**Hong Kong Vis East Moot Annual Lecture:**
***"Interim Measures in Arbitration:***
***Surprise Attack or Offensive Defence?"***
**by Ms Teresa Cheng, SC**
**Secretary for Justice**
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## A. Importance of interim measures in arbitration

In 1978, the American scholar John Leubsdorf, in a landmark article in the Harvard Law Review, described interim injunctions as "the most striking remedy wielded by contemporary courts".[1]

The UK White Book comments that:

> "*Cases can arise in which, as a practical matter, the grant or refusal of an injunction at the interlocutory stage will, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. … In some instances, the hearing of the application for interlocutory relief may well,*

[1] John Leubsdorf, 'The Standard for Preliminary Injunctions' (1978) 91 Harv L Rev 525.

*in practice, be determinative of the dispute between the parties, … because, taking a commercial view, the court's decision at the hearing renders it not worthwhile for the unsuccessful party to continue to prosecute or defend (as the case may be) the action."*[2]

Of course, interim relief is not confined to injunctions. Interlocutory court proceedings, an important part of which being fighting for and resisting interim relief, are sometimes known as "interlocutory warfare".

While these comments have been made in the context of traditional court litigation, one may argue that the intensity and complexity of such warfare at least double in the arbitration scene. In arbitration, interim measures may be granted by arbitral tribunals and by national courts. Therefore, many parties have to face a two-front warfare. Indeed, for international arbitration involving the interplay between the

[2] UK White Book 2018, Vol. II, para. 15-18.

arbitral tribunal and the courts of multiple jurisdictions, it may become a multiple-front warfare. The intricacies arising from competing and overlapping jurisdictions will increase the complexity of the warfare exponentially. For parties to arbitration and their lawyers, the importance of knowing how to take advantage of interim measures strategically cannot be overstated. It is no exaggeration to say that, in some cases, successful application for interim measures (or otherwise) may make or break the whole arbitration, even leading at times to early settlement or abrupt end of the dispute.[3]

The title of this lecture is "Interim Measures in Arbitration: Surprise Attack or Offensive Defence?". You would probably appreciate the element of "surprise attack" in some interim measures. On the other hand, "offensive defence" refers to the tactic that an offensive, in the form of making the first strike, is sometimes your best defence. This may remind you of the theory of "pre-emptive self-defence" which remains a

[3] Geoffrey Ma and Neil Kaplan (ed.), *Arbitration in Hong Kong: A Practical Guide* (Sweet & Maxwell, 2003), p. 346, para. 13-02.

controversial area in international law. I may also share with you the wisdom of Master Sun Tzu (孫子), the famous Chinese military strategist, in his classic treatise on "The Art of War" written some 2,500 years ago:

> "*Attack him where he is unprepared, appear where you are not expected*."("攻其無備，出其不意。")[4]

On the other hand, if a party may face the offensive, it is equally important to know the other side. Again, Master Sun Tzu said:

> "*If you know the enemy and know yourself, you need not fear the result of a hundred battles.*" ("知彼知己，百戰不殆。")[5]

## B. Types of interim measures

Next, I will talk about different types of interim measures one may get. They are the "weapons" in your "interim measures arsenal". The starting point is Article 17 of the 2006 version of

[4] Translated by Lionel Giles: http://classics.mit.edu/Tzu/artwar.html
[5] Translated by Lionel Giles: http://classics.mit.edu/Tzu/artwar.html

the UNCITRAL Model Law on International Commercial Arbitration (Model Law) which sets out four different types of interim measures:

**2006 Model Law:**

***Article 17 Power of Arbitral Tribunal to Order Interim Measures***

*(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.*

*(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*

*(a) Maintain or restore the status quo pending determination of the dispute;*

*(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*

*(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*

*(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

**(adopted in section 35 of the Arbitration Ordinance (Cap. 609))**

Article 26 of the 2010 UNCITRAL Arbitration Rules provides for similar powers of the tribunal to grant interim measures. It replicates the four paragraphs in Article 17(2)(a) to (d) of the

2006 Model Law but, in contrast with the 2006 Model Law, explicitly states they are listed non-exhaustively (they are "for example and without limitation").[6]

In Hong Kong, Article 17 is adopted in the Arbitration Ordinance (Cap. 609) under section 35. Therefore, it has effect in defining the scope of interim measures that may be granted by **arbitral tribunals**. In addition, section 45 of the Arbitration Ordinance governs interim measures that the **Hong Kong court** may order in aid of domestic or international arbitration. That section defines court-ordered "interim measures" by reference to Article 17 of the 2006 Model Law.[7] Therefore, under Hong Kong law, arbitral tribunals and the Hong Kong court may grant the same four types of interim measures as enumerated in Article 17.

[6] The relevant wording in Article 26(2) of the 2010 UNCITRAL Rules is: "An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to… [Article 17(2)(a) to (d) of the Model Law is replicated]".

[7] See section 45(9) of the Arbitration Ordinance (Cap. 609).

However, as held by the Hong Kong court in a recent case, while the types of interim measures are the same, their targets may well be different. Article 17 refers to interim measures as orders directing "a party" to do (or not to do) something. In the context of arbitral tribunals, "party" means a party to the arbitration, whereas in the context of court proceedings, "party" refers to "a party brought before the court, against whom the interim measure is sought to be made" (who may be a third party to the arbitration).[8] Thus, the binding effect on third parties can in some cases be a huge advantage of interim measures ordered by courts over those granted by tribunals.

The four types of interim measures under Article 17 will be discussed in detail.

### *B1. Article 17(2)(a): "Maintain or restore the* status quo *pending determination of the dispute"*

[8] *Company A and Others v Company B and Others* HCCT 31/2018 (3 October 2018), paras. 33 -34.

The 2006 Model Law speaks of both **maintaining** and **restoring** the *status quo*. Apart from seeking to maintain the current state of affairs, in some cases, parties may request restoration of *status quo ante*, for example as at the time before commencement of the arbitration.[9]

Commenting on this provision, the courts of Hong Kong and New Zealand, both of which jurisdictions having adopted the 2006 Model Law, held that "the concept of the *status quo* is inherently flexible." It can be a point in time before the conduct complained of, before commencement of proceedings, or at the time of hearing of the application for the interim measures. Therefore, the interim measures may be granted for maintenance or restoration of a state of affairs either past or present.[10]

[9] Gary B. Born, *International Commercial Arbitration* (2nd ed.), Volume II (Kluwer Law International, 2014) (***Gary Born***), p. 2486.

[10] *Safe Kids in Daily Supervision Limited v McNeil* [2010] NZHC 605, paras. 24 -26; *Chen Hongqing v Mi Jingtiane* HCMP 962/2017 (27 June 2017), paras. 68-69.

**Example:** [11]

In an arbitration between two shareholders, each of them claimed it was entitled to acquire the shares of the other party. One of the parties requested an interim measure directing the other party to deposit its shares in a trust to avoid it selling the shares. The arbitral tribunal directed both parties to deposit their shares in a trust and ruled that the shares would be delivered to the winning party to be finally decided by the tribunal. By this way the interim measure had the added advantage of avoiding further enforcement proceedings of the award.

## *B2. Article 17(2)(b): "Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself"*

[11] Case No. 8879 reported in 11 ICC International Court of Arbitration Bulletin (Spring 2000, no. 1) pp. 84-91, cited in Jose Maria Abascal, "The Art of Interim Measures", in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress* (Kluwer Law International; 2007), p. 761.

By including this category, the UNCITRAL Working Group II (Arbitration) (Working Group) sought to make it clear that an arbitral tribunal has the power to prevent obstruction or delay of the arbitral process, including by issuing **anti-suit injunctions**.

**Example:** [12]

The claimant, a US company, and the respondent, a Dominican Republic company, were parties to a professional services agreement. The respondent initiated proceedings in the courts of the Dominican Republic accusing the claimant of breach of contract. The claimant sought an anti-suit injunction from the arbitral tribunal in Texas, the U.S. ordering the respondent to suspend the court proceedings.

The tribunal noted that effect of the arbitration agreement between the parties meant that the parties must refrain from undertaking any conduct which was contrary to such

[12] ICC Case 10681 (Partial Award dated May 2001), *ICC International Court of Arbitration Bulletin* Vol. 22 Special Supplement 2011, pp. 34-36

commitment. If the court proceedings continued, it may produce a judgment which, regardless, of its findings, was clearly contrary to the parties' intention to resolve dispute by arbitration. Therefore, the tribunal ordered the respondent to immediately cease and desist from continuing the litigation before the courts of Dominican Republic and refrain from undertaking any conduct which might contradict the arbitral proceedings.

### *B3. Article 17(2)(c): "Provide a means of preserving assets out of which a subsequent award may be satisfied"*

Interim measures within this category may be in the form of **freezing orders** (also known as ***Mareva* injunctions**).[13] This kind of order is designed to ensure that a party's substantive claim is not rendered nugatory because of the deterioration in the financial condition of its counterparty by deliberate

[13] Jan Paulsson and Gergios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International, 2018) (***Paulsson & Petrochilos***), p. 226.

dissipation of assets.[14] This is generally described as **security for claims**. Another interim measure is an order for **security for costs**.[15] This is to protect the respondent from unmeritorious claims brought by impecunious claimants who would otherwise escape the consequence of having to pay for the costs of the respondents when the respondent's defence prevails. The 2012 International Arbitration Survey conducted by Queen Mary University of London reported that when securities for costs were requested, arbitral tribunals granted them in whole or in part in about one-quarter of all applications.[16]

**Example: freezing order**[17]

The respondent, a BVI company, provided in favour of the

[14] Gary Born, p. 2492.

[15] In the Arbitration Ordinance (Cap. 609) of Hong Kong, apart from adopting Article 17 of the 2006 Model Law, there is an additional provision which makes it beyond doubt that tribunals may order security for costs. Section 56(1)(a) provides that: "Unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may make an order … requiring a claimant to give security for the costs of the arbitration".

[16] 2012 International Arbitration Survey on "Current and Preferred Practices in the Arbitral Process" conducted by Queen Mary University of London http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf, p. 18.

[17] *E Transportation (Shenyang) Co Ltd v Lu Jinxiang* [2014] HKCFI 223; HCMP 1792/2013 (22 January 2014)

claimant a guarantee in relation to a purchase agreement. Under the guarantee, the claimant commenced arbitration in Hong Kong at the HKIAC. The claimant applied to the arbitral tribunal for urgent interim order preventing dissipation of respondent's assets. At a hearing by conference call before the tribunal, the tribunal granted the interim order prohibiting the respondent from removing, dissipating or otherwise disposing of its assets wherever located, whether owned or controlled directly or indirectly by the respondent up to an equivalent value of USD 323 million (being the sum claimed in the arbitration excluding costs).

The claimant later enforced the interim order in the Hong Kong court. Shortly afterwards, in breach of the interim order, the respondent disposed of certain shares it owned indirectly. The CEO of the respondent who caused or aided in the share disposal was later committed for contempt of court and was sentenced to imprisonment for 3 months by the Hong Kong court.

### *B4. Article 17(2)(d): "Preserve evidence that may be relevant and material to the resolution of the dispute"*

Interim measures to preserve evidence may be granted, for example, to preserve some goods so as to verify their conformity with the contract or with the samples.[18] In particular, the Working Group noted that the term "relevant" was understood to require that the evidence be connected to the dispute, and the term "material" referred to the significance of the evidence.[19]

**Example**[20]

A charterparty agreement provided for dispute resolution by arbitration in England. Disputes as to the seaworthiness of the vessel arose between the owner and the charterer after the

[18] Jose Maria Abascal, "The Art of Interim Measures", in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress* (Kluwer Law International; 2007), p. 763.

[19] Howard M. Holtzmann, Joseph E. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) (***Holtzmann***), p. 168.

[20] *Owners of the Ship or Vessel "Lady Muriel" v Transorient Shipping Ltd* [1995] 2 HKC 320 (CACV 87/1995)

vessel had been anchored in Hong Kong for almost a month with a series of breakdowns. The charterer sought an order from the Hong Kong court directing the owner to allow inspection of the vessel so as to carry out an independent survey of the conditions of the vessel which would be necessary and relevant evidence in the arbitration commenced in England.

## C. Conditions for granting interim measures

The conditions for granting interim measures are set out in Article 17A of the 2006 Model Law.

**2006 Model Law:**

***Article 17A Conditions for Granting Interim Measures***

*(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:*

*(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*

*(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

*(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.*

**(adopted in section 36 of the Arbitration Ordinance (Cap. 609))**

The two conditions in Article 17A(1)(a) and (b) are mandatory for the grant of interim measures by tribunals, except that for the measure referred to in Article 17(2)(d) (i.e. preservation of evidence) the requirements apply only to the extent the arbitral tribunal considers appropriate.

These two conditions resemble the two requirements for granting interlocutory injunctions in many common law jurisdictions as laid down in the seminal House of Lords case of *American Cyanamid Co. v Ethicon Ltd*.[21] The requirements are: (i) that there is a serious question to be tried and (ii) that the balance of convenience lies in favour of granting an injunction.

[21] [1975] AC 396.

### *C1. Article 17A(1)(a): harm not adequately reparable by damages and balance of convenience*

Two elements are embedded in the condition under Article 17A(1)(a), namely inadequacy of damages as remedy and the test of balance of convenience.

Regarding the **first element**, the Working Group once considered requiring “irreparable harm” as a condition, noting that it was recognized as an ordinary prerequisite in some legal systems. The following examples were considered as amounting to irreparable harm: loss of a priceless or unique work of art; a business becoming insolvent; loss of essential evidence; loss of an essential business opportunity; and harm being caused to the reputation of a business as a result of trademark infringement. However, the Working Group eventually settled for a less restrictive wording of “harm being not adequately reparable”, believing that the it would confer on arbitral

tribunals the discretion to determine the level of harm necessary to merit issuance of an interim measure. It was also believed that the lesser standard accorded with current arbitral practice as it was not uncommon for arbitral tribunals to issue interim measures in circumstances where it would be "comparatively complicated" to compensate harm with an award of damages.[22]

Such standard is comparable to the common law standard which requires the court to consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, then no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be.[23]

[22] Holtzmann, pp. 169-170.

[23] *Fellowes & Son v. Fisher* [1976] Q.B. 122 at 137; Hong Kong Civil Procedures (Hong Kong White Book), para. 29/1/11.

The **second element** is a general balance of convenience test. Again, the common law jurisprudence may be instructive. Although the test is commonly known as one of "balance of convenience", it has been said that the balance is more fundamental, more weighty, than mere "convenience", and may be better described as the "balance of the risk of doing injustice".[24] Ma J (as Chief Justice Ma then was) put it this way in a Hong Kong case: "the Court will take whichever course appears to carry the lower risk of injustice if it should turn out that it is wrong."[25]

At common law, although it is recognized that "it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them,"[26] some guiding principles are considered relevant:

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[24] *N.W.L. Ltd v. Woods* [1979] 3 All E.R. 614 at 625 (HL); Hong Kong White Book, para. 29/1/14.

[25] *Music Advance Limited v. The Incorporated Owners of Argyle Centre Phase I* [2010] 2 HKLRD 1041.

[26] *Fellowes & Son v. Fisher* [1976] Q.B. 122 at 137

(1) In addition to considering whether the harm done to the plaintiff (if interim measure is not granted) would be inadequately reparable by damages, the flip side should equally be considered. That is to say, one must assess whether the harm done to defendant (if interim measure is granted) is adequately reparable under the plaintiff's undertaking as to damages and whether the plaintiff would be in a financial position to pay them.[27] In this connection, it is relevant to note that under Article 17E(1) of the 2006 Model Law, the tribunal may require a party requesting an interim measure to provide appropriate security.

(2) Where other factors appear to be evenly balanced it is "a counsel of prudence" to take measures that would preserve the *status quo*.[28]

(3) As a last resort, if the irreparable disadvantage to each party

[27] Ibid.
[28] Ibid.

would not differ greatly, it is not improper to take into account in tipping the balance the relative strength of each party's case. This, however, should be done only where it is apparent on the facts disclosed by evidence that the strength of one party's case is disproportionate to that of the other party. Anything akin to a trial of the merits of the case should not be embarked on.[29]

### *C2. Article 17A(1)(b): reasonable possibility of success on the merits*

The Working Group viewed the requirement that there be a "reasonable possibility" of success on the merits as a standard that provided an arbitral tribunal with "the required level of flexibility" to make a determination in the circumstances of the case.[30] The same wording is to be found in the provisions for *ex parte* applications for interim measures (see Article 17B(3)). Hence, the Model Law does not appear to envisage a higher

[29] Ibid.
[30] Holtzmann, p. 171

threshold only because of the *ex parte* nature of the application.

In a survey conducted in 2006, 88% of the arbitrators agreed that a party requesting an interim measure should be required to show "a possibility to succeed" on the merits of the claim (note the wording used in the survey in contrast with the reference to "reasonable possibility" in the final text of the 2006 Model Law). But their understanding as to what amounted to "a possibility to succeed" differed. Among them, 23% required a degree of possibility of less than 25%; 45% of them required a degree of 25% - 50%; 27% of them required a degree of 51-75%; and the remaining 5% of the respondents demanded a high degree of possibility of more than 75%.[31]

In many common law jurisdictions including Hong Kong, for applications of interim relief in litigation proceedings before the

[31] Kaj Hober, "Interim Measures by Arbitrators", in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress* (Kluwer Law International; 2007), p. 743.

courts, the thresholds required of regarding the merits of the substantive claim may vary depending on the specific type of interim relief being sought. In general, the standard is one laid down in *American Cyanamid Co. v Ethicon Ltd*[32], i.e. there must be **a serious question to be tried**. It has been said that it is "not a very steep hurdle"[33] and that "so long as there is a serious issue it matters not whether the court thinks the plaintiff's chances of success at trial are 90% or 20%."[34]

However, for some particular forms of interim relief, the thresholds are set at higher levels. For example, when a mandatory injunction is sought by which another party is compelled to act rather than prohibited from acting, a higher standard of proof of "**strong *prima facie* case**" is called for according to Hong Kong's case law.[35] A similar threshold of "strong *prima facie* case" also applies for the request of an

[32] [1975] AC 396.
[33] *Re Billion Shipping Ltd* [2003] HKLRD 674 at [28]; Hong Kong White Book, para. 29/1/10.
[34] *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at 373; Hong Kong White Book, para. 29/1/10.
[35] Hong Kong White Book, para. 29/1/29.

*Anton Piller* Order (i.e. an order directing another party to permit entry to its premises to search for documents or other articles of moveable property, and to take them away for retention).[36] Likewise, for an application for a *Mareva* injunction, there is a high threshold of requiring "**a good arguable case**" "in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one that the judge believes to have a better than 50% chance of success"[37].

In one case[38], the New Zealand High Court equated the condition of "reasonable possibility of success" under the 2006 Model Law to the common law test of "serious question to be tried", saying there was no significant difference between the two. In that case, the plaintiff asked the court to grant an interim order to restrain the defendants, which were subject to an arbitration agreement with the plaintiff, from operating an

[36] Hong Kong White Book, paras. 29/8/20 – 22.
[37] *The Niedersachsen* [1983] 1 W.L.R. 1412; Hong Kong White Book, para 29/1/66.
[38] *Safe Kids in Daily Supervision Limited v McNeil* [2010] NZHC 605

after school children's care programme at a school in Auckland. Under the New Zealand Arbitration Act, the "reasonable possibility of success" test under Article 17A applies whether the interim measures are to be granted by arbitral tribunals or by the court in aid of arbitration.[39] The Judge concluded that:

> *"There are differences between the threshold test for an interim injunction and other tests arising in the High Court Rules, such as the requirement for a "strong arguable case" for freezing orders or in relation to service out of jurisdiction. The adjective "strong" creates a higher threshold. However, I do not consider that such a difference arises in relation to [Article 17A(1)(b) of the Model Law]. There is no adjective such as "strong" and no significant difference between the "reasonable possibility of success" test in [Article 17A(1)(b) of the Model Law] and the usual*

[39] New Zealand has adopted the provisions in the 2006 Model Law as regards the powers of and conditions for granting interim measures by arbitral tribunals (Articles 17 and 17A of the Model Law) in its Arbitration Act. The Act further provides that the New Zealand Court has the same powers as an arbitral tribunal to grant interim measures subject to the same conditions. (See Article 9 in Schedule 1 to the Arbitration Act 1996 of New Zealand).

*interim injunction test of "serious question to be tried". I will approach matters on the basis that there is no difference."* [40]

On the face of it, the above passage may be taken as setting a monolithic standard (one comparable to "serious question to be tried") for all types of interim measures under the Model Law. However, given the condition of "reasonable possibility of success" was intended by the Working Group to be a flexible requirement, it remains to be seen whether other courts and arbitral tribunals will borrow from the common law jurisprudence and adjust the standard flexibly, depending on the nature of the specific interim measures being requested. If so, a more stringent merits requirement may be imposed if the interim measures in question are regarded as more draconian, such as measures akin to *Mareva* injunctions and *Anton Piller* orders.

[40] *Safe Kids in Daily Supervision Limited v McNeil* [2010] NZHC 605, para. 31.

Other than showing a reasonable possibility that the substantive claim is meritorious, the condition can also be seen as importing a requirement of showing a reasonable possibility that the arbitral tribunal possesses jurisdiction over the claim. The tribunal's jurisdiction is an implicit pre-requisite for succeeding "on the merits of the claim".[41] Such understanding is consistent with arbitral practice that the establishment of the tribunal's jurisdiction, at least on a *prima facie* basis, is a precondition for granting interim measures.[42]

The same may be said for other forms of international adjudication. The International Court of Justice has ruled that:

> "*on a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures*

[41] Paulsson & Petrochilos, pp. 219-220.
[42] Gary Born, p. 2481.

*unless the provisions involved by the Applicant appear,* prima facie*, to afford a basis on which the jurisdiction of the Court might be founded*."[43]

## D. Preliminary orders (*ex parte* orders)

**2006 Model Law:**

***Article 17B Applications for preliminary orders and conditions for granting preliminary orders***

*(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.*

*(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.*

*(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.*

**(adopted in section 37 of the Arbitration Ordinance (Cap. 609))**

Article 17B authorizes a party to an arbitration to request an *ex*

[43] *Nicaragua v USA*, Order of 10 May 1984 [1984] ICJ Rep. 169, 179, cited in Gary Born, p. 2483.

*parte* order "directing a party not to frustrate the purpose" of a requested interim measure. A typical example is an order to freeze liquid assets, such as bank accounts, or vessels and aircraft in case there is a risk of dissipation if the respondent has notice of the application.[44]

There were lengthy discussions within the Working Group about the desirability of making *ex parte* order available under the Model Law. One view was that, in line with existing arbitration laws in a number of countries, the possibility of ordering an interim measure of protection on an *ex parte* basis should be reserved only to courts. "It was argued that no exception should be made to the principle that each party should have equal access to the arbitral tribunal and a full opportunity of presenting its case, as expressed in article 18 of the Model Law. Recognizing the possibility that *ex parte* measures might be ordered by the arbitral tribunal was said to open an avenue for dilatory and unfair practices that should be

[44] Paulsson and Petrochilos, p. 232.

avoided."[45]

The contrary, and ultimately prevailing, view was that *ex parte* interim measures would be useful addition to the Model Law and meet the needs of arbitration practice.

The compromise reached was that *ex parte* interim measures, known as "preliminary orders", would be featured in the Model Law subject to certain "safeguards" or limitations:

(1)**Temporary nature**: Preliminary orders are temporary and, under Article 17C(4), they expire after twenty days from the date of issuance. However, the tribunal may extend (if necessary, with modification) a preliminary order after the respondent has been heard.

(2)**Unenforceable in court**: Preliminary Orders are unenforceable in court under Article 17C(5).

[45] April 2002 Working Group Report A/CN.9/508 (12 April 2002), para. 77; see Holtzmann, pp. 242-243.

(3) **Provision of security**: Article 17E(2) provides for the default rule that the tribunal shall require the requesting party of a preliminary order to provide security, unless the tribunal considers it inappropriate or unnecessary. Discretion of the tribunal is catered for as there may be situations in which the requesting party should not be ordered to provide security, such as when it has been deprived of assets enabling it to pay security by the putative respondent.[46]

(4) **Disclosure requirement**: Article 17F(2) requires the requesting party of a preliminary order to "disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order". This entails a duty to disclose facts that are both helpful and harmful to a party's application for a preliminary order.[47] This concept was no doubt inspired by the "full and frank disclosure" requirement

[46] Holtzmann, p. 177.
[47] Holtzmann, p. 179.

familiar to practitioners from a common law background.[48] At common law, in any *ex parte* application, the applicant must proceed "with the highest good faith."[49] The material facts to be disclosed are all matters which are material for the judge to know and which are necessary to enable him to exercise his discretion properly. They include not only facts known to the applicant but also any additional facts which would have been known if proper inquiries had been made.[50]

While it was acknowledged that the concept of presenting arguments against a party's own position may be foreign to lawyers from non-common law legal traditions, the Working Group considered the disclosure requirement as an "essential condition" to the acceptability of preliminary orders because an arbitral tribunal considering the application does not have the opportunity to hear from both

[48] April 2002 Working Group Report A/CN.9/508 (12 APRIL 2002), para. 78, see Holtzmann, p. 243.
[49] *Schmitten v. Faulkes* [1893] W.N. 64, per Chitty J.
[50] Hong Kong White Book, para. 29/1/51.

parties.[51]

## E. Choice of court or arbitral tribunal ordered interim measures

There are occasions that an application would have to be made to courts and a decision has to be made as to whether an application should be made before a court or arbitral tribunal. The relevant considerations include:

(a) Lex arbitri and lex fori – whether the law of the seat of arbitration or the law of the forum where the interim measures are being sought can provide the particular interim measures;

(b) Power of the national court in aid of foreign arbitration – whether the arbitration in question is a foreign arbitration which the national court is empowered to grant interim measures in aid of foreign arbitration;

[51] Holtzmann, p. 179-180.

(c) Compliance by third parties – whether the order for interim measures needs to be complied with by any third parties (e.g. banks);

(d) Enforcement by courts – whether the order for interim measures would require enforcement by a court and as such an order by the relevant court would be more effective for instance;

(e) Enforcement of *ex parte* orders (preliminary orders) in arbitration – whether there is any need for enforcement of such orders (which are not enforceable by courts under the Model Law).

## F. Recognition and enforcement of interim measures granted by tribunals in foreign arbitrations

Next, the international perspective of enforcing interim measures will be discussed. Consider the following scenario which may not be unusual for international arbitration:

**Scenario:**

A party, **A**, commenced arbitration against its contractual counterparty **B** from another jurisdiction pursuant to an arbitration clause in the contract for an arbitration seated in a third jurisdiction, **X**. Meanwhile, **B** commenced parallel litigation proceedings before the court of its home jurisdiction. **A** successfully obtained an anti-suit injunction from the tribunal to prohibit **B** from continuing the court proceedings. In addition, fearing that B would remove its assets from its home jurisdiction to another place which is a non-New York Convention jurisdiction to evade enforcement of the final award, **A** successfully persuaded the tribunal to grant a freezing order in respect of **B**'s assets in its home jurisdiction.

In this scenario, the anti-suit injunction and the freezing order granted by the tribunal seated in jurisdiction X would be meaningless "paper judgments" unless they are recognized and enforced by the court of B's home jurisdiction. This highlights the prime importance of international enforcement of interim measures.

### *F1. Order or award?*

In this connection, Article 17 of the 2006 Model Law provides that interim measures may be "in the form of an award or in another form". In drafting the 2006 amendments, the Working Group recognized that in some jurisdictions, there were requirements that an interim measure must be in the form of an award in order for it to be recognized or enforced.[52]

In a well-known and controversial case, the Supreme Court of Queensland examined whether a decision labelled "Interim Arbitration Order and Award" made by an arbitrator in the U.S. to protect the contractual rights of a party during the proceedings was capable of being recognized and enforced in Australia under the New York Convention. The Court concluded in the negative holding that "the reference to 'arbitral award' in the Convention does not include an interlocutory order made

[52] Holtzmann, pp. 168-169.

by an arbitrator, but only an award which finally determines the rights of the parties".[53]

But instead of rigidly requiring interim measures to be in the form of awards, the Working Group preferred a flexible approach in the Model Law allowing interim measures to be in other forms.[54] Arguably the need of issuing interim measures in the form of awards for enhancing enforceability may have become less apparent given that the 2006 Model Law now contains provisions permitting enforcement of interim measures in whatever form.[55] It will be discussed shortly.

Apart from enforceability, tribunals may well have other considerations in deciding whether to issue an interim measure in the form of an "award" or an "order". For example, orders can typically be issued more promptly than awards due to their fewer formality requirements (e.g. less extensive text and

[53] *Resort Condominiums International, Inc v Bolwell*, Y (29 October 1993) Comm. Arb, 1995, p. 628. Available at: http://www.newyorkconvention.org/11165/web/files/document/1/8/18047.pdf

[54] Holtzmann, pp. 168-169.

[55] Paulsson & Petrochilos, p. 228

statement of reasons). For some arbitral institutions (e.g. ICC), awards have to be internally scrutinized by the institutions.[56]

Sometimes, tribunals try to have "the best of both worlds" by first issuing an interim measure as an order, followed by a subsequent award.[57]

### *F2. Enforcement under 2006 Model Law*

Articles 17 H and 17 I of the 2006 Model Law deal with recognition and enforcement of interim measures by national courts:

**2006 Model Law:**

***Article 17H Recognition and Enforcement***

*(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.*

**(Not adopted in the Arbitration Ordinance (Cap. 609))**

[56] Gary Born, p. 2506.
[57] Gary Born, p. 2507.

Article 17H applies to all interim measures issued by any arbitral tribunal, i.e. whether the arbitration is a domestic or international one. Also, recognition or enforcement may not be denied only because the place of arbitration is not a Model Law jurisdiction.[58] An interim measure may be recognized and enforced in multiple jurisdictions.[59]

Under the 2006 Model Law, the court may refuse recognition and enforcement of interim measures only on any of the grounds specified in Article 17 I. Basically, those grounds are similar to grounds for refusing recognition and enforcement of arbitral awards under Article 36 of the Model Law, which is in turn modelled on the well-known Article V of the New York Convention. The Working Group believed that such approach would ensure uniformity for interim measures and arbitral awards in terms of recognition and enforcement.[60]

[58] Holtzmann, p. 183.
[59] Ibid.
[60] Holtzmann, pp. 186, 188.

In addition, the Model Law envisages that the enforcing court may "reformulate the interim measure to the extent necessary to adapt it to [the court's] own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance." An example may be excluding certain documents from an interim measure ordering production of documents because of applicable legal requirements for protecting privacy or privilege in the particular jurisdiction.[61]

### *F3. Enforcement under Hong Kong law*

The Model Law provisions on recognition and enforcement of interim measures are not adopted in the Hong Kong Arbitration Ordinance. Indeed, Hong Kong's own liberal approach for recognizing and enforcing interim measures (including those issued by arbitral tribunals seated outside Hong Kong) predated the 2006 amendments to the Model Law.

[61] Holtzmann, pp. 187-188.

Since 2000, there has been an express provision in the Hong Kong Arbitration Ordinance (section 2GG of Cap. 341, now repealed) empowering the Hong Kong court to enforce "order or direction", which would include orders for interim measures, made by an arbitral tribunals whether in or outside Hong Kong.

**Arbitration Ordinance (Cap. 341) (repealed):**

***2GG.Enforcement of decisions of arbitral tribunal***

*(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.* *(Added 75 of 1996 s. 7. Amended 38 of 2000 s. 2)*

*(2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.* *(Added 38 of 2000 s. 2)*

The approach is largely retained in section 61 of the new Arbitration Ordinance (Cap. 609). (That section deals with enforcement of orders and directions while section 84 deals with enforcement of awards.)

**Arbitration Ordinance (Cap. 609):**

***61.Enforcement of orders and directions of arbitral tribunal***

*(1) An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.*

*(2) Leave to enforce an order or direction made outside Hong Kong is not to be granted, unless the party seeking to enforce it can demonstrate that it belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.*

*(3) If leave is granted under subsection (1), the Court may enter judgment in terms of the order or direction.*

*(4) A decision of the Court to grant or refuse to grant leave under subsection (1) is not subject to appeal.*

*(5) An order or direction referred to in this section includes an interim measure.*

During the drafting of the new Arbitration Ordinance, there was a suggestion from the industry that a reciprocity requirement should be introduced. In other words, interim measures granted in foreign arbitration should be enforced in Hong Kong only if the court in the place of that foreign arbitration would

act reciprocally in respect of interim measures granted by Hong Kong arbitral tribunals.[62]

That suggestion was not preferred by the Government and not eventually adopted in the new Ordinance because it was believed that interim measures are procedural and interlocutory in nature and there would likely be "conflicting expert opinions as to the existence of reciprocity" in practical situations.[63]

There are some differences between the current Hong Kong approach and the Model Law approach:

- The Hong Kong provision does not refer to the specific grounds of refusal under the Model Law (which are substantially the same as grounds for refusing enforcement of awards under the New York Convention);

[62] Hong Kong Institute of Arbitrators, *Report of Committee on Hong Kong Arbitration Law* (30 April 2003).

[63] *Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (Department of Justice, December 2007), pp. 47-48.

- The Hong Kong court will only enforce interim measures granted by a foreign tribunal which are of the types that a Hong Kong arbitral tribunal may grant. For example, US-style orders for discovery and depositions may not be covered.[64]

## G. Court-ordered interim measures in aid of foreign arbitrations

In addition to, or as an alternative to, enforcement of the interim measures granted by foreign arbitral tribunals, the national court of a particular jurisdiction may also assist parties to foreign arbitrations by way of issuing interim measures itself in aid of foreign arbitrations. As mentioned above, court-ordered interim measures have the added advantage that they may, subject to applicable domestic law,[65] bind third

[64] John Choong & J. Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (Sweet & Maxwell, 2011), p. 311.

[65] There are English cases suggesting that interim measures under section 44 of the Arbitration Act 1996 may only be directed to parties to the arbitration: *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] 2 CLC 784 and *DTEK Trading SA v Mr Sergey Morozov* [2017] WHC 94.

parties to the arbitration agreement. Furthermore, *ex parte* procedures may be available in some national courts, while *ex parte* preliminary orders granted by arbitral tribunals are not enforceable in courts as provided in Article 17C(5) of the Model Law.

Two articles in the 2006 Model Law relate to interim measures ordered by national courts: Articles 9 and 17J. Article 9 was in the original 1985 Model Law and was not amended in 2006, whereas Article 17J was a new addition in 2006.

**2006 Model Law:**

***Article 9 Arbitration agreement and interim measures by court***
*It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*

**(adopted in section 21 of the Arbitration Ordinance (Cap. 609))**

***Article 17 J Court-Ordered Interim Measures***
*A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international*

*arbitration.*

**(not adopted in the Arbitration Ordinance (Cap. 609))**

Before the existence of an express statutory provision empowering the Hong Kong court to grant interim measures in aid of foreign arbitration (i.e. section 45 of the Arbitration Ordinance (Cap. 609) and its predecessor provision, section 2GC, in the repealed Ordinance), the Hong Kong court relied on the its inherent jurisdiction. Article 9 of the Model Law is not itself an empowering provision. It is only permissive in nature which ensures the compatibility between an arbitration agreement and interim measures granted by the court. It reflects the dual principles that, first, a party does not waive its right to go to arbitration by seeking interim measures from courts and, second, courts may grant such measures despite the arbitration agreement.[66]

[66] Holtzmann, p. 332

The *Lady Muriel* case[67] was considered a leading Hong Kong authority on the court's inherent jurisdiction in this regard. The Hong Kong Court of Appeal adopted a cautionary approach by laying down a stringent test for granting interim relief in aid of foreign arbitration:

> *"where a party to an international commercial arbitration, the seat of which is in a place other than Hong Kong, seeks 'an interim measure of protection' from the court of Hong Kong without having first obtained the approval of the arbitrators to his application, the Hong Kong court should refuse the application unless satisfied that the justice of the case necessitates the grant of the relief in order to prevent what may be serious and irreparable damage to the position of the applicant in the arbitration. If, as I think is here the case, the applicant is unable to discharge this (admittedly,*

[67] *Owners of the Ship or Vessel "Lady Muriel" v Transorient Shipping Ltd* [1995] 2 HKC 320 (CACV 87/1995)

*very heavy) burden, the Hong Kong court should refuse him relief."*[68] (emphasis original)

In contrast with the previous restrictive approach relying on the court's inherent jurisdiction, now section 45 of the Arbitration Ordinance (Cap. 609) explicitly empowers the Hong Kong court to grant interim measures in aid of "arbitral proceedings which have been or are to be commenced in or outside Hong Kong".

Principles on how to apply section 45 in relation to foreign arbitration were expounded in the interesting case of *Top Gains Minerals Macao Commercial Offshore Limited v TL Resources Pte Ltd*[69]. In that case, before commencing arbitration in Singapore, the plaintiff applied to the Singapore court in June 2015 for a worldwide *Mareva* injunction to restrain the defendant from disposing of its assets. However, the Singapore court refused to grant the injunction because it was not

[68] *Lady Muriel*, para. 13.
[69] HCMP 1622/2015, 18 November 2015.

satisfied that there was a real risk that the defendant would dissipate its assets to evade its liabilities.

Notwithstanding the Singapore court's refusal, the plaintiff applied to the Hong Kong court in July 2015 for a *Mareva* injunction to restrain the defendant from disposing some of its assets within Hong Kong.

The court adopted a two-stage test for determining whether to grant interim relief: (1) whether the facts of the case warrant the grant of interim relief if substantive proceedings were brought in Hong Kong, and (2) whether it is unjust or inconvenient for the court to grant the interim relief.

Hence, at the first stage, the relevant principles governing an application for the particular type of interim measure being sought in the context of local proceedings will equally apply to a request for such interim measure in aid of foreign arbitration. This seems to be in line with the spirit in Article 17J of the 2006

Model Law that a court has the "same power of issuing an interim measure in relation to arbitration proceedings … as it has in relation to proceedings in courts" and that such power shall be exercised "in accordance with its own procedure".[70]

At the second stage, the court considers whether it is unjust or inconvenient for it to grant the interim relief. Factors to be taken into account may include:

- "whether the making of the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order in the primary court or overlaps with it"; and
- "whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state whether person enjoined resides or where the assets affected are located".[71]

[70] Ibid, para. 23.
[71] Ibid, para. 27.

At this second stage, the court will consider (in accordance with section 45 (5)) whether the interim measure should be declined because it is currently the subject of arbitral proceedings; and the court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.[72] This approach is consistent with the requirement under Article 17J of the Model Law that the national court should exercise its power "in consideration of the specific features of international arbitration".

As such, while the Arbitration Ordinance (Cap. 609) does not adopt Article 17J in terms, the spirit of that Article is very much respected.

Interestingly, in *Top Gains*, the Judge observed that while the Hong Kong court must respect the view and the approach of the foreign court which was seized of the substantive

[72] Ibid, para. 30.

proceedings, and should be cautious and slow to take a different view, that was not to say that it could not take a different view. Hong Kong was bound to exercise its own independent discretion in deciding whether there was a real risk of dissipation of assets, as a matter of Hong Kong law.[73] On that basis, the Hong Kong *Mareva* injunction was granted despite the Singapore court's refusal to grant the worldwide *Mareva* injunction.

## H. Cross-jurisdictional arrangements for foreign parties to seek interim measures: a stop-gap measure?

The above discussion shows the powerful and wide-ranging natures of interim measures in arbitration. In the context of international arbitration, the powers and readiness of the court of a jurisdiction (particularly one in which a party's assets are located) in assisting parties to foreign arbitrations, by way either of enforcement of tribunal-granted interim measures or

[73] Ibid, para. 42.

itself issuing interim measures in aid of arbitrations, are of pivotal importance to the protection of the foreign parties' interests as well as the smooth and effective conduct of the arbitrations. In this regard, the Hong Kong court has been fully empowered under the Hong Kong law and has consistently shown and reaffirmed its willingness to be an arbitration-friendly jurisdiction as far as foreign arbitration parties are concerned.

However, these features are not yet universally embraced by all jurisdictions, particularly those which have not yet adopted the Model Law (either in its 1985 or 2006 version). In some jurisdictions, arbitral tribunal does not have power to grant interim measures and any such applications have to be brought before national courts. For instance, in the Mainland China, application is made to the court through the arbitral institution administering the arbitration. Under Article 28 of the Arbitration Law:

*"A party may apply for property preservation if it may become impossible or difficult for the party to implement the award due to an act of the other party or other causes.*

*If a party applies for property preservation, the arbitration commission shall submit the party's application to the people's court in accordance with the relevant provisions of the Civil Procedure Law."*

Under the Arbitration Law, "arbitration commissions" are those established within Mainland China.[74]

Therefore, currently, a party to an arbitration seated outside Mainland China can neither seek the Chinese court to enforce an interim measure issued by the tribunal nor apply to the Chinese court for any interim measure in aid of its arbitral proceedings.

[74] Article 10 of the Arbitration Law of China.

For those jurisdictions, an ideal solution in the long run may be to gradually reform the national arbitration law to adopt the Model Law standards and practice. But before that ideal position can be achieved, can some stop-gap measures be devised? For example, would it be possible to explore the idea of signing cross-jurisdictional arrangements to assist and facilitate parties to arbitration to seek interim measures from the national court concerned? Would such “interim stop-gap measure” in respect of “interim measures in arbitration” be a viable option? Is this not a way for these jurisdictions to gradually be accustomed to the international practice laid down in the Model Law regime, thereby creating a more inclusive and harmonized arbitration infrastructure for the international arbitration community as a whole?