EMERGENCY ARBITRAL PROCEEDINGS AS A NEW GLOBAL STANDARD IN ARBITRATION RULES: IS THERE STILL A NEED TO MAINTAIN THE CONCURRENT JURISDICTION OF ARBITRAL TRIBUNALS AND COURTS FOR INTERIM MEASURES?

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ABSTRACT

Parties to a commercial contract choose arbitration to exclude courts' jurisdiction over a potential dispute. Yet, despite the arbitration agreement, the courts' jurisdiction is preserved in terms of interim measures. Depending on which forum it perceives to be more beneficial, a party may apply to courts of law or arbitral tribunals for protective orders in most jurisdictions. The question is whether this approach is still appropriate, considering that, given emergency proceedings have become a standard generally accepted by arbitral institutions, parties do not have to wait for the arbitral tribunal to be appointed to obtain interim protection. In this respect, the paper briefly describes the current law on interim measures in different jurisdictions and then confronts the arguments in support of courts' jurisdiction in this area with the arguments in favor of exclusive jurisdiction of arbitral tribunals rendering decisions in emergency proceedings. The paper shows that there is still a need for concurrent jurisdiction of courts regarding interim measures, but its scope can and should be narrowed to encompass only the inherent limitations of arbitration that any rational treaty or legislation cannot overcome.

I. INTRODUCTION

Emergency arbitration proceedings are becoming increasingly popular in modern arbitration rules. Over the last ten years, major arbitral institutions have adopted provisions on emergency proceedings. With local organizations following this lead, the availability of emergency proceedings has become a truly global legal standard. Nevertheless, the position of emergency arbitrators is still uncertain. Located somewhere between courts of law and arbitral tribunals in terms of bodies entitled to grant interim measures, they seek their place in the system. This competence competition is not easy. Parties to the dispute prefer to apply to the courts for interim measures, leaving the option for emergency arbitration behind. The question is whether maintaining concurrent jurisdiction is still appropriate—namely, do the parties who entered into an arbitration agreement have to seek protection in another forum when arbitral institutions have developed an option to

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grant such protection immediately? From the adverse party perspective, must it be exposed to risks arising out of courts' jurisdiction in terms of interim measures, if it entered intentionally into an arbitration agreement to exclude courts of low quality, or even being corrupted? These questions concern the reasons underlying regulatory support for court jurisdiction and power to grant interim measures in aid of arbitration and are aimed at finding and formulating appropriate postulates *de lege ferenda*.

This article first describes the current law on interim measures and then confronts the arguments in support of courts' jurisdiction in this area with the arguments working in favor of exclusive jurisdiction of arbitral tribunals rendering decisions in emergency proceedings. It aims to show that there is still a need for concurrent jurisdiction of courts regarding interim measures, but that its scope should be narrowed to encompass only the inherent limitations of arbitration that any rational treaty or legislation cannot overcome. In Part II, I describe the law on interim measures, focusing on the overlapping powers of national courts and arbitral tribunals in this area, without going too much into details that may blur the broader picture. Part III is devoted to presenting the ratio underlying exclusive jurisdiction of arbitral tribunals in terms of provisional protection and to arguments raised by practitioners and scholars in favor of courts' jurisdiction. I confront the arguments indicating that public international law guarantees court jurisdiction. I then explore arguments regarding the history of interim measures, courts' experience and the time necessary to render decisions. I find that emergency arbitration faces inherent limitations that necessitate the maintenance of concurrent jurisdiction in this field. Part IV closes with a summary of the key findings of this paper.

II. THE WORLD IN BRIEF

Interim measures[1] may broadly be described as "orders intended to preserve evidence, to protect assets, to respect procedural rights, and otherwise to maintain the status quo pending the outcome of the arbitration proceedings."[2]

It is also well accepted that anti-suit injunctions constitute "interim protection measures".[3] Several arbitration practitioners have observed that the effectiveness of protection in international commercial arbitration relies on these measures.[4] Even the shortest dispute brought to arbitration may be too long in terms of the dynamics

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[1] These kinds of measures come by different names, such as "interim measures of protection" in the UNCITRAL Model Law, "conservatory and interim measures" in the ICC Rules, as well as "provisional relief" and "provisional measures", among others, but for clarity, only the term "interim measure" is used for all kinds of pre-award reliefs aimed at securing parties' interests.

[2] ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 313 (6th ed. 2015).

[3] Richard Garnett, *Jurisdiction Clauses Since Akai,* 87 AUSTL. L.J. 134, 148.

[4] U.N. Comm'n on Int'l Trade L., Rep. of the Working Group on Arbitration on the Work of Its Thirty-Second Session, ¶ 60, U.N. Doc. A/CN.9/468 (2000); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2604 (3rd ed. 2021).