International Arbitration in Switzerland

A Handbook for Practitioners

Second Edition

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CHAPTER 6

Interim Measures

Georg von Segesser and Christopher Boog

§6.01 INTRODUCTION

When international business relationships derail, time is often of the essence. Although the resolution of disputes by way of arbitration is often speedier than court proceedings, it nevertheless takes some time for an arbitral tribunal to render a final award. As a consequence, it may be necessary for a party to an arbitration to obtain interim measures in order to stabilize matters on a provisional basis, or to regulate the terms of an on-going relationship for the duration of the arbitral proceedings, or to avoid frustration of the final award. Obtaining such interim relief swiftly and effectively is often of crucial importance to a party whose rights or interests may be substantially harmed by the conduct of the adverse party.

This chapter addresses the issues that are of primary importance in such situations, such as: Do arbitral tribunals have the authority to grant interim measures? May a party to an arbitration agreement also turn to courts for interim relief? Are there other instances that may grant interim measures before the arbitral tribunal is constituted? May a party apply to the arbitral tribunal for a new decision after a court has decided upon interim relief? What are the forms of relief that an arbitral tribunal may grant and what are the prerequisites that must be fulfilled? In particular, may an arbitral tribunal order the freezing of assets in order to secure money claims? In case of non-compliance, does the arbitral tribunal itself have any means of furthering compliance? How is an arbitral tribunal's order granting interim relief enforced? Will Swiss courts enforce interim measures ordered by arbitral tribunals sitting outside Switzerland? What is the effect of interim measures ordered by foreign courts? What if such foreign interim measures themselves confirm or ratify measures ordered by arbitral tribunals sitting abroad?

When considering these issues, it is important to bear in mind three features which are typical of interim measures issued by arbitral tribunals in Switzerland. First,

In the previous edition of this book, this chapter was authored by G. von Segesser and C. Kurth.

international arbitrations conducted in Switzerland often do not have any connection with Switzerland other than it being the location of the seat of the arbitral tribunal. Consequently, foreign courts will often have the power to issue interim measures based upon foreign laws, transnational regulations or international conventions[1] and the enforcement of interim measures ordered by Swiss arbitral tribunals will often be governed by the law of the foreign place of enforcement. Secondly, requests for interim measures have become progressively frequent in international commercial arbitration both in Switzerland and in other leading venues for international arbitration, and arbitral tribunals are showing an increasing tendency towards granting such relief. Thirdly, while emphasis is often placed on the potential difficulties associated with seeking to enforce interim measures issued by arbitral tribunals, it is important to recognize that many parties tend to comply voluntarily with such measures.

§6.02 THE AUTHORITY OF ARBITRAL TRIBUNALS TO ORDER INTERIM MEASURES

Swiss law affirms the authority of arbitral tribunals to order interim measures: Article 183(1) of the PILA establishes a presumption that the parties have conferred upon the arbitral tribunal the general authority to order such measures: 'Unless the parties have otherwise agreed, the Arbitral Tribunal may, on motion of one party, order provisional or and conservatory measures'.

As reflected in the wording of Article 183(1) of the PILA, the parties are free to exclude, limit or otherwise qualify the arbitral tribunal's power to order interim measures. Such an agreement can be entered into before or after the commencement of the arbitration and is not subject to any specific requirements as to form. An agreement to exclude the authority of the arbitrators to order interim measures must, however, be explicit. Thus, reference to a set of procedural rules that does not expressly provide for such authority is not considered sufficient to demonstrate the parties' intent to deprive the arbitral tribunal of the authority presumed under Article 183(1) of the PILA.[2]

§6.03 INTERIM MEASURES AVAILABLE TO ARBITRAL TRIBUNALS

[A] Applicable Law

Absent an express agreement by the parties, the question of whether or not an arbitral tribunal has the authority to grant interim relief must be determined under the *lex arbitri*. However, what types of interim measures may be ordered in a specific case is a different question, which is governed either by the relevant procedural rules or by the *lex causae*, depending on whether interim measures are considered to be a matter of

1. In particular, Article 31 of EU Regulation No. 44/2001 or Article 31 of the Lugano Convention.
2. T. Rüede & R. Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht* (Zurich: Schulthess, 1993), 252.

procedural law or substantive in nature.[3] The Swiss *lex arbitri* does not render more precisely which types of interim measures an arbitral tribunal seated in Switzerland may order and, absent an express agreement by the parties, such an arbitral tribunal may thus consider a number of different sources in evaluating the permissible type of measure, including the applicable procedural rules and the *lex causae*.[4]

[B] Requirements

In order to obtain interim relief, the requesting party must generally satisfy the following requirements:

- prima facie jurisdiction of the arbitral tribunal;[5]
- prima facie evidence that there is a risk of imminent harm or injury to the requesting party, and such harm outweighs the harm that is likely to result against the party to whom the measure is directed if the measure is granted (*periculum in mora*).[6] The arbitral tribunal should apply a proportionality test in order to evaluate whether the imminent harm is serious enough to warrant the requested measure;[7]
- reasonable chance of success on the merits (*fumus boni iuris*);[8]
- if ordered by the arbitral tribunal, provision of appropriate security.

Urgency is not a distinct, general requirement for granting interim measures in international arbitration.[9] It is, however, an important factor which will regularly be taken into consideration by arbitral tribunals when undertaking the proportionality test

3. C. Boog, 'The Laws Governing Interim Measures in International Arbitration', in *Conflict of Laws in International Arbitration,* Eds F. Ferrari & S. Kröll (Munich: Sellier, 2011), 409 et seq., 431 et seq.; J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* (Zurich: Schulthess, 2007), n. 623, 534; N. Voser, 'Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach', *Dispute Resolution International* (2007): 178.
4. For a detailed account with references see C. Boog, 'The Laws Governing Interim Measures', 431-441; see also N. Voser, 'Interim Relief in International Arbitration', 179; G. von Segesser & D. Schramm, 'Swiss Private International Law Act', in *Concise International Arbitration*, Ed. L.A. Mistelis (The Netherlands: Kluwer Law International, 2010), Article 183, n. 5, 936.
5. G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 3, 935. A defence of lack of jurisdiction raised by one party does not prevent the arbitral tribunal from ordering interim measures once the file has been transmitted to it, provided that the arbitral tribunal is satisfied that it has prima facie jurisdiction. See G. von Segesser, 'Vorsorgliche Massnahmen im Internationalen Schiedsprozess', [2007] ASA Bull. 476.
6. See e.g., G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 3, 935.
7. G. Petrochilos, 'Interim measures under the revised UNCITRAL Arbitration Rules', [2010] ASA Bull. 883; L.F. Wyss, 'Vorsorgliche Massnahmen und Beweisaufnahme – die Rolle des Staatlichen Richters bei Internationalen Schiedsverfahren aus Schweizer Sicht', *SchiedsVZ* (2011): 196; N. Voser, 'Interim Relief in International Arbitration', 177, also refers to this as a 'balance of convenience' test.
8. See. e.g., G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 3, 935.
9. See e.g., Article 17 A of the UNCITRAL Model Law; G. von Segesser, 482; G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 3, 935; N. Voser, 'Interim Relief

and weighing the parties' respective interests under the *periculum in mora* requirement.[10] Whether or not and to what degree urgency is to be taken into account in such test must be established on a case-by-case basis.[11]

Moreover, in certain situations, arbitral tribunals have ordered interim relief where a party was about to take actions that could aggravate the dispute. This form of interim relief is not uncommon in international arbitration, whereas it is less frequent before national courts. The typical example is where a party purports to draw on a bank guarantee that is on the verge of expiring although the other party has concretely offered to have the bank extend the guarantee. In this type of case, arbitral tribunals often set a low threshold when assessing the 'risk of imminent harm'.[12]

[C] Types of Interim Measures

[1] General Comments

Swiss arbitration law does not specify the types of interim measures that may be granted by arbitral tribunals. In a 2010 decision, the Federal Tribunal held that arbitral tribunals can order interim measures based on Article 183(1) of the PILA that fall into the three categories (a) conservatory or protective measures (aimed at securing the effectiveness of the arbitral award); (b) regulatory measures (aimed at regulating and/or stabilizing the relationship between the parties during the arbitration); and (c) measures ordering interim performance of an obligation.[13] This categorization is to be understood as a general guideline and is not exhaustive.[14] As a general rule, arbitral tribunals may order whatever measures they deem necessary to: (a) protect the rights of the requesting party pending the arbitration in view of securing the effectiveness of the award; (b) regulate the relationship between the parties during the arbitration; or (c) preserve evidence that may be relevant and material to the outcome of the case.[15]

Within this permissive framework, arbitral tribunals may consider a number of different sources of law in evaluating the appropriate interim measure to be ordered.[16] They may look to the contract that has given rise to the dispute.[17] If the contract provides a mechanism for interim protection, the arbitral tribunal will certainly apply such a contractual mechanism. However, the parties rarely address this type of matter

in International Arbitration', 177; D. Hascher, 'Introduction to Decisions on ICC Arbitration Procedures', *ICC Bull. Special Supplement* (2010): 15.

10. Similarly L.F. Wyss, 196.
11. G. Petrochilos, 882; see also N. Voser, 'Interim Relief in International Arbitration', 177.
12. E. Geisinger, 'Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesures provisionnelles', *Semaine Judiciaire* 2 (2005): 379 and references.
13. DFT 136 III 200.
14. See B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (Bern: Stämpfli, 2010), n. 1150, 325.
15. M. Wirth, 'Interim or Preventive Measures in Support of International Arbitration in Switzerland', [2000] ASA Bull. 32. For more on the types of interim measures granted by arbitral tribunals see sections §6.03[C][2]-[7] *infra*.
16. C. Boog, 'The Laws Governing Interim Measures', 431 et seq.
17. M. Wirth, 32.

in their agreements. Instead, the parties usually agree upon a particular set of arbitration rules to govern the arbitral proceedings. While these arbitration rules usually do not contain detailed provisions on interim measures,[18] they often include general clauses defining the scope of admissible relief, giving the arbitral tribunal wide discretion to determine the types and content of interim measures it may order.[19] Moreover, it is sometimes possible to find guidance in previous procedural decisions rendered under such rules.[20]

Arbitral tribunals also regularly turn to the law applicable to the substance of the dispute (the *lex causae*), which may provide for specific measures.[21] Reference to the applicable substantive law may also ensure that any interim measures ordered will be harmonized with the final award on the merits.[22]

[2] Measures Aimed at Ensuring the Effectiveness of the Arbitral Award

Measures aimed at ensuring the effectiveness of the arbitral award are usually referred to as protective or conservatory measures. They typically require a party to perform or refrain from performing certain specific acts and are designed to ensure the effective enforcement of the final award, i.e., to prevent the final award from becoming irrelevant by the time it is issued. The following are examples of protective or conservatory measures:

- an order to refrain from disposing of or modifying the object of a proprietary claim;
- an order to deposit the goods in dispute or goods to be delivered with a custodian;
- an order to refrain from drawing on a letter of credit or guarantee;[23]
- an order prohibiting one or both parties from publicizing the evidence or certain aspects of a dispute (while such an order is generally not aimed directly at ensuring the effectiveness of the final award, it may be necessary to protect the economic interests of a party because a one-sided public account of the dispute may result in significant reputational damage).[24]

18. Two exceptions are Article 26(2) of the UNCITRAL Arbitration Rules and Article 25 of the LCIA Rules, each of which contain non-exhaustive lists of possible measures.
19. Article 26(1) of the Swiss Rules, e.g., stipulates that the arbitral tribunal may 'grant any interim measures it deems necessary or appropriate'; similarly, Article 28(1) of the ICC Rules provides that the arbitral tribunal may 'order any interim or conservatory measure it deems appropriate'.
20. F. Vischer, in *Zürcher Kommentar zum IPRG*, Eds D. Girsberger, A. Heini, M. Keller, J. Kren Kostkiewicz, K. Siehr, F. Vischer & P. Volken, 2nd ed. (Zurich: Schulthess, 2004), Article 183, n. 5, 2017-2018. With respect to arbitration under the similar rule of the 1998 ICC Rules, see A. Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice', *ICC ICArb. Bull.* 31 (2000): 33 et seq.
21. See e.g., Article 92 of the CO, which authorizes the obligor to perform its delivery obligations by depositing the goods when the obligee is in default.
22. J.-F. Poudret & S. Besson, n. 623, 534.
23. M. Wirth, 33.
24. A. Bucher & P.-Y. Tschanz, *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 1989), 87. See also Chapter 7 *infra*.

[3] Measures Aimed at Regulating the Conduct of and the Relations between the Parties during the Arbitration

In certain circumstances, a party may wish to request measures to regulate the conduct of the parties during the arbitration. Such regulatory measures are most often requested in disputes involving long-term contracts or disputes arising in corporate settings. The following are examples of regulatory measures:

- an order requiring a contractor to carry on with construction works and/or the owner to continue to make payments (possibly into an escrow account);
- an order requiring a manufacturer to continue supplying a distributor;
- an order requiring a distributor to continue selling a manufacturer's products;
- a so-called 'cease and desist' order;
- an order authorizing the suspension of the performance of certain contractual obligations;
- an order suspending the effect of a corporate resolution.

[4] Measures Aimed at Preserving Evidence

Arbitral tribunals also have the authority to issue orders aimed at preventing evidence from being altered or destroyed or rendered unavailable. The following are examples of such orders:

- an order authorizing the inspection of a construction site prior to impending changes;
- an order appointing an expert to prepare a report ascertaining the status of facts or events at a particular time.[25]

[5] Measures Aimed at Securing the Enforceability of Money Claims

When a party makes a request for measures aimed at securing the enforceability of money claims, two main difficulties arise.

The first difficulty stems from the fact that an arbitral tribunal only has jurisdiction over the parties to the arbitration agreement. Yet, in order to be effective, measures securing the enforceability of money claims must often be directed at third parties such as banks, in addition to the parties to the dispute. In such a case, a party will be compelled to request the measures from a competent court.

The second difficulty results from the nature of measures aiming to secure the enforceability of money claims, which are often considered as measures arising under debt enforcement laws over which courts ordinarily exercise exclusive jurisdiction.

25. See J.-F. Poudret & S. Besson, n. 628, 538 et seq.

Under Swiss law, the prevailing view is that an arbitral tribunal may not grant a freezing order within the meaning of Article 271 of the Swiss Debt Enforcement and Bankruptcy Act of 1889 ('DEBA').[26] An arbitral tribunal may, however, grant certain alternative measures, such as an order requiring a party to furnish a bank guarantee covering the amount claimed, or provisionally deposit the amount claimed with a custodian, or refrain from disposing of a specific portion of its assets.[27] An arbitral tribunal may also consider ordering a party to pay the amount claimed to the requesting party on a provisional basis.[28] An ICC arbitral tribunal considered ordering security for a money claim where the requesting party argued that there was little chance of obtaining recognition and enforcement of an arbitral award against the adverse party under the New York Convention, given a decision on this issue by the highest court of the country where the adverse party was domiciled.[29]

[6] Anti-suit Injunctions

In general terms, an anti-suit injunction may be defined as a measure whereby a court orders a party to refrain from commencing or prosecuting proceedings in another court.[30] Originally, anti-suit injunctions were granted exclusively in common law jurisdictions,[31] where the failure to comply with such measures could potentially result in a finding of contempt of court.[32] Although the court granting the injunction only has in personam jurisdiction over the party against whom the measure is directed and who is party or a potential party to the foreign proceedings, this remedy has been considered to be an indirect interference with the process of the foreign court.[33]

In recent years, the use of anti-suit injunctions has become increasingly frequent in the context of international arbitration and the scope of such measures has broadened at a similar pace. A party to an arbitration agreement may envisage

26. For an overview of the different scholarly opinions see C. Boog, *Die Durchsetzung einstweiliger Massnahmen in internationalen Schiedsverfahren* (Zurich: Schulthess, 2011), n. 99-100, 51-52.
27. S. Besson, *Arbitrage international et mesures provisoires* (Zurich: Schulthess, 1998), n. 79, 67; C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 101-102, 52-53.
28. See Interim Award published in [1994] ASA Bull. 159. See also Article 39 of the English Arbitration Act of 1996 and Article 25.1(c) of the LCIA Rules.
29. ICC Case No. 8786 (Interim Award) published in [2001] ASA Bull. 751: The arbitral tribunal referred to F. Vischer, in *Zürcher Kommentar zum IPRG*, Article 183, n. 6, 2018, who considers that arbitral tribunals have the authority to order the deposit of a sum with a third party, a guarantee or surety to serve as a security for a monetary claim.
30. There is no precise definition of the term 'anti-suit injunction'. The term is used in a multitude of jurisdictions and to describe various forms of relief enjoining a party from commencing or continuing proceedings before a national court or an arbitral tribunal. As an umbrella term, it is regularly understood to include not only anti-'suit' injunctions as such, but also anti-arbitration injunctions and anti-anti-suit (or counter-anti-suit) injunctions and anti-anti-arbitration injunctions issued by both national courts and arbitral tribunals; see O.L. Mosimann, *Anti-suit Injunctions in International Commercial Arbitration* (The Hague: Eleven International Publishing, 2010), 7 et seq.
31. Civil law jurisdictions rely on the principle of lis pendens to deal with parallel proceedings.
32. S. Clavel, 'Anti-suit injunctions et arbitrage', *Revue de l'Arbitrage* 4 (2001): 671.
33. See e.g., Decision of the ECJ (*Turner v. Grovit*) C-159/02.

requesting an anti-suit injunction – from a court or from the arbitral tribunal – *inter alia* in the following circumstances:

- to enjoin the adverse party from commencing proceedings before a court or another arbitral tribunal;
- to order the adverse party to withdraw proceedings pending before another arbitral tribunal or court or to request a stay of such proceedings;
- to resist or support the enforcement of an arbitral award.

It is noteworthy in this context that courts bound by EU Regulation No. 44/2001 may no longer issue anti-suit injunctions enjoining a party from pursuing its claim in the competent courts of any other state subject to the said Regulation since the ECJ's famous *West Tankers* ruling.[34]

Arbitral tribunals often have two reservations of principle when faced with applications for anti-suit injunctions. First, arbitral tribunals may prefer not to issue anti-suit injunctions because such measures may conflict with the principle of *Kompetenz-Kompetenz*, according to which each arbitral tribunal has the power to decide upon its own jurisdiction. Secondly, arbitral tribunals are often very cautious when ordering anti-suit injunctions because such measures may interfere with a party's fundamental right to free access to courts and, in certain circumstances, may cause damage to the enjoined party (for instance, where court proceedings are necessary to toll a limitation period).[35]

In practice, arbitral tribunals have adopted a variety of different approaches to anti-suit injunctions. In an ICC construction arbitration for example, 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'.[36] By contrast, two international arbitral tribunals sitting in Switzerland issued anti-suit injunctions that enjoined a party from suing before a court. In one case, the tribunal based its order on the arbitration agreement, arguing that it created an obligation to refrain from seeking relief from courts. In the other case, the arbitral tribunal found that such obligation was contained in the contract that gave rise to the arbitration.[37]

34. See Decision of the ECJ (*Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.*) C-185/07, where the ECJ found that an anti-suit injunction issued by an English court enjoining proceedings before an Italian court otherwise competent under EU Regulation No. 44/2001 if not for an arbitration clause providing for arbitration in London is incompatible with EU Regulation No. 44/2001.
35. See L. Lévy, 'Les anti-suit injunctions prononcées par les arbitres en droit commun de l'arbitrage', in the documentation for the International Arbitration Institute ('IAI') Conference on the Use of Anti-Suit Injunctions in International Arbitration (Paris, 21 November 2003).
36. Unreported Procedural Order No. 3 of September 2003.
37. These cases are discussed in M. Wirth, 36-37.

[7] Security for the Parties' Legal Costs

A party, most often the respondent, will sometimes request an order requiring the adverse party to furnish security for costs to be incurred in the arbitral proceedings. Such costs may include the fees and expenses of the arbitral tribunal on the one hand, but also the party's legal fees and other expenses. Under Swiss law, it is generally accepted that arbitral tribunals have the power to order a party to provide such security for costs under Article 183(1) of the PILA.[38]

Usually a party will be ordered to provide security for costs where there is a risk of non-recovery by the other party. However, the extent of risk required varies from one decision to another. Thus, in one unreported decision,[39] an arbitral tribunal held that security for costs should only be ordered in exceptional situations, i.e., where there is a clearly documented risk that the assets of a party would not cover a future award of costs. In a decision from 1997, an arbitral tribunal of the Geneva Chamber of Industry and Commerce ('CCIG') held that the voluntary liquidation of a party during arbitration is a risk inherent in international trade and that only manoeuvres contrary to good faith could justify an order for security for costs.[40] Arbitral tribunals operating under the ICC Rules appear to apply a rather restrictive general approach.[41] For instance, one arbitral tribunal held in a 2003 decision that 'insolvency is not sufficient, in itself, to form the basis of a request for security for costs' and that the party seeking security for costs should establish, on a prima facie basis, that the opposing party is 'organizing its own insolvency' or that it 'deliberately provoked its insolvency in order to avoid the financial risks related to the arbitral proceeding', or 'for any other fraudulent reason'.[42]

By contrast, in a decision from 1998, an arbitral tribunal took a less restrictive view and only required the requesting party to demonstrate that there was a potential risk that a

38. See B. Berger, 'Security for Costs: Trends and Developments in Swiss Arbitral Case Law', [2010] ASA Bull. 9; M. Wirth, 36. Likewise, arbitral tribunals operating under the ICC Rules have repeatedly based their competence to decide on applications for security for costs on Article 23 of the ICC Rules 1998; see ICC Case No. 12035 (6 June 2003), ICC Case No. 12228 (11 June 2003) and ICC Case No. 12393 (30 July 2003) published in *ICC Bull. Special Supplement* (2010). The provision of security for legal costs must be distinguished from the bond that may be requested from the requesting party (see section §6.04[B] *infra*) and the deposit of costs or advance on costs. While legal costs refer to the costs incurred by a party in particular for its external representation, deposits or advances cover the costs of the arbitral proceedings, including the fees of the arbitral tribunal, expenses incurred by the arbitrators and experts, and costs of expert advice, and are provided for in all major arbitration rules (e.g., Article 41 of the Swiss Rules; Article 36 of the ICC Rules; Article 24 of the LCIA Rules). These rules typically provide that, if a party fails to pay its share of the deposit or advance, the other party is free to make the required payment in order for the proceedings to continue (e.g., Article 41(4) of the Swiss Rules; Article 36(5) of the ICC Rules; Article 24.3 of the LCIA Rules).
39. This decision is discussed in M. Wirth, 36.
40. Arbitral Award (25 September 1997) published in [2001] ASA Bull. 745.
41. See ICC Case No. 12035 (6 June 2003), ICC No. Case 12228 (11 June 2003), ICC Case No. 12393 (30 July 2003) and ICC Case No. 12853 (3 December 2003) published in *ICC Bull. Special Supplement* (2010).
42. ICC Case No. 12305 (6 June 2003).

future award of costs would not be enforceable.[43] Finally, in 2001, a sole arbitrator ordered security for costs on the basis that the requesting party's interest in obtaining such security prevailed over the adverse party's interest in unimpeded access to arbitral justice, where such adverse party had been the subject of bankruptcy proceedings that were stayed due to lack of assets.[44]

It remains to be seen whether international arbitral tribunals seated in Switzerland will be influenced in the future by the new provision in Article 379 of the CCP limiting the ordering of security for cost by a domestic arbitral tribunal to cases of manifest insolvency.[45]

§6.04 PROCEDURAL ISSUES

[A] Ex Parte Orders

There are two main situations in which it may be desirable for a party to obtain interim measures on an ex parte[46] basis, i.e., without the adverse party having been notified of a request for interim measures and/or having had the opportunity to present its position prior to the order being granted. The first situation arises in cases of utmost urgency, i.e., when there is simply no time to hear the adverse party. The second situation is where the very purpose of the interim measure could be defeated if the adverse party had advance notice of the request, e.g., where there is a risk that the adverse party would dispose of or conceal assets which are the target of the measure.

Although ex parte measures are regularly granted both in civil and common law court systems, whether arbitrators may and/or should order interim measures on an ex parte basis is a highly contentious issue in international arbitration. This is best demonstrated by the debate within the UNCITRAL Working Group II (Arbitration)[47] during the redrafting of Article 17 of the UNCITRAL Model Law relating to interim measures. The views expressed within the Working Group differed considerably, ranging from a recommendation that arbitral tribunals should have no power whatsoever to order ex parte measures to a recommendation that arbitral tribunals should be authorized to grant ex parte orders, which would then be enforced by courts even

43. Arbitral Award (21 December 1998) published in [1999] ASA Bull. 59.
44. Arbitral Award (20 November 2001) published in [2002] ASA Bull. 467.
45. Rightly critical towards Article 379 of the CCP B. Berger, 14-15; B. Berger & F. Kellerhals, n. 1461, 416 and n. 1476a, 421; N. Voser, 'New Rules on Domestic Arbitration in Switzerland: Overview of Most Important Changes to the Concordat and Comparison with Chapter 12 PILA', [2010] ASA Bull. 762.
46. For a general understanding of ex parte orders, see D.F. Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals for Moving Forward', in *International Commercial Arbitration: Important Contemporary Questions*, Ed. A.J. van den Berg, *ICCA Congress Series No. 11* (The Hague: Kluwer Arbitration, 2002), 82-149.
47. < www.uncitral.org > , 18 July 2012.

before the adverse party is given notice.[48] After a lengthy and at times heated debate, the Working Group ultimately settled on a set of rather detailed provisions in Articles 17 B and 17 C of the UNCITRAL Model Law, under the heading 'preliminary orders'. According to these provisions, while an arbitral tribunal is competent to order interim relief on an ex parte basis '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',[49] and having regard to special safeguards,[50] such measures are not subject to enforcement by a national court.

Under Swiss law, it is well established that an arbitral tribunal has the power to issue interim measures on an ex parte basis.[51] Given that an arbitral tribunal and a court are in an analogous position, there is no reason in principle why arbitrators should not be vested with powers similar to those of a judge in this regard. In order to comply with the requirements of due process, an arbitral tribunal should limit the granting of ex parte interim measures to the two situations mentioned at the outset of this chapter, namely particular urgency and frustration of the purpose of the measure sought. The arbitral tribunal has discretion in this regard and should order ex parte interim measures only where appropriate, thereby weighing the parties' interests in each individual case, taking into consideration all circumstances. In case an ex parte measure is ordered, the adverse party should be notified of the order immediately after it has been granted and be given an opportunity to be heard at the first possible occasion. Furthermore, the interim measure should only remain in force until such time as the arbitral tribunal has heard the adverse party. After having heard all parties, the arbitral tribunal can then decide whether or not to order an extension of the interim measure, or else to lift or modify its initial order.

In practice, arbitral tribunals in commercial cases still rather rarely grant interim measures on an ex parte basis and in any event do so only in exceptional circumstances, e.g., where such an order is absolutely necessary in order for the measure to be effective.[52] Generally, arbitral tribunals are reluctant to issue ex parte orders for fear

48. Reports of the working sessions of Working Group II can be found at <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>, 18 July 2012.
49. See Article 17 B(2) of the UNCITRAL Model Law.
50. See Article 17 C of the UNCITRAL Model Law.
51. See e.g., B. Berger & F. Kellerhals, n. 1153, 326; C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 916-918, 329-330; D. Girsberger & N. Voser, *International Arbitration in Switzerland*, 2nd ed. (Zurich: Schulthess, 2012), n. 821, 246 and n. 859, 257; G. Kaufmann-Kohler & A. Rigozzi, *Arbitrage international: Droit et pratique à la lumière de la LDIP* (Bern: Editions Weblaw, 2010), n. 584, 385; S.V. Berti, in *Basler Kommentar zum Internationalen Privatrecht*, Eds H. Honsell, N. Vogt, A.K. Schnyder & S.V. Berti, 2nd ed. (Basel: Helbing & Lichtenhahn, 2007), Article 178, n. 12, 183; M. Wirth, 31 and 38; A. Bucher & P.-Y. Tschanz, 90. In court proceedings, ex parte orders are often effective when directed at third parties, such as banks having a business relationship with the adverse party. However, arbitral tribunals generally do not have jurisdiction over entities that are not parties to the arbitration agreement. Although on its face Article 183(1) of the PILA vests 'the arbitral tribunal' with the authority to order interim measures, the arbitrators may agree that the chairperson shall have the authority to grant ex parte interim relief, provided that such delegation is permissible under the applicable procedural rules (Article 182 of the PILA). See A. Bucher & P.-Y. Tschanz, 86.
52. See M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel: Helbing & Lichtenhahn, 1999), n. 865, 263.

that the enjoined party may lose confidence in the arbitration if such an order is granted very early in the proceedings and based upon only one party's version of the facts.[53] However, putting into place specific safeguards such as, for instance, those provided for in Articles 17 C and 17 E of the UNCITRAL Model Law[54] might ease a tribunal's reluctance and might further the effective protection of the parties' rights in international arbitration.

The granting of ex parte orders is less rare in CAS arbitrations, where it is sometimes necessary to render an urgent decision on a request to stay the effects of a decision by a sports' governing body barring an athlete or team from participating in a competition.[55]

Reflecting the majority view in legal writing in Switzerland, under the Swiss Rules as revised in 2012, arbitral tribunals have the express power to order ex parte interim measures. Under Article 26(3) of the Swiss Rules, the arbitral tribunal may, in exceptional circumstances rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.

[B] Security

As a precondition for granting interim measures, arbitral tribunals often require the requesting party to post security. The purpose of such security is to protect the adverse party by facilitating the recovery of any damages caused by the interim measures, if such measures are ultimately found to be unjustified in the final decision on the merits.[56] Security is only appropriate if the interim measures are capable of causing damage and if the amount of the required security does not exceed the maximum possible loss that could be sustained by the adverse party.[57] The financial situation of the requesting party is irrelevant for the purpose of fixing the amount of the security.[58]

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53. See J.E. Castello & Y. Derains, 'The View Against Arbitral Ex-parte Interim Relief', *AAA Dispute Resolution Journal* (August – October 2003): 60-69.
54. E.g., giving the party against whom the measure is ordered the immediate opportunity to present its case; deciding promptly on any objection to the ex parte order; automatic expiry of the ex parte order after a certain period of time; provision of security by the party requesting the ex parte order as a rule.
55. Accordingly, Article R37 of the Arbitration Rules of the Court of Arbitration for Sport as amended on 1 January 2012 ('CAS Rules') provides that:

> In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent shall be heard subsequently.

A similar rule is found in Article 14 of the CAS Rules for the Resolution of Disputes arising during the Olympic Games ('CAS ad hoc Division Rules').
56. See G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 8, 937.
57. G. Walter, W. Bosch & J. Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz* (Bern: Stämpli, 1991), 151-152.
58. M. Wirth, 38.

Article 183(3) of the PILA explicitly authorizes the arbitrators (and the courts) to 'make the granting of interim relief or conservatory measures subject to the provision of appropriate security'. The language of Article 183(3) of the PILA leaves no room for doubt that the arbitral tribunal is empowered to order security for interim measures ex officio, without the need for any application by a party. In practice, the ordering of security upon application of a party will be more frequent than a sua sponte order of the tribunal.

Even though this is not expressly stated in Article 183 of the PILA,[59] the prevailing view is that the jurisdiction of the arbitral tribunal extends to claims for damages arising out of interim measures which prove unjustified.[60]

Most arbitration rules contain provisions to the same effect as Article 183(3) of the PILA with regard to ordering security.[61] Some even expressly confirm the arbitral tribunal's jurisdiction to rule on a claim for damages arising out of an unjustified interim measures.[62] Even where the rules do not include such explicit language, like under Article 183 of the PILA, the tribunal is often presumed to have jurisdiction to adjudicate the damage claim.[63]

[C] Form of Decisions on Interim Measures

The PILA is silent on the form of decisions on interim measures. Most arbitration rules leave it to the arbitral tribunal to determine whether the decision should take the form of an 'order' or an 'award'.[64] Under the ICC Rules, the form of the decision as either a procedural order or an arbitral award is relevant to the determination of whether such decision is subject to scrutiny by the ICC Court.[65]

Generally, the characterization of a decision as an arbitral award or as a procedural order will depend on its substantive content, not on the label given to it.[66]

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59. But see Article 374(4) of the CCP for domestic arbitration which explicitly provides that the arbitral tribunal is competent to hear damage claims arising out of interim measures which prove to be unjustified.
60. S.V. Berti, in *Basler Kommentar zum Internationalen Privatrecht*, Article 183, n. 15, 1626; F. Vischer, in *Zürcher Kommentar zum IPRG*, Article 183, n. 18, 2020; contra G. Walter, W. Bosch & J. Brönnimann, 152
61. See Article 26(2) of the Swiss Rules (the arbitral tribunal shall be entitled 'to order the provision of appropriate security'), Article 25.1(a) of the LCIA Rules (the arbitral tribunal has the power 'to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute') and Article 26(6) of the UNCITRAL Arbitration Rules (the arbitral tribunal may 'require the party requesting an interim measure to provide appropriate security in connection with the measure'). Article 28(1) of the ICC Rules does not explicitly refer to security for costs but it is undisputed that such measures are embraced by the broad wording of this provision (see Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed. (The Hague: Kluwer Law International, 2005), 297).
62. See, e.g., Article 26(4) of the Swiss Rules; Article 26(8) of the UNCITRAL Arbitration Rules.
63. ICC Case No. 12363/ACS (23 December 2003).
64. See e.g., Article 26(2) of the Swiss Rules ('Interim measures may be granted in the form of an interim award […]'); Article 28(1) of the ICC Rules ('Any such measures shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate').
65. Article 33 of the ICC Rules.
66. DFT 136 III 200.

Whether titled 'award' or 'order', it is not possible to bring an application to set aside a decision granting or refusing interim measures under Article 190 of the PILA.[67] Likewise, it is not possible to obtain a certificate of enforceability for an interim measures pursuant to Article 193(2) of the PILA or to enforce an interim measure in Switzerland under the provisions of the New York Convention,[68] irrespective of how the measures is labelled.

§6.05 ENFORCEMENT OF INTERIM MEASURES

[A] Voluntary Compliance and Sanctions at the Tribunal's Disposal in Case of Non-Compliance

Most interim measures direct a party to perform or refrain from performing a specific act. Such an order by an arbitral tribunal is *'lex imperfecta'*, as arbitral tribunals lack the power to enforce their orders directly against the parties.[69] Despite this fact, there is generally a high incidence of voluntary compliance with interim measures ordered by arbitral tribunals.[70]

In case of non-compliance, arbitral tribunals cannot, according to the prevailing view in Switzerland, combine their interim measure orders with a threat of criminal sanctions, such as Article 292 of the Swiss Criminal Code of 1937 ('Swiss Criminal Code').[71] Such sanctions are the prerogative of the national courts.

A different question is whether arbitral tribunals have the authority to impose penalties on a party for failure to comply with orders granting interim measures. Such penalties are typically payable to the other party and are characterized as private fines, rather than as a form of compensation for damages sustained. In French law, they are known as *'astreintes'*. They are also recognized in Dutch and Belgian law.[72] In Switzerland, there is no case law and no consensus on this issue. While there are good arguments in support of the view that arbitral tribunals have the general authority to

67. *Ibid*.
68. See C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 294-381, 121-150.
69. Declaratory orders – such as orders authorizing the applicant to call a performance bond or to sell perishable goods – are 'self-executing' and do not need to be enforced.
70. Parties may comply voluntarily because they are conscious of their obligation to mitigate damages and refrain from aggravating the dispute. Non-compliance with an order for interim measures may also have an adverse impact on the arbitral tribunal's assessment of damages in the final award. In addition, the parties' willingness to comply with such orders may be explained by the justified or unjustified concern of antagonizing the arbitrators. Finally, if non-compliance with an order for interim measures results in additional work, arbitral tribunals may well take this into account when deciding on the costs of the proceedings in a subsequent award.
71. See e.g., C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 134-136, 67-68 (with references); see also O.L. Mosimann, 141-147, stating that the arbitral tribunal can make orders under threat of Article 292 of the Swiss Criminal Code, but that this has the effect of a warning only.
72. See S. Besson, n. 533, 316.

order such penalties,[73] there continues to be considerable debate as to their admissibility. This is particularly true in cases where the parties did not explicitly authorize the arbitral tribunal to impose such penalties[74] and did not agree upon the application of arbitration rules that explicitly grant such authority to the arbitral tribunal.[75]

Furthermore, depending on the type of measure ordered, the arbitral tribunal may draw adverse inferences from the non-compliance with the measure insofar as there is a causal link between the non-compliance and the outcome of the case on the merits.[76] Other measures available to the arbitral tribunal which might help promoting compliance with interim relief orders include imposing damages on the recalcitrant party, ordering the execution of a performance measure by substitution, or setting specific deadlines for compliance and issuing reminders.[77]

[B] Enforcement of Interim Measures in Connection with Arbitration in Switzerland

[1] Assistance by Swiss Courts

Pursuant to Article 183(2) of the PILA, the arbitral tribunal may request the assistance of the competent court if a party does not comply with its order.[78] Despite the unambiguous language of Article 183(2) of the PILA, it is a matter of contention whether the parties themselves may also apply for assistance directly to the court.[79] Applying Article 374(2) CCP governing domestic arbitration by analogy, a party should be entitled to apply to the courts for enforcement assistance, subject to prior approval by the arbitral tribunal. As a practical matter, it will normally be advisable to seek assistance from the court at the place where the measure is to be enforced, e.g., at the place where the goods are located or at the domicile or residence of the adverse party,[80] and not at the seat of the arbitral tribunal. Often, the place of enforcement will not be situated in Switzerland and, as a result, Article 183(2) of the PILA will be of little help.

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73. See e.g., L. Lévy, 'Les astreintes et l'arbitrage international en Suisse', [2001] ASA Bull. 21; C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 151-161, 74-78.
74. L. Lévy, 'Les astreintes et l'arbitrage international en Suisse', 29 (opining that tacit consent of the parties is sufficient); P. Mayer, 'Imperium de l'arbitre et mesures provisoires', in *Etudes de procédures et de l'arbitrage en l'honneur de Jean-Francois Poudret*, Eds J. Haldy, J.-M. Rapp & P. Ferrari, (Lausanne: Faculté de droit de l'université de Lausanne, 1999), 442-443 (requiring explicit consent of the parties). For an overview of scholarly opinions, see C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 143-150, 71-74.
75. Although the ICC Rules do not explicitly grant such authority, at least one arbitral tribunal has ruled that an injunction coupled with a fine for non-compliance was consistent with the ICC Rules. See A. Yesilirmak, 33.
76. D. Girsberger & N. Voser, n. 835, 249 et seq.
77. C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 168-191, 80-87.
78. If the arbitral tribunal anticipates non-compliance based on a party's conduct or other circumstances, it need not wait for the non-compliance to occur but rather may apply to the court immediately. See A. Bucher & P.-Y. Tschanz, 89.
79. For a recent overview of the scholarly positions, see C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 249-250, 108-109.
80. S. Besson, n. 512, 304 (with references).

In such circumstances, the requesting party is well advised to apply directly to the foreign court for assistance in enforcing the order made by the arbitral tribunal.

In considering applications for assistance in enforcing orders made by an arbitral tribunal, Swiss courts focus on whether – on a prima facie basis – there is a valid arbitration agreement, the tribunal was correctly constituted, and the arbitral tribunal has prima facie jurisdiction to order the granted measure.[81] If these conditions are satisfied, the Swiss court will not second-guess the substance of the arbitral tribunal's order, but rather restrict itself to a review of the interim measures from the perspective of Swiss public policy.[82]

The legal nature of the Swiss court's assistance pursuant to Article 183(2) of the PILA has been controversial in the past and many a scholarly writing – including the previous edition of this publication – held that the court's order was a 'decision in and of itself, not merely a decision enforcing the arbitral tribunal's order'.[83] The better view today is that the national court's assistance constitutes an enforcement procedure sui generis.[84] As a consequence, the court seized for assistance does not itself order an interim measure, but only makes the dispositions necessary for the enforcement of the measure previously ordered by the arbitral tribunal.[85] This can include a direct order for the enforcement of the measure[86] or, if necessary, the transformation of a measure unknown to Swiss law into an enforceable title.[87] It is only when the arbitral tribunal's order of interim measures cannot be transformed to fit the applicable rules of enforcement that the court may refuse to enforce them.[88]

[2] Assistance by Foreign Courts

If the place of enforcement is abroad, the question as to whether an arbitral tribunal sitting in Switzerland may apply for assistance directly to a foreign court at that place depends upon the law at the foreign place of enforcement. Many jurisdictions already have special provisions pertaining to the enforcement of interim measures granted by arbitral tribunals, and others are certain to follow when they implement the amended provisions of the UNCITRAL Model Law, which provides for a detailed enforcement regime for such measures (Articles 17 H and 17 I of the UNCITRAL Model Law). Other

81. S.V. Berti, in *Basler Kommentar zum Internationalen Privatrecht*, Article 183, n. 18, 1627; G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 6, 936-937.
82. C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 228-241, 100-105 (with references).
83. G. Von Segesser & C. Kurth, Interim Measures, in *International Arbitration in Switzerland – A Handbook for Practitioners*, Eds G. Kaufmann-Kohler & B. Stucki, (The Hague: Kluwer Law International, 2004), 81.
84. C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 211-215, 94-96. This view is corroborated by the explanatory note to the new Swiss domestic arbitration law which expressly refers to Article 183(2) of the PILA; see Explanatory Note on the Bill for the CCP, BBl 2006 7399 / FF 2006 7006.
85. B. Berger & F. Kellerhals, n. 1163, 329; see also G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 6, 936-937.
86. B. Berger & F. Kellerhals, n. 1164, 329.
87. B. Berger & F. Kellerhals, n. 1163, 329; for more detail, see C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 862-898, 312-322.
88. See F. Vischer, in *Zürcher Kommentar zum IPRG*, Article 183, n. 16, 2020.

jurisdictions, such as the US, for lack of an alternative concept treat interim measures as (partial) arbitral awards and, at least in principle, allow for enforcement under the New York Convention.[89]

[3] Enforcement of the Swiss court Order Pursuant to Article 183(2) of the PILA

If the order of the Swiss court pursuant to Article 183(2) of the PILA is to be enforced in Switzerland, the parties will resort to usual procedures for enforcement of domestic decisions, including the court's recourse to the '*force publique*', and, if applicable, the imposition of criminal sanctions. In principle, the court seized under Article 183(2) of the PILA should, on its own motion, immediately combine its order with the necessary enforcement measures.[90]

If the court order is to be enforced abroad, the party relying on the order may enforce it to the extent provided under the applicable enforcement treaty or the local rules of civil procedure at the place of enforcement. It is debated whether an enforcement order pursuant to Article 183(2) of the PILA is enforceable under the Lugano Convention binding Switzerland and the states of the European Union, as well as Norway and Iceland.[91]

[C] Enforcement of Interim Measures in Connection with Arbitration Abroad

It is only possible to recognize and enforce in Switzerland decisions on interim measures rendered by a foreign arbitral tribunal under the New York Convention if such decisions qualify in substance as '*awards*' within the meaning of the New York Convention. This will regularly not be the case.[92]

Therefore, in most instances, the only possibility to enforce an interim measure granted by an arbitral tribunal abroad in Switzerland will be for that tribunal or a party to the foreign arbitration to seek court assistance pursuant to Article 183(2) of the PILA. The majority of Swiss commentators[93] maintain that a Swiss court may offer such enforcement assistance, provided that the Swiss court would have jurisdiction to grant

89. See Restatement (Third) of United States Law of International Commercial Arbitration, Tentative Draft No. 1 of 29 March 2010, section 1-1(a) and (p), 1-3, 5-6, 15-17, 20, 24-26, 33-37.
90. C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 273, 115-116.
91. For a detailed account, see C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 622-661, 233-246.
92. For a detailed account, see C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 294-381, 121-150. Moreover, since Article 1(2)(d) of the Lugano Convention expressly excludes arbitration from its scope of application, it goes without saying that interim measures ordered by foreign arbitral tribunals cannot be recognized and enforced in Switzerland under the enforcement regime of the Lugano Convention.
93. See e.g., J.-F. Poudret & S. Besson, n. 637, 544-545; C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 382-392, 150-154, each with further references.

the interim measures if such application were made directly to it,[94] i.e., without having recourse to the foreign arbitral tribunal.

[D] Enforcement of Interim Measures Securing Money Claims

The enforcement of interim measures securing money claims granted by an arbitral tribunal sitting in Switzerland provides a good illustration of the intricate interplay between private arbitration and public enforcement proceedings, and the balancing of theoretical options and practical needs.

[1] Freezing Order

Under the DEBA, the remedy provided for securing money claims is the freezing order (*Arrest*), which is ordered on an ex parte basis by the competent Swiss court and enforced by the competent Swiss debt collection office at the place where the assets are located. As discussed above, there is some discussion as to whether arbitral tribunals have the authority to grant freezing orders (see section §6.03[C][5] *supra*). Whatever the ultimate resolution of this controversy, the majority of legal commentators consider that Swiss debt collection offices are not competent to enforce freezing orders granted by arbitral tribunals. Consequently, an arbitral tribunal granting a freezing order must, in any event, seek the assistance of the Swiss courts pursuant to Article 183(2) of the PILA for the purposes of enforcement, which will in most cases deprive the measure of its surprise effect.

For this reason, the requesting party's need for a swift and effective measure to secure monetary claims will rarely be met by a freezing order granted by an arbitral tribunal. In most cases, the requesting party is, therefore, well advised to secure money claims by seeking a freezing order directly from the court at the place where the assets are located.

[2] Restraining Order

Alternatively, the requesting party seeking to secure money claims could request the arbitral tribunal to grant a restraining order directing the adverse party to refrain from disposing of some or all of its assets (a '*freezing injunction*').[95] But again, the arbitral tribunal would be unable to enforce this restraining order by its own means should the adverse party fail to comply with it voluntarily.[96]

94. Pursuant to Article 31 of the Lugano Convention or Article 10 of the PILA. Other authors object and maintain that Chapter 12 of the PILA, including Article 183(2), is only applicable when the seat of the arbitral tribunal is in Switzerland, as provided for in Article 176 of the PILA.
95. S.V. Berti, in *Basler Kommentar zum Internationalen Privatrecht*, Article 183, n. 7, 1625-1626.
96. F. Vischer, in *Zürcher Kommentar zum IPRG*, Article 183, n. 7, 2018; contra G. Walter, W. Bosch & J. Brönnimann, 137.

§6.06 THE AUTHORITY OF COURTS TO ORDER INTERIM MEASURES

[A] Concurrent Jurisdiction of Courts and Agreements Excluding such Jurisdiction

Prior to the commencement of arbitral proceedings and also possibly at a later stage, a party in need of immediate protection may seek interim relief from a court. Under Swiss arbitration law, the arbitral tribunal and the courts have concurrent jurisdiction to grant interim relief, even though this is not expressly provided for in Article 183 of the PILA.[97] Moreover, the arbitration rules most commonly invoked do not exclude this concurrent jurisdiction.[98] In other words, the parties are free to seek interim relief at any time either from the arbitral tribunal or from a competent Swiss (or foreign) court. Under Swiss law, a party's decision to request interim relief from a court does not constitute a waiver of the arbitration agreement.

Obviously, parties who have validly agreed to exclude the jurisdiction of courts to order interim measures do not have such a choice. Such an agreement – the mirror image of an agreement that deprives the arbitral tribunal of its authority to order interim measures – is, in our view, permissible under Swiss law, at least insofar as there is either an arbitral tribunal or another instance, like an emergency arbitrator, in place to grant interim relief, but must be explicit and specific.[99] It can be concluded at

97. See S. Besson, n. 231, 149 and n. 310, 191-192, with further references; S.V. Berti, in *Basler Kommentar zum Internationalen Privatrecht*, Article 183, n. 5, 1626; E. Geisinger, 375, who notes that this parallel jurisdiction of national courts and arbitral tribunals in relation with interim relief constitutes a limitation to the 'effet négatif' of the arbitration agreement. D. Sangiorgio, *Vorsorglicher Rechtsschutz in internationalen Schiedsgerichtsverfahren nach Schweizerischem Recht* (Aachen: Shaker, 1997), 128-129. A few authors argue that the courts lose jurisdiction after the constitution of the arbitral tribunal. See T. Rüede & R. Hadenfeldt, 252; P. Karrer, *International Business Law Journal* (1989): 761, 768-769.

98. See Article 26(9) of the UNCITRAL Arbitration Rules and Article 26(5) of the Swiss Rules (the Swiss Rules in revised form make it abundantly clear that a party's right to request interim relief from the arbitral tribunal is an additional option and does not curtail such party's ability to seize a national court). Article 28(2) of the ICC Rules provides that the parties may apply to a court in 'appropriate circumstances' once the file has been transmitted to the arbitral tribunal. Article 25.3 of the LCIA Rules provides that the parties may apply to a court only in exceptional circumstances once the arbitral tribunal is formed. By contrast, Article 39 of the Rules of Procedure for Arbitration Proceedings of the International Center for the Settlement of Investment Disputes as revised on 26 September 1984 ('ICSID Rules') provides that the parties may not apply to a court for interim measures unless 'they have so stipulated in the agreement recording their consent'.

99. Scholarly views on this issue are divided. Some authors consider an agreement to exclude national court jurisdiction admissible without further qualification, see e.g., D. Schramm, A. Furrer & D. Girsberger, in *Handkommentar zum Schweizer Privatrecht*, Eds M. Amstutz, P. Breitschmid, A. Furrer, D. Girsberger, C. Huguenin, M. Müller-Chen, V. Roberto, A. Rumo-Jungo, A.K. Schnyder, H.R. Trüeb, 2nd ed., (Zurich: Schulthess, 2012), Articles 182-186, n. 13, 745 et seq.; other authors, like e.g., B. Berger & F. Kellerhals, n. 1166, 330, consider a limitation of national court jurisdiction inadmissible before the constitution of the arbitral tribunal because this would amount to a waiver of a parties' right to access to justice in advance. A lower regional court in the Canton of Bern, however recently found with reference to domestic arbitration that the national courts' jurisdiction to grant interim relief cannot be waived at all; see the Decision of the Regionalgerichts Bern-Mittelland of 14 February 2012, CIV 12 75 WUN published in part in *Causa Sport* (2012): 79.

any time, as part of the arbitration clause, or separately before or after the commencement of arbitral proceedings.[100] Although an agreement to exclude the jurisdiction of the courts over interim relief is not generally advisable, there may be specific reasons that justify such an agreement, e.g., confidentiality, concerns about the risk of parallel proceedings before multiple instances, or an interest in strengthening the mutual obligation to abide by decisions of the arbitral tribunal.

[B] Jurisdiction of the Swiss Courts to Grant Interim Measures in the Presence of an Arbitration Agreement

At the international level, Article 10 of the PILA and Article 31 of the Lugano Convention[101] provide that Swiss courts have jurisdiction to grant interim measures even in cases where they do not have international jurisdiction over the merits of the dispute.[102]

Within Switzerland, the jurisdiction *ratione loci* can be determined based on Article 10 of the PILA. As a consequence, based on Article 10(b) of the PILA, the Swiss court at the place of enforcement has jurisdiction to grant interim measures even in the presence of an arbitration agreement. Whether, by applying Article 10(a) of the PILA by analogy, a party may also apply to the Swiss court at the seat of arbitration or possibly even to the court(s) which would be competent on the merits if there were no arbitration clause is questionable, but should be acceptable at least in the former case.

[C] Enforcement of Interim Measures Ordered by Courts

[1] Measures Ordered by Swiss Courts

If an interim measure ordered by a Swiss court requires enforcement in Switzerland, Article 267 CCP provides that the court ordering the measure shall also take the necessary enforcement steps.

[2] Measures Ordered by Foreign Courts

It is generally accepted that interim measures ordered by the courts of a state bound by the Lugano Convention, in connection with a foreign arbitration, may be enforced in

100. See M. Wirth, 40-41, with further references. A Swiss court faced with a request for interim relief despite the existence of a valid exclusion agreement should decline jurisdiction. See S. Besson, n. 225, 147 and n. 299, 184.

101. In *van Uden v. Deco-Line*, the ECJ decided that Article 31 of EU Regulation No. 44/2001 (Article 24 of the former Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 ('Brussels Convention')) applies in court proceedings even in the presence of an arbitration agreement (Decision of the ECJ (*van Uden v. Deco-Line*) C-391/95 published in *European Court Reports* (1988), I-7091, n. 31-34). See J.-F. Poudret & S. Besson, n. 612-613, 555-556.

102. Note that B. Berger & F. Kellerhals, n. 1171, 331, base the court's international jurisdiction to grant interim measures on Article 183(2) of the PILA.

Switzerland by means of the Lugano Convention, notwithstanding the fact that arbitration is excluded from the scope of application of such convention.[103]

There are conflicting positions, both in case law and scholarly writings, as to whether interim measures ordered by foreign courts of states which are not bound by the Lugano Convention may be enforced in Switzerland under the PILA.[104] The debate centres on the interpretation of Article 25 of the PILA, which provides that a foreign court decision will only be recognized in Switzerland if it is final or if it is no longer subject to any ordinary appeal.

§6.07 CONFLICTS BETWEEN ARBITRAL TRIBUNALS AND COURTS

Due to the concurrent jurisdiction of arbitral tribunals and courts over interim measures, there is a risk of inconsistent decisions between these two possible sources of interim relief: a party may be tempted to file simultaneous applications for interim relief before both the arbitral tribunal and a court; or after failing to obtain interim relief from a court, a party may apply for the same relief from the arbitral tribunal in the hope of securing a more favourable ruling, or vice-versa.[105]

With respect to interim measures, arbitral tribunals and courts are not bound by the doctrines of lis pendens and res judicata.[106] Nevertheless, in order to prevent conflicting decisions and promote adjudicative efficiency, arbitral tribunals and courts often decide that a party may not apply for interim relief before two legal venues at the same time. In addition, once a court has dismissed a request for interim relief, a party should not have a second chance to obtain the same interim relief from the arbitral tribunal unless a change in circumstances justifies otherwise.[107]

In an ICC arbitration in Switzerland, it was held that a party should not be given a second chance to obtain interim measures from the arbitral tribunal where (a) the party had already applied unsuccessfully for identical interim relief before a court, (b) the application for interim relief before the arbitral tribunal was based upon the same facts and evidence as the one brought before the court, (c) the arbitral tribunal would apply the same standards in deciding on the application for interim relief as the court had, and (d) due process had been granted in the court proceedings. The arbitral tribunal held that it would, however, be appropriate to grant a second chance to apply for the interim relief if new facts arise since the decision of the court or new evidence had become available.[108]

103. S. Besson, n. 659, 376, with further references.
104. S. Besson, n. 630, 363-364; C. Boog, *Die Durchsetzung einstweiliger Massnahmen*, n. 527-584, 203-221, each with further references.
105. On these issues, see E. Geisinger, 376-377 and 382-382.
106. See S.V. Berti & A.K. Schnyder, in *Internationales Privatrecht,* Eds H. Honsell, N. Vogt & A.K. Schnyder (Basel: Helbing & Lichtenhahn, 2007), n. 10-11, 218-219.
107. See G. von Segesser & D. Schramm, in *Concise International Arbitration*, Article 183, n. 2, 935.
108. ICC Procedural Order (2 April 2002) published in [2003] ASA Bull. 810.

§6.08 EMERGENCY ARBITRATOR AND SIMILAR PROCEDURES

Besides arbitral tribunals and courts, the parties are free to empower other private bodies to grant interim measures. In principle, the parties can vest the authority to grant interim relief in such bodies for both the time before and after constitution of the arbitral tribunal. In practice, however, such authority is usually limited to the time before the tribunal is in place.

There are different ways in which the parties can empower a private body to order interim measures. They can agree on a body and the proceedings under which such body shall act without referring to any pre-existing set of rules (ad hoc solutions). They can also agree to empower another dispute resolution body to grant interim measures. For example, parties to a contract based on one of the standard contracts of the International Federation of Consulting Engineers ('FIDIC') can agree to vest the Dispute Adjudication Board ('DAB') with the power to issue interim measures. Finally, the parties can resort to one of a number of predefined sets of emergency arbitrator or similar rules by submitting their dispute to a set of arbitration rules containing such an emergency relief procedure. Such rules include the emergency arbitrator procedure under Article 43 of the Swiss Rules, the emergency arbitrator procedure pursuant to Article 29 and Appendix V to the ICC Rules, the emergency arbitrator procedure as per Article 32(4) and Appendix II to the SCC Rules, Article 37 of the AAA/ICDR Rules proving for an emergency arbitrator, Rule 14.1 of the Non-administered Arbitration Rules of the International Institute for Conflict Prevention and Resolution effective as of 1 November 2007 ('CPR Rules') providing for a special arbitrator, the emergency arbitrator procedure pursuant to Schedule 1 of the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules'), or the emergency arbitrator procedure pursuant to Schedule II of the Arbitration Rules of the Australian Centre for International Commercial Arbitration entered into force on 1 August 2011 ('ACICA Rules').

Parties who plan to choose institutional arbitration as their form of dispute resolution should be aware that many modern institutional arbitration rules provide for emergency arbitrator relief on an opt-out basis, meaning that the emergency arbitrator rules apply automatically whenever the parties have agreed on arbitration pursuant to the arbitration rules of that institution, unless the parties have expressly excluded the emergency arbitrator rules in their arbitration agreement. For example, whereas parties used to have to expressly agree on, i.e., opt-in to, the ICC Pre-Arbitral Referee Rules as from 1 January 1990 ('ICC Pre-Arbitral Referee Rules'), under the ICC Rules as revised in 2012 the emergency arbitrator procedure pursuant to Articles 29(1)-(4) and Appendix V to the ICC Rules applies unless the parties have agreed to opt-out of the emergency arbitrator provisions.[109] The same default opt-out standard applies under the Swiss Rules,[110] the SCC Rules,[111] the AAA/ICDR Rules,[112] the ACICA Rules[113] and

109. See Article 29(6)(b) of the ICC Rules.
110. See Article 43(1) of the Swiss Rules.
111. See Article 32(4) of the Swiss Rules.
112. See Article 37(1) of the AAA/ICDR Rules.
113. See Article 28.1(a) of ACICA Rules.

CPR Rule 14.[114] Although excluding the emergency arbitrator's competence to grant interim relief is not generally advisable in practice, there might be reasons in individual cases do to so.

§6.09 CHALLENGE AND APPEAL OF INTERIM MEASURES

An arbitral tribunal's order on interim measures is not a final decision and therefore is not open to challenge in accordance with Articles 190 and 191 of the PILA, irrespective of whether it was issued in the form of a procedural order or an award.[115] A party may, however, request an arbitral tribunal to reconsider such an order. This applies *mutatis mutandis* to interim measures ordered by emergency arbitrators.

By contrast, Swiss court orders that enforce decisions on interim measures made by arbitral tribunals are subject to appeal pursuant to Articles 308 et seq. of the CCP. In the last instance, an appeal in civil matters to the Federal Tribunal is admissible, provided that the requirements of the FTA are met.

Decisions requiring the payment of penalties for non-compliance with interim measures, such as *'astreintes'*, do not, as such, constitute provisional measures. If the arbitral tribunal fixes the final amount of such penalty, it must do so in the form of an award. If the penalty is fixed in a partial award, this type of decision is open to immediate challenge pursuant to Article 190(3) of the PILA, however only if the ground for setting aside is the improper constitution of the arbitral tribunal or the fact that the arbitral tribunal wrongly accepted or declined jurisdiction. In all other cases, the parties must wait until a final award has been rendered before challenging the award before the Federal Tribunal.[116]

114. See Rule 14.1 of the CPR Rules.
115. DFT 136 III 200.
116. See Chapter 11 *infra*.