the following grounds: (i) if the appointment of an arbitrator or the constitution of the arbitral tribunal was incorrect and (ii) if the arbitral tribunal has wrongly assumed or refused jurisdiction.<sup>220</sup> However, as mentioned above<sup>221</sup>, a decision on interim measures will – notwithstanding its titling as order or partial award – generally not qualify as preliminary award in the sense of art 190 SPILA.<sup>222</sup> The fact that there are no remedies against an arbitral tribunal's decision on interim measures is in line with the concept that decisions of the arbitral tribunal shall be final. WALTER/BOSCH/BRÖNNIMANN<sup>223</sup> state that the parties' lack of remedies is not apprehensive, because the affected party is not forced to comply with the decision due to the tribunal's lack of power to enforce its decision. In my opinion this view does not give enough regard to the fact that parties to arbitration proceedings may often be compelled for other than legal reasons to comply with the arbitral tribunal's orders. However, if the arbitral decision on interim measures has to be enforced by Swiss courts, the court's decision is subject to appeal under cantonal and federal laws.<sup>224</sup>

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<sup>219</sup> Von Segesser/Kurth, p. 86; Vischer, art 183 N 15, p. 2020; Berger/Kellerhans, N 1157, p. 406; Sangiorgio, p. 139.

<sup>220</sup> See art 190 (3) and 190 (2) lit a and b.

<sup>221</sup> See III.3.7.

<sup>222</sup> But cf Oetiker, art 26 N 22, p. 237, who is of the opinion that if the arbitral tribunal is not in a position to change the decision on interim measures during the proceeding, a setting aside proceeding pursuant to art 190 SPILA must be possible.

However, even if such a decision is qualified as preliminary award in terms of art 190 SPILA, the concerned party still only has the two mentioned grounds on which the decision can be challenged.

<sup>223</sup> Walter/Bosch/Brönnimann, p. 153 f.

<sup>224</sup> Von Segesser/Kurth, p. 86.

## 4 Enforcement of interim measures ordered by arbitral tribunals with seat in Switzerland

### 4.1 Voluntary compliance

Interim measures ordered by an arbitral tribunal are contractually binding on the parties.<sup>225</sup> However, with exception of 'self-executing' declaratory orders<sup>226</sup>, interim measures are *leges imperfectae* since the arbitral tribunal does not have the power to enforce them.<sup>227</sup> Thus, the arbitral tribunal respectively the requesting party needs the assistance of the state courts to compel a party to comply with the tribunal's orders (see III.4.2). Nevertheless, there is a high incidence of voluntary compliance with interim measures ordered by arbitral tribunals.<sup>228</sup>

Parties do comply with interim measures for different reasons and will think twice to ignore them. A party might for instance be conscious of its obligation to mitigate damages. Furthermore, a party might be concerned not to aggravate the dispute or to antagonise the arbitrators.<sup>229</sup> On the other hand, if a party does not comply with an interim measure the tribunal might evaluate this situation and consider the behaviour of the party in the framework of its decision on the merits, for instance by drawing adverse inference when considering the evidence.<sup>230</sup>

Notwithstanding these arguments there may be situations, in which a party does not comply with the ordered interim measures. Thus, the tribunal or the other party will have to initiate further steps to enforce the tribunal's order.

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<sup>225</sup> Blessing, N 869, p. 264.

<sup>226</sup> So called *declaratory orders* like eg an order which allows an applicant to sell perishable goods. Cf Von Segesser/Kurth, p. 80; Wirth, p. 33 f.; Blessing, N 871, p. 264.

<sup>227</sup> Von Segesser/Kurth, p. 80 f; Blessing, N 869 ff, p. 264.

<sup>228</sup> Blessing, N 869, p. 264; Von Segesser/Kurth, p. 80.

<sup>229</sup> Von Segesser/Kurth, p. 80 FN 54.

<sup>230</sup> Blessing, N 872, p. 264; Von Segesser/Kurth, p. 80.

## 4.2 Enforcement in Switzerland (in the country where the arbitral tribunal has its seat)

### a) Application for the competent court's assistance

According to art 183 (2) SPILA the arbitral tribunal can request the assistance of the competent court in case a party does not comply with its order on interim measures. Notwithstanding the clear wording of art 183 (2) SPILA it is accepted by the majority of the scholars that also the parties themselves may apply for assistance to the court.<sup>231</sup> However, most of the scholars consider a direct application by the parties only possible subject to the approval of the arbitral tribunal.<sup>232</sup> BERGER/KELLERHANS<sup>233</sup> do not acknowledge the parties' right to directly address the competent court, but refer to the parties' possibility to request the arbitral tribunal to do so. However, it is the court respectively the judge who finally decides on the issue, whether a party may directly (with or without prior authorisation of the arbitral tribunal) apply for assistance. Thus, a party will be well advised to get familiar with the cantonal praxis. In canton Zurich, for instance, well-known scholars<sup>234</sup> are of the opinion that parties are not allowed to directly address the court for assistance.

Art 183 (2) SPILA talks of the 'competent court' but does not determine which court has competence to provide for assistance. The prevailing view in Swiss legal doctrine is that a request for assistance is to be addressed to the court at the place where the interim measure shall be enforced. This might be for instance the place where goods are located or at the domicile or residence of the adverse party.<sup>235</sup> However some scholars acknowledge an al-

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<sup>231</sup> Berti, art 183 N 16, p. 431; Von Segesser/Kurth, p. 81; Karrer/Straub, N 137, p. 1067; Poudret/Besson, N 637, p. 574; Wirth, p. 39. Dissenting Berger/Kellerhans, N 1160, p. 407; Vischer, art 183 N 7, p. 2018; Besson, N 511, p. 303 f.

<sup>232</sup> Karrer/Straub, N 137, p. 1067, Poudret/Besson, N 637, p. 574. This approach is in line with art 372 of the draft of the Swiss Federal Code on Civil Procedure, which provides for the parties' possibility to directly apply for assistance subject to the authorisation of the arbitral tribunal in domestic arbitration.

<sup>233</sup> Berger/Kellerhans, N 1160, p. 407.

<sup>234</sup> Frank/Sträuli/Messmer, § 239 N 20, p. 821.

<sup>235</sup> Berger/Kellerhans, N 1161, p. 407 f.; Von Segesser/Kurth, p. 81; Wirth, p. 39; Berti N 17, p. 431; Besson, N 512, p. 304; Walter/Bosch/Brönnimann, p. 150; Vischer, art 183 N 7, p. 2018.

ternative venue at the place where the arbitral tribunal has its seat.<sup>236</sup> Furthermore, § 239 Code on Civil Procedure of the canton Zurich ('CCP') also provides for a venue at the place where the arbitral tribunal has its seat.

The *lex fori* applies with regard to the procedural law applicable to the proceedings before the court. Thus, in canton Zurich the Code on Civil Procedure of the canton Zurich ('CCP') and the Code on Judicial Organisation of canton Zurich ('CJO') determine which court or judge has subject-matter jurisdiction (jurisdiction *ratione materiae*) and the nature of the proceedings (eg ordinary, summary or accelerated proceedings). Art 239 CCP states that the District Court has jurisdiction for requests for assistance pursuant to art 183 (2) SPILA. Within the organisation of the District Court it is the 'single judge' ('Einzelrichter') who has subject-matter jurisdiction. The nature of the proceeding is the ordinary proceeding ('ordentliches Verfahren').<sup>237</sup>

*b) Requirements for application and the court's cognition*

Requirement for an application of the court's assistance is that (at least with a high probability) the party, against whom the interim measure is directed, does not comply with the measure voluntarily.<sup>238</sup> This requirement obviously leads to the situation, that a party must be notified before the assistance of the court may be requested. Consequently, any *ex parte* orders by arbitral tribunals can not directly be enforced and thus, the measure will be deprived of its surprise effect.<sup>239</sup>

According to Art 183 (2) SPILA the requested court has to apply its own law. Considering the application for assistance the court will in a first step examine whether there is a valid arbitration agreement and whether the arbitration tribunal has *prima facie* jurisdiction.<sup>240</sup> No consensus in Swiss legal doctrine exists with regard to the question of the cognition of courts regarding

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<sup>236</sup> Berger/Kellerhans, N 1161, p. 407 f.

<sup>237</sup> Frank/Sträuli/Messmer, § 239 N 19, p. 821.

<sup>238</sup> Rüede/Hadenfeldt, p. 254; Sangiorgio, p. 86.

<sup>239</sup> Von Segesser/Kurth, p. 84.

<sup>240</sup> Von Segesser/Kurth, p. 81; Berti, art 183 N 18, p. 431 f. Dissenting Berger/Kellerhans, N 1164, p. 409, who are of the opinion that the court may not consider whether a valid arbitration agreement exists or not.

the substance of the arbitral tribunals order.<sup>241</sup> Some scholars are of the opinion that the court only has to verify whether the interim measure is 'obviously contrary to Swiss law', which basically will be a review of the measure from the perspective of Swiss public policy.<sup>242</sup> Others acknowledge the courts' own discretion to examine whether the arbitral tribunal's decision was justified or not.<sup>243</sup> In my opinion, the view that a court shall examine whether the arbitral tribunal abused its discretion ('Ermessensmissbrauchskontrolle') is to favour. This approach respects the arbitral tribunal's power to adjudicate on interim measures, but does leave room for courts to reject assistance in case of obviously misleading orders.

However, consensus exists that the court must not reject an application for the mere reason, that the ordered type of interim measure is not known to Swiss law or to the applicable civil procedural law.<sup>244</sup> If an interim measure granted by the arbitral tribunal does not correspond to any form of interim relief under the *lex fori*, the court is required to modify the arbitral tribunal's order so as to make it compatible with the *lex fori*. However, only if the tribunal's order cannot be adapted the court must refuse its assistance to enforce it.<sup>245</sup>

Furthermore, it should be noted, that a court order in terms of art 183 (2) SPILA is a decision in and on itself and not merely a decision enforcing the arbitral tribunal's order.<sup>246</sup> Despite the fact, that the court might adapt the interim measure to make it compatible with the *lex fori*, the court will often have to amend the tribunal's decision by ordering sanctions for the case of non-compliance.<sup>247</sup> On the other hand, the procedure must be distinguished

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<sup>241</sup> For an overview on the legal doctrine cf Sangiorgio, p. 84 ff.

<sup>242</sup> Vischer, art 183 N 16, p. 2020; Sangiorgio, p. 89; Berger/Kellerhans, 1164, p. 409, state that the court may only examine whether the arbitral tribunal abused its discretion and not whether the ordered interim measure is appropriate or functional, subject of course that the *lex fori* provide for such measures.

<sup>243</sup> Cf references in Sangiorgio, p. 86 ff. However, all scholars agree that the cognition of the court should not lead to a new adjudication of the request for interim measures.

<sup>244</sup> Cf eg Berger/Kellerhans, N 1164, p. 409, with further references.

<sup>245</sup> Von Segesser/Kurth, p. 81 f; Berger/Kellerhans, N 1164, p. 409.

<sup>246</sup> Von Segesser/Kurth, p. 81; Frank/Sträuli/Messmer, § 239 N 21, p. 821.

<sup>247</sup> Berger/Kellerhans, N 1164, p. 409.

from the procedure in case a party directly addresses the state judge with a request for interim measure (see IV), because the court's cognition is limited and the court does make a decision on the interim measure itself.

*c) Remedies*

The decision of the court is subject to remedies as provided for by the cantonal and the federal procedural law. On the cantonal level, in canton Zurich, parties may first appeal to the Court of Appeal ('Obergericht'). However, the Court of Appeal does only have cognition whether the assistance by the lower court was justifiable or not, but may not set aside the court's decision because the interim measure was not appropriate or functional. The parties may appeal the Court of Appeal's decision to the cantonal Court of Cassation ('Kassationsgericht') in cases where important rules of cantonal procedural law have been violated. On the federal level, the parties may under certain circumstances appeal the latter's decision to the Swiss Federal Supreme Court, but only on very limited grounds.

*4.3 Enforcement in a country other than Switzerland (where the arbitral tribunal does not have its seat)*

Parties may face the situation that the interim measures obtained have to be enforced outside Switzerland, because generally they chose the seat of the arbitral tribunal in a 'neutral' country, meaning that neither party has its domicile, habitual residence or any assets in this country, nor does the underlying contract foresee any performance duties within this country. Thus, the question arises how to enforce the arbitral tribunal's decision abroad. In a first step it must be considered whether the enforcement may be sought under the national law of the foreign state or whether there is a treaty which provides for enforcement.<sup>248</sup> In a second step the procedural modalities must be taken into account.

*a) Enforcement through national laws*

Arbitral interim measures may be enforced abroad where the law at the place of enforcement allows it.<sup>249</sup> However, only the laws of a minority of

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<sup>248</sup> Yesilirmak, N 6-33, p. 258.

<sup>249</sup> Berger/Kellerhans, N 1183, p. 415.

states permit the enforcement of interim measures issued by an arbitral tribunal abroad.<sup>250</sup>

Against the background of this unsatisfying situation the new art 17 I UNCITRAL Model Law introduces now principle that interim measures ordered by arbitral tribunals shall be recognised and enforced irrespective of the country in which they were issued. Art 17 H UNCITRAL Model Law provides for limited grounds on which recognition and enforcement may be refused. Thus, in countries adapting the (new) art 17 – 17 J UNCITRAL Model Law arbitral decisions on interim measures will be enforceable.<sup>251</sup>

*b) Enforcement through treaties*

There is no multilateral treaty which handles the international or cross-border enforcement of arbitral interim measures.<sup>252</sup> As far as Switzerland is concerned, there is also no such bilateral treaty. Thus, the question remains, whether arbitral orders granting interim measures are enforceable under the New York Convention. However, the New York Convention does not explicitly deal with applications to enforce interim measures.<sup>253</sup> Whether orders or arbitral awards granting interim measures are enforceable under the New York Convention is disputed among legal scholars and there is only little case law on this issue.<sup>254</sup>

Main argument of scholars denying the enforceability under the New York Convention is that decisions on interim measures should or cannot be issued in the form of an interim or partial award and if an arbitral tribunal does so, that the titling of the decision as an award does not make it one for

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<sup>250</sup> Cf Redfern et al, N 7-16; Yesilirmak, N 6-34, p. 258 f, for an enumeration of the national laws which provide for enforcement of foreign interim measures ordered by arbitral tribunals.

However, with regard to Switzerland it must be noted that decisions of foreign arbitral tribunals on interim measures are (like such orders of Swiss arbitral tribunals) not considered to be enforceable decisions. Furthermore, no consensus exists in Swiss legal doctrine whether a foreign arbitral tribunal may apply for assistance under art 183 (2) SPILA. Cf Karrer, p. 108 and Berger/Kellerhans, N 1185, p. 415.

<sup>251</sup> Berger/Kellerhans, N 1183, p. 415.

<sup>252</sup> Yesilirmak, N 6-35, p. 259; Besson, N 563 f., p. 329.

<sup>253</sup> Yesilirmak, N 6-35, p. 259.

<sup>254</sup> Cf Yesilirmak, N 6-35 ff, p. 259 ff, for an overview on the case law.

the purpose of the New York Convention.<sup>255</sup> The difficulty however is that the term 'award' is not defined in the Convention. In general the characteristics of an 'award' as understood under the New York Convention are that the decision is 'final and binding'.<sup>256</sup> Orders on interim measures are in fact binding on the parties but they do in general not finally resolve any points in dispute. Thus, they are unlikely to satisfy the requirements of finality imposed by the New York Convention.<sup>257</sup>

However, some scholars argue in favour of enforceability under the New York Convention, at least under certain circumstances.<sup>258</sup> For instance YESILIRMAK<sup>259</sup> states with reference to the prevailing view in United States of America practice<sup>260</sup> that it is arguable that an interim award on interim measures is final in respect of the issues it deals with, as long as the order disposes of this issue in dispute and as this issue is separable from the remaining issues.<sup>261</sup> The author further states that such a 'pragmatic approach' should be taken, because it is in line with the overall object and purpose of the New York Convention to enhance effectiveness of arbitration through facilitating international enforcement of arbitral decisions, but at the same time he also admits that this view is neither free from criticism nor widely accepted.<sup>262</sup>

Thus, it must be said that – regardless of the broad consensus that there is an actual need for possibilities to enforce interim measures interna-

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<sup>255</sup> Karrer, p. 108; Besson, N 570 ff, p. 333 ff; Redfern et al, N 7-16; Berger/Kellerhans, N 1184, p. 415.

<sup>256</sup> See eg Redfern, p. 45; Berger/Kellerhans, N 1184, p. 415.

<sup>257</sup> Redfern et al, N 7-16; Redfern, p. 45; Yesilirmak, N 6-39, p. 263 f; Blessing, N 874, p. 265, who points out that especially if the test is that the award must be 'final' in the strict sense (with res judicata effect) then the threshold would not be met.

<sup>258</sup> Cf references in Yesilirmak, N 6-39, p. 262 f and FN 112, p. 263; Oetiker, art 26 N 19, p. 236.

<sup>259</sup> Yesilirmak, N 6-41, p. 265.

<sup>260</sup> With regard to this view cf *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y.).

<sup>261</sup> See Oetiker, art 26 N 19, p. 236 with further references, who states that enforceability 'may subsist (i) if the measure requested is covered by the parties' agreement to arbitrate (in order to avoid the ultra petita-defence pursuant to art V (1) (c) New York Convention) and (ii) if the decision cannot be changed by the arbitrators during the proceedings so that it may be regarded as binding.'

<sup>262</sup> Yesilirmak, N 6-41, p. 265.

tionally – the advocacy for the enforceability under the New York Convention rather pertains to some 'wishful thinking' as BLESSING<sup>263</sup> points it out with regard to those arbitration rules, which – with the same intent – allow the issue of interim measures in the form of awards.

*c) Direct application to foreign courts by the parties or by the arbitral tribunal*

Another question is how to proceed if an interim measure must be enforced abroad. Does the arbitral tribunal have to apply for enforcement of the interim measure or may the parties directly address the foreign court? The answer depends of course also on the law at the forum where the interim measure shall be enforced. However, neither the Swiss law nor the ICC Rules or the Swiss rules do determine how to proceed in such a case. Thus, subject to the law at the place of enforcement, there are different approaches to be considered.<sup>264</sup> Either the tribunal or a party can directly address the competent foreign court. Another opportunity is to apply for enforcement by means of judicial assistance. According to VISCHER<sup>265</sup> the arbitral tribunal may request the competent court at the seat of the tribunal for assistance and the latter will then have to request judicial assistance by means of a rogatory request from the competent foreign court. However, in general judicial assistance procedures are time consuming and thus, do not meet the demands of a party seeking interim relief.<sup>266</sup>

*d) Conclusion*

Because of these difficulties and uncertainties with regard to the recognition and enforcement of interim measures, the party requesting interim measures, which have to be enforced outside Switzerland, will often be well advised to request the measures directly with the competent court at the place of enforcement. However, this might by virtue of the applicable law or any agreements to the contrary not always be possible.

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<sup>263</sup> Blessing, N 875, p. 265.

<sup>264</sup> For an overview cf Berger/Kellerhans, N 1162, p. 408, with further references.

<sup>265</sup> Vischer, art 183 N 10, p. 2018 f.

<sup>266</sup> Berger/Kellerhans, N 1162, p. 408.

## IV. Interim measures by courts in canton Zurich in aid of an arbitral proceeding

### 1 Introduction

Subject to any agreement to the contrary and any restriction in the applicable arbitration rules, the parties may at any stage of the arbitral proceeding address the national courts with a request for interim measures. To apply for interim measures before the competent court bears advantages and disadvantages compared with a request before the arbitral tribunal.

However, as already mentioned parties to arbitration with seat in Switzerland will often face a situation that they have to directly address courts outside Switzerland in order to obtain interim measures, because the assets they want to have attached or the place of performance is not located in Switzerland. Notwithstanding these circumstances I will focus in this thesis on court procedure in Switzerland, respectively in canton Zurich.<sup>267</sup>

It would be beyond the scope of this thesis to illustrate the court procedure in details. Purpose of this chapter is to bring out some of the advantages and disadvantages related to a request for interim measures before the state courts a party should consider before addressing either the arbitral tribunal or the state courts.

### 2 Venue

As set out under II.2.2 courts do have concurrent jurisdiction to order interim measures under Swiss law, even if art 183 SPILA does not provide for explicitly. Contrary to other provisions governing international arbitration<sup>268</sup> art 183 SPILA does not determine the venue where a party has to apply for interim measures before the state court. Dissenting opinions<sup>269</sup> are found in

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<sup>267</sup> As mentioned above (see II.2.1), there are 26 differing cantonal Codes of Civil Procedure. In this thesis, I will only refer to the Code of Civil Procedure of the canton Zurich.

<sup>268</sup> Art 184 (2) SPILA states for instance that if assistance of a state judiciary authority is necessary for the taking of evidence, it is the state judge *at the seat of the arbitral tribunal* which is competent.

<sup>269</sup> Cf Berger/Kellerhans, N 1161, p. 407; Walter/Bosch/Brönnimann, p. 150 f; Von Segesser/Kurth, p. 85 f, all with further references to Swiss legal doctrine. While some authors directly apply art 185 SPILA which provides for a venue at the seat of the arbi-

Swiss legal doctrine on how to interpret art 183 SPILA respectively based on which other provisions the venue must be determined. However, according to most scholars the court at the place where the interim measure has to be enforced has jurisdiction.<sup>270</sup> Furthermore, quite a few scholars argue in favour of an alternative venue at the seat of the arbitral tribunal.<sup>271</sup>

As mentioned above, the subject-matter jurisdiction ('sachliche Zuständigkeit') and the procedure are determined by cantonal procedural law.

### 3 Statutory provisions

The legal situation with regard to interim measures in Switzerland is quite complex, because there are no general provisions regulating interim measures. In contrary, various provisions concerning this issue can be found in federal law<sup>272</sup> and in cantonal law.

The prevailing view in Swiss legal doctrine is that Swiss federal law (substantive law) determines whether a valid cause of action for interim measures exists or not,<sup>273</sup> whereas the cantonal law (procedural law) should only determine the procedure to obtain interim measures and which kind of interim measure shall be applied.<sup>274</sup> However, the Swiss Federal Supreme Court follows a dualistic approach.<sup>275</sup> According to the Swiss Federal Su-

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tral tribunal, others do apply art 10 SPILA and art 24 of the Lugano Convention (respectively the EU Regulation 44/2001 [the former Brussel Convention]) which both state that Swiss courts have jurisdiction even in cases where they have no international jurisdiction to decide the action on the merits. Furthermore, some authors apply art 33 of the Swiss Act on Jurisdiction in Civil Matters by analogy, which provides that *'the court that has jurisdiction on the claim on the merits or the court at the place of where the provisional measure must be enforced'* has jurisdiction to grant interim measures.'

<sup>270</sup> Berger/Kellerhans, N 1161, p. 407; Walter/Bosch/Brönnimann, p. 150 f; Von Segesser/Kurth, p. 85 f; Berti, N 5, p. 429; Vischer, art 183 N 9, p. 2018; Rüede/Hadenfeldt, p. 254.

<sup>271</sup> Walter/Bosch/Brönnimann, p. 150 f; Berger/Kellerhans, N 1161, p. 407.

<sup>272</sup> For instance, detailed regulation is found in art 28 ff Civil Code. These provisions regulating the civil libel actions and also providing for interim measures are often referred to in other acts and statutory provisions.

<sup>273</sup> Frank/Stäuli/Messmer, § 110 N 2; Vogel/Spühler, chapter 12 N 203 ff.

<sup>274</sup> Vogel/Spühler, chapter 12 N 205 ff, with further references; Frank/Stäuli/Messmer, § 110 N 3, p. 386 f.

<sup>275</sup> Cf DFT 103 II 5 and DFT 104 II 179.

preme Court the cantonal law regulates interim measures aimed at securing the status quo (as long as the federal legislator did not provide for regulations).<sup>276</sup> On the other hand, interim measures which deprive or provide a party with rights for the duration of the proceeding must find a legitimation in Swiss federal law. However, such a request for interim measures can also be based on 'unwritten federal law'.

Under the cantonal Code of Civil Procedure in Zurich (CCP) one has to distinguish between interim measures requested *before* the main action respectively the claim on the merits has been submitted *or is pendent* at another venue (§ 222 (3) CCP) and interim measures requested *during* a procedure (§ 110 CCP). In the latter case the judge or court concerned with the claim on the merits is competent to order interim measures, whereas under § 222 (3) CCP the parties have to address the single judge and a summary procedure applies ('Einzelrichter im summarischen Verfahren').

With regard to an arbitral proceeding, if the request for interim measures is submitted *before* the arbitral tribunal has been established, § 223 (3) CCP will be applicable. Another question is which provision applies in cases where a party addresses the state judge *during* a pending *arbitral proceeding*. In my opinion, § 110 CCP is not applicable because there is no 'state judge or court' concerned with the claim on the merits.<sup>277</sup> However, this question is of minor importance, as the requirements to obtain an interim measure under both § 110 CCP and § 222 (3) CCP are the same.<sup>278</sup>

According to § 222 (3) CCP the judge may order an interim measure

*'in order to avoid a not easily remediable harm or injury, which would result among other reasons if the status quo would be altered and the party provides prima facie evidence for such allegations and a proceeding on the claim on the merits is not yet pending or pending at different venue.'*

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<sup>276</sup> Vogel/Spühler, chapter 12 N 207.

<sup>277</sup> One could also argue that § 223 (3) CCP should be applied by analogism like in those cases where a court proceeding on the merits is pendent at a venue outside the canton Zurich and the concerned court may not order interim measures or the respective interim measures would not be enforceable within the canton Zurich. Cf Frank/Srtäuli/Messmer, § 222 N 30a, p. 743.

<sup>278</sup> Frank/Sträuli/Messmer, § 222 N 34, p. 744.

#### 4 Interim measures available to courts in canton Zurich

As mentioned above (see III.2.3) the Swiss state courts' range of potential interim measures is narrower than that of an arbitral tribunal with seat in Switzerland. The Swiss judge can only order interim measures which the Swiss law provides for.<sup>279</sup> To determine the respective kind of interim measure the judge will have to consider both, federal law and the cantonal law.

However, according to BERGER/KELLERHANS<sup>280</sup> the state judge should take into account that the dispute on the merits is pendent before or will be brought before an arbitral tribunal. Thus, when deciding on the requested interim measures, the judge should also consider whether a possible interim measure is also known to the *lex causae*<sup>281</sup>.<sup>282</sup>

As stated above with regard to the arbitral tribunal, it is also not possible to enumerate the interim measures available to courts under Swiss law. However, some cantonal codes enumerate different categories of interim measures others simply state that the judge may order 'appropriate measures'.<sup>283</sup>

§ 223 CCP states that the judge may order a person to undertake or refrain from undertaking a certain act combined with the threat of a specific sanction in case of non-compliance.<sup>284</sup> Furthermore, the judge may order the seizure of objects<sup>285</sup>, the blocking of public registries ('Registersperre') or assign a third person to attend a party's interests. Beside that, some further interim measures can be found in the federal law.<sup>286</sup> However, if the re-

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<sup>279</sup> Wirth, p. 42; Berger/Kellerhans, N 1175, p. 412. The arbitral tribunal on the other hand may go beyond and apply alternatively the *lex fori*, the *lex causae* or the *lex executionis*.

<sup>280</sup> Berger/Kellerhans, N 1175, p. 412.

<sup>281</sup> In any case, the state court has to refer to the *lex causae* when considering the possibility that the party requesting the interim measure will succeed on the merits (see also III.3.2b).

<sup>282</sup> Cf also Wirth, p. 42, who seems to be of the opinion that the state court can – at least in some circumstances – apply the *lex causae* beside the *lex fori*.

<sup>283</sup> Spühler/Vogel, chapter 12 N 214 ff.

<sup>284</sup> With regard to the possible sanctions see IV.5.5.

<sup>285</sup> As stated above, the seizure of objects is not possible if such a measure aims at securing the enforceability of monetary claims (see III.2.5a). However, the court may, for instance, order the seizure of goods in dispute.

<sup>286</sup> See IV.3.

requested type of measure is neither provided for by federal nor by cantonal law, the judge can not order such measures. This is for instance the case with antisuit injunctions.<sup>287</sup> Furthermore, one must remember, that interim measures aimed at securing the enforceability of a monetary claim are governed exclusively by the federal law (Swiss Debt Enforcement and Bankruptcy Act).<sup>288</sup>

Probably the most important difference between possible interim measures an arbitral tribunal and the judge can order is that the latter has the power to address third parties not being party to the arbitration agreement respectively the court proceedings. This means that a third party will be bound by the judge's order. Thus, in all those cases where a third party is or must be involved in order to achieve the purpose of a certain interim measure the parties have to refer to the state court.

## 5 Procedural aspects

### 5.1 *General Requirements which must be fulfilled*

The procedural requirements in terms of § 222 (3) CCP do not differ from those required in an arbitral proceeding (prima facie jurisdiction, reasonable possibility of success on the merits, prima facie evidence of risk of irreparable harm or injury, urgency requirement and appropriate security if requested).<sup>289</sup>

Interim measures aiming to preserve evidence are governed by §§ 231 ff CCP. In contrary to interim measures in accordance with § 222 (3) CCP the applicant does only have to provide prima facie evidence that the taking of the evidence at a later stage is endangered, but does not have to establish reasonable possibility of success on the merits.<sup>290</sup>

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<sup>287</sup> Stacher, Prozessführungsverbote, p. 61 ff and p. 78 N 56.

<sup>288</sup> Cf III.2.5a)III.2.5a.

<sup>289</sup> See III.3.2 and Wirth, p. 42; Vogel/Spühler, chapter 12 N 208 ff.

<sup>290</sup> Cf Spühler/Vogel, chapter 12 N 202.

## 5.2 Decision on the court's jurisdiction

Like the arbitral tribunal also the judge requested to order interim measures rules on its own jurisdiction (principle of 'Kompetenz-Kompetenz'). Complications arising from the concurrent jurisdiction of the arbitral tribunal and the competent judge will be discussed in chapter V.

## 5.3 Ex parte orders

As pointed out earlier (see III.3.4) it is questionable whether arbitral tribunals have the power to grant interim measures on an ex parte basis and even if they do so, there are further circumstances as for instance the lack of power to enforce the measures, which may lead to a party's decision to address the state judge instead, if an ex parte order is needed.

According to § 224 CCP which refers to § 110 (2) CCP the judge may grant an interim measure on an ex parte basis, if the requesting party provides prima facie evidence that the granting of the interim measures is of utmost urgency and all the other requirements<sup>291</sup> are fulfilled.

If an ex parte order is issued, the respondent has the possibility to submit an objection within ten days. The ex parte order will be abolished if the respondent submits an objection, unless the judge ordered otherwise in the ex parte order (§ 224 (3) CCP). In case the respondent does *not* object within ten days, the order becomes enforceable (§ 224 (2) CCP). In case of an objection the judge has to summon the parties and a hearing will take place.<sup>292</sup>

However in most cases when an interim measure is granted on an ex parte basis it will make sense that the ex parte order is declared enforceable irrespective of a potential objection by the respondent.<sup>293</sup> If the judge does so, the requested interim measure will normally only be granted subject to appropriate securities being furnished by the applicant (see IV.5.4).

If an ex parte order is declared enforceable irrespective of a potential objection of the respondent it will stay in place until the judge makes its final

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<sup>291</sup> See IV.5.1.

<sup>292</sup> Frank/Stäuli/Messmer, § 224 N 2a, p. 748.

<sup>293</sup> Walder-Richli, N 23, p. 364.

decision on the requested interim measures after having heard both parties.<sup>294</sup> If an arbitral proceeding is already pending the ordered interim measures – depending of course on their purpose – will stay in place until the final award has become binding on the parties, subject to a modification or a reversal by the judge or the arbitral tribunal (see V.2.2). On the other hand, if the interim measures are requested and granted prior to an arbitral proceeding, the judge will oblige the applicant to file the action on the merits within a specific period and declare that the decision on the interim measures will be abolished in case the applicant fails to do so (§ 228 CCP). Because in an arbitral proceeding first the tribunal has to be established the applicant should not be obliged to file a statement of claim or any similar document within a specific period, but to take the necessary steps to initiate the arbitral proceeding.

It is worth mentioning that so called attachment orders are also issued on an ex parte basis but do not fall under this provision. As stated above (see III.2.5a) the issuance of attachment orders is exclusively governed by art 271 ff of the Swiss Debt Enforcement and Bankruptcy Act.

#### 5.4 Security

According to art 183 (3) SPILA not only the arbitral tribunal but also the judge may make the granting of interim measures subject to appropriate securities. According to BERGER/KELLERHANS<sup>295</sup> this provision applies to both the judge acting in assistance for the arbitral tribunal according to art 183 (2) SPILA<sup>296</sup> and to the judge being directly addressed by a party with a request for interim measures. In my opinion it might at least be questionable whether the said provision applies in the latter too. As mentioned under II.2.2 the judge's power to order interim measures is not expressly stated in art 183 SPILA. Thus, it would not make sense to assume that the legislator intended to explicitly empower a judge to order that appropriate security must be pro-

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<sup>294</sup> The ex parte order will 'automatically' become a final decision with regard to the requested interim measures if the respondent does not object.

<sup>295</sup> Berger/Kellerhans, N 1176, p. 413.

<sup>296</sup> See III.4.2.

vided without explicitly empowering the same judge to order the interim measures in question.

However, as mentioned above (see IV.3), there are various provisions in the Swiss federal law which provide a legal basis to order interim measures. Normally these provisions also regulate whether the applicant can be obliged to furnish appropriate security or not.<sup>297</sup> In those cases where the legal basis is found in the cantonal law § 227 (1) CCP does also provide for the possibility to make the granting of interim measures subject to appropriate securities, but only if the respondent requests so.<sup>298</sup> Apart from that, the judge's decision is subject to the same requirements like an arbitral tribunal's decision on this issue (see III.3.5).

In addition § 227 (2) CCP states that the judge may decide not to order the requested interim measure or revoke an already granted interim measures if the *respondent* provides for appropriate security. However, there are only few cases where the purpose of the interim measure can also be achieved by merely providing appropriate security.<sup>299</sup>

## 5.5 Sanctions

The judge may only order sanctions provided for by the *lex fori*. As the purpose of interim measures and the factual circumstances may vary from case to case the judge has to determine in every single case, which kind of sanction is appropriate. Determining which sanction to choose, the judge must also give regard to the respondent's interest and thus, if different sanctions would serve the purpose, order the one which is the 'mildest' from the respondent's perspective. The sanctions a judge may order under the law of the canton Zurich are determined exhaustively in §§ 304 ff CCP.<sup>300</sup> This includes the threat of administrative fines payable to the state, threat of pun-

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<sup>297</sup> Frank/Sträuli/Messmer, § 227 N 1, p. 752.

<sup>298</sup> However, if interim measures are ordered on an *ex parte* basis and declared enforceable immediately and irrespective of a potential objection by the other party, the judge may make the granting subject to appropriate securities on its own motion.

<sup>299</sup> Frank/Sträuli/Messmer, § 227 N 3, p. 753.

<sup>300</sup> Frank/Sträuli/Messmer, § 223 N 2, p. 746.

ishment in terms of art 292 Swiss Penal Code<sup>301</sup>, threat of substitute performance by third parties ('Ersatzvornahme'), the enforcement by means of coercion ('Zwangsvollzug') and in case the respondent's declaration of intention is necessary in order to achieve the purpose of the interim measure the substitution of the declaration by means of the judge's decision.

Like the interim measure itself, which may be directed to third parties not being involved in the arbitral procedure respectively not being party to the arbitration agreement, the judge is empowered to combine orders with sanctions against third parties in case of non-compliance.

## 5.6 Costs

The general principle is that the unsuccessful party shall bear the costs. The judge may, however, differ from this principle in special circumstances.<sup>302</sup>

With regard to the costs for decisions on interim measures it must be distinguished between the situation where interim measures are requested prior to the filing of the action on the subject matter and those requests while a dispute on the subject matter is already pending. However, in both cases no problems occur if the requested interim measures are not granted. In these cases the requesting party has to bear the cost of the proceeding and to reimburse the respondent for its legal costs.<sup>303</sup> The situation is different if the interim measures are granted. As most of the interim measures aim at securing a status quo or are regulating the parties' rights respectively their legal relationship on a temporary basis until the final award is rendered, one might normally only assess whether the adjudication of the prima facie case was correct and thus, the interim measures was justified or not, once the final award is rendered.

If the action on the subject matter has already been filed, the judge or court having jurisdiction with regard to this action and accordingly also with

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<sup>301</sup> See III.3.6.

<sup>302</sup> Cf § 64 CCP.

<sup>303</sup> The compensation for the legal costs of the succeeding party will normally not cover the actual expenses, because the compensation is calculated according to a tariff schedule and not based on the actual expenses.

regard to the request for interim measures, will normally rule that the costs for interim measures will be awarded in the final judgement, subject to extraordinary circumstances. However, if the dispute on the subject matter is pending before an arbitral tribunal the judge will not have this possibility respectively will not be willing to do so, because it would be in the sole discretion of the arbitral tribunal to make sure that the state court will get compensated. Thus, in these cases the judge is facing a similar situation as if a party is requesting interim measures prior to the constitution of the arbitral tribunal or prior the action on the subject matter has been filed with a court.

For this reason, the judge will in the latter cases normally order that the requesting party has to advance the costs for the court proceeding for the time being subject to a different allocation in the final award.<sup>304</sup> The costs will become due as soon as the decision becomes binding on the parties. If the arbitral proceeding is not yet pendent and the judge obliged the applicant to take the necessary steps to initiate the arbitral tribunal within a certain period (see III.3.4) and the applicant fails to do so, the provisional decision on the cost will become binding and the applicant has to bear the costs definitely. Furthermore, the judge may in their decision on the interim measures also provisionally determine the reimbursement for the legal costs of the opposing party. The said amount will then also be subject to a different allocation in the final award, but will become due at an earlier stage if the applicant fails to initiate the arbitral proceedings within the ordered period.

## 5.7 Remedies

Whether parties do have remedies against the decision of the state judge must be determined according to the *lex fori*.<sup>305</sup> Against the single judge's decision on interim measures in accordance with § 222 (3) CCP the parties may appeal to the Court of Appeal of the canton Zurich (§ 272 CCP; 'Rekurs'), but only if the value in dispute exceeds Swiss francs 8,000.<sup>306</sup>

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<sup>304</sup> Cf Frank/Stäuli/Messmer, § 222 N 27b, p. 742 and § 67 N 5, p. 301. The same concept applies for procedures before the appellate courts.

<sup>305</sup> Berger/Kellerhans, N 1174, p. 412.

<sup>306</sup> Cf § 272 (1) CCP and § 1 of cantonal Ordinance on the Adaptation of the Cantonal Law to the Federal Supreme Court Act (Zürcher 'Verordnung über die Anpassung des kantonalen Rechts an das Bundesgerichtsgesetzes).

Against the latter's decision the parties can bring an appeal for nullity ('Nichtigkeitsbeschwerde') before the Court of Cassation in cases where important rules of cantonal procedure law have been violated (§ 281 CCP). Furthermore, the parties may – under certain circumstances<sup>307</sup> – file an appeal to the Swiss Federal Supreme Court. However, the Swiss Federal Supreme Court only has cognition to review the decision with regard to the question whether rights granted by the constitution have been violated.<sup>308</sup>

Thus, compared with a decision on interim measures by an arbitral tribunal against which no remedy exists (see III.3.9), parties have more possibilities to delay and extend the proceeding in case of a proceeding before the judge. However, if the very purpose of an interim measure requires that the measure is enforceable irrespective of a potential remedy<sup>309</sup> the judge and also the appellate courts may divest the objection's respectively the appeal's suspensive effect, either on a party's request or on their own motion. Thus, if the appeal has been deprived of its suspensive effect, the appeal procedure might bind the parties' resources and be costly but does not affect the effectiveness of the interim measure.

On the other hand, the finality of the arbitral tribunal's order only rounds to a party's advantage if the opposing party voluntarily complies with the measures ordered. If the state court's assistance in terms of art 183 (2) SPILA is needed to enforce the interim measures, the latter's decision is also subject to remedies (see III.4.2c).

## 6 Enforcement of court orders

In Switzerland cantons are competent to regulate the enforcement of civil judgements issued within their own territory. Swiss federal law grants the

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<sup>307</sup> Cf for instance decision of the Swiss Federal Court from 26 June 2007 (5A\_181/2007), where the decision on interim measures of the court of appeal in canton Aargau was considered to be a 'final decision' and thus, to be subject to an appeal to the Swiss Federal Supreme Court.

<sup>308</sup> Cf art 98 Federal Supreme Court Act.

<sup>309</sup> For instance, this might be the case if the interim measure aims at securing the status quo by prohibiting the other party to sell the object in dispute.

inter-cantonal enforcement of civil judgements within the territory of Switzerland.<sup>310</sup>

The question whether or not an order on interim measures is enforceable in another canton or even in a foreign country normally only arises if the request for interim measure is requested at the place where the arbitral tribunal has its seat and not at the place of enforcement.<sup>311</sup>

### *6.1 Enforcement of orders on interim measures by Swiss courts in Switzerland*

Orders on interim measures differ from judgements on the merits because the former are subject to modification and thus, not 'final' in a strict sense.<sup>312</sup> Notwithstanding this fact, an order on interim measures is enforceable within the canton where it has been issued and in other cantons like civil judgements.<sup>313</sup> Thus, the enforcement of orders on interim measures within Switzerland does not cause any problems.

As pointed out earlier the enforcement of monetary claims and interim measures aimed at securing the enforcement of monetary claims, like attachment orders, is exclusively governed by the Swiss Debt Enforcement and Bankruptcy Act.<sup>314</sup> Thus, a different proceeding applies.

### *6.2 Enforcement of orders on interim measures by Swiss courts in foreign countries*

Whether or not interim measures ordered by Swiss courts respectively by Swiss judges are enforceable in foreign countries depends on the applicable law at the place of enforcement.

However, within the scope of application of the Lugano Convention orders on interim measures are enforceable if the requirements for recognition

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<sup>310</sup> Spühler/Vogel, chapter 15 N 3 f.

<sup>311</sup> However, there might be situations, where the application for interim measure is made to the court at the (respectively at a) place of enforcement but the interim measures also have to be enforced in other cantons.

<sup>312</sup> Spühler/Vogel, chapter 15 N 15 f.

<sup>313</sup> Vogel/Spühler, chapter 15 N 15.

<sup>314</sup> See also III.2.5a and III.3.4.

of a judgement are fulfilled. One of these requirements is that the parties' right to be heard has been complied with. Thus, ex parte orders are in general not enforceable under the Lugano Convention.<sup>315</sup>

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<sup>315</sup> Cf Vogel/Spühler, chapter 15 N 15b; However, there are dissenting opinions on this issue in legal doctrine. Cf references to the differing views in the decision of the Swiss Federal Supreme Court from 30 Juli 2003 (DFT 129 III 626 ff). The Swiss Federal Supreme Court declared an order rendered in England on an ex parte basis enforceable. The said ex parte order modified a freezing injunction under English law which was issued in an earlier procedure. The respondent was heard only in the procedure leading to the original decision but not in the procedure where the freezing injunction was modified. This decision of the Swiss Federal Tribunal was criticised. See Dasser, p. 3 ff.

## V. Selected questions with regard to concurrent authority

### 1 Introduction

Due to the concurrent jurisdiction of the arbitral tribunal and the state courts to order interim measures, a party may be tempted to file simultaneous applications before both judicial bodies or after failing to obtain the desired interim relief from one authority to try to obtain a more favourable ruling from the other judicial body.<sup>316</sup> Hence, to eliminate such behaviour, rules must be defined to deal with it.

### 2 Parallel request for interim measures submitted to an arbitral tribunal and to the state court

#### 2.1 Consequences in case of identical request to the arbitral tribunal and the court

In Swiss legal doctrine it is widely accepted that the principles of *lis pendens* and *res judicata* do not apply to interim measures.<sup>317</sup> Thus, the concurrent authority of the arbitral tribunal and the judge may lead to conflicting orders if a party requests identical interim measures from both bodies.<sup>318</sup> According to OETIKER<sup>319</sup> this consequence has to be accepted to some extent.

Nevertheless, to prevent conflicting decisions and to promote adjudicative efficiency the prevailing view in Switzerland is that the competence to order the measures is deemed to lie with the body with which the request has first been filed.<sup>320</sup> This principle shall also apply, if the state court was only requested first because of the fact that the arbitral tribunal was not yet constituted. Even in such cases the state court will retain jurisdiction.<sup>321</sup>

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<sup>316</sup> Von Segesser/Kurth, p. 86.

<sup>317</sup> Besson, N 438 f, p. 260; Von Segesser/Kurth, p. 86 with further references.

<sup>318</sup> Oetiker, art 26 N 30, p. 239.

<sup>319</sup> Oetiker, art 26 N 30, p. 239.

<sup>320</sup> Wirth, p. 43; Berger/Kellerhans, N 1169, p. 411; Von Segesser/Kurth, p. 86; Walter/Bosch/Brönnimann, p. 147; Geisinger, p. 382.

<sup>321</sup> Walter/Bosch/Brönnimann, p. 147; Berger/Kellerhans, N 1166, p. 410; Wirth, p. 43 Dissenting Rüede/Hadenfeldt, p. 252.

However, some scholars do acknowledge an exception to the exclusionary competence of the judicial body which was first approached where an order is sought on an *ex parte* basis. It is argued that under these circumstances the state court shall have always priority, even if the arbitral tribunal was approached first.<sup>322</sup>

If an actual conflict nevertheless arises and conflicting orders are issued, the interim measure ordered by the tribunal should usually be given priority, unless there are valid reasons for the court's order to prevail (eg issues of enforcement or *ex parte* orders).<sup>323</sup>

## 2.2 *Modification of interim measures*

Another question is whether the arbitral tribunal has the right to modify or reverse interim measures ordered by the state court and vice-versa. Despite the fact that the principle of *res judicata* does not apply to interim measures, a party whose request has been (partly) dismissed by the court or the arbitral tribunal should not have a second chance to obtain the identical interim measure from the other judicial authority.<sup>324</sup> Thus, if interim measures were already granted or declined by a competent judicial body, an arbitral tribunal or court addressed at a later stage should not give the party a second chance to modify the decision of the first authority if (i) the request is identical to the earlier request, (ii) the facts and evidence submitted are the same, (iii) the same or equivalent standards in deciding on the application for interim relief would be applied and (iv) due process was granted in the earlier proceedings.<sup>325</sup>

However, a second chance to apply for interim measures or a request to modify such measures would be appropriate if new facts had arisen since the first decision or if new evidence had become available.<sup>326</sup> If this is the

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<sup>322</sup> Vischer, art 183 N 4, p. 2017; Wirth, p. 43; Berger/Kellerhans, N 1169, p. 411.

<sup>323</sup> Oetiker, art 26 N 30, p. 239; Besson, N 440, p. 260.

<sup>324</sup> Von Segesser/Kurth, p. 86; Walter/Bosch/Brönnimann, p.147; Berger/Kellerhans, N 1170, p. 411.

<sup>325</sup> ICC Procedural Order of 2 April 2002 in [2003] ASA Bull, p. 810; Oetiker, art 26 N 30, p. 239; Von Segesser/Kurth, p. 86.

<sup>326</sup> ICC Procedural Order of 2 April 2002 in [2003] ASA Bull, p. 810.

case, the parties would be free to address either the arbitral tribunal or the court, irrespective of the judicial body that has granted or declined the interim measure in the first place.

In some cases the parties may even have to request the modification of the interim measures from the other judicial body. For instance, if a party to an ICC arbitration obtained interim relief from the court because the arbitral tribunal was not yet established (respectively the file had not yet been transmitted to the arbitral tribunal<sup>327</sup>), the party seeking modification or reversal of the ordered measures based on new facts at a later stage of the proceeding, might have to address the arbitral tribunal<sup>328</sup>, after the latter has been established (see II.4.1).

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<sup>327</sup> See art 23 (2) ICC Rules.

<sup>328</sup> According to art 23 (2) ICC Rules, after the file has been transmitted to the arbitral tribunal, the parties may only address the state court in appropriate circumstances.

## VI. Conclusion

As mentioned in the introduction, parties confronted with the need for interim measures in international arbitration proceedings, have to consider a broad spectrum of aspects. Summarized it can be said, that they have to take into account especially the following considerations:<sup>329</sup>

First of all the parties have to consider whether they are allowed to apply to the judicial authority they want to or if the applicable arbitration rules, any agreement between them or the *lex arbitri* restrict their free choice (see II.2, II.3 and II.4).

If the arbitral tribunal is not yet established and the matter is urgent, the request has to be submitted to the state judge (see III.3.1) unless the parties agreed on a pre-arbitration proceeding like the ICC Rules for a Pre-Arbitral Referee Procedure (see III.2.6).

If the matter is of utmost urgency and the purpose of the requested interim measure is to have a surprising effect, the only promising option will be to apply to the state authority to issue an *ex parte* order (see IV.5.3). Because of the arbitral tribunal's lack of enforcement power, the latter would have to apply to the state authority for assistance in order to enforce the measure and this can only be done after the opposing party has been notified and does not voluntarily comply with the interim measure ordered (see III.3.4 and III.4). Furthermore, under certain arbitration rules, it is at least questionable whether the arbitral tribunal does have the power at all to issue *ex parte* orders.<sup>330</sup>

On the other hand, there are good reasons for a party to apply to the arbitral tribunal. The arbitral tribunal might already have dealt with the case extensively at the time the request for interim measures is made and thus, be familiar with the facts. Applying to the arbitral tribunal may also reduce the risk that interim measures are ordered which subsequently turn out to be incompatible with the holdings in the final award.<sup>331</sup> Beside the knowledge of

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<sup>329</sup> Cf Wirth, p. 44 f.

<sup>330</sup> With regard to the ICC Rules see III.3.4.

<sup>331</sup> Wirth, p. 44 f.

the case the technical or business knowledge of the arbitrators might be of great importance in order to find a fair decision. Furthermore, the parties might have a prevailing interest in the confidentiality of the proceedings and thus, want to have the arbitral tribunal to deal with the request. However, confidentiality will only be achieved if the parties comply with the arbitral order voluntarily and there is no need to seek the assistance of the state judge for enforcement.<sup>332</sup> Furthermore, the variety of interim measures available to the state authority is narrower than the one available to arbitral tribunals (see III.2 and IV.4), but there are also some limitations of great importance. Arbitral tribunals may not issue interim measures obliging third parties (see III.2.6) and the cross-border enforcement of interim measures is still questionable (III.4.3).

Especially the concerns with regard to the international enforcement of interim measures ordered by arbitral tribunals will – in those cases where a party cannot count on the voluntary compliance by the other party – often lead to the conclusion that it will be more advantageous to address the state courts instead of the arbitral tribunal. Numerous discussions took place among scholars how to achieve the desired enforceability. As it seems to be illusionary to dream of the possibility of amending the New York Convention, other solutions have to be found.<sup>333</sup> Against this background the recently adopted provisions in the UNCITRAL Model Law<sup>334</sup> may be certainly a first step in the right direction.

To sum it up, as today one must state that there is no generally applicable advice for parties which path to choose, meaning whether to apply to the state court or the arbitral tribunal. The right solution – if there is one at all – rather must be determined by considering various points of relevance, which vary from case to case.

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<sup>332</sup> Note that under Swiss law it is possible to exclude the state courts authority to adjudicate on requests for interim measures but not the latter's power to assist to enforce interim measures ordered by an arbitral tribunal II.3.3.

<sup>333</sup> Blessing, N 875 f, p. 265.

<sup>334</sup> Cf art 17 H and art 17 I UNCITRAL Model Law.

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