"The envisaged reformation of interim measures of protection under the UNCITRAL Model Law – can the new German Code of Civil Procedure serve as a role model?"

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Declaration

I declare that "*The envisaged reform of interim measures of protections under the UNCITRAL Model Law – can the new German Code of Civil Procedure serve as a role model?*" is my own work.

It has not been submitted before for any degree or examination in any other university.

All the sources I have used or quoted have been indicated and acknowledged as complete references.

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September 15, 2004

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The envisaged reformation of interim measures of protection under the UNCITRAL Model Law - can the new German Code of Civil Procedure serve as a role model?

A. Introduction

When the United Nations Commission on International Trade Law (UNCITRAL) assembled in Vienna between May 17 and June 4, 1999, it decided that the time had come for an evaluation on how to further develop arbitration laws, rules and practices[1]. Some fourteen years earlier, on December 11, 1985, UNCITRAL created the Model Law on International Commercial Arbitration (MAL) to achieve uniform standards of arbitral procedure[2]. These were regarded as necessary since international arbitration became increasingly important in order to solve the growing numbers of disputes arising in international business transactions. The expected purpose of the Model Law was to reduce the differences in national procedural laws so that international arbitrators would only have to battle with the multitude of national substantives law to decide upon the merits of the case. Without hesitation, it may be claimed that it did fulfil this task, as it became a *"vehicle to achieve the widest possible acceptance and (...) greatest degree of harmonisation of national law"*[3]. Already 50 countries, including not only prominent trading nations like Germany, Canada, India and Russia, but also numerous emerging nations have introduced the Model Law with only minor modifications if any at all. It has in the meantime inspired most other countries that were drafting a new procedural law concerning arbitration[4]. For example the United Kingdom paid close regard to the Model Law when

[1] UNCITRAL Document: "Report of the Working Group on Arbitration on the work of its fortieth session" (herein after "Working Group Report"), entered on http://www.uncitral.org/en-index.htm 20.06.04, p. 1

[2] Ibid., p. 2

[3] Gerold Herrmann: "The Role of Courts under the UNCITRAL Model Law Script" in "Contemporary Problems in International Arbitration", p. 166

[4] Marianne Roth: "The UNCITRAL Model Law on International Commercial Arbitration" in "Practitioner's Handbook on International Arbitration", part 5, (herein after Roth: "UNCITRAL Model Law") p. 1158

passing the Arbitration Act 1996[5]. The reason for the successful launch of this Model Law is that it concentrates on merely providing the basis for a legal system and shows a great degree of flexibility. At the same time, it is very sophisticated and includes a reliable set of rules required to conduct a predictable arbitral proceeding. For this reason, the provisions of the modernised Code of Civil Procedure ("Zivilprozessordnung", ZPO) in Germany, where arbitration is used widely in practice, are to great extent translations of the Model Law. They will be discussed extensively in this thesis.

However, in the course of its 32nd session, UNCITRAL realised the need for arbitration to adapt to the new economic world order that had experienced a radical change since the Model Law came into existence. At the same time, UNCITRAL recognised the major importance for this institute of dispute resolution to be equipped with competitive procedural rules to carry on its growth as an "arbitration service industry"[6]. Therefore, the Working Group on Arbitration and Conciliation was established. It was meant to determine the areas where arbitral tribunals may fail to meet the demands of its potential clients. The Working Group found that the availability of interim measures of protections is regarded as one of arbitration's major weakness and thus shall be made the priority item[7]. These measures, also referred to as "provisional orders", "conservatory measures" or "protective measures", may provide that arbitrational agreements as well as the awards they result in are enforceable. Especially in international disputes, they may be required to preserve essential rights of the parties situated in different jurisdictions.

Yet it is often felt that the Model Law would fail to provide the arbitral tribunals with a solid competence to order effective interim measures; it would lack a clear definition to make their application more reliable and predictable. Finally, a large amount of uncertainty exists about the way that interim measures can be enforced. Therefore, a wide consensus exists that the Model Law needs to be reformed in this area. The last time the Working

[5] John P. Gaffney: "Ex Parte Measures in International Arbitration" in Mealey's International Arbitration Report, Vol. 17, No. 11 (herein after: Gafney: "Ex Parte Measures"), p. 39

[6] Frank-Bernhard Weigand: "Introduction" in "Practitioner's Handbook on International Arbitration", part 1 (herein after: Weigand: "Introduction"), p. 11

[7] "Working Group Report", op. cit. fn. 1, p. 1

Group of UNCITRAL met to discuss this ambitious project was in New York between February 23 and 27, 2004. During this 40th session of the Working Group various amendments to the Model Law were considered however no final conclusion could be found[8]. Unfortunately these efforts at reform seem to have gotten stuck and, up to date, have only resulted in a declaration of intentions.

In this thesis I will describe the challenges faced by arbitral tribunals that are indirectly applying the Model Law when interim measures of protection become necessary. I will focus on possible solutions to overcome these problems. Specifically I will consider the potential use of the experience in Germany by evaluating the relevant provisions of its Code of Civil Procedure and commenting on how these could benefit a revision of the Model Law.

B. The development of international commercial arbitration since the introduction of the Model Law

I. The relevance of international arbitration for disputes in international trade

The growing relevance of international arbitration can best be illustrated by the significant expansion of the number of trade related disputes resolved by this alternative to litigation in the past decade. Whereas the leading arbitral institute, the International Chamber of Commerce (ICC), handled 337 requests in 1992, the number of requests grew to 541 not even ten years later in 2000[9]. Similarly, the American Arbitration Association (AAA), which has the largest international arbitration caseload in the world, had 672 new cases filed in 2000 after only administering 101 in 1991[10]. This evolution is related to changes in quantity as well as special quality of international disputes.

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[8] "Working Group Report", op. cit. fn. 1, p. 17

[9] Gary B. Born: "International Commercial Arbitration" (herein after Born: "International Commercial Arbitration"), p. 7

[10] The Metropolitan Corporate Counsel, August 2003

1. Growth in international trade – the prerequisite towards more arbitral proceedings

Upon considering the development of the global economy of the last two decades, their striking characteristic is an immense growth rate in cross border trade. But even now, in the beginning twenty-first century, international businesses are still expanding and the markets are far from saturated. The factors contributing to this development popularly described as globalisation are well known: The birth of the information technology accelerated communication, turning the entire world into a "global village"[11]; the improvement of infrastructure and logistics made distances become seemingly shorter and provided an exceptional accessibility of new markets; the powerful transformation from socialism to capitalism predominantly in Asia and Eastern Europe turned former developing countries in key trading partners and created new sources for income; borders became permeable for international transactions; and institutions like the WTO and the World Bank recommend the abolishment of restricting barriers like quotas and tariffs. These developments have already led to the creation of free trade agreements and custom unions and, as the example of the European Union has proven can eventually result in single markets. Globalisation has indeed affected all regions of the world. Predominantly it has enhanced the import and export figures of the main trading nations. In addition, it is hoped that as development continues, countries that live up to their potential will also be able to participate in the global economy. With the enormous growth of international trade, an increase in the number of international commercial disputes is inevitable. The continued growth of global economies is thereby also fuelling the growth of international arbitration and mediation.

[11] Jason Fry: "Interim measures of protection recent developments and the way ahead" in International Arbitration Law Review (herein after Fry: "Interim Measures of Protection"), p. 156

2. Character of international commercial disputes - explanations for the popularity of arbitration

The typical constellation in international cases - that the conflicting parties origin from different jurisdiction - contributes to the complexity of the legal proceedings. However, while the economic systems of the various countries begin to resemble one another more and more, their respective legal systems are far from becoming "globalised". Therefore, it is widely perceived that competent national courts have common difficulties coping with the international facets of the case. Thus, the reasons for the growth of international arbitration essentially originate in the manifold disadvantages of litigating it inappropriate for international cases[12].

In the following section I briefly describe why parties to international commercial transaction are wise not to leave the resolution of potential conflicts to the national courts.

a) Competence of the arbitral tribunal

In commercial litigation the first conflict often arises when the forum for the dispute resolution has to be determined. In an international dispute the conflict of jurisdiction is often strenuous and carriers the threat of early clashes. Even after a decision about the competent court is made, at least one of the parties involved will have to litigate outside its own jurisdiction. This creates not only a financial and administrative burden, but also potential feelings of being treated unfairly under a foreign jurisdiction, which it may consider to be biased. In arbitration, the parties can select a neutral forum and avoid this "home ground advantage". In this respect, arbitration is regarded as being a more equitable way of dispute resolution. Practice has shown that the parties prefer an independent and non-governmental person or body, like an arbitral tribunal or arbitrator[13].

[12] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (herein after "UNCITRAL Explanatory Note") on http://www.uncitral.org/english/texts/arbitration/ml-arb.htm entered 28.08.04, par. 4

[13] René David: "Arbitration in International Trade - Why people resort to arbitration", p. 10

b) Expertise of the arbitral tribunal

Another dominant argument used by commercial arbitrators to stress why parties to an international transaction should rather consult arbitral tribunals lies in the unpredictability of national courts[14]. It is often not possible to establish in advance, which court within a national legal system will eventually decide a dispute. The parties may fear that a certain judge might not have the necessary insight to the complex questions that arise. If the parties agree entirely on dispute resolution by arbitration when concluding their contracts, they are able to select the arbitral tribunal by focusing on its qualifications and legal training[15]. Further, they practice the freedom to designate the substantive law that is most appropriate to their type of commercial relationship, a flexibility the national courts cannot provide. In particular the arbitral tribunal *"...shall take into account the usages of the trade applicable to the transaction."* as article 28 (4) MAL rules.

c) Efficiency of the arbitral tribunal

Often the parties wish to escape the national courts due to their lack of efficiency. It is popularly and perhaps fairly believed that courts follow an unnecessarily formalised and therefore time consuming and costly procedure. This applies in particular to the legal systems in developing countries. There exists a large backlog of cases and parties might have to wait for years until the national court hears a particular claim. This delay makes it difficult to predict when a decision will be obtained. As an extreme example, there are 25 million cases waiting to be heard in India, some of which were filed twelve years ago[16].

d) Private character of the arbitral proceeding

Not to be underestimated is the advantage of the private nature of the whole arbitration process as opposed to the public nature of the litigation process. This creates a highly confidential atmosphere that can prevent

[14] Weigand: "Practitioner's Handbook", op. cit. fn. 6, p. 11
[15] Born: "International Commercial Arbitration", op. cit. fn. 9, p.7

business secrets from being disclosed[17]. This advantage has provided a fertile ground for arbitration involving commercial disputes of great financial significance.

e) Consensual atmosphere of the arbitral proceeding

Parties who have close ties and do not wish to jeopardise their smooth relationship often choose arbitration. By mutually agreeing on arbitration prior to a dispute they already show their readiness to co-operate. Further, in contrast to a national court whose composition they cannot influence the parties may appoint reputable arbitrators. This gives the process a spirit of consent or at the very least contributes to a sense that the parties will accept the arbitrator's decision voluntarily[18].

f) International enforcement of the arbitral award

Apart from somewhat idealistic considerations concerning co-operation a further strength of arbitration concerns recognition and enforcement of the final award. It is often complicated and time consuming to enforce decisions by a foreign court because of the lack of multilateral treaties. By contrast, the New York Convention of 1958, ratified by more than 130 countries, enables foreign arbitrational awards to be effected easily and reliably worldwide[19]. In fact the Model Law itself modelled their enforcement rules on the provisions of this convention. However, no such convention exists to facilitate the "cross-border traffic of court judgements"[20]. This helps to explain the popularity of arbitration in international contexts.

II. The changing environment for international arbitration – reasons for a review of the Model Law

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[16] Margaret Wang: "Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?" in Arbitration International, Vol. 16, No.2, p. 197
[17] Weigand: "Practitioner's Handbook", op. cit. fn. 6, p. 8
[18] Ibid., p. 10
[19] Born: "International Commercial Arbitration", op. cit. fn. 9, p. 8
[20] Weigand: "Practitioner's Handbook", op. cit. fn. 6, p. 7

Since UNCITRAL created the Model Law in 1985, international trade has developed enormously and arbitral proceedings have become more frequent. These changes, however, have not left the character of international arbitration unaffected. Its original concept was aimed at smaller scale claims between traders from different countries. The group of arbitrators were regarded as a "gentlemen's club" where "artisan specialists"[21] rendered their services within an informal atmosphere. This alternative way of solving international disputes has changed drastically. Today's disputes take place in a different environment. They often occur between large corporate groups. It is not unusual that claims arise from multimillion-dollar transactions and the cases are therefore extremely complex. Especially because the disputes might prove economically vital for both parties involved, and also because they are generally represented by international commercial lawyers, a tendency toward procedural tactics and confrontation that are typical of court proceedings can be observed. Hence, international commercial arbitration has become a business where the promotion of justice and fairness are no longer the only *raison d'être*.

As with any other business, arbitration is forced to remain competitive. Its main competitor is commercial litigation, which it resembles in many respects. A key difference is that the parties in international disputes expect a more efficient resolution from a private arbitral tribunal than from the state machinery. At the same time however, they demand that the mechanisms, which safeguard and protect their legal interests are as adequate as those they come to expect from the respective national courts. This raises the issue as to whether arbitration is able to keep track with the latest procedural developments. The popularity of arbitration is dependant on how arbitral tribunals will deal with these evolving challenges. UNCITRAL is required to provide those countries that are applying rules based on the Model Law with a practicable solution. It is therefore imperative that it discovers the weaknesses of the Model Law.

[21] Ibid., p. 11

C. Interim measures of protection in arbitral proceedings – the status quo

I. The necessity for interim measures in international arbitral proceedings - a general overview

Interim measures of protection play an important role in all legal proceedings. Often the principal action that is directed at the final award might not be sufficient to effectively protect the rights of the parties[22]. In the following section I will describe the typical situations in which parties are seeking interim measures for the protection of their legal interests.

1. The need for the protection of evidence

These measures are of growing relevance preserving, discovering or producing evidence[23]. For example one of the parties might be concerned that certain materials that are essential to the resolution of the dispute may be altered or vanish completely. From the beginning of a proceeding, the tribunal must be able to secure such vital evidence.

2. The need to prevent accomplished facts

Other critically important interim measures aim at preserving the assets or rights that are the subject matter of the dispute[24]. Numerous situations may arise during the process in which one party is able to take actions that irreparably frustrate the final decision irreparably. Pending the outcome of the proceeding one party may feel tempted to make property disappear or to pass on rights which are difficult to unravel. The ruling body requires methods to guard against the eventuality that the object of the proceeding vanishes, is passed into the hands of a third party or is defeated by the time the final relief is granted. Otherwise the rights of the party in whose

[22] Julian Lew, Loukas Mistelis, Stefan Kröll: "Comparative International Commercial Arbitration", (herein after Lew, Mistelis, Kröll: "Comparative Arbitration") p. 586
[23] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 39
[24] Jean-Louis Delvolvé: "Interim Measures and International Arbitration" in LCIA News Vol. 8, Issue 2, (herein after Delvolvé: "Interim Measures") p. 12

favour it rules will be prejudiced as it may be left with little or nothing to satisfy the award. The international constellation of arbitration exacerbates this problem due to the risk that assets necessary to satisfy the judgement are removed to a jurisdiction where enforcement is unlikely[25].

3. The need for the protection of additional claims

Related to the enforcement of the final judgement, interim measures may also be needed to secure the payment of legal fees and other costs in order to facilitate effective execution. This can be achieved by demanding that parties who do not seem creditworthy to furnish security for the subsequent satisfaction of additional claims.

4. The need for the acceleration of the proceedings

Another issue showing the importance of interim measures is the time factor. Especially in disputes relating to international trade, special circumstances that make the coordination of the proceedings more difficult have to be kept in mind[26]. Often the parties have not only to cover great geographical distances, but also overcome linguistic and cultural barriers by finding ways to adapt to varying business ethics. These factors result in longer proceedings. Delays can also be attributed to tactics applied by the parties. In today's international disputes the party who is seemingly in an inferior position might try its utmost to delay or even prevent the final award[27]. Moreover the time span between the beginning of the dispute and its resolution in commercial arbitration has increased in recent years; ICC arbitrations have an average duration of between 18 and 24 months[28]. Courts frequently order interim measures to prevent the litigation period from extending too long. Thus, the need for interim measures certainly arises in arbitration as it does in commercial litigation.

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[25] Born: "International Commercial Arbitration", op. cit. fn. 9, p. 920
[26] Ibid., p. 920
[27] Klaus Peter Berger: „Internationale Wirtschaftsschiedsgerichtsbarkeit" (herein after Berger: „Internationale Wirtschaftsschiedsgerichtsbarkeit"), p.10

5. The need for interim measures in arbitration compared to litigation

Often the conflicts in commercial litigation and commercial arbitration are rather similar. As they may be subject to the same "potential pitfalls"[29] the need for interim measures arises in both tyres of dispute resolution alike. When national courts decide on interim measures they take into consideration that a failure to grant them may render the judgement useless[30]. In arbitration, certain acts or omissions are equally likely to cause irreparable harm and jeopardise the ultimate decision. Given this similarity between litigation and arbitration it is reasonable to expect the regime of protection available to arbitral tribunals to be just as extensive as that in the national courts[31]. However, this is clearly not the case as an UNCITRAL questionnaire discovered. Whereas interim solutions are a regular feature in court proceedings arbitral tribunals are reluctant to apply them. The reason for the fact that interim relief is difficult to obtain from these tribunals lies to a great extent in the widespread uncertainty as to its availability[32]. The present version of the Model Law simply fails to give clear guidance on the interim measures that may be available and contains a number of limitations where the arbitral tribunal is given the competence to order them. This results in a crucial shortcoming in the legal systems of the states that adapted the Model Law, which must be described as crucial. This is especially troubling because disputes with an international background situation are likely to require interim measures.

II. Prerequisites for interim measures of protection in arbitral proceedings under the Model Law

The possibility to order interim measures arises from Article 17 MAL. It provides that arbitral tribunals can *"... order any party to take such interim*

[28] Weigand: "Practitioner's Handbook", op. cit. fn. 6, p. 11
[29] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 153
[30] Ibid., p. 153
[31] Ibid., p. 153
[32] Richard W. Naimark, Stephanie E. Keer: "Analyses of the UNCITRAL Questionnaires on Interim Relief" in Mealey's International Arbitration Report Vol. 16, No. 3 (herein after Naimerk, Keer: "Analyses"), p. 11

measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute."

It is readily parent that this provision does not list the conditions, which the ruling body will have to find before ordering interim measures. The only substantive requirement for the arbitral tribunal is that the measure is to be "considered necessary". However the arbitral tribunal will generally consider the following conditions when applying its discretion.

1. Immanent harm for the rights of the applying party

Here, the applicant must prove a threat to its legal position that includes an increased likelihood of serious or even irreparable damages. The tribunal will have to determine whether this harm outweighs the harm that the opponent will suffer if the measure is granted, and whether this harm cannot instead be compensated for by damages in the final award[33]. Further, the applicant will have to show the urgency of the requested relief. The tribunal must find that it would be unacceptable for him to await the final decision.

2. Increased chance of success for the applying party

A further condition widely agreed upon in arbitration practice is that the underlying claim is reasonably strong and therefore a has a chance of success[34]. This requirement is seen problematic as a prejudgement of the case might take place when the tribunal establishes the strength of the applicant's claim. It is feared that the arbitrator may be unwilling to depart from his provisional opinion when deciding upon the final award[35]. As the Woking Group on Arbitration pointed out, the decision on interim measures shall never be a final decision on the merits[36]. Therefore, the tribunal must avoid a determination in respect of the "reasonable chances" before having considered all essential evidence. To be safe, it is

[33] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 604
[34] Ibid., p. 604
[35] Delvolvé: "Interim Measures" op. cit. fn. 25, p. 14
[36] "Working Group Report" op. cit. fn. 1, p.18

recommended that the approach of the Netherlands Arbitration Institute is followed. This requires only that the applicant's case is not groundless on its merits[37]. Any interim decision made by a tribunal would not affect its discretion to make any subsequent determination.

D. Controversies regarding the application of interim measures under the Model Law

Hand in hand with the introduction of the Model Law into various national laws goes the conferment of further powers to arbitral tribunals[38]. This step followed the idea that a well working arbitral proceeding needs the ability to address all issues arising from the arbitral agreement. The interference of national courts should therefore be limited to issues where it would be essential to support the proceeding or required by the public policy of the forum[39]. With respect to the ability to order interim measures of protection, this principle is not absolute. Instead rather a significant limitation to the rules governing interim measures in arbitral proceedings exists, thereby confining its competence in this particular area. In this regard the official UNCITRAL-commentary notes *"... the range of interim measures covered by article 18 MAL (now article 17 MAL) is considerably narrower than the envisaged under article 9 MAL."*[40]. The express authority to order interim measures is not sufficiently defined and most arbitral tribunals are reluctant to exercise powers that could exceed their authority. Therefore, the incidents of requests for interim measures by the parties remain low[41].

Essentially, three main reasons can be named to explain the arbitrator's reluctance in this area of law. In the first place, there are doubts regarding their authority to decide on interim measures. That is particularly so where there is conflict with the national courts and the question arises as to whether one body is competent to exclude or at least restrain the other. A further

[37] "American Producer and German Construction Company" Interim Award of December 12, 1996, Case No. 1694, XXIII YBCA 97 (1998)

[38] Piero Bernardi: "The Role of the International Arbitrator" in Arbitration International Vol. 20, No. 2 (herein after Bernardi: "The Role of the International Arbitrator"), p. 115

[39] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 355

[40] UN-Commentary A/CN 9/264, article 18, section 3 in Klaus-Peter Berger: "Das neue Recht der Schiedsgerichtsbarkeit", p. 264

source of uncertainty for arbitral tribunals relates to the subject matter of the decision. The Model Law does not provide an answer to the issue of what types of measure they are entitled to order. The final source for this reluctance is the problems that arise when the parties wish to enforce the order.

I. Competence of the arbitral tribunal - the relationship between court-ordered interim relief and arbitration

1. Mutual competence of national courts and arbitral tribunals to order interim measures

One of the major principles of arbitration is the legal autonomy of its procedure. In this respect, article 5 MAL provides that no court shall intervene in an arbitral proceedings expect where the Model Law itself permits it. The intention behind the strict limitation of the power of national courts is obvious: As soon as the parties to a business transaction have agreed that all disputes are to be referred to and settled by arbitration they have manifested their decision against the resolution of disputes by national courts[42]. At the same time, a mutual competence could lead to confusion over the competences of the different judicial bodies. In particular it creates the risk that an order or award ordered by a court could depart from or even contradict a prior order by an arbitral tribunal. Therefore, the Model Law reduces the possibility of delay or even disruption of the proceeding by turning to national courts for legal support.

A similar aim is pursued under article 8 MAL which effectively denies the parties to an arbitration agreement the legal protection of the national courts. UNCITRAL anticipated the peril that too much influence of the courts could undermine the efficiency of the arbitration procedure[43]. Accordingly, it can be observed that courts withdrew their influence from arbitral proceedings in recent decades. Their role has developed from a

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[41] Naimerk, Keer: "Analyses" op. cit. fn. 33, p. 11
[42] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 355
[43] Klaus-Peter Berger: „Das neue deutsche Schiedsvefahrensrecht" in DziWiR, 1998, p. 47

supervising and controlling body into one focussing on co-operation in order to enhance the efficient conduct of the proceedings[44]. Regarding interim measures however, the limitations of the competence of national courts has not progressed very far and is certainly not absolute. As opposed to the general concept of the sole competence of arbitral tribunal in arbitral proceedings a mutual competence exists when it comes to the order of interim measures. In contrast to article 5 MAL, either party is explicitly permitted to call upon the courts and request interim measures to secure the main proceeding under article 9 MAL. The norm provides that *"it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

Under the Model Law today, the decision over which body to apply to for interim measures is left to the autonomy of the parties. In article 17 MAL, they are empowered to exclude the arbitral tribunal from ordering interim measures. In contrast to article 17 MAL, article 9 MAL does not explicitly permit the parties to stipulate in the arbitration agreement that provisional remedies from courts are unavailable. However, this does not lead to the conclusion that the parties are kept from agreeing on the sole competence of the arbitral tribunal. In this respect UNCITRAL clarifies: *"While the article (9 MAL) should not be read as precluding such exclusion agreement, it should not be read as positively giving effect to any preclusion agreement"*[45].

Therefore, it is basically up to the parties to decide the circumstances under which interim relief may be obtained from the courts. However, it is doubtful if all courts will recognise such a waiver of court protection. At least in cases where the legal system of the forum prescribes their right to involvement as mandatory, it will not be subject to the disposition of the parties. Hence, the parties simply may not have the authority to dispossess the courts of their powers by excluding the possibility of referring to them for the protection of their rights.

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[44] Bernardi: "The Role of the International Arbitrator" op. cit. fn. 39, p. 115

[45] UN-Commentary No. A/40/17 article 9, section 4 in Klaus-Peter Berger: "Das neue Recht der Schiedsgerichtsbarkeit", p. 266

2. Criticism against the unclear regulation of competences

Originally, the concept of the Model Law was aimed at keeping the interference of national courts low[46]. Therefore, it could be argued that the concurrent competence of the courts to order interim measure contradicts the objective of minimising judicial interference and might contravene the principle of compatibility[47]. Often the arbitral tribunal decides the dispute in its award, whereas the court simply enforces it without interfering with the decision. An approach where the order of interim measures of protection is equally left to the exclusive sphere of arbitration and only the enforcement is left to the courts would mirror the regular arbitration process. Indeed, strong reasons exist to proceed accordingly in respect of interim measures. Various arguments support this opinion, and consider the arbitral tribunal as the "better forum to order interim measures"[48] than the competent national court.

a) Contradiction against prior agreements

The open choice of the parties on which forum to select is often seen to frustrate the parties' prior agreement to arbitrate. But apart from this, one must consider other risks involved when parties are able to freely refer to the national courts. In particular, a new dispute may arise as to whether seeking such recourse would constitute a breach of the arbitration agreement. In addition the application to the court may not only contradict against the principle of party autonomy. It also might create further reaching problems especially if one party tries to get access to the forum in a country that is regarded to be biased or corrupt. Often the mere announcement to take court action might be meant to put pressure on the other party. This occurs in cases where a dispute should be solved confidentially where it poses a threat to go to a public court.

[46] Gary B. Born: International Commercial Arbitration, p. 30
[47] Roth: "UNCITRAL Model Law" op. cit. fn. 4, p. 1202
[48] Naimerk, Keer: "Analyses" op. cit. fn. 33, p. 11

b) Possibility of contradicting orders

The additional power given to the national courts in article 9 MAL is widely criticised for lacking any limitations regulating their interference. In the first place the simultaneous involvement of a court could be regarded incompatible with the prior agreement of the parties to arbitrate. In addition, the current legislation could create a situation in which a court could grant an interim measure differentiating from a prior ruling of the arbitral tribunal. This would inevitably create a conflict with the arbitral proceeding.

c) Decision making by less competent forum

As the arbitral tribunal is occupied with the proceeding from the beginning, it is the forum that is more acquainted with the legal and factual details of the case. Generally, it is equipped with the experience to evaluate the chances of success on the merits. It is in the position to foresee the impact an order could have on the case as a whole and can thereby balance the interests of the parties when it is applying its discretionary powers. This view is expressed by Vivienne M. Ashman, attorney with the General Counsel of the AAA: She notes that *"resources would be used more efficiently if parties were able to make their requests for enforceable interim measures directly to the arbitral tribunal, rather than to the court; primarily because the tribunal is familiar with the case and possesses expertise on the subject matter."*[49]

Due to its knowledge and experience in complex commercial matters, the arbitral tribunal is also more likely to be able to identify applications brought forward for dilatory reasons.

3. Support for the current competence of the national courts

Under certain circumstances, access to the courts may be a necessity for the protection of the rights of the parties. The intervention of the courts is indispensable where the Model Law does not cover a certain issue. In such circumstances a kind of default mechanism comes into existence.

This occurs where the arbitral tribunal is technically unable to order interim measures of protection.

a) Orders prior to the establishment of the arbitral tribunal

The greatest demand for provisional remedies arises in the time gap between the commencement of the application and he actual hearing. At this stage, the arbitral tribunal has not yet been constituted and permanent tribunals to which international commercial arbitrations are submitted do not exist. However, it takes time to establish a new tribunal after arbitration has been requested. As there is no other body available to grant the often urgently needed interim relief, the national courts play a vital role to ensure that a fair arbitration occurs at a later stage.

b) Orders against third parties

The right of the national courts to grant interim measures is not restricted to the pre-panel phase but extends to the time after the tribunal has been constituted[50]. The situations in which interim measures ordered by the arbitral tribunals prove to be particularly fruitless are those involving third parties. This is a consequence of the inherent limitations of a tribunal which derives all its authority from the consensus of the parties. An arbitration agreement, like any other contract only binds the parties who entered into it. It therefore has no effect on third parties. Therefore the tribunal's interim measures like all the other awards it may grant are only valid against the parties to the agreement. As such the tribunal has no powers to order attachments or injunctions against persons or entities not party to the agreement. In other words, the arbitral tribunal lacks the competence to direct interim measures at third parties and is defenceless against their acts or omissions[51]. Here again, only the courts, which draw their legitimacy from their constitutionally derived competence within the state, can grant effective legal protection[52].

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[49] New York Law Journal, September 7, 1999
[50] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 368
[51] Ibid., p. 594

c) Efficiency of measures ordered by national courts

Lastly, it is sometimes argued that efficiency considerations demand court access for the arbitration parties. Whereas they may obtain a court decision on an interim matter within few hours, the arbitral tribunal may need to be assembled first. This time factor may be of vital importance for protective measures.[53] Later in the proceeding, the recognition and enforcement of an award bears further possibilities for delays. Although the national legislations generally provide for the enforcement of the interim relief granted by an arbitral tribunal, a court may have to be called upon to grant permission. This adds a extra step to the procedure which is likely to cause delay. Therefore, even after the arbitrational proceedings have started, it may be justified for reasons of practicability and urgency that arbitral tribunals do not have exclusive authority to order interim measures[54].

4. Necessity for an amendment of the Model Law to clarify the competences

Although arbitral tribunals are arguably more competent than courts to grant interim measures, it would not be advisable to give them exclusive power to decide upon these matters. Because of the situations mentioned above, the arbitral tribunals in fact rely upon court support. This support therefore ought not to be withdrawn completely. If arbitral tribunals could order *all* measures of interim relief that courts can order, the need for court applications would not arise. Under the present situation however, there is little justification to completely exclude the court from ordering interim measures. A core competence of the courts ought to be retained.

The next is whether the Model Law clarifies which body is the primary forum and which one plays a supportive and subsidiary role[55]. One approach is that access to the local courts is stayed unless the arbitral

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[52] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 155
[53] Ragnar Harbst: "Arbitrating in Germany" in The Journal of the Chartered Institute of Arbitrators, Vol. 70, No. 2, (herein after Harbst: "Arbitrating in Germany") p. 95
[54] Roth: "UNCITRAL Model Law" op. cit. fn. 4, article 17, marg. no. 7
[55] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 622

tribunal is unable to act accordingly. For example, article 44 (5) of the English Arbitration Act provides that the courts' competence depends on the condition that the arbitral tribunal has no power or is unable to act efficiently.

An amendment to the Model Law might be dispensable, as in fact, many national courts have already adopted this approach voluntarily and display a reluctance to prejudice the outcome of an arbitration proceeding. Based on the argument that a requested measure could be granted identically by the already appointed arbitral tribunal, a Hong Kong court decided in *Leviathan shipping Co. v Sky Sailing Overseas* not to grant the requested interim relief. The decision was supported by the consideration that it would be contrary to the arbitration agreement between the parties to remove the matter from the arbitral tribunal[56]. Another case showing that national courts act cautiously and mainly support the arbitral process is the decision in *Channel Tunnel Group v Balfour Beatty Constructions*. There the House of Lords considered the existence of an arbitration agreement and refrained from exercising its jurisdiction to issue the required injunction[57].

In my view the relationship between the local courts and arbitration is regularly one of trust and support. This makes it possible for both forums to have jurisdiction. This also seems to be the view of the Working Group who regards it as desirable for the parties to have access to both courts and tribunals[58]. As for amendments to the Model Law they are necessary to account for the possible event that courts and tribunals order measures that are in conflict with each other. In such cases restraints need to be imposed on the parties which consider their prior choice to arbitrate. Although the system of concurrent competences should be maintained in general, it should not result in a lack of legal certainty when competing interim relief is granted. Therefore, the Model Law needs to declare that the arbitral tribunal's order must prevail over contradicting court orders.

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[56] "Leviathan Shipping Co. Ltd. v Sky Sailing Overseas Ltd." in International 1 ALR N-114 (1998)

[57] "Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd." in 1 Lloyd's Law Report 291, 334 (1993)

II. Different types of interim awards possible under the Model Law

One target for criticism of Article 17 MAL is that it fails to list the available interim measures. Instead, the Model Law simply provides that arbitral tribunals may order such measures, which they *"may consider necessary"*. According to the official commentary the tribunals merely have to regard the general purpose of interim measures *"to prevent or minimise any disadvantage which may be due to the duration of the arbitral proceeding until the final settlement of the dispute and the implementation of the result."*[59]

This means that the tribunals are equipped with a wide discretion to ensure the protection of a party's right pending the resolution of the dispute. They are basically free to determine the appropriate measure according to the facts of the case and by evaluating the risks involved. Thereby they can choose from various the forms of interim measures that exist according to the practice of the national courts. The most prominent in developed legal systems include the restraint or stay of activities, the freezing or sequestration of the assets of a party, or, alternatively the order to deposit property into the custody of an independent party or body. Further, security may be ordered to guarantee later payment of the amount in dispute or the legal costs. But this does not mean that there is an unlimited freedom of choice by the tribunals. The various measures are subject to limitations arising from party autonomy or the law of the forum[60]. They are applied differently depending on the entire framework of the respective legal systems.

Consequently the practice of ordering interim measures in arbitration proceedings is not consistent. Rather the choice is determined by the following two considerations: The general interpretation of the term "interim measures", and the law of the country where the proceeding takes place.

[58] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 159

[59] UN-Commentary A/CN 9/264, article 18, section 4 in Klaus-Peter Berger: "Das neue Recht der Schiedsgerichtsbarkeit", p. 264

[60] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 595

1. Qualification of the interim measure according to its definition

Arbitral tribunals are not entirely left without guidance when exercising their discretion. An important way of determining their options is by defining the term "interim measure". Firstly, in comparison to the final award, they should never determine the merits of the dispute definitively because the measures are of an "interim" nature. By dealing with the subject matter on a provisional basis the tribunal ensures that it does not create irreversible facts. Hence, it is only such measures which it can withdraw or at least amend that can be described as interim[61]. This is only possible, if there is no prejudgement regarding the final outcome of the dispute.

Secondly, such measures are necessarily "protective", in that they are *"intended to preserve a factual or legal situation so as to safeguard rights"* as articulated by the European Court of Justice[62]. Hence, they serve to maintain or to restore the *status quo* between the parties and enhance the possibility that a later award is enforceable[63].

2. Qualification of the interim measure influenced by the law of the forum

A further limitation of the arbitrator's jurisdiction to grant any interim measure that is inherent in the arbitral process is that the appropriate measure depends on the law of the forum. Some legal systems provide that certain measures are the strict preserve of a court order. For example, section 39 (1) the English Arbitration Act only gives the arbitral tribunal all powers, which are available in the main action. Further, it has to be realised that certain interim measures such as specific performance guarantees, the Mareva injunction or search orders are not universally valid and may therefore not be enforceable in various forums. Any such measures being unknown to the national jurisdiction are not fortified with the threat of contempt of court. In these cases the arbitral tribunals may

[61] Klaus-Peter Berger: „Internationale Wirtschaftsschiedsgerichtsbarkeit" op. Cit. Fn. 28, p. 235

[62] „Van Uden Maritime BV Kommandit Gesellschaft v Firma Deco-Line" in ECRI 7091, 7133 para. 375 (1998)

[63] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 153

consider it useless to order them, because courts will only allow enforcement of the measures they could grant themselves[64]. Still, the contractual effect that arbitration has on the parties should not be underestimated. By deciding to arbitrate instead of seeking relief from the national courts, they show their willingness to settle their disputes without interference from the courts. Few parties would therefore insist on measures that could have been ordered by the very same national court whose involvement they sought to avoid.

3. Necessity for an amendment of the Model Law to list the possible measures

It could be argued that a clear statement of the specific interim measures available would provide arbitral tribunals with necessary legal certainty. Is the principle that "justice under the law is best achieved by certainty"[65] valid in this context? As a counter argument, it could be said that a prescriptive approach would unduly limit the flexibility of arbitral tribunals[66]. Specifically, such a prescription would limit the tribunal's discretion. Therefore it has to be accepted that the practice of the tribunals will always present this tension. As described earlier, this tension is not solely caused by unclarified competence but can also be attributed to the relevant legal system of the forum. Both of these factors will unavoidably influence arbitral tribunals' decision and contribute to their inconsistent practice.

The Model Law is not capable therefore not required to exhaustibly spell out the measures an arbitral tribunal is authorised to decide upon and the requirements it has to observe in doing so. It would simply not be practicable to comprehensively identify the measures in the Model Law. Further, it must be recognised that one of the reasons parties choose arbitration is, as was shown above under section B I 2, to avail themselves of more flexible rules. As the Model Law aims to provide a flexible set of

[64] Harbst: "Arbitrating in Germany" op. cit. fn. 54, p. 95
[65] Mark Saville: "The Origin of the New English Arbitration Act 1998, Reconciling Speed with Justice in the Decision-making Process" in Arbitration International Vol. 13, No.3, p. 242
[66] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 153

regulations, the arbitral tribunals are required to decide themselves on the interim measures they consider appropriate and feasible. The more arbitral procedure resembles litigation the less effective it might become. As such a Model Law that prescribes every available measure is not desirable.

III. Interim measures ordered ex parte

As the chances of amending the Model Law to prescribe the available interim measures available are minor, I shall focus on a more realistic, yet still controversial topic: The procedural requirements for the order of *ex parte* interim measures under the Model Law. During the thirty-second session of UNCITRAL a discussion commenced regarding the introduction of such measures.[67] These are ordered without offering the adversely affected party the opportunity to be heard.

Normally, the tribunal orders interim measures subject to the following prerequisites: Firstly, either of the parties must have made a request for interim relief based on the substantive requirements mentioned above under section C II. Secondly, the measure can only be applied in an area where the tribunal has jurisdiction. Thirdly, and most importantly in the context of this discussion, a hearing of the other party must have taken place[68].

Voices within the Working Group demanded that the tribunals should be empowered to order interim measures without observing the last condition. This would mean that measures could be issued without giving notice to the party against whom they are directed. In general, this issue covers not only situations where one party petitions for relief without the other party present, but also those where the other party is notified but not given an opportunity to respond[69].

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[67] "Working Group Report" op. cit. fn. 1, p. 2

[68] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 606

[69] Hans van Houtte: "Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration" in Arbitration International, Vol. 20, No. 1 (herein after van Houtte: "Ten Reasons against Ex Parte Measures"), p. 88

The current version of the Model Law does not expressly provide for *ex parte* relief. Moreover, it seems that the UNCITRAL Secretarial only considers this possibility in limited circumstances. It does not confer an implied right to order interim measures *ex parte* to arbitral tribunals and explains that the "*proceedings may be continued in the absence of a party only if due notice was given.*"[70]

Hence, the efforts to amend the Model Law by introduction these measures are met with strong opposition and the topic is often regarded as the major "stumbling block"[71] to finding an agreement on a revised text on interim measures in the Model Law.

1. Reasons against ex parte interim measures

The main concern against introducing interim measures of protection ordered on an ex parte basis is that they might *"adversely affect the proper development of international commercial arbitration"*[72].

In fact *ex parte* orders do contradict against an established principle of the Model Law. The right to be heard is expressed in article 18 MAL, which provides that *"...each party shall be given a full opportunity of presenting his case."*

This is regarded as one of the fundamental procedural rights of the parties[73]. As part of a fair trial it is widely accepted in litigation procedures to provide both parties with the equal right to defence, especially when important issues such as the ability to deal with one's own property are at stake[74]. This leads to a conclusion that they must at least have the possibility to gain access to the tribunal and be afforded the opportunity to fully present their case. If this is not guaranteed, the party against whom the measure is directed may lose confidence in the fairness of the arbitral procedure. This could have far reaching consequences for this instrument

[70] "UNCITRAL Explanatory Note" op. cit. fn. 13, par. 33
[71] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 156
[72] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p.86
[73] "UNCITRAL Explanatory Note" op. cit. fn. 13, par. 28
[74] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 58

of dispute resolution in that it relies on the consensus and co-operation of the participating parties[75].

Another objection rises from the applying party's need for an urgent decision. As the tribunal may have to make its decision rather hastily and based on a single position the accuracy of the procedure might be compromised. Hence, some voices in the literature have raised the fear that *ex parte* interim measures could encourage parties to act in bad faith[76].

Lastly, the opposition to measures ordered *ex parte* submits that the effectiveness of arbitral tribunals will always remain limited in such cicumstances. Under the *status quo* national courts handle *ex parte* measures in support of the arbitral proceeding. Even if the Model Law provides for such measures in the future, judicial assistance will be required as long as arbitral tribunals are not equipped with an enforcement machinery. Hence, it can be argued that these measures should remain reserved to the national courts, which eventually have to deal with the matter anyway.

2. Reasons in favour of ex parte interim measures

In general *ex parte* interim measures of protection are necessary to prevent a party from taking action that would defeat a potential order. Their necessity in particular proceedings may be illustrated with following example: If one party becomes aware that the other party seeks a stay to preserve assets, it might be tempted to relocate or to dispose of the assets after gaining notice of the envisaged measure and before the legal procedure is concluded. It would, however, not be led into this temptation if it did not have information of the imminent stay. In this sense, notice can be regarded as a warning signal. Therefore, the effectiveness of interim measures is sometimes predicated on surprising the other party.

[75] James Costello: "Ex Parte Measures – a View in Favour" in LCIA News Vol. 8, Issue 2 (herein after Costello: "Ex Parte Measure in Favour"), p. 17
[76] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 155

According to UNCITRAL, this element of surprise can often prevent frustration of interim measures before they are granted[77].

Most commentators who support the introduction of *ex parte* interim measures of protection claim that they are imperative to enhance arbitration as an individual and independent mean of dispute resolution[78]. To date, such *ex parte* measures can only be obtained from the national courts. This renders courts a more effective source of temporary protection of the rights of the parties. Accordingly, the worry exists that a party who needs emergency relief while arbitration is underway may be forced to take the matter into the national court. The latter in turn could be encouraged to expand their competence and decide the case on the merits.

It is undisputable that the parties may have an interest in resolving their disputes entirely outside the courts. Rightfully, their trust in the actions of arbitral tribunals who they select and appoint according to article 11 (2) MAL is high. As any national court, they are obliged to act impartially and independently. Because of the competition in the arbitration business, their reputation depends strongly on their conduct. Moreover, the arbitral tribunal is regarded as qualified as it is already familiar with commercial complexities. Only a comprehensive protection of the party's legal rights, which includes *ex parte* measures, would fully shield the arbitration proceeding against interventions that undermine the decision of the parties to resolve their disputes outside the courts[79].

3. Strict preconditions for ex parte measures

In its latest draft proposal, UNCITRAL envisaged that the granting of orders on an *ex parte* basis should be left to the discretion of the arbitral tribunal. However, the prerequisites for this most efficient form of interim relief must be higher than for regular interim measures. The tribunals could only exercise their discretion under exceptional circumstances and

[77] Report of the Working Group on Arbitration on the work of its forty-first session p.29 on http://ods-dds-ny.un.org/doc/UNDOC/LTD/V04/562/85/PDF/V0456285.pdf entered 10.09.2004

[78] Costello: "Ex Parte Measure in Favour" op. cit. fn. 72, p. 16

[79] Costello: "Ex Parte Measure in Favour" op. cit. fn. 72, p. 19

subject to certain criteria. The idea is to make the applying party establish certain requirements to ensure that the arbitral tribunal can grant *ex parte* measures without being used as an instrument for unjust orders. Therefore, the Model Law must include safeguards that prevent abuse of this "risky practice"[80].

a) Urgent need for the interim measure

Firstly, the arbitral tribunal would have to recognise the exceptional nature of *ex parte* measures. Essentially they would be ordered to secure certain assets of the applying party. The need for this may arise where the applicant is subject to the risk of serious harm to a potential judgement in its favour. In particular, it would have to be shown that the envisaged measure ordered *ex parte* is necessary to ensure the effectiveness of any final order that may be granted. This could be the case if assets without which the whole process of dispute resolution would be rendered illusory are dealt with in a way that could defeat enforcement. However, a control mechanism is required to respect the importance of the guaranteed right to be heard of the party against whom the measure is issued. This could be achieved by placing a burden of proofing urgent necessity on the applying party. In addition, that party would be obligated to show that immanent and serious harm is about to take place.

It is difficult to imagine that arbitral tribunals will frequently find the need for an interim measure to be so essential, that the hearing of the opposing party could be dispensed with. Necessarily, it would have to define uncertain criterion such as "serious harm". This would be decided according to the discretion of the arbitral tribunal and therefore difficult for the parties to anticipate. This difficulty is made greater by the likelihood that the determination of this criterion will differ according to the jurisprudential principles of the forum[81]. Such uncertainties could give rise to further disputes concerning the tribunal's decision and thereby hamper the whole process.

[80] Ibid., p. 17

[81] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 158

b) Balancing the urgent need for the ex parte measure with the harm it might create for the adversely affected party

The need for efficiency must always be viewed in light of the opposing party's right to due process[82]. As a consequence the possible harm must outweigh the harm that might arise to the opposing party in order to an *ex parte* measure to be justified. Such evaluation of the party interests will necessarily have to consider the strength of the applicant's case by establishing the substantial likelihood of ultimate success[83]. As discussed above under section C II (2), the arbitral tribunal must perform this interim assessment without making a premature decision on the merits of the claim[84].

c) Provision of financial securities

It would also have to be ensured that the parties applying for interim measures of protection are not using them for dishonest or dilatory tactics. Here, it is the task of the Working Group to establish adequate safeguards such as appropriate security[85]. One of the most effective measures used in litigation is the liability of the applying party for unjustified requests. The effectiveness stems from the obligation to compensate the party against whom the measure is directed for suffering by a measure that is later found to be wrongfully initiated[86]. Before the tribunal could issue an *ex parte* interim measure, it should therefore require the applicant to furnish a corresponding undertaking. However, the fact that an arbitral tribunal does not draw its legitimacy from a constitutional system is relevant in this context. Because the tribunal lacks inherent jurisdiction to compensate with an order of damages, it would need the support of the state courts to execute such demands A solution could be achieved if it was mandatory for the applying party to furnish securities or to provide guarantees securing the payment of potential liabilities against the other party. However, if the tribunal then found that the damage, which might be

[82] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 39
[83] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p. 85
[84] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 156
[85] "Working Group Report", op. cit. fn. 1, p. 29
[86] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 155

caused by the interim measures, could not be covered by the payment of the security, its powers to order such measures would have to be excluded[87].

Despite these dangers, an extensive system of protection against bad faith applications could compromise the efficiency of the procedure. The possibility of unjustified actions ought not prevent good-faith parties from accessing *ex parte* interim relief. There are other means to prevent such abuses without entirely eliminating a potentially beneficial type of interim order.

c) Full and frank disclosure of all facts

A key safeguard against unjustified *ex parte* orders demand that the applying party disclose all materials and circumstances in support of the interim measure being sought. This is crucial because the tribunal has to make a judgement based on the submission of one party. In order for the tribunal to obtain a balanced view of the matter, the applying party therefore has to disclose all relevant facts, including those adverse to it[88]. This is meant to ensure that the applicant will not attempt to mislead the tribunal by omitting certain weaknesses. The demand for full disclosure requires extensive enquiries and proper research. Especially where it creates an obligation to present not only acts already known the applicant but also facts not yet known to it, it becomes a rather onerous task. Though necessary, this requirement makes the tribunal's task quite difficult and can prove to be yet another source of delay.

According court decision from the United Kingdom the duty of good faith requires the applying party to *"disclose all material facts fully and fairly"*[89].

This test serves as an adequate guideline in circumstances where there is a high risk of a party trying to deceive a tribunal that will decide on the merits at a later stage of the proceeding.

[87] Klaus-Peter Berger: International Economic Arbitration (herein after Berger: "International Economic Arbitration"), p. 338

[88] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 39

[89] "Siporex Trade SA v Commodities Limited" in 2 Lloyds Law Report 428 (1986)

d) Flexibility of the arbitral tribunal after ordering the interim measure

The surprise factor created by *ex parte* measures corresponds to and contradicts the right of the other party to be heard. As a minimum requirement, therefore, it is important that the arbitral tribunal conducts a supplementary hearing that includes this party as soon as is practicable. After this subsequent hearing the tribunal must be able to reconsider its decision on the *ex parte* hearing[90]. The occurrence of this second hearing without any major delay could be ensured if the interim measure is granted for a specific period only. Accordingly, the European Court of Justice decided in regard to *ex parte* measures in litigation that the courts must be able link such orders with a time limit. As soon as this limit expires, the other party must be summoned to a hearing *inter partes*[91].

The flexibility of the tribunal must also be guaranteed trough the content of the interim measure. When arbitral tribunals order interim measures they have to take extra care that they can restore the former *status quo* by amending or revoking them[92]. As discussed above under section C II 2, tribunals are not supposed to anticipate the outcome of the case. Often, however, the consequences of *ex parte* interim measures are difficult to predict as they are ordered in urgent circumstances. Because the full effect of such a measure might only become obvious after it has been enforced, the tribunal must be allowed to continuously asses whether the initial conditions justifying the order remain fulfilled[93].

4. Evaluation of the arguments

As mentioned above under section C III, the Model Law currently does not provide for interim measures granted on an *ex parte* basis. The task to establish a model that could serve as a recommendation for the respective legal systems of the national states is not an easy one as there is no reported precedent at an international arbitral level in this respect[94]. Realising their ultimate advantages for fair procedure arbitral tribunals

[90] Costello: "Ex Parte Measure in Favour" op. cit. fn. 72, p. 17
[91] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 42
[92] Berger: "International Economic Arbitration", op. cit. fn. 89, p. 338
[93] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p. 86

should be allowed to grant *ex parte* measures. Moreover, the parties are more likely to accept the decision of a body that they constituted themselves but are presently unable to approach for *ex parte* relief. In this sense, the absence of an interim stage could end up compromising the consensual nature of the rest of the dispute resolution process. It could be argued, therefore, that excluding tribunal competence in this respect could have a disproportional impact on the arbitral enterprise.

The Working Group concludes that they should be introduced, *"unless otherwise agreed by the parties"*[95]. In other words, the parties should be provided with an opt-out provision. Realising, that *ex parte* measures might go against the expectations and intentions of the parties who wish for a consensus through cooperation the revised version of the Model Law should rather include an opt-in provision.

IV. The enforcement of interim measures ordered in arbitral proceedings

Further challenges arise in the final step of the procedure, which concerns recognition and enforceability of interim measures. Because arbitral tribunals are not subject to the separation of powers of a state, they lack the authority and coercive powers available to competent national courts. Instead they acquire their competence solely from the private agreement through which the parties submit potential disputes to an arbitral tribunal. Hence, if an interim order is not carried out voluntarily, it will have to be enforced by the national court. Accordingly, UNCITRAL understands that this task is an *"intrinsic part of the national procedural law and practice"*[96].

Essentially, there are three critical questions when considering the relationship between interim measures of protection in arbitration with their dependence on supportive sanctions from the state. Firstly it is doubtful whether interim measures are as enforceable as final awards since the Model Law fails to mention how they can be enforced. Secondly, it must be

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[94] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 39
[95] "Working Group Report", op. cit. fn. 1, p.29

asked whether such enforcement may be limited to certain ypes of measures ordered. Thirdly, the issue of whether *ex parte* measures can be enforced must be addressed.

1. Enforceability of interim measures in general

The Model Law regulates the enforcement of arbitral awards in general through the provisions of the New York Conventions, which enjoy worldwide acceptance[97]. Article 35 (1) MAL provides a general guideline for national courts by stating that an arbitral award *"...shall be recognized as binding and, upon application in writing to the competent court, shall be enforced..."*.

In article 36 MAL, the grounds upon which enforcement may be refused are listed. However, while the Model Law does arrange for the issuance of interim measures under article 17, it fails to accompany this competence with an express enforcement mechanism. As a consequence, the legal systems of most states deal with this topic in an unsatisfactory way[98].

As the Model Law remains silent on the issue of enforcement, the academic question that is extensively discussed is whether an interim measure of protection is to be recognised and treated like a final arbitral award[99]. The decisive factor should not be how a certain national legislation decides to name the order. The key feature of an article 17 MAL award is its interim function, so the question is not whether such a measure is granted as an award or final order[100]. Instead, it has to be determined whether an interim measure of protection can be treated like an award. Its provisional nature is one of its most important and defining characteristics, and distinguishes it from final awards[101]. Although they do have binding legal force they lack finality. This becomes obvious when it is recalled hat an arbitral tribunal may freely revise their rulings when circumstances change, even without any of the parties seeking avoidance.

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[96] " UNCITRAL Explanatory Note" op. cit. fn. 13, par. 49
[97] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 53
[98] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p. 91
[99] Lew, Mistelis, Kröll: "Comparative Arbitration", op. cit. fn. 23, p. 610
[100] Berger: "International Economic Arbitration", op. cit. fn. 89, p. 343
[101] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 159

However, the fact that interim measures are temporary does not mean that they must be precluded from enforcement. This seems to be the point of view of UNCITRAL as well, as it declares, *"any state adopting the Model Law would be free to provide court assistance in this regard."*[102]

Hence, the fact that the Model Law does not provide guidance on the enforcement of interim awards should and does not prevent national courts worldwide from enforcing them like other arbitral decisions if they are not carried out voluntarily. This is also supported by a default mechanism through which the tribunal relies on the intervention of the courts to enforce orders over a party or its property. This does not, however, provide a satisfactory explanation as to why the Model Law does not prescribe the task of the national courts to recognise interim measures in order to enforce them.

2. Limitations on the enforceability of certain kind of interim measures

Usually national courts follow the common practice of enforcing interim measures ordered in arbitration. In doing so, they have to conduct a further proceeding in which they evaluate weather the measure is at all enforceable in their respective legal system. As the issue of enforcement is highly disputed, experienced parties may be well advised to agree on penalties for the non-compliance with such orders. They might even agree on private mechanisms to bypass court interference. These can offer more flexible and therefore more appropriate solutions for the parties.

The situation of interim orders that are unknown to the law of the forum has fewer negative effects than one may expect. In the end, their effectiveness depends not so much on enforceability as the parties regularly follow the ruling of the tribunal without pressure. They often do so for reasons that can be classified as psychological. Here, it is of great importance that in most cases the parties initiated arbitration and formed the tribunal themselves. Hence, the feeling of beeing at the mercy of a superior body might be mutes compared to that feeling in relation to the courts: This makes it more likely that the parties will develop trust in

[102] " UNCITRAL Explanatory Note" op. cit. fn. 13, par. 26

arbitral decisions. Regularly, the lack of an enforcement mechanism is also compensated for by the persuasive powers of the tribunal. In this respect the parties realise that if the arbitral tribunal has been made aware of non-compliance with an order for an interim measure it might draw negative inferences out of such behaviour[103].

Therefore, the effectiveness of interim measures ordered by arbitrators as an alternative to court-ordered interim relief does not entirely depend on the particular measure being fortified with a threat of enforcement.

3. Enforcement of ex parte interim measures

Whereas the absence of a general enforcement mechanism for interim measures under the Model Law does not create unsolvable practical problems, the assistance of courts to enforce *ex parte* measures may be more difficult to obtain. However it is likely that court support may be required quite regularly. As *ex parte* measures are directed against parties who are suspected of a plan to destroy evidence or remove assets, it is feared that they will not follow the resulting orders voluntarily. However, the readiness for enforcement seems to be low. The European Court of Justice, for example, refused to enforce an order against the defendant's bank who was not summoned to appear and thus not subject to an adversarial proceeding[104].

Even if the national courts are willing to enforce *ex parte* measures, the recognition and enforcement procedure is not only costly but may also compromise the surprise value of the order since any advance notice could threaten the protection. As such the competence to order interim measures *ex parte* is not complete unless accompanied by the ability to make an enforcement decision equally without hearing the other party. As many countries are already reluctant to introduce *ex parte* measures in their own legislation, it is unlikely that they would incorporate such

[103] Berger: "International Economic Arbitration", op. cit. fn. 89, p. 334

[104] Case 125/79 in ECR 1553 (1980)

regulations for the judicial enforcement of such measures ordered by an arbitral tribunal[105].

E. Interim measures in arbitral proceedings under the new German Code of Civil procedure

I. Brief history of the reform process

Germany, a major participant in international commerce and investment, has to date had little role as a venue for international arbitration. Despite the growing popularity of arbitration, only 138 ICC cases took place in Germany during the period from 1989 to 1999 compared with 1056 in France and 318 in the United Kingdom[106]. However, as most modern international commercial contracts include an arbitration clause, alternative dispute resolution has become an important and profitable business. Naturally therefore, Germany has a great interest in closing the gap between the high number of arbitration agreements that are concluded and the low number of arbitration proceedings that are conducted there[107].

The primary reason for this discrepancy, besides other unchangeable causes like language difficulties and historically motivated concerns, was identified by the fact that German arbitration rules contained a multitude of deficiencies[108]. In response, Germany changed its entire Code of Civil Procedure on January 1, 1998 and introduced a new Arbitration Act[109] during this process[110]. Unlike in other jurisdictions, the Germen law on arbitration is still not codified separately but remains an integrated part of the Code of Civil Procedure, forming its tenth book. Whereas prior to the reform the German arbitration legislation was not regulated at all, the new law now deals with this

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[105] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p. 92

[106] Robert Hunter: "Arbitration in Germany a Common Law's Perspective" in SchiedVZ, No.4 (herein after Hunter: "Arbitration in Germany"), p.155

[107] Karl-Heinz Böckstiegel: An Introduction to the New German Arbitration Act based on the UNCITRAL Model Law, in Arbitration International, 1998, Vol.14, No.1, p.19

[108] Harbst: "Arbitrating in Germany" op. cit. fn. 54, p. 88

[109] all quotations of the new Code of Civil Procedure are taken from the unofficial translation by the German Federal Ministry of Justice, in Arbitration International, 1998, Vol. 14, No. 1, p. 7 - 18

topic extensively. Further it is now clearly based on the Model Law, which marks a "fundamental and radical change" [111] from the old procedural rules. This decision towards international cooperation is deemed to be of great practical importance and is aimed at making this means of alternative dispute resolution more accessible and comprehensible for foreign arbitrators[112]. According to the latest evaluations the adoption of the Model Law together with Germany's geo-political situation in Europe has created strong and objective reason in favour of the choice of Germany as a seat of arbitration[113].

II. Interim measures of protection under the new German Code of Civil Procedure in general

The new German Code of Civil Procedure introduced interim measures of protection into German arbitration proceedings. It did not include any statutory source for such measures before. As such, arbitral tribunals could generally only order such measures if the parties remembered to stipulate their availability in their arbitration agreement. This changed with the adoption of the Model Law into this new piece of legislation. The idea was to apply the wording of the Model Law as much as possible, while introducing minor changes where this was considered absolutely unavoidable in view of the legal and institutional framework[114]. The result encompasses a few departures that can be regarded as sensible and beneficial[115].

Assessing the first five years of experience with the German enactment of the Model Law under its Code of Civil Procedure allows for the judgement that the latter might function as a model in return. In this vein, it is useful to observe how the new section 1041 ZPO can be considered as a practical

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[110] Karl-Heinz Böckstiegel: "An Introduction to the New German Arbitration Act based on the UNCITRAL Model Law" in Arbitration International, Vol. 14, No. 1 (herein after Böckstiegel: "Arbitrating in Germany"), p. 21

[111] Ibid., p.19

[112] Gerhard Wagner: Practitioner's Handbook on Arbitration, Country Report - Germany, Part 4, p.685

[113] Hunter: "Arbitration in Germany" op. cit. fn. 108, p. 155

[114] Böckstiegel: "Arbitrating in Germany" op. cit. fn. 111, p.21

[115] Hunter: "Arbitration in Germany" op. cit. fn. 108, p.164

and academical source for establishing how article 17 MAL should be modernised.

III. Competence to order interim measures under the ZPO

The relevant provision describing the jurisdiction of the arbitral tribunal in respect of interim measures is section 1041 (1) ZPO. Whereas tribunals lacked the power to issue interim measures before, they are now expressly authorised to do so under this section. Essentially Germany adopted article 17 MAL with a minor change. Under the Model Law, tribunals may *"...order any party to take such measures..."* as it may consider necessary under whereas under the German Code of Civil Procedure, they can *"... order such interim measures..."* under the same prerequisites.

The relationship between interim measures granted by an arbitral tribunal and the role of national courts is ruled identical in article 9 MAL and section 1033 ZPO. As such, German courts are declared competent to provide interim relief even in disputes that are entirely subject to arbitration[116]. The new German law has thereby decided on concurrent jurisdiction of courts and arbitral tribunals. In doing so, it follows the free-choice approach of the Model Law which provides for court access alongside the arbitrator's competence to order interim measures of protection. A key difference is that the Code of Civil Procedure has found a way to prevent the consequences of competing interim measures. Under section 1041 (2) ZPO, the court is prohibited from enforcing a measure ordered by an arbitral tribunal when an application for a corresponding measure is made to the court.

Still the German Code of Civil Procedure fails to introduce comprehensive rules to coordinate the two mechanisms of dispute resolution in cases of urgency. As it lacks a "system of pre-eminence"[117], the courts are not required to establish that interim measures are unavailable through the arbitral tribunal if they wish to interfere with the arbitral proceeding.

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[116] Gerhard Wagner: "Country Report - Germany" in "Practitioner's Handbook on International Arbitration", part 5 (herein after Wagner: "Country Report – Germany"), marg. No. 277

IV. Types of interim measures in arbitral proceedings under the German Code of Civil Procedure

Under the new procedural rules concerning arbitration, the specific kinds of interim measures arbitral tribunals may order are not described. The literature is divided between a national and an international interpretation. In determining the measures arbitrators may order, the provision concerning the arbitral procedure does not give much of an indication since it refers to measures the tribunal "considers necessary".

1. Arguments in favour of a limitation to the interim measures known to German legislation

According to the national interpretation, the relief available in cases of emergency would be congruent with those in the catalogue of sections 916 to 945 ZPO. The types of interim measures known under the German Code of Civil Procedure are well defined and clearly exhaustive. They are limited to the arrest *in personem* or *in jurem* where the assets of the other party are attached, and the interlocutory injunction[118]. The fact that arbitration is primarily an alternative to litigation could allow the conclusion that it has to be consistent this alternative. This would mean that its interim measures may only consist of those mentioned in the catalogue for litigation[119]. When examining section 1041 (1) ZPO in the context of section 1041 (2) – (4) ZPO, it could be noted that the latter includes recognisable references to the coordination between arbitral and court proceedings. This, however, does not necessarily lead to the conclusion that the German legislation restricts the kind of interim measures available. In order to achieve such a restriction it could simply have referred to these measures explicitly. More convincing is a different argument brought forward in favour of the national interpretation. It says

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[117] Ibid., Rn. marg. No. 279

[118] Gaffney: "Ex Parte Measures" op. cit. fn. 5, p. 41

[119] Karl-Heinz Schwab, Gerhard Walter: „Schiedsgerichtsbarkeit, systematischer Kommentar zu den Vorschriften der Zivilprozessordnung" (herein after Schwab, Walter: „Schiedsgerichtbarkeit"), chapter 17a, marg. 4

that only such measures should be ordered that German courts are familiar with, as I is they who are left with the task of enforcement[120].

2. Arguments against such limitations

Firstly, section 1041 (1) ZPO clearly departs from the approach used in other areas of the procedural law that provide with a limited list of the interim measures available[121]. The common view is that the German legislators chose this different wording on purpose. As mentioned above under section E I, the new ZPO commits itself to the task of internationalising arbitration. This could explain why arbitral tribunals have gained a self-contained competence to choose which interim measure to order. Although it is admittedly unlikely that national courts are willing to enforce orders unknown to them, it indeed makes sense for arbitral tribunals to maintain a wide scope of interim measures outside the range of state enforcement. Often the situation will arise that orders are observed voluntarily due to the mere authority of the arbitral tribunal. Furthermore, enforcement will not become relevant at all if interim measures are secured by private mechanism, where they are agreed upon by the parties or where an order needs to be enforced abroad.

More importantly, the German Code of Civil Procedure in section 1041 (2) contains a control mechanism for interim measures that are unknown to its jurisdiction. Here, the court *"may recast such an order if necessary for the purpose of enforcement".* In doing so the court is not limited to applying modifications to the language of the ruling of the arbitral tribunal, but even may transform the order into a measure compatible with the German enforcement mechanism[122].

The only applicable limitation pertains to measures that contravene national public policies[123]. Under German law, it is forbidden to anticipate the outcome of a dispute by granting interim relief. That is why tribunals

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[120] Ibid., chapter 17a, marg. 20

[121] Hans-Jürgen Schroth: „Einstweiliger Rechtsschutz im deutschen Schiedsverfahren“ in SchiedsVZ, Vol.3 (herein after Schroth: „Einstweiliger Rechtsschutz“)_, p. 102

[122] Wagner: “Country Report – Germany” op. cit. fn. 118, marg. No. 286

[123] Schwab, Walter: „Schiedsgerichtbarkeit“ op. cit. fn. 121, marg. 5

should for example refrain from ordering interim payments amounting to the sum of the entire claim.

3. Interim measures ordered ex parte under the Code of Civil Procedure

As Germany has adopted article 17 MAL without major modifications in section 104 (1) ZPO it is often concluded that the tribunals do not have the authority to order interim measures an *ex parte* basis. Moreover, by merging article 18 MAL into section 1042 (2) ZPO, the procedural rule that each party must be given the opportunity to present his case is manifested. This could lead to the conclusion that German arbitrators are entirely precluded from deciding on *ex parte* orders. As a counter argument, it is noteworthy that the German Code of Civil Procedure is familiar with this practice. Under the prerequisites of sections 921 (1) and 944 ZPO, and under exceptional circumstances, German courts *are* permitted to order interim measures. They are regarded necessary if only an urgent order of this kind could secure the main proceeding.

A relevant amendment to the Model Law can be found in section 1063 (3) ZPO, which authorises the court left with the enforcement decision to make it without an oral hearing in order to speed up the procedure[124]. It explicitly provides that the court *"may issue, without prior hearing of the party opposing the application, an order to the effect that (...) the applicant may (...) enforce the interim measure of protection"*. This proves that the legislature regarded the possibility of surprising the adversely affected party as a vital feature of interim measures. It cold be argued that if the courts are already permitted to enforce *ex parte* orders pursuant to section 1041 (1) ZPO the arbitral tribunals must be permitted to order them this being a less severe interference with the rights of the parties[125]

V. Enforcement under the ZPO

[124] Böckstiegel: "Arbitrating in Germany" op. cit. fn. 111, p. 29

[125] Mark Tell Krimpenfort: „Vorläufige und sichernde Maßnahmen in schiedsrichterlichen Verfahren", p. 103

Due to the lack of enforcement provisions, adherence to orders made under the old Code of Civil Procedure depended on the goodwill of the parties. This helps to explain why the German Federal High Court decided that already the provisional character of interim measures would exclude them from enforcement[126]. An important amendment to the Model Law is reflected in Section 1041 (2) ZPO, which connects the interim measures to enforcement and compensation machinery. The new legislation reads a follows:

> *"(2). The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1, unless application for a corresponding interim measure has already be made to a court. It may recast such an order if necessary for the purpose of enforcing the measure.*

With respect to the enforcement of interim measures, 1041 (2) ZPO is a great step forward compared to the Model Law. At the same time, it is a clear break with the former situation whereby court enforcement only applied to final awards. The Code of Civil Procedure fills the gap by providing for the enforcement of the interim order along the line of the enforcement of the final award. Appropriately, it added a few grounds for refusals that are specific to interim measures. Apart from those the framework for the recognition and enforcement of awards is generally identical for all types of decisions.

F. Conclusion

Contrary to most national jurisdictions that suffer from a growing load of court cases, arbitration aims *at increasing* its private rsolution business. But in order to enhance its acceptance among the parties to international trade, it needs to provide a framework that is as comprehensive as possible. It is the task of the globally regarded instrument of the Model Law to ensure that arbitral proceedings accommodate all practical requirements of the parties. This naturally includes the availability of interim measures, which might often be as important for the protection of their rights as the final award. Therefore the parties may confine themselves to a means of dispute resolution that can

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[126] Bundegerichtshof on May 22, 1957 in ZZP 1958, p. 427

provide them with this essential measure. The fact that the provisions of the Model Law address this topic in only rudimentary fashion creates a gap between the different legal frameworks that adopted it. This not only causes uncertainties among the body of international arbitrators but might eventually undermine the faith of international traders in the arbitral process itself.

Certainly, the fact that requests for interim measures are relatively uncommon in arbitration can be partly explained by the nature of arbitration. Yet despite paucity of their use, it is troubling that new legislation is unable to erase the lack of effectiveness that results from a two-step procedure. In particular, it is problematic that whenever speedy decisions are required, parties will feel that interim measures ordered by arbitral tribunals are not immediately enforceable but instead require court authorisation[127]. This disadvantage is, however, compensated for by the flexibility of arbitral tribunals offering, as they do advantages like a greater variety of possible orders and a wider acceptance thereof by the parties[128].

It is an indispensable task for UNCITRAL to amend the Model Law by concretising its regulations on interim measures. The present version simply does not offer sufficient legal certainty and can rightfully be considered as *"too permissive"* creating the risk that arbitral tribunals *"latch on ill-defined principles for the sake of expediency."*[129]

As established in the course of the thesis, I see a need to clarify the sole competence of arbitral tribunals as a default rule, with court interference being limited to the exceptions mentioned above under section D I 3. Regarding the types of interim measures that are available, the Model Law should stick to its principle of refraining from too much detail. Different countries with a wide variety of legal systems are more likely to adopt a law that is not overly descriptive and thereby easier to integrate into their existing jurisdiction. For the same reason, it would not be wise to prescribe *ex parte* measures as compulsory. UNCITRAL must especially be wary of introducing rules that are highly contested. Doing so may deter various jurisdictions from

[127] Rolf Schütze: Einstweiliger Rechtsschutz im Schiedsverfahren, Praxisgerechte Neuregelung oder juristischer Papiertiger; Betriebs-Berater, Vol. 33, p. 1650

[128] Schroth: „Einstweiliger Rechtsschutz" op. cit. fn. 123, p. 102

[129] Fry: "Interim Measures of Protection", op. cit. fn. 11, p. 160

accepting them as a model[130]. Therefore, a general and unlimited introduction of *ex parte* measures is not recommended and should rather be left to the autonomy of the parties. Finally, in respect of enforcement there is no convincing reason to treat interim measures and final awards differently. There, the Model Law should codify the common practice of symmetry that is found throughout the world.

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[130] van Houtte: "Ten Reasons against Ex Parte Measures" op. cit. fn. 70, p. 88

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