



## Arbitration Newsletter Switzerland

### Interim Measures in Arbitration - an update

#### Introduction

Interim measures are an important tool in litigation and in order for arbitration to be an efficient platform for dispute resolution arbitral tribunals should have the authority to issue interim measures. There is a consensus as to that issue<sup>1</sup>, however, a few exceptions still remain and shall briefly be addressed in this article. Thereafter, the ICC Rules for a Pre-Arbitral Referee Procedure and their efficiency are analyzed. Furthermore, this article shall present the different types of interim measures available and shall, in particular, deal with the amended UNCITRAL Model Law which now proposes that arbitral tribunals have also authority to issue interim measures *ex parte*.

#### Definition

Art. 17 (2) of the amended UNCITRAL Model Law, now formally approved at the plenary meeting of the thirty-ninth session in July 2006 in New York, defines interim measures as follows:

"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 the which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute."

#### Authority of an Arbitral Tribunal to grant Interim Measures

Such authority is widely accepted, but exceptions are still to be found (in particular in Italy, where such authority is reserved to state courts only<sup>2</sup>). In The Netherlands and England, arbitral tribunals seem to have such authority only if it has been conveyed upon them specifically. This can occur by making a reference to institutional arbitration rules which grant authority to the arbitral tribunal in this field. Particular caution as to the authority of the arbitral tribunal to issue interim measures is to be applied if *ad hoc* arbitration is provided for.

Numerous institutional arbitration rules specifically address the issue of interim measures<sup>3</sup>.

The authority to grant interim measures does not automatically stand for the willingness of an arbitral tribunal to actually grant interim measures. An arbitral tribunal may be hesitant to grant such interim measures, at least in an early stage of the proceedings, since it does not want to prejudice its position as to the merits of the case.

Panellist at the ICCA Meeting in May 2006 in Montreal provided interesting data revealing that interim measures are not applied for too frequently<sup>4</sup>.

#### Timing

What if interim measures are requested but the arbitral tribunal is not yet constituted?

In this case, the requesting party has access to state courts, but the question remains which state court would be competent? The party requesting interim measures may have the choice to ask for such interim measures at the place the arbitration is going to be held or at respondents domicile or at the place where a specific activity should occur or declared to be prohibited under the requested interim measures. In



each individual case the requesting party will have to give due consideration to national particularities in this field and will also have to look at the chances for enforcement of such interim measures to be issued by a state court.

In order to provide the parties to an ICC arbitration a possibility to have interim measures ordered under the auspices of ICC already prior to the constitution of an arbitral tribunal, ICC introduced, as per January 1<sup>st</sup> of 1990, its "Rules for a Pre-Arbitral Referee Procedure" (hereinafter "Referee-Rules"). These rules were then lying dormant for more than ten years. Two cases initiated in late 2001 brought the Referee-Rules to life and gave raise to a detailed analysis thereafter<sup>5</sup>, in particular since the decision of the second pre-arbitral referee was challenged by an action to set aside at the Court of Appeal of Paris, which declared the appeal to be inadmissible since the decision of the pre-arbitral referee was considered to be of "contractual nature only and not an arbitral award". Both pre-arbitral referees published their experiences in this new role<sup>6</sup>.

The Referee-Rules provide a reasonable framework, i.e. the rules are detailed enough but still leave room enough for flexibility. However, in order to be applicable, the Referee-Rules must be expressly referred to in a written agreement<sup>7</sup>. Instead of having to opt-in in the Referee-Rules, it would have been more preferable to directly implement those rules into the ICC Rules, however, offering the parties an opting-out possibility<sup>8</sup>.

According to Art. 2.1 of the Referee-Rules, the referee enjoys a wide range of powers, namely:

"(a) to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;

(b) to order a party to make to any other party or to another person any payment which ought to be made;  
(c) to order a party to take any step which ought to be taken according to the contract between the parties including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;

(d) to order any measures necessary to preserve or establish evidence."

The referee is appointed by the parties or if they fail to come to an understanding, which is likely to occur, appointed by the Chairman of the ICC Court of International Arbitration in the shortest time possible.<sup>9</sup> Once appointed the referee and the parties can structure the proceedings according to the particularities of the case since the Referee-Rules do not provide for specific procedural details. The decision taken by the referee shall be delivered in the form of a reasoned order<sup>10</sup> within 30 days after the file has been transmitted to the referee.<sup>11</sup> The order rendered "does not pre-judge the substance of the case, nor shall it bind any Competent Authority, which may here any question, issue or dispute in respect of which the Order has been made."<sup>12</sup> Hence, the order has no *res judicata* effect.

The Referee Rules have proven their efficiency; nevertheless, the parties may still prefer to directly apply to state courts for interim measures. The fact that the Referee Rules have to be specifically referred to, in order to become applicable, is a distinct disadvantage. Particularly, in contracts involving states or state agencies it is certainly advisable to consider the specific reference to the Referee Rules.

In the meantime AAA (ICDR) has introduced, as per May 1, 2006, in a new Article 37 "Emergency Measures of Protection" a similar mechanism, providing for an emergency arbitrator to be appointed within one business day after receipt of a request. The emergency arbitrator shall, within a further two business days, establish a schedule for the consideration of the application for emergency relief. The emergency arbitrator shall, however, have no further power to act once the arbitral tribunal is constituted and he may also not serve as a member of the arbitral tribunal, unless the parties agree so specifically.

Finally, it should be noted that the Rules of the Netherland Arbitration Institute (NAI) also provide in its Art. 42a - 42o for summary arbitral proceedings where the arbitral tribunal has not yet been constituted. In this situation the NAI administrator appoints, at the request of one of the parties, a sole arbitrator which issues then an enforceable award on short notice.



But what, if interim measures are requested from an arbitral tribunal on issues which have already been previously dealt with by a state court? Is there *res judicata* for interim measures?

The answer is: generally no! Circumstances may change from one request to another. The parties can furnish new evidence between the first decision for interim measures and the second request for interim measures, and the arbitral tribunal may also consider different legal arguments.

But exceptions are possible, such as in an ICC case<sup>13</sup>, where the requesting party first filed a request for interim relief in a New York State Court, which was denied, and then filed the identical measures at the arbitral tribunal, which then stated:

*"Accordingly, this Tribunal will not admit Claimant's request for Interim Relief if it finds that*

*the Request previously submitted to the New York Court and the one presented to this Tribunal are the same; and*

*the facts submitted and the evidence tendered in the New York proceedings and before this Tribunal are the same (to the extent relevant); and*

*the legal test applied by the New York Court for denying the Request and the one to be applied by this Tribunal are the same; and*

*due process was granted in the New York proceedings."*

Since all of above conditions were met, the arbitral tribunal dismissed the request for interim measures based on *res judicata*.

### **Different Types of Interim Measures**

Many of the interim measures requested are of procedural nature only, regulating the relationship between the parties during the arbitral proceedings<sup>14</sup>, and dealing with such issues as production of documents, protection of confidentiality, and security for costs. In very specific cases such a request could also be for security for the claim itself, as specifically provided for in Art. 25.1 (a) LCIA<sup>15</sup>. This is, however, a rather unique provision not to be found in other

arbitration rules and, according to the LCIA secretariat, applied only occasionally.

Security for costs is usually requested from claimant and such request is justified if there is reasonable cause to believe that claimant is insolvent and will not pay, in case he loses the arbitration, the pertaining costs and compensation for attorney fees. In earlier times there was, at least in certain jurisdictions, a certain reluctance to convey to arbitral tribunals the authority to honour requests for security of costs. But it can now be considered as settled practice that, under particular circumstances, respondent can request from claimant such security<sup>16</sup>.

Typical patterns serving as basis for honouring a request for security are established insolvency (such as bankruptcy or Chapter 11 proceedings), transfer of the claim to a special purpose vehicle and disposal of all relevant assets prior to initiating arbitration proceedings. But in all cases respondent shoulders the burden of proof. But should such security also be furnished if in the view of respondent claimant's claim is obviously abusive? This had recently to be decided in ICC arbitral tribunal in Geneva<sup>17</sup>. The arguments submitted in this particular case were not of a nature which would have allowed qualifying the claim as abusive and it seems that security for "abusive" claims should be granted in exceptional cases only.

With regard to interim measures dealing with the merits of the case (i.e. protecting the rights of the requesting party from harm that can not later be remitted by the final award)<sup>18</sup>, two distinctions are to be made. Passive interim measures are geared to preserve the status quo, whereas active interim measures are to compel a party to a certain activity, such as to continue to deliver or to execute voting rights in a requested way.<sup>19</sup>

### **New Chapter IV bis of the UNCITRAL Model Law**

It took seven years to find a consensus within Working Group II in UNCITRAL to achieve a compromise on interim measures in arbitration. The key issue was whether arbitral tribunals should have authority to issue also preliminary orders *ex parte*<sup>20</sup>. What has now been formally approved in June/July 2006 is the result of a compromise, which seems to



have been proposed by the Swiss Delegate Prof. Gerhard Walter, with the support of ASA<sup>21</sup>.

There were still two changes made prior to the final approval, namely in Article 17 *bis* (b)<sup>22</sup> and Article 17 *undecies*<sup>23</sup>. Furthermore, the approved version in the official records of the General Assembly uses now instead of the Latin numbering *bis to undecies* capitals as numbering i. e. Article 17 *bis* became Article 17 A, Article 17 *ter* is now Article 17 D until Article 17 *undecies*, which became Article 17 J.

It will obviously still take years until the provisions in the amended UNCITRAL Model Law find their way into national law. Nevertheless, the amended UNCITRAL Model Law is already now a very helpful tool for arbitral tribunals sitting in countries where authority is conveyed upon them to issue interim measures and preliminary orders. Arbitral tribunals may make reference to the amended UNCITRAL Model Law as guideline for their decision making in the field of interim measures and preliminary orders, similar to references to the IBA Rules of Taking Evidence.

Finally, it should be noted that Austria has, in its amendment of its Civil Procedural Rules on Arbitration, already adopted some of the provisions contained in the amended UNCITRAL Model Law as to interim measures, however, without conveying arbitral tribunals the authority to issue *ex parte*-preliminary orders.

Art. 17 UNCITRAL Model Law defines the conditions under which interim measures can be granted and requires for interim measures under Art. 17 (2) (a), (b) and (c) the generally accepted standards, namely (i) harm not adequately reparable by an award of damages whereby 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 (ii) a reasonable possibility that the requesting party will succeed on the merits of the claim.

In so far interim measures are ordered just to preserve evidence that may be relevant and material to the resolution of the dispute in the sense of Art. 17 (2) (d) of the UNCITRAL Model Law the above two prerequisites shall be applied only to the extent the arbitral tribunal deems appropriate.

### **Preliminary orders *ex parte* in particular**

Art. 17 B and C of the UNCITRAL Model Law stipulate that an application for a preliminary order can be made only together with a request for an interim measure and is restricted to "... directing a party not to frustrate the purpose of the interim measure requested"<sup>24</sup>. Immediately upon receipt of an application for a preliminary order the arbitral tribunal shall give:

- notice to all parties of the request for interim measure;
- the application for the preliminary order;
- the preliminary order, if any, and all other communications between any party and the arbitral tribunal in relation thereto.<sup>25</sup>

A preliminary order shall automatically expire after 20 days and is not enforceable, but still binding on the parties.

Is there an actual need for preliminary *ex parte*-orders in arbitration? In essence, yes, at least in particular cases, therefore, an arbitral tribunal should not be deprived from the possibility of issuing preliminary *ex parte*-orders, if it so deems appropriate. Nevertheless, due consideration should be given to the argument raised by van Houtte<sup>26</sup>.

In any case, an arbitral tribunal issuing a preliminary order should ask for security<sup>27</sup>, whereas for interim measures the approval of a request for security lies within the discretion of the arbitral tribunal<sup>28</sup>.

If there is an actual need for an application for a preliminary order caution must be exercised that such application includes also arguments which might speak against the granting of such preliminary order<sup>29</sup>. The English Court of Appeal has in *Brink's-MAT Ltd. v. Elcombe*<sup>30</sup>, clearly established that:

*"the duty of the applicant is to make a full and fair disclosure of all the material facts" ...*

*the material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers...*



*the applicant must make proper enquiries before making the application..."*

There is nothing worse than obtaining a preliminary order based on a restricted presentation of facts only. The arbitral tribunal will soon realise this shortcoming and counsels' credibility might be tampered once for all in these proceedings.

### **Form of Interim Measures and Preliminary Orders**

Interim measures can either be issued in the form of a procedural order or as interim award<sup>31</sup>. Preliminary orders can never be issued as an award.<sup>32</sup>

### **Enforcement Interim Measures and Preliminary Orders**

Voluntarily compliance is the rule.<sup>33</sup> Where necessary assistance of state courts may be sought<sup>34</sup> Art. 17 novies UNCITRAL Model Law now provides particularly that interim measures shall be enforced "irrespective of the country in which it was issued."

### **Conclusions**

An arbitral tribunal must be in a position to grant interim measures and, if need arises, also be able to issue preliminary orders *ex parte*. But such measures and orders do add an additional layer of complexity to the arbitral process.

While drafting the arbitration clause due consideration should be given to the relevance of potential interim measures in the specific case. This applies in particular if *ad hoc* arbitration is provided for. Does the *lex arbitrii* convey authority to the arbitral tribunal to issue interim measures? Are specific provisions to be added for the time the arbitral tribunal is not yet constituted? Should a specific state court be determined for the issuance of potential interim measures for the time the arbitral tribunal is not yet constituted? Is the implementation of the Referee Rules a reason alternative?

Once a need for interim measures arises, the requesting party should, if time permits, first try to obtain an undertaking from the party against whom the interim measures are sought, to voluntarily comply with such request. Such forgoing fits best into the concept of consensual dispute resolution.

Only if the previous conduct of the party against whom the interim measures are sought does not reasonably expect for compliance, formal issuance of interim measures should be requested.

Are interim measures to be requested from a state court or the arbitral tribunal? State courts may be more accustomed to deal with requests for interim measures and they may also be less preoccupied about taking a preliminary decision as to the merits of the case. Nevertheless, once an arbitral tribunal is constituted applications to state courts should, if possible, be avoided.

The fact that the UNCITRAL Model Law now provides for a more detailed set of rules for interim measures should not be taken as a general invitation to overdo it in this field.

Where one party applies for interim measures it should, at least for a preliminary order, directly offer adequate security for the potential damage arising out of the granting of such request, if it is ill-founded at the end of the procedure.

With requests for preliminary orders *ex parte*, caution must be applied not to only base such application on favourable arguments but to make a "full and franc disclosure" of all the relevant facts, be it pro or con.

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<sup>11</sup> For a more comprehensive description of interim measures in arbitration see: Georg von Segesser/Christoph Kuhn, Interim Measures, in Gabrielle Kaufmann-Kohler/Blaise Stucki, International Arbitration in Switzerland, 2004, p. 69-87; Jean-François Poudret/Sébastien Besson, Droit compare de l'arbitrage international, Bruxelles/Zurich 2002, p. 548-580; W. Lawrence Craig/William W., Park/Jan Paulsson, International Chamber of Commerce Arbitration, third edition, New York/London/Rome 2000, § 26.05 and § 27; Julian D.M. Lew, Commentary on Interim and Conservatory Measures in ICC Arbitration cases, ICC Bulletin 2000, vol.11/1, p. 23-30; Ali Yesilirmak, Interim and Conservatory Measures in ICC Arbitral Practice, ICC Bulletin 2000, vol. 11/1, p. 31-36; Markus Wirth, Interim or Preventive Measures in Support of International Arbitration in Switzerland, ASA Bulletin 2000, p. 31-45; Marc Blessing, Introduction to Arbitration - Swiss and International Perspective, Basle 1999



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<sup>2</sup> Art. 818 of the Italian Code of Civil Procedure.

<sup>3</sup> Article 17 UNCITRAL Model Law as source, and, to name just a few, Article 26 Swiss Rules, Article 23 ICC, Article 25 LCIA, Article 21 AAA (IAR), Article 20 DIS.

<sup>4</sup> According to Neil Kaplan at the LCIA, from January 1, 2004 - May 2006, 245 arbitration proceedings were commenced, with 16 applications for expedited proceedings, out of which 8 asked for interim measures. Also Kaj Hobér noted that requests for interim measures are, based on the statistic he developed from his survey, "not very frequent". Already Lew, *op. cit.*, stated that as from 1985 to 2000 there have been approximately 75 ICC cases only in which some form of interim relief has been sought. Nevertheless, there seems nowadays to be a growing demand for the issuance of interim measures by arbitral tribunals.

<sup>5</sup> Klaus Peter Berger, Pre-Arbitral Referees: Arbitrators, Quasi-Arbitrators, Hybrids or Creatures of Contract Law, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner, ICC, 2005* and, in German: *Die Rechtsstellung des Pre-Arbitral Referees*, *Schieds VZ 2006*, p. 176-182; Paul Hobeck/Matthias Weyhreter, *Anordnung von vorläufigen oder sichernenden Massnahmen durch Schiedsgerichte in ex-parte-Verfahren*, *SchiedsVZ 2005*, p. 238-241; Jean-Yves Garaud/Charles-Henry de Taffin, *The ICC Rules for a Pre-Arbitral Referees Procedure*, *ICC Bulletin Vol. 16/No. 1-2005*, p. 33-69; Emmanuel Gaillard/Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, *Arbitration International, Vol. 20, No. 1, 2004*, p. 13-37.

<sup>6</sup> Bernhard Hanotiau, *The ICC Rules for a Pre-Arbitral Referee Procedure*, *Int. A. L. R.*, 2003, p. 75 et seq.; Pierre Tercier, *Le référé pré-arbitral*, *ASA Bulletin 2004*, p. 464-478; first experiences were also discussed at the Seminar of the International Arbitration Institute of May 31 of 2002 in Paris, see [www.iaiparis.com/pdf/actes\\_colloques.pdf](http://www.iaiparis.com/pdf/actes_colloques.pdf)

<sup>7</sup> Referee Rules, Art. 3.1.

<sup>8</sup> Garaud/de Taffin, *op. cit.*, p. 38; contra: Berger, *op. cit.*, p. 87.

<sup>9</sup> In the first case it took the ICC secretariat one day, in the second case two days to appoint the referee.

<sup>10</sup> Art. 6.1 Referee Rules.

<sup>11</sup> Art. 6.2 Referee Rules. In the first case it took Bernhard Hanotiau 18 days to deliver an order of 39 pages and in the second case an order was rendered by Pierre Tercier 28 days after the file was transmitted to him. In 2005 two cases were decided within four resp. five weeks after appointment of the referee; *ICC Bulletin Vol. 17/1-2006* p. 13.

<sup>12</sup> Art. 6.3 Referee Rules

<sup>13</sup> ASA 2003, p. 810-821

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<sup>14</sup> Von Segesser/Kuhn, *op. cit.*, p. 72.

<sup>15</sup> "The arbitral tribunal shall have the power.. to order any respondent party to a claim or counter claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee.."

<sup>16</sup> Pierre Karrer/Marcus Desax, *Security for Costs in International Arbitration, Why, when, and what if..*, in *Liber Amicorum Karl-Heinz Böckstiegel, 2001*, p. 339-353; Bernhard Berger, *Prozesskostensicherheit (cautio judicatum solvi) im Schiedsverfahren*, *ASA Bulletin 2004*, p. 4-21.

<sup>17</sup> Procedural Order No. 1 of ICC Case 12542/EC, published in *ASA 2005*, p. 685-700; this order contains a detailed analysis of recent case law and scholarly writing on security of costs.

<sup>18</sup> Von Segesser/Kurt, *op. cit.*, p. 72.

<sup>19</sup> In the first pre-trial referee case claimant was ordered not to change a number of contracts implementing the main contract giving raise to the dispute since such changes would have placed claimant before a *fait accompli* which could not have been altered even if he were to win the case. In the second pre-trial referee case respondent was ordered to continue to perform his obligation for delivery of oil in accordance with the contractual obligations for which claimant had already paid substantial sums of money (Garaud/de Taffin, *op. cit.*, p. 50).

<sup>20</sup> Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3-7 October 2005), N 49-55; see [www.uncitral.org](http://www.uncitral.org).

<sup>21</sup> Report of the United Nations Commissions on International Trade Law on the work of its thirty-ninth session, June 19-July 17 2006, N 87-145. [www.uncitral.org](http://www.uncitral.org)

<sup>22</sup> Now reading: "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 making any subsequent determination." (Previously: ".. provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.")

<sup>23</sup> Now reading: "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." (Previously: "The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purpose of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedure insofar as these are relevant to the specific features of an international arbitration.")



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<sup>24</sup>§§ 577 - 518 ZPO, in particular § 593 ZPO, entered into force as per July 1, 2006.

<sup>24</sup>Art. 17 B (3) UNCITRAL Model Law .

<sup>25</sup>Art. 17 C (1) UNCITRAL Model Law.

<sup>26</sup>Hans van Houtte: Ten Reasons Against a Proposal for *Ex Parte* Interim Measures of Protection in Arbitration, Arbitration International 2000, p. 85-95.

<sup>27</sup>Art. 17 E (2) UNCITRAL Model Law: "... shall require... to provide security... unless the arbitral tribunal considers it in appropriate or unnecessary to do so."

<sup>28</sup>Art. 17 B (1) UNCITRAL Model Law: "The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure."

<sup>29</sup>Art. 17 F (2) UNCITRAL Model Law clearly requests:"The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or to maintain the order.."

<sup>30</sup>[1988] 3 All ER 188 (C.A.), cited after Steve Gee QC, "Commercial Injunctions" (5<sup>th</sup> edition).

<sup>31</sup>E.g. Art. 26 (2) of the Swiss Rules "... may be established in the form of an interim award";

<sup>32</sup>Art. 17 C (5) UNCITRAL Model Law: "A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award."

<sup>33</sup>Surprises can, however, not be avoided as demonstrated most recently in a ICC case reported in the Newsletter of Global Arbitration Review of September 22, 2006 under the heading "ICC Interim Order falls flat". In a dispute involving the Philippine Government, which should have cleared, based on an interim order, an airport terminal, which executive secretary of the government stated: "How can they bully the government? It's like somebody trying to kick an elephant. We dare them to do that, Just because an international [panel] ordered the NAIA 3 handed to PIATCo, it doesn't mean it will be executory."

<sup>34</sup>e.g. Art. 183 (2) PILA: "If the party concerned does not voluntarily comply with this measures, the Arbitral Tribunal may request the assistance of the State Judge, the Judge shall apply his own Law."