State justice cooperation in international arbitration: Interim measures

Ezequiel H. Vetulli* and Pablo Jaroslavsky**

Abstract. The purpose of this paper is to assess the functioning and evolution of international cooperation mechanisms through which an arbitral tribunal may request the assistance of a state judge to execute a interim measure. As a result, it is expected to present a balance of the issue to the date herein, and then analyze their strengths and weaknesses, and if possible solutions to the latter.

Keywords. International Arbitration. Interim Measures. State Justice. International Cooperation.

* Lawyer, Universidad de Buenos Aires. Professor of Elements of Trade Law, Universidad de Buenos Aires. He has represented the university in the Commercial Arbitration International Competition and in the Willem C. Vis competition, and is currently coach of the team for such competitions. Co-author of "La inconsistencia en los arbitrajes CIADI", Buenos Aires, La Ley, July 25, 2012

** Lawyer, Universidad de Buenos Aires, he has represented the university in Commercial Arbitration International Competition, and is currently head coach for this competition. He has also represented the university in the Foreign Direct Investment Moot. Co-author of "La inconsistencia en los arbitrajes CIADI", Buenos Aires, La Ley, July 25, 2012

¶ Translation by Diego Baranda Westphal and Carlos E. Díaz de Léon

I. Introduction

Arbitration has been established as the preferred method for resolving international trade disputes, where the vast majority of the times, the parties are from different States[1]. This is due to the fact that it offers the possibility of choosing a neutral forum rather than the dispute being decided by State courts of the country of either party[2].

[1] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th ed., London, Sweet & Maxwell 2004), 1 (Redfern and Hunter).

[2] Redfern and Hunter (n 1), 26.

It may be added that arbitration proceedings often are more agile than judicial proceedings, they offer greater confidentiality to the parties, and allow the selection of a panel of arbitrators specialized on the subject to which the case regards[3].

As a result, the rise of private international arbitration is now an undeniable and obvious fact[4].

The arbitration agreement grants jurisdiction to arbitrators, such jurisdiction understood as the power to resolve on issues submitted before them through a mandatory decision[5]. The positive effect of the arbitration agreement requires the parties to honor their commitment and provides the basis for the jurisdiction of the arbitral tribunal. On the other hand, the negative effect prevents parties from trying for State courts to resolve the issues covered by the arbitration agreement[6], so in turn, such State judges are prevented from resolving conflicts that the parties agreed to submit to arbitration[7].

Like any other dispute resolution mechanism, arbitration is effective only if the decisions of the arbitrators may be executed[8]. Even though, since they enjoy *jurisdiction*, same are authorized to decide on all the elements required as to resolve a dispute[9], they lack *imperium*[10]. This means that for the enforceability of their decisions, they inevitably require judicial cooperation; therefore, the search for mechanisms

---

3 Redfern and Hunter (n 1), 27.

4 Alfonso Calvo Caravaca, "Medidas Cautelares y Arbitraje Privado Internacional" (2004), La Ley, n 6128, de November 16, 2004, pp. 1-9; also in (2005) Foro de Derecho Mercantil. Revista Internacional, Bogotá, n 6, pp. 61-99; in (2005) Revista de Derecho Internacional y del Mercosur, Buenos Aires, 9th year, n 2, 7-29; and in (2005) Revista de Derecho de la Empresa, Santiago de Chile, 2, 9-46, para. 3 (Calvo Caravaca).

5 Roque Caivano, "Course on Dispute Settlement in International Trade, Investment and Intellectual Property" (2005) Dispute Settlement, United Nations Conference on Trade and Development, International Commercial Arbitration, The Arbitration Agreement, 4 (Caivano).

6 Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman and John Savage, *International Commercial Arbitration*, (Kluwer Law International 1999) para. 624 (Fouchard and others).

7 Caivano (n 5), 4.

8 Eduardo Silva Romero, "Adopción de Medidas Cautelares por el Juez y por el Árbitro" (2007), talk in the Second International Congress of the Spanish Arbitration Club – El Arbitraje y la Jurisdicción, Madrid, par. 3 (Silva Romero) <www.clubarbitraje.com> verified on November 20, 2012.

9 José Carlos Fernández Rozas (2005), "Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators", in *IAI* Series on International Arbitration (Juris Publishing 2005) pp. 73-85, 73 (Fernández Rozas).

10 Silva Romero (n 8), para. 10.

that favor cooperation is indispensable if to encourage the use of this method of dispute settlement is intended.

The intervention of State courts in arbitration may be necessary in three stages of the process: (i) in the establishment of the arbitral tribunal; (ii) when a request for provisional and conservatory measures is made by a party; and (iii) when reviewing an award[11]. Hence, judicial cooperation is necessary to ensure proper course of the arbitration[12].

II. Interim measures in international arbitration

A. The importance of interim measures during the arbitration process

The effectiveness of arbitration in many cases depends on obtaining interim measures[13], which are necessary to prevent the claim to be denied, therefore, same are real fundamental rights of litigants[14].

Thus, during the course of the arbitration, it may be necessary to take measures to preserve evidence, protect assets, or otherwise maintain the *status quo* pending the final outcome[15].

Often, the party noticing the likelihood of an outcome adverse to its expectations might try to hide their assets as to avoid execution[16]. That is why, prior to the final decision of any judgment process, it is usually necessary to take measures to prevent claimed rights from becoming misleading.

The generally accepted requirements for granting preliminary injunction are: (i) to verify the so called *fumus bonis juris*[17] –namely– the likelihood in law, (ii) there *periculum in mora*, defined as a risk of serious or irreparable damage if measurement is not taken, and (iii) not prejudging the merits[18], since the court generally rejects the measure

---

[11] Fouchard and others (n 6), para. 683.

[12] Redfern and Hunter (n 1), para.7-10.

[13] Silva Romero (n 8), para. 5.

[14] José Carlos Fernández Rozas "Arbitraje y Justicia Cautelar (Arbitration and Interim Justice)" (2007) vol. XXII Revista de la Corte Española de Arbitraje, pp. 23-60, 24 (Fernández Rozas II).

[15] Redfern and Hunter (n 1), 393.

[16] Fernández Rozas II (n 14), 34.

[17] Redfern and Hunter (n 1), para.7-29.

[18] Redfern and Hunter (n 1), para.7-29.

when it essentially involves what must be resolved in arbitration merit[19]. In some cases countersecurity may also be required.

B. Who orders the injunction on arbitration?

In order to determine who should order an injunction in an international arbitration context, the rules set by the parties shall govern firstly[20]. It may be material rules of procedure (material autonomy) or, may refer to the law of a State (conflict-based independence).

Where the parties have not chosen the law governing the arbitration procedure same must be adhered to the law of the venue[21], which unless otherwise agreed[22], is that which gives the court the power to order interim measures[23].

C. When is the measure ordered by the arbitral tribunal?

For some authors, the content of the jurisdiction delegated to arbitrators not only reaches the resolution of the conflict but also ancillary questions[24], therefore, following the rule by which he who shall know of the main process is also the one competent to take the precautionary measures, it should be understood that arbitrators can carry out the latter[25].

Similarly, it has been said that a good-faith interpretation of the arbitration agreement, indicates that if the parties have empowered the arbitrators to decide current or possible disputes, it is understood they

---

[19] Redfern and Hunter (n 1), para.7-30.

[20] Horacio Grigera Naon, "Choice of Law Problems in International Commercial Arbitration" (2001) vol. 289 Collected Courses of The Hague Academy on International Law, pp. 9-396, 155.

[21] Calvo Caravaca (n 4), para. 25.

[22] Gary Born, *International Commercial Arbitration* (vol. 1 Kluwer Law International 2009), 1293.

[23] Fernández Rozas II (n 14), 35.

[24] Fernández Rozas II (n 14), 36.

[25] Fernández Rozas II (n 14), 36.

also have jurisdiction to implement the interim measures necessary to ensure the successful completion of the arbitration proceedings[26].

In that event, they have the exclusive power to examine the requirements to decide on the lifting or replacement as well as any possible upgradeability requests[27]. This solution seems practical as well, since the arbitrators, being aware of the main trial, are the ones who have the most information for determining the suitability of a particular measure[28].

Following this understanding, most of the world's arbitral legislation grant arbitrators such authority[29], unless the parties have waived same. So do, among others, the UNCITRAL Model Law[30], Peruvian Arbitration Law[31], as well as the French Arbitration Law[32].

Similarly, the most used arbitration rules, such as UNCITRAL[33], the *London Court of International Arbitration*[34] and the International Chamber of Commerce[35] grant arbitrators such authority, as well.

The new ICC Rules provides under Article 28 that arbitrators may issue any interim or conservatory measure they deem appropriate, and may require a proper security. However, regardless of the rules and applicable law, the authority of arbitrators to dispose of precautionary measures will be limited in respect to its object, as can only be provided concerning the object of the legal relationship submitted to arbitration.

The court may order measures consisting of positive obligations, obligations to deliver, negative obligations and even obligations not to innovate. Thus, may order –for instance– the contractor to continue the construction work, the owner of the work to make the corresponding

---

26 Calvo Caravaca (n 4), para. 32.

27 Fernández Rozas II (n 14), 36.

28 Fernández Rozas II (n 14), 49.

29 Silva Romero (n 8), para. 15.

30 1985- *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration*, with amendments as adopted in 2006. Article 17 (Model Law)

31 Legislative Decree N° 1071, Perú, June 28, 2008, Article 47.

32 Decree 48/2011, France, January 13, 2011, Article 1467.

33 *United Nations Commission on International Trade Law Arbitration Rules* April 28, 1976. (as revised in 2010), Article 26.

34 *Arbitration Rules of the London Court of International Arbitration* (1998). (adopted to take effect for arbitrations commencing on or after 1 January 1998), Article 25.

35 *International Chamber of Commerce Rules of Arbitration* on January 1, 2012, Article 28 (CCI Rules).

payments; prohibit a party to sell products of the opposing party; and prohibit a party to dispose of its property[36].

In turn, this authority was confirmed by several arbitrations. It has been provisionally banned all advertising of the litigation[37], as well as the payment of bank guarantees[38].

In the *Channel Tunnel* case, one of the parties to the arbitration sought an injunction in the English courts. It was decided, in first instance, that the court had the authority to pass the measure. The appellate court held that the case deserved the measure to be granted, but found that it lacked the power to do so as an arbitration agreement existed. Finally, although the House of Lords considered that it had the power to enact the measure, it established that such measure did not deserve to be granted[39].

As shown, the case took three decisions of various courts and each of them differently resolved the question of whether the State court had the authority to ordain an injunction concerning an arbitral process. This demonstrates the difficulties of the subject as there is no strict rule about who should dictate[40].

In sum, we can state that, save for certain cases, the arbitral tribunal generally has the authority to ordain interim measures[41], notwithstanding that, as will be seen later, the concurrence of a State judge is required[42]. The truth is that if arbitrators cannot do so, the parties should always recur to State courts, bringing the advantages of arbitration as an alternative to State justice to being vanished or even lost directly[43].

---

36 Silva Romero (n 8), para. 27.

37 *Amco Asia Corp. y otros c. Republica de Indonesia*, Laudo de 9 diciembre 1983, YCA, 1986, pp. 159-161.

38 Decisión *Society of Maritime Arbitrators* del 24 agosto de 1985, YCA, 1986, 209; *Laudo CCI N°. 3896*, JDI Clunet, 1983, pp. 914-919, *Laudo CCI n. 3540*, JDI Clunet, 1981, pp. 914-927.

39 *Channel Tunnel Group c. Balfour Beatty Ltd*, 1993, A.C. 334-367. Adjudictations Law Report 01/21.

40 Redfern and Hunter (n 1), para.7-32.

41 Redfern and Hunter (n 1), para.7-11.

42 José Luis Roca Aymar "Las medidas cautelares en materia de arbitraje internacional: su eficacia según la ley española" (1994) Revista de la Corte Española de Arbitraje, España, pp. 99-110, 102.

43 Calvo Caravaca (n 4), para. 15.

D. What occurs, particularly, regarding *ex parte* measures

There is no doubt that under certain *circumst*ances a party may need an *ex parte* measure to be adopted, understanding by such, those adopted without the intervention of its counterparty against whom the measure is ordained. As a matter of fact, BUCHER and REYMOND expressed, in 1988 and 1989, that a need for a "surprise effect" in emergency situations could enable such measures[44]. However, the laws of the most common venues and the rules of the busiest institutions do not provide the arbitrators with the authority to do so[45].

This topic was particularly in the focus of the debate when UNCITRAL designed a working group to amend the Model Law, and among the matters to be addressed, was the inclusion of the authority of arbitrators to ordain interim *ex parte* measures or preliminary orders in its Article 17, such matter resulted in significant discrepancies[46].

The U.S. delegation presented a detailed proposal in this respect, which posited the authority of arbitrators to adopt such measures, and which counted with the support of Switzerland, Singapore, China, Spain, Mexico, Croatia and the Russian Federation, while the UK, France, Belgium, Serbia and Montenegro, as well as New Zealand were against it[47].

As well, there was strong opposition from renowned institutions related to arbitration such as the International Chamber of Commerce, the *American Arbitration Association*, the Permanent Court of Arbitration, and the Club of Arbitrators of the Chamber of Commerce of Milan[48].

Professor VAN HOUTTE, a member of such above-mentioned institution, while recognizing that in some circumstances it may be crucial to adopt measures as to prevent the final award becoming

---

[44] Hans Van Houtte, "Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration" (2004), *Arbitration International*, vol. 20 n 1, pp. 85-95, (Van Houtte), citando a Andreas Bucher, *Le nouvel arbitrage international en Suisse* (Basilea, Helbing & Lichtenhahn, 1988), 75; y a Pierre Lalive, Jean-Francois Poudret and Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse* (Lausana, Helbing & Lichtenhahn Verlag 1989), 362.

[45] Redfern and Hunter (n 1), 307.

[46] Diego Fernández Arroyo, "Acerca de la introducción de las llamadas medidas cautelares ex-parte en la Ley Modelo de UNCITRAL sobre arbitraje comercial internacional," *DeCITA*, n 3, 2005, pp. 328-331, 329, (Fernández arroyo).

[47] Fernández Arroyo (n 46), 329.

[48] Fernández Arroyo (n 46), 329.

illusory, shows himself strongly against the inclusion of such a provision in the Model Law and identifies a number of reasons why such prerogative should not be granted to arbitrators.

First, he argues that the idea of the Model Law is to reproduce the principles established in arbitration practice and believes that the authority to ordain these measures is not an established principle, since it is not allowed for arbitral tribunals in several states to adopt the concerning measures, not even hearing both sides. Therefore, considering that the ordained *ex parte* injunctions enjoy a very low acceptance, he states that the Model Law is not the proper way to implement this institution[49].

In turn, he notices that they are not necessary, as a party is more likely to obey a measure when it has had the opportunity to be heard than when it has not[50]; that they affect the rights of a defense, cause a loss of confidence in the tribunal[51], imply a risk of prejudgment[52], affect impartiality, their execution would be too difficult, can cause irreversible damage, and finally, that to adopt them could jeopardize the compliance of the ethical standards of the arbitrators and expose them to liability.

Furthermore, CAIVANO while acknowledging that the objections are understandable since not hearing the position of one party may affect the due process, recognizes that impartiality would not be compromised, since arbitrators would, in a way, be prejudging even if both parties are heard prior to the adoption of a interim measure. This problem, in any case, is common to any decision –interim or regarding any other aspect-, which is issued prior to the final award, with or without a prior hearing[53].

Several authors are enrolled as well in a stand against the authority of arbitrators to adopt such measures, such as LALIVE, who argues that they are contrary to the spirit of arbitration, whose essence is

---

49 Van Houtte (n 44), para. I.

50 Van Houtte (n 44), para. II.

51 Van Houtte (n 44), para. IV.

52 Van Houtte (n 44), para. VI.

53 Roque Caivano, La Convención de Nueva York y la Ejecución de las Medidas Cautelares, in Carlos Alberto Soto Coaguila (director), *La Convención de Nueva York de 1958. Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras*, 2009, Magna, Perú, pp. 25-59, 56 (Caivano II).

trust between the parties[54], or GOLDMAN for whom the arbitration is inherently contradictory[55].

In the same way, SILVA ROMERO argues that the possibility of an arbitrator ordaining ex-parte injunctions opposes to the consensual nature of arbitration and believes that the new Article 17 of the Model Law means backwards development of international arbitration[56].

Beyond the debate about the possibility that an arbitral tribunal might ordain such measures, even more problematic is the situation regarding its eventual implementation, which should be asked to State court in case of breach of the measure. In such sense, VAN HOUTTEargues that its execution would be extremely difficult, as State courts would be reluctant to accept them and, even if such is achieved, it would be lost so long that the measure would not be effective.

The European Court of Justice had a chance to decide that an injunction ordered by a State court without hearing the other party was not enforceable under the Brussels Convention[57]. The aforementioned author remarks that such precedent could also reach similar measures ordained by any arbitral tribunal, and concludes that its execution would not be possible in Europe.

In this regard, FERNANDEZ ARROYO is worthy of mention, as he believes that such measures are highly problematic because of the adverse reaction that can result in countries sensitive to arbitration[58]. All these circumstances suggest that currently a measure issued *ex parte* by an arbitral tribunal would hardly be successful.

In summary, while a doctrinal majority considers that the conditions to allow this kind of measure are not yet established, opinions, both in favor and against, can be perceived. Therefore, we believe that it is worth a further discussion as to allow arbitration practice to find an answer to these specific situations.

---

54 Fernández Arroyo (n 46), 329.

55 Van Houtte (n 44), quoting Claude Goldman, "Provisional Measures in International Arbitration" (1993) in International Business L.J. 3, 6.

56 Silva Romero (n 8), para. 69.

57 *Denilauler c. Snc Couchet Frères*, 125/79 (1980) European Court Reports, 1553.

58 Fernández Arroyo (n 46), 330.

E. When is the measure ordered by state court?

The power of arbitrators usually finds a limit in some specific cases. Namely, it is discussed whether they can enact measures: (i) addressed to a third party, (ii) before the constitution of the tribunal, (iii) *ex parte*, (iv) if it affects property rights, and (v) in case of urgency.

Consequently, though arbitrators have authority to order interim measures, there are certain cases in which the State court is the only option.

(i) As a rule, when the measure is to be ordered by the State court when directed to a third party as it did not express its consent to arbitration. However, some authors consider that arbitrators themselves may order measures directed to a third party, but they will, indeed, need the cooperation of State courts for their execution[59].

(ii) If the arbitral tribunal is not yet constituted, the measure can be applied directly to a judge or, in certain cases, to the arbitral institution, if notified of the arbitration. This is established since 1990, the ICC Rules for a Pre-Arbitral Referee Procedure, which contemplates that the parties may agree that a third party ordain emergency measures prior to the constitution of the tribunal[60]. In most cases in which this procedure was used, the measures were accomplished voluntarily[61]. Currently, the new ICC Rules provides under article 29 the "emergency arbitrator" figure for such scenario.

We share the position that, once the arbitral tribunal is already constituted, it is appropriate to apply first to him, unless it is a kind of measure which cannot be enacted by an arbitral tribunal[62].

(iii) As explained *ut supra* (§ 4), the current state of the debate on *ex parte* measures suggests that today a measure as such, issued by an arbitral tribunal, would hardly be successful.

---

59 Calvo Caravaca (n 4), para. 40.

60 International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure from January 1st, 1990.

61 Emmanuel Gaillard and Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) vol. 20, n 1, London Court of Inernational Arbitration, 19.

62 Redfern and Hunter (n 1), para. 7-22.

Consequently, although it is allowed for certain cases by the Model Law[63], it seems most prudent to apply in State courts.

(iv) In addition, much of the doctrine holds that, even if purely for conservation purposes, measures such as attachments or seizures can only be adopted by State courts as such measures affect property rights[64].

(v) As well, in cases of extreme emergency, it may result necessary to apply directly to a State court[65]. In response to this need, most arbitration laws maintain that the application for interim measures made in State courts is not discordant to the arbitration agreement[66].

The need for judges on the implementation of precautionary measures ordained by the arbitrators, suggests that it is more practical to use the judges directly[67]. Nonetheless, the principle of good faith and the abuse of the right theory should build a limit to the request for injunctive relief to the judge[68].

Consequently, during the course of the arbitration proceedings, the parties may request the measure before a State judge as well as before the arbitral tribunal. But regarding measures affecting the property, aimed at third parties, in case of urgency, or when the tribunal is not yet constituted, it must be applied for before the State judge[69].

III. Cooperation between the judges and arbitrators.

A. Who executes the measure ordered by an arbitral tribunal?

As noted above, arbitrators lack *imperium*, meaning they have no coercive power to enforce the implementation of their decisions[70],

63 1985- *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration*, with amendments as adopted in 2006. Article 17

64 Fouchard and others (n 6), para. 685; as well as Silva Romero, (n 8), para. 28.

65 Redfern and Hunter (n 1), para.7-18.

66 Redfern and Hunter (n 1), para. 7-19.

67 Silva Romero (n 8), para. 33.

68 Silva Romero (n 8), para. 22.

69 Silva Romero (n 8), para. 71.

70 Fernando Mantilla Serrano, *Ley de Arbitraje. Una perspectiva internacional (*Madrid, Iustel 2005), 147.

therefore, they will always require judicial cooperation if to execute an interim measure against a party by means of the police force or against third parties turn out to be necessary[71].

In case of international arbitration, it is likely that the properties are located in a State other than the venue State, so it is of fundamental importance to the parties that interim measure can be as effective in the venue State, as elsewhere.

Interim measures ordained by arbitral tribunals are *imperfectae leges*[72], which makes the relationship between judicial courts and arbitration tribunals absolutely necessary to ensure the harmonious operation of the arbitration proceedings[73].

It has been said that the relationship between State and arbitration tribunals lays somewhere between forced collaboration and true partnership[74]. If such relationship is not structural, hierarchical, nor jurisdictional[75], the truth is that State courts could exist without arbitration, but arbitration could not exist without State courts[76].

REDFERN and HUNTER raise the question of why is the intervention of a State court necessary, if the arbitral tribunal has the authority to ordain interim measures[77]. Arbitrators require judicial cooperation, as they lack a coercive apparatus to execute the interim measures they have adopted, as well as compelling force over the parties[78].

FERNÁNDEZ ROZAS understands that the lack of coactivity, prevents even, the imposition of sanctions as liability for damages and lost profits[79]. As for ourselves, we share the position of other authors in the sense that arbitrators may adopt an injunction consisting in a positive, negative or other conduct, etc., and non-compliance can be fined. It will not be a public law fining, but a private penalty sanctioned by arbitrators, obviously[80].

---

71 Eric Schwartz and Mark Jurgen, "Provisional remedies in international arbitration" (1995) World Arbitration & Mediation Report, 59.

72 Silva Romero (n 8), para. 32.

73 Fernández Rozas (n 9), 74.

74 Redfern and Hunter (n 1), 388.

75 Fernández Rozas (n 9), 84.

76 Redfern and Hunter (n 1), 389.

77 Redfern and Hunter (n 1), para.7-12.

78 Calvo Caravaca (n 4), para. 12.

79 Fernández Rozas II (n 14), 49.

80 Calvo Caravaca (n 4), para. 40.

CANTUARIAS SALAVERY and ARAMBURU, meanwhile, argue that it would be logical that arbitrators may adopt as well as implement by themselves their own decisions, since the parties have decided to trust them their conflicts resolution[81]. We do not share this point of view, as we deem reasonable a limit on the exercise of coercive power that should, as it should only be reserved for the State.

The interim and arbitration processes may seem to contradict each other, as the purpose of arbitration is to apart the parties from the jurisdiction of State judges, but, in order to execute the measure, cooperation of a national court may be required[82]. However, such incompatibility is not so, since the participation of the judge must be in support of the arbitration tribunal and not to block it.

The truth is that while modern international trade arbitration has achieved a considerable degree of independence from State courts[83], the overall effectiveness of arbitration depends on their assistance[84].

Importantly, the required judge must self-constrain to the execution of the measure, since the possibility that State courts judge the merits of the injunction ordered by arbitrators may not seem the most appropriate form of cooperation[85].

The State judge may only reject coercive measures if no valid arbitration agreement exists, or if the injunction ordered by the arbitrator goes against police rules or affects international public order principles[86]. As Silva Romero argues, reference should not be made to "intervention" but to "cooperation"[87].

---

81 Mario Castillo Freyre and Rita Sabroso Minaya, "Asistencia Juicial en el Arbitraje: Intervención complementaria del Poder Judicial" (2007) n 3 Athina Revista de Derecho de los alumnos de la Universidad de Lima, Lima, pp. 317-331, para. 4; as in Revista de la Facultad de Derecho de la Universidad San Agustín, n 9, Arequipa, pp. 203-213, 8, quoting Fernando Cantuarias Salaverry and Manuel Diego Aramburú Yzaga *El Arbitraje en el Perú: Desarrollo actual y perspectivas futuras* (Fundación M.J. Bustamante De la Fuente, Lima, 1994), 353.

82 María Blanca Noodt Taquela, "Medidas Cautelares en el Arbitraje Internacional en el Mercosur. Cooperación internacional entre jueces y árbitros" (1997) Revista de la Corte Española de Arbitraj*e*, Madrid, pp. 127-149, as in (1997) El Derecho Procesal en el Mercosur. Libro de ponencias, Santa Fe, pp. 347-368, para. 1 (Noodt Taquela).

83 Redfern and Hunter (n 1), 389.

84 Redfern and Hunter (n 1), 29; Fouchard and others, (n 8), para. 77; Fernández Rozas, (n 9), 74.

85 Noodt Taquela (n 82), 18.

86 Noodt Taquela (n 8282), 19.

87 Silva Romero (n 8), para. 10.

Article 17 of the Model Law expressly provides that the precautionary measures ordained by arbitrators are binding and must be carried out by the competent court. It indicates, as well, the only grounds for execution refusing, which institutes the obligation of the State judge to constrain himself to the execution of the measure, as a principle.

Similarly, Peruvian Arbitration Law, one of the most modern legislations on the subject, states under its article 48.3, that "the judicial authority has no jurisdiction on interpreting the content and the scope of the injunction."

Unfortunately, if there is no precise statement as in the Peruvian law, it is possible that many judges understand that they must analyze the validity of the measure. Such overlapping competencies, conspires against the speed that precautionary measures require and betrays the autonomy of the parties as subjects of arbitration[88].

B. How is the execution by a state judge applied for?

In the conflicts originated in international trade, interim measures are usually implemented in a State other than the venue State, thus resulting in the need to ensure the effectiveness abroad of these decisions[89].

It is obvious that both procedures, court and arbitration, should have the same tools to protect the subject matter of the dispute, however, equating interim justice in both methods has not yet been achieved[90], and while there are many mechanisms for judicial cooperation (established by treaties), there are none for cooperation among judges and arbitrators, unfortunately.

Decisions adopting a precautionary or interim measure provide obvious difficulties of international circulation, thus, it results necessary to have a procedure for State courts to cooperate with arbitrators by executing the measures adopted by these in the framework of an international private arbitration[91].

The decision by an arbitrator on the adoption of the measure can take two main forms: (i) a mere procedural order recommending an

88 Noodt Taquela (n 82), 19.

89 Fernández Rozas II (n 14), 29.

90 Fernández Rozas II (n 14), 26.

91 Fernández Rozas II (n 14), 43; as well as Calvo Caravaca, (4), para. 11.

involved party the implementation of the measure, or (ii) the form of partial award.

The first one requires no substantiation, but has the disadvantage of lacking legal binding[92]. The second, although recommended because of its execution power, must necessarily be substantiated, resulting in the loss of the surprise effect of some measures[93].

The Model Law, under its Article 17.2, indicates that the measurement can be issued whether in the form of award or not. Meanwhile, the ICC Rules in Article 28 states they can take the form of an order, giving reasons, or as award, at the discretion of the tribunal.

C. Current status of cooperation between judges and arbitrators

1. Is it possible to execute a measure ordered by an arbitral tribunal as per the New York Convention?[94]

The question of whether an arbitration award which adopts an interim measure can be implemented as per to the CNY, or not, is often considered[95].

It has been understood by most of the scholars that this is not possible. Poudret and Besson believe that CNY only applies to final awards[96]. They add that it does not matter at all if arbitrators base their decision to adopt interim measures as final award as the final ruling of that decision will correspond to the executing State judge[97].

REDFERN and HUNTER take such position by stating that precautionary measures, by definition, do not give an end to the dispute and therefore do not meet the requirement of purpose established by the CNY[98].

This was deemed as such in a case before the Court of Appeal of Paris when it overruled the execution of a measure since it was

---

92 Fernández Rozas II (n 14), 47.

93 Calvo Caravaca (n 4), para. 45; Fernández Rozas II, (14), 36.

94 The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 1958 (the NYC)

95 Silva Romero (n 8), para. 37.

96 Silva Romero (n 8), para. 38, quoting Jean-Francois Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international,* (Bâle: Bruylant, LGDJ, Schultess, 2002), 550.

97 Silva Romero (n 8), para. 39.

98 Redfern and Hunter (n 1), para. 7-16.

considered not to be an arbitration award under the terms of the CNY, as its required to be a decision that ends all or part of the dispute[99].

While there is no agreement on how widely should the term "award" be interpreted under the CNY, another school believes that CNY extends upon the *exequatur* of all types of arbitration decisions[100], including those regarding interim measures. For instance, the French case law has adopted a broader conception of what should be understood as "arbitral award"[101].

According to FERNÁNDEZ ROZAS, the CNY does not reveal precisely an ability or inability to recognize and enforce an interim or interlocutory arbitral resolution ordering the adoption of interim measures, existing arguments both for and against[102].

The aforementioned author states that such could be done as long as several conditions are settled, namely: (i) that the ruling law allows them to take the form of an award, (ii) the law of the State where it is to be enforced grants them executor force, and (iii) that such State has ratified the CNY[103].

However, he notes as a barrier, that only a minority of systems accept the enforceability of these measures, so the application of that international text to these measures has not yet widespread. He also states that the course of the *exequatur* established by the CNY is inherently slow and complicated, not in any way promoting the essential immediacy necessary for interim measures[104].

As a foreign arbitral interim measure could not be considered executable because of its lack of obligatory nature or enforceability, it should take the form of partial award, which could access the *exequatur*, rather than interim award[105].

---

99 Cour d´Appel de Paris, (1994), *Société Sardisud et autre c. Société Technip et autre*, en Revue de l´Arbitrage, n 2, 25 on March, 1994, 391.

100 Calvo Caravaca (n 4), para. 50.

101 Eduardo Zuleta, "¿Qué es una sentencia o laudo arbitral? El laudo parcial, el laudo final y el laudo interino", in Guido Tawil and Eduardo Zuleta, *El Arbitraje Comercial Internacional, Estudio de la Convención de Nueva York con motivo de su 50° Aniversario* (Buenos Aires, Abeledo Perrot, 2008) pp. 50-68, 54. See also Yves Derains, *A Guide to the ICC Rules of Arbitration* (2° ed. Kluwer Law International, The Hague, 2005), 31, quoting Paris Court of Appeals, 07/09/99; *Braspetro Oil Services Company – Brasoil c. GMRA*, 07/01/99 decision in *Yearbook Commercial Arbitration*, vol. XXIVa-1999, The Hague, Kluwer Law, 1999, pp. 296-302.

102 Fernández Rozas II (n 14), 42.

103 Fernández Rozas II (n 14), 41.

104 Fernández Rozas II (n 14), 41.

105 Fernández Rozas II (n 14), 42.

As noted, dispute is based on whether an award ordering an injunction can be considered final or not. However, the issue may be further complicated if the arbitral tribunal implements its decision as a procedural order, rather than in the form of an award.

On this point, the U.S. Seventh Circuit Court of Appeals ruled on the case *Publicis v. True North Communications*[106], where the arbitral tribunal issued a decision it called "order" requiring *Publicis* to provide tax information to the other party. Having breached the order, *True North* solicited its execution to the courts of Illinois. Despite *Publicis* claimed that, since it was not an award, the CNY was not applicable, both the District Court and the Seventh Circuit Court of Appeals understood that it was, indeed, an award and should be executed according to the CNY.

The Court of Appeals noted, first, that the term used for the decision was irrelevant, and that was necessary to analyze its nature, as to admit or deny its implementation, regardless of the term it had used, as this would mean an inadmissible formalism. Thus, taking into consideration three other precedents, the Court found that the arbitration decision qualified as "final", since it resolved a controversial matter, and imposed to *Publicis* a strict deadline for compliance[107].

Finally, SILVA ROMERO asserts that an arbitration award ordering an interim measure is final[108], and contends that scholars should avoid getting lost in technical formalistic considerations and ensure, by every possible means, the implementation of interim measures taken by an arbitrator through award and even through a procedural order[109].

2. Europe

The European Convention on International Commercial Arbitration, held in Geneva in 1961[110], is silent on cooperation between arbitration and the judiciary branch.

---

106 *Yearbook Commercial Arbitration*, vol. XXV-2000, The Hague, Kluwer Law, 2000, pp. 1152-1157.

107 Caivano II (n 53), 50.

108 Silva Romero (n 8), para. 42.

109 Silva Romero (n 8), para. 45.

110 *European Convention on International. Commercial Arbitration* of 1961 done at Geneva, April 21, 1961

Meanwhile, both the 2007 Lugano Convention[111] and Regulation 44/2001[112] govern the recognition and enforcement of rulings, expressly excluding arbitration from its material scope.

French Arbitration Act 2011[113] provides important developments in the field. Such legislation created the position of " arbitration support judge" and grants a sort of "universal jurisdiction" to assist arbitral tribunals even if there is no link between the arbitration process and the State of France. That is, even if the venue of arbitration is in a different State, or when the French law has not been agreed governing law, the judge will assist if any of the parties to the arbitration is in danger that its right to justice is being denied.

3. America

The Inter-American Convention on International Commercial Arbitration of 1975[114] governing enforcement of foreign arbitral awards, does not refer to interim measures, it refers generically to "arbitral awards", which seem to regard a final decision in the process.

On the other hand, the American Convention on Execution of Preventive Measures of 1979[115] refers to measure execution ordered by State courts, but makes no reference to the decisions of arbitral tribunals.

In turn, while the Inter-American Convention on Rogatory Letters and Additional Protocol dated 1975[116] provides under Article 16 the possibility that States parties extend the rules to arbitration proceedings, but no State has yet exercised such power. Notwithstanding the foregoing, pursuant to Article 2, same only applies to pure procedural acts as notifications and evidence obtaining, not to coercive executions.

---

[111] *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, signed in Lugano on 30 October 2007.

[112] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[113] Decree 48/2011 of January 13, 2011.

[114] *Inter-American Convention on International Commercial Arbitration*, signed in Panama on January 30 1975.

[115] *Inter-American Convention on Execution of Preventive Measures*: signed in Montevideo, Uruguay, on May 8, 1979.

[116] *Inter-American Convention on Letters Rogatory* done at Panama on 1975.

Meanwhile, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979[117] establishes that judicial decisions and arbitral awards shall be recognized in any of the signing States, leaving the enforcement process under the law of the State where it is intended. This Convention does not yet provide a definition of "award", which would allow interpreting that a partial award lies within its scope. In turn, within the scope established in Article 2 for its execution, nothing is said about mandatorily ending the controversy, though it specifies that the decision to be executed must have been substantiated.

4. Mercosur

In regard to Mercosur, the International Commercial Arbitration Agreement of 1998[118] is in effect, which regulates the concerning issue. This agreement empowers the arbitral tribunal to order interim measures and to establish their countersecurity. Article 19 as well provides that "[t]he arbitral tribunal may, on its own initiative or on parties request, require the competent judicial authority to adopt an interim measure." For such purpose, same provides that the measures ordered by the arbitral tribunal "shall be implemented through an interim or interlocutory award".

In addition, it establishes a specific method for the execution of the measure. In accordance with Article 19 "[t]he international supervisory cooperation requests ordered by the arbitral tribunal of a State Party shall be sent to the judge of the State venue of the arbitral tribunal, in order for the judge to turn it for its implementation to the competent court of the requested State, by the means provided under the Protocol of Ouro Preto[119]."

Finally, indicates that States may agree that the arbitral tribunal requests the assistance of the competent judicial authority of the State in which measure is to be enforced, through the respective central authorities, or where appropriate, to the authorities responsible for managing international judicial cooperation. We understand that

[117] *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* done at *Montevideo, Uruguay* on May 8, 1979.

[118] *Agreement on International Commercial Arbitration of MERCOSUR*, Buenos Aires, July 23, 1998.

[119] *Agreement on International Commercial Arbitration of MERCOSUR*, Buenos Aires, July 23, 1998.

it would have been better to establish the latter mechanism as a rule, not only for the case where the States agree so. It should have as well established that judges should not analyze the merits and appropriateness of the measure.

Mercosur Party States are also interrelated with Chile and Bolivia through a side agreement to the above not yet entered into force[120]. Such instrument contains a similar provision stating that the execution shall be requested to the judge of the State venue of the arbitration. Likewise, it states that among the states of Mercosur, the request shall be processed by the Protocol of Ouro Preto, whereas in the case of another State, will be through the Inter-American Convention on Execution of Preventive Measures, 1979. Anyway, it also leaves the possibility that the States agree to do so directly before the judge of that State where it is to be executed.

D. Issues regarding the current situation

The above shows that, despite the importance of arbitration to solve disputes in international trade, and of the power of arbitrators to issue interim measures, there are very few specific mechanisms of cooperation between judges and arbitrators to facilitate the implementation of the latter measures ordered. While many treaties governing cooperation between judges, seem to forget the arbitration.

Such lack of mechanisms, significantly, impedes the fluency of the decisions made by an international arbitral tribunal. For instance, laws requiring the arbitrators to communicate the judge of the State Venue of the measure so that such judge immediately communicates it to judge of the State where the measure is to be executed, directly affect the speed.

It should be noted that today the parties to an international contract usually come from diverse countries and may have assets anywhere in the world, which means that a provisional measure may not always be directed to the State of any party or to the Venue State, but may be directed to any other.

At the time of signing the arbitration agreement, the parties do not know if there will be controversy, or when it may arise. Even if imagined such need for an injunction, the State where to be executed may not

[120] *Agreement on International Commercial Arbitration among MERCOSUR, Bolivia and Chile*, done in Buenos Aires, on July 23, 1998.

be known, since by that time, the economic reality of the counterparty may have changed significantly, being his property in any State. In turn, the parties cannot know if there is cooperation between the State of the venue and where the measure should be implemented.

The lack of cooperation mechanisms, involves the risk that the eventual injunction may not be executed. This situation significantly affects the parties, so the great advantages of arbitration are neutralized.

Consequently, for the parties to a contract to have certain degree of certainty about which interim procedure shall govern the eventual dispute, there must be international uniformity on the treatment of the issue. That is, the more alike prudential regimes of the several States, the fewer surprises will the parties face.

The concerning issue, is that, in the absence of a specific conventional regulation, a foreign judge cannot be constrained to cooperate[121]. However, in 1924, PILLET already spoke of States' obligation to provide cooperation among themselves to ensure the rule of law[122].

HUET as well, in 1965, considered the State evasion to the imperative of cooperation virtually impossible, if to meet the requirements of a good justice was intended[123].

FERNÁNDEZ ARROYO teaches that the current internationalization of people lives leads for States to agree on mechanisms to achieve the protection of those interests against international private situations. Thus, cooperation is no longer an option but a requirement inherent to great market needs[124].

E. Proposals to improve cooperation between judges and arbitrators

It is clearly advisable and necessary to build a system of prudential guardianship, in the context of private international arbitration[125].

---

[121] Fernández Rozas II (n 14), 41.

[122] María Blanca Noodt Taquela "Relaciones Entre Tratados de Derecho Internacional Privado en Materia de Cooperación Judicial Internacional" (Doctoral Thesis, Universidad de Buenos Aires, March, 2011), 141, quoting Antoine Pillet, *Traité pratique de droit international privé (*t. 2, Paris, Tenin 1923), 503 (Nood Taquela II).

[123] Noodt Taquela II (n 122), 142, quoting André Huet, *Les conflits de lois en matière des preuves* (Paris, Dalloz, 1965), 348.

[124] Noodt Taquela II (n 122), 142, quoting Diego Fernández Arroyo, "Conceptos y problemas básicos del derecho internacional privado", in *Derecho Internacional Privado de los Estados del Mercosur* (Buenos Aires, Zavalía 2003), pp. 70-74, 71.

[125] Calvo Caravaca (n 4), para. 13.

It is purported that the intervention of a State court in the granting of interim measures be careful to not become a restriction to the development of the arbitration process. It is even said to be subsidiary and restricted[126], refraining from making a decision that jeopardizes the outcome of the arbitration[127].

FERNÁNDEZ ROZAS proposes establishing specialized State courts in arbitration matters. That is why in most arbitration-friendly jurisdictions there is –in addition to legal assistance– a tendency to develop certain specifically designated courts to hear matters relating to arbitration[128]. However, it is also critical that the regulatory framework be adequate.

Ideally, the generation of uniform methods to implement arbitration injunctions by creating formal mechanisms through the conclusion of international treaties, should be intended.

We understand that when the measure is ordered as award, no obstacle to applying the CNY is found, and a broad and non-restrictive interpretation should be given. Otherwise, what would be the meaning of those rules stating that the measures may take the form of an award, such as the Model Law.

The bases of cooperation agreements between judges could also be applied analogously to the extent possible, at least to take account of its guiding principles.

Another level of cooperation can occur in the internal source. That is, a State can facilitate the implementation of such measures, through legislation favorable to collaboration, as with Peruvian law, and particularly with the French law, which is an example to follow. This can be achieved for example by adopting the Model Law.

In that same way, the Principles ALI/UNIDROIT of Transnational Civil Process, adopted in 2004 by UNIDROIT and the American Law Institute, aimed at reconciling the differences between the various national procedural laws, taking into account the peculiarity of transnational disputes. They serve as guides to promote new legislation.

Significantly, the official commentary to its preamble, states that they are equally applicable to international arbitration. Therefore, the obligation to provide assistance contained in article 31, is extensible to commercial arbitration. In addition, the commentary to article 8 on

[126] Fernández Rozas II (n 14), 44.

[127] Redfern and Hunter (n 1), para. 7-20.

[128] Fernández Rozas (n 9), 74.

interim measures provides that a State judge can implement measures ordered by arbitral tribunals.

IV. Conclusion

The importance of arbitration as a method for dispute resolution that it is the most used to settle disputes in the international order.

During arbitration proceedings, as in any other process of trial, to rely on interim measures often results indispensable as to ensure the effectiveness of the final decision, that is, to avoid the rights of the parties frustration.

As noted, it is widely recognized by the laws and regulations of arbitration, the power of arbitrators to issue interim measures. Obviously, these measures would be meaningless if they could not be executed. In terms of execution, it is largely accepted that the arbitrators cannot execute, because they lack *imperium*, so it will be a State judge who should pay assistance to do so.

While we support the position that the arbitrators may order interim measures, we deem reasonable the imposition of a limit in executing them, as the coercive powers to force the parties or third parties should be reserved to the State apparatus.

Now, this is not a problem itself since the same thing happens with a judge ordering a measure to be executed in another State in which he has no jurisdiction. However, the difference lies, for this hypothesis, in the many existing ways of cooperation that allow the measure ordered by a State judge to be executed by the court of another State.

However, this is not the case in arbitration, because, as we have discussed, there are very few existing cooperation mechanisms. This situation not only goes against the many advantages offered by arbitration, but it affects in a fundamental way, as the final decision of the arbitration may be frustrated by obstacles to the execution of the injunction.

We advocate the use of arbitration, as we consider the most appropriate method to solve international disputes, so we believe it would be necessary to settle this issue and facilitate the implementation of interim measures through methods similar to those used by State judges.

As discussed, there are several ways to solve this issue, from the conclusion of international treaties, to the application of principles

to facilitate the implementation, and any of them would take a step towards a better system.

The truth is that even if there a political will to take any of the paths above would exist, it is clear that this will not happen in any moment soon, but a road of incremental advances should be taken, always keeping true cooperation as a guide.