



C E N T R A L E U R O P E A N U N I V E R S I T Y

**Interim Measures under the UNCITRAL Model Law
and the Palestinian Arbitration Act
No 3 for the year 2000**

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Abstract

This thesis aims to spot a light about the arbitral interim measures in Palestine and to compare it to the UNCITRAL Model Law, to answer and investigate the question of who has the power to grant an interim measure in a dispute its parties agreed to submit it to arbitration, and also to show what role can the national courts can play in these interim measures and to show what are the applicable laws for arbitration in Palestine and what role the national courts can play in this, therefore this study is will be divided as follows:

The first chapter will be an introductory chapter to give a glimpse about the legislative history in Palestine,

The second will answer what are interim measures? What may limit or prevent an arbitral tribunal from granting interim measures?

The third chapter will discuss who has the power to grant an interim measure? The tribunal or the national court judge? Is easy to get?

And the fourth will analyze the relation ship between arbitration and the national courts in Palestine in connection with granting interim measure.

And the last one will spot a light about the Res Judicata and the expiry of the arbitral interim measure.

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Introduction

Nowadays, Litigation, is not the only way to settle a dispute that might arise between two or more parties, parties may use arbitration, which is a kind of special jurisdiction based on the principle of free will, that goes in parallel with the jurisdiction of the national courts, to solve a dispute or disputes which may arise during the performance of a contract, it can be found as a separate agreement for arbitration or an arbitration clause in their contract.

"Arbitration is an institution which preceded courts; yet shortly after the appearance of the latter, arbitration assumed the position of the younger (and weaker) brother."¹

Arbitration is based on the principle of choosing a third party (who could be a person or a number of persons or legal person), whom will play the role of their judge in that dispute, they agree to choose it, and by their decision to arbitrate, they give it the power to have a binding outcome which is an arbitral award, that has the same power as a court decision, and can be enforced -with some additional procedures- the same way that a court decision is executed.

Arbitration was known in the ancient societies, and was used to solve the various disputes between the people on the basis of prevailing customs and traditions, before the national courts appeared.

After the substance of government has developed, the role of arbitration has very much contracted as an instrument for solving disputes between its members.

¹ Tibor Varady, John J. Barcelo III, Arthur T. von Mehren . INTERNATIONAL COMMERCIAL ARBITRATION ,A TRANSNATIONAL PERSPECTIVE, Fourth Edition ,page 45 WEST.

Because of the Development and improvement the complexity of trade and business domestically and internationally, arbitration has developed, so nowadays there are international conferences, treaties and conventions, issuance of arbitration legislation by various countries and international organizations and centers for specific types of arbitration.

In this thesis I will put the lights on a very important issue in the arbitration fields, which is the interim measures in the disputes that the parties agreed to submit it to arbitration, and I will give an answer to some of the following questions:

Who has the authority to take provisional interim measures in an arbitral dispute?

Does the arbitral tribunal have the power to take interim measures?

What if one of the parties went to a national court for this, would it be considered as disclaimer?

And what role the National Court Judge can play in this?

What is the power of an interim measure published by the tribunal?

Is it enforceable?

These questions and some other related questions would be subject matter of this paper, throw the following

Chapter 1. What is the position of arbitration in Palestine? Why is it important?

This introductory chapter is to give a historical overview about the regulations for arbitration in Palestine, and will begin from the era of the Ottoman Empire, even there are much older regulations, but will not expand in this field otherwise I will reach the roman period and even older.

And will also discuss and show how arbitration in Palestine has reached a very advanced stage in the legislative part, but lacks the application, and why the Palestinians are in real need for a good arbitration system.

The end of this chapter will discuss the Palestinian arbitration act no3 for the year2000 and the UNCITRAL Model Law, in the parts that speak about interim measures.

Part1

What is the position of arbitration in Palestine?

When Palestine became part of the Ottoman Empire after the fall of the Crusaders kingdom, new laws were applied on this region as a part of this Empire. Almajalla , is the most important and most remarkable in the legal issues, which is considered as the civil code of this super power, and the first Islamic civil code , it was published in 1869, approved in 1876

and still valid until this day², contained at the beginning of the fourth section the provisions for arbitration (1841-1851) that is based completely on the Islamic Sharee'ah³.

" The Ottoman Turks, who were non-Arabs but religious Muslims, ruled the area for 400 years (1517-1917). Under Ottoman rule, the Palestine region was attached administratively to the province of Damascus and ruled from Istanbul. The name Palestine was revived after the fall of the Ottoman Empire in World War I and applied to the territory in this region that was placed under the [British Mandate for Palestine](#)."⁴

In 1916, Palestine faced a new occupation which was called afterwards the (British Mandate), in this period many laws were published including the Palestinian arbitration act that was issued on 6th march 1926 and its amendments, but did not mentioned any thing about canceling the fourth section in al majallah that speaks about arbitration.⁵

And when the Arab Jordanian Army crossed the Jordan river to the eastern part of Palestine (that is called nowadays the west bank) in the 8th of may 1949, it became part of it and followed it s regulations .in 1952 the Jordanian constitution was published, and a new level of legislating have started for the two river banks (Jordan and west bank). Legislations in this period were new and different from the previous legislations, the Jordanian arbitration act No18 for the year1953, but it was different in Gaza strip, because the Egyptian Administrative Governor, for the purpose of making no changes to the Palestinian situation,

² The Palestinian Ministry of Justice website, an overview about Al Majallah, last visited 23march 2010http://www.moj.ps/index.php?option=com_content&task=view&id=88&Itemid=71

³ Barrak, Ahmed , Head of General Prosecution in Palestine. Published comparative study about Arbitration In Civil Litigation , publisher (Palestinain Center For The Independence Of The Judiciary And The Legal Proffesion "MUSAWA" published in November 2009.Page 146.

⁴ http://www.palestinefacts.org/pf_early_palestine_name_origin.php last visited 24March 2010

⁵ Supra.

left all the valid laws valid without any changes to keep the Palestinian entity. As a result of this the two parts of the country became using different laws.⁶

When the Palestinian national authority came -after the Oslo peace agreement- in 1993 with Israel, it Took on the responsibility of unifying the two parts of the country, so they established throw the Palestinian legislative council many laws including the Palestinian arbitration act no 3 for the year 2000that canceled all what contradicts with the Provisions of this Act(article57)⁷

Part 2.

The importance of arbitration for the Palestinian state,

The Palestinian legislature has adopted many notion of the UNCITRAL Model Law and some of it were almost Identical such as articles 43,47that is alike articles 34,35 and from the Egyptian arbitration act no27for the year 1994 and the Jordanian arbitration act no 31for the year 2001.

And how it developed ending by publishing the Palestinian arbitration no 3 for the year 2000 and its Executive Regulation act no. (39) For the year 2004

The need for arbitration system in Palestine can be seen as one of the pillars to push the commercial activities and industries to get advantages of the advantages that the arbitration system can provide, specially at the international level, by concluding or entering into international ,regional, agreements, international trade in general. Moreover it is considered

⁶ Barrak, Ahmed , Head of General Prosecution in Palestine. Published comparative study about Arbitration In Civil Litigation , publisher (Palestinain Center For The Independence Of The Judiciary And The Legal Proffession "MUSAWA" published in November 2009.Page 146.

⁷ Supra.

as an important need for such a young state to grow up in the international market and trade, and by having an advanced arbitration system (arbitrators, arbitration institutions, regulations, etc) the opportunity to enlarge the economy in Palestine.

Also to reduce the huge number of cases that is swarming in the national courts, by arbitration which is private, fast, more specialized in cretin fields, where the duration of cases -until a final decision- is some times more than 10 years, while it will be very much shorter in arbitration, in my opinion "late justice is injustice or even useless"

Moreover we can find a very strong relationship between the Palestinian arbitration act no3 for the year2000 and the UNCITRAL Model Law which is one of the notions and sources that the Palestinian legislature took into consideration to coop with the international development of arbitration, where many articles are almost identical and most of the wrest do not contradict with it.

Chapter 2. What are interim measures? What may limit or prevent an arbitral tribunal from granting interim measures?

This chapter will give a glance about interim measures, its role and importance in arbitration, and what are the limits that may prevent an arbitral tribunal from granting an interim measure, and what is the role of the National Courts in this.

Part 1.

What are Interim Measures?

The rules for interim measures in arbitrational disputes in the 2006 Amendments to the UNCITRAL Model Law, the current Palestinian arbitration act , The UNCITRAL Model Law (2006 Amendments), art 17

The Palestinian Civil and Commercial Procedures act No 2 for the year 2001,

The Palestinian Executing act no23for the year 2005art8 \2 defined the executory bonds and considers the arbitration award an executory bond

And art19 1+2 that prohibits executing arbitration awards unless it is validated by the competent court, but an exeption for this is for the urgent interim measure.

The Palestinian arbitration act no 3 for the year 2000 art 33and its translation from the Arabic original text is " the arbitral tribunal, has the power, during the dispute, to issue any interim and\or protective measure, against any of the parties, if the agreement to arbitrate allows that, this measure will have the same power of competent court orders, and implemented the same way that the court decisions and orders are implemented.

The Executive law of the Palestinian arbitration act no39 for the year 2004 art 66if the competent court , allowed issuing any interim and\or protective measure

In an arbitral dispute, then it has the power to practice this measure with out effecting the subject matter of the dispute, and it must cancel this measure if the arbitral tribunal decided that.

art76 for implementing the foreign arbitral awards in Palestine requires:

A, issued within a legal arbitration agreement in the countries where it was issued,

B, issued by the arbitral tribunal formed in the way that the parties agreed, or formed in the way the agreement to arbitrate provides

C, issued in a legal way in the country where it was published

D, has became final in the country where it was published

E, the subject matter of this award is arbitrable under the arbitration law of Palestine and does not contradict with the public order in palatine.

The Palestinian Civil and Commercial Procedures act No 2 for the year 2001 art 29

The Palestinian Execution act No 23 for the year 2005 art 19+36

I will start this part of this chapter with this Chinese proverb:

Distance waters won't quench your thirst.,⁸

Interim measures; nature in general

"The Model Law and the UNCITRAL Arbitration Rules refer to them as "interim measures of protection". In the English version of the ICC Rules, they are known as "interim or conservatory measures." In the Swiss law on international arbitration, they are called

⁸ Micheal Young (Herbert Smith)& Carine Dupeyron(Cleary Gottlieb Steen & Hamelton LLP. Geneva 25 January 2007 INTERIM MEASURES TO REVENT IRREPARABLE HARM :WHAY CAN BE DONE BY THE ARBITRAL TRIBUNAL?

A slides found on the internet last visited 29 March 2010

<http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf>

"provisional or conservatory measures". Whatever the nomenclature, they operate as holding orders, pending the final outcome of the arbitration proceedings."⁹

Interim measure is a necessary and/or urgent remedy for one or more of the parties; it might be granted upon an application of this party.

The purpose of this provisional or preclude or protective measure can be to take or preserve evidence, for example the measure to preserve goods for expertise and can be to provide security for costs for example in the event a party is suspected to have financial difficulties and/or to be a shell company from which recovery will be unlikely an Anglo Saxon more than a continental approach.¹⁰

The interim measure can be aimed to preserving the status quo, for example dispute on termination of trade mark agreement.¹¹

The interim measure can be aimed to injunctions and other measures to secure enforcement, for example setting an escrow account, issuing freezing orders.¹²

Before the making of an award –which is final and binding for the parties –at the conclusion of the proceedings, a party may wish to have certain interim protection. Such relief may be particularly desirable in multiparty disputes in which there are unresolved procedural issues

⁹ Eduardo R. Ceniza **Interim Measures: The Role of the Arbitral Tribunal and the Court** (A Synopsis) last visited 29 March 2010 <http://www.pdrcl.org/web1/art002.html>

¹⁰ Micheal Young (Herbert Smith) & Carine Dupeyron (Cleary Gottlieb Steen & Hamelton LLP. Geneva 25 January 2007 INTERIM MEASURES TO REVENT IRREPARABLE HARM :WHAY CAN BE DONE BY THE ARBITRAL TRIBUNAL?

A slides found on the internet last visited 29 March 2010 <http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf>

¹¹ supra

¹² supra

"The arbitration rules allow for two types of interim measures: those taken by tribunal and those provided by a court. Any party may request the tribunal to take measures to protect the subject matter of the dispute, e.g., to conserve goods that are perishable. Such relief may be granted in the form of an "interim award" under article 26-2. It must be noted that interim award can be obtained only if the law of the place of arbitration allows such relief. Thus the party seeking an interim award will need first to ascertain whether domestic law has preempted the field by vesting the power to grant interim protective measures exclusively in courts. however judicial assistance for interim relief may be sought in any event , and under the rules as well as the model law , such a step will not be deemed to be inconsistent with or a waiver of the agreement to arbitrate".¹³

"Interlocutory orders are usually intended to give both parties equal opportunity to present their cases to the tribunal, to preserve the status quo, or to permit other reasonable practical measures relating to performance under the contract pending final resolution of the dispute. The first category may be illustrated by an order directed to one party to permit its adversary to inspect goods, merchandise, or equipment within the former party's control. Absent such an order, party with out access to the disputed article may not be able to present substantial proof of its version of the facts . if the party in possession refuses to comply with the tribunal's order , the arbitrators would surly be justified in drawing adverse in ferences and accepting as correct the facts alleged by the party refused the right of access."¹⁴

¹³ Isak I.Dore Theory and Practice of Multiparty Commercial Arbitration ,with special reference to the UNCITRAL frame work ,Provisional Relief Before Award ,Graham & Martinus Nijhoff, Members of the Kluwer Acadimic Publishers groupe, LONDON\DORDRECHT\BOSTON.

¹⁴W. Lauren Craig , William W. Park , Jan Paulsson ,International chamber of commerce arbitration ,Second Edition.1990 OCEANA PUBLICATIONS.INC

"International arbitration practitioners are all too aware that the availability of arbitral interim measures is not nearly so simple. The conundrum is this: In certain circumstances, an arbitral tribunal's ability to grant interim measures may be limited. If that is the case, a party to an international arbitration will have to seek interim measures in a national court that it may have wished to avoid when it agreed to arbitration. Further, if that happens, the court may decline to grant the measure requested, either because it concludes that seeking judicial interim relief is incompatible with the arbitration agreement or that it is undesirable for the court to interfere in the arbitration process".¹⁵

"The problem is not merely academic. In a recent survey of international arbitrators by the Global Center for Dispute Resolution Research, 64 respondents identified 50 separate arbitration cases in which interim relief was sought either to restrain or stay an activity, order specific performance, or provide security for costs.³ These figures are consistent with earlier reports to the United Nations Commission on International Trade Law (UNCITRAL), which indicated that parties are seeking interim measures in an increasing number of cases.⁴ The availability of arbitral interim measures is not a subject that can safely be ignored."¹⁶

Part 2.

"What may limit or prevent an arbitral tribunal from granting interim measures?"¹⁷

"The answers most frequently given to this question are:

Interim measures may be urgently needed before the tribunal has been formed.

¹⁵ http://findarticles.com/p/articles/mi_qa3923/is_200211/ai_n9339198/

Arbitral interim measures: Fact or fiction? ARTICLE last visited 28March2010

¹⁶ SUPRA

¹⁷ SUPRA

Although the arbitrators may have the knowledge and expertise required to decide the substantive issues in dispute, they may not consider it part of their function or within their area of competence to issue emergency or provisional orders.

Arbitral orders granting interim measures may be difficult to enforce.

To be effective, interim measures may require the involvement of third parties over whom the arbitrators do not have jurisdiction.

The tribunal's jurisdiction to grant interim measures may be limited by the governing law of the arbitration."¹⁸

"Enforceability Issues

Whether enforceability is a limitation on the effectiveness of an interim measure ordered by an arbitral tribunal depends mainly on the mechanisms for enforcement available

(1) In the arbitration process itself,

(2) Under the procedural law of the arbitration, and

(3) in national courts having jurisdiction over the party against whom the interim measure is to be enforced or that party's assets.¹⁹

The power of arbitral interim measures to be taken into consideration by UNCITRAL the model law, they distributed it under three main types of interim measures:

(a) Measures aimed at facilitating the conduct of arbitral proceedings,

¹⁸ SUPRA

¹⁹ SUPRA

(b) Measures to avoid loss or damage and preserve the status quo until the dispute is resolved, and

(c) measures to facilitate later enforcement of the award.

They also considered facilitating the later enforcement of the of an interim measure is the greatest for enforcement of the award, such as orders freezing or attaching assets or orders to provide security. It considered that a mechanism to enforce interim measures to preserve the status quo (including orders regulating contractual performance during the arbitration) was needed to lesser extent. There was even less of a need for enforcement support for measures aimed at facilitating the arbitration, since the tribunal normally has the ability to regulate compliance with such measures by means of its final decision on arbitration costs.²⁰

Involvement of Third Parties

"While the scope of jurisdiction of the arbitrators is based on the consent of the parties, they may not issue interim measures that affect third parties, but this rule is not absolute, they can extend their scope by the help of the national courts".²¹

The Palestinian legaelasive provides and allows and give the power to the tribunal to grant an interim measure if agreed by the parties art 33, unlike the UNCITRAL rules that gave this power automatically to the arbitrator unless other wise agreed.

²⁰ SUPRA

²¹ SUPRA

Chapter 3. Who has the power to grant an interim measure? The tribunal or the national court judge? Is easy to get?

This chapter will discuss who has the power to grant an interim measure in the Palestinian arbitration act, the UNCITRAL Model law, and how legislature referred most of this power to the parties.

Part 1

Who has the power to grant an interim measure?

Brief historical background:

"For many years, in many jurisdictions an arbitral tribunal did not have the power to order interim measures, as these powers were exclusively vested in national courts.

Nowadays, in the majority of modern laws (but nit all) , such powers are granted to the arbitral tribunals , or at least the parties are given the right to agree that such powers be vested in the arbitral tribunal . this trend is explained by the recognition that in most cases , the arbitral tribunal , once appointed and confirmed , is best placed to assess the factual and legal details of a case , the purposes of a request –whether legitimate or dilatory- and subsequently to decide whether and which interim measure shall be ordered."²²

"Who can issue interim measures?

There are still some countries — like Italy, Greece and the People's Republic of China — whose arbitration laws do not grant to arbitrators the power to issue interim measures of

²² Micheal Young (Herbert Smith)& Carine Dupeyron(Cleary Gottlieb Steen & Hamelton LLP. Geneva 25 January 2007 INTERIM MEASURES TO REVENT IRREPARABLE HARM :WHAY CAN BE DONE BY THE ARBITRAL TRIBUNAL?

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<http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf>

protection. Today, however, most modern arbitration laws — influenced by the Model Law, which has become a benchmark for many countries seeking to modernize their arbitration laws — grant to arbitrators the power to issue interim measure of protection."²³

"Under the Model Law, both the arbitral tribunal (Art. 17) and the competent court (Art. 7) are given the power to grant interim measures of protection. Since the arbitral tribunal and the competent court have concurrent power to grant interim measures of protection, the question then is: When does a party apply with the arbitral tribunal and when does it apply with the competent court?"²⁴

"The tribunal's jurisdiction to grant interim measures may be limited by the governing law of the arbitration".²⁵

The Palestinian arbitration act was clear about the power of the tribunal in granting an interim measure for one of the parties and the main thing in this is the free will of the parties in the arbitration agreement , it reads as follows :the arbitral tribunal and during the dispute has the power to take any interim measure to any of the parties if the parties in arbitration accepted that , and this order will have the same power as if issued by a competent court and is able to implemented the same way the court orders are implemented.

Where we can see that the cornerstone in giving the arbitral tribunal the power to issue an interim measure is the will of the arbitration parties.

²³ Eduardo R. Ceniza **Interim Measures: The Roll of the Arbitral Tribunal and the Court** (A Synopsis) last visited 29 march 2010 <http://www.pdrcl.org/web1/art002.html>

²⁴ Eduardo R. Ceniza **Interim Measures: The Roll of the Arbitral Tribunal and the Court** (A Synopsis) last visited 29 march 2010 <http://www.pdrcl.org/web1/art002.html>

²⁵ http://findarticles.com/p/articles/mi_ga3923/is_200211/ai_n9339198/
Arbitral interim measures: Fact or fiction? **ARTICLE** last visited 28March2010

And what may prevent the tribunal from issuing such an award, is the will of the parties, where they choose not to give this power to the arbitral tribunal,

When one of the parties who need to obtain an interim measure, few factors should be taken into consideration The arbitration agreement Prevent the arbitral tribunal of taking such a measure.

"In other words the parties in international commercial contracts have the power and freedom to select the means by which their dispute will be resolved. Usually this choice is made at the contracting stage. Even if the parties did not include an arbitration agreement in their original contract, it still possible for them to agree that the existing dispute will be referred to arbitration."²⁶

Part 2.

Is it easy to get?

In most of the cases the proceedings of arbitration will begin and finish with out the need any party applying either to arbitral tribunal or national courts, but it is well that the tribunal be equipped with the power to issue interim measure.²⁷

An so obtaining an interim measure depends largely at:

The arbitration agreement adopted.

The national courts system .

The national procedural laws.

The international conventions.

All of these can determine whether obtaining an interim measure is easy or not

And this also applies on the Palestinian case.

²⁶ PHILLIP CAPPER, INTRNATIONAL ARBITRATION:A HAND BOOK Third edition lovells 2004

²⁷ Eduardo R. Ceniza **Interim Measures: The Roll of the Arbitral Tribunal and the Court**
(A Synopsis) last visited 29 march 2010 <http://www.pdrcl.org/web1/art002.html>

Chapter 4. The relation ship between arbitration and the national courts in Palestine in connection with granting interim measure.

This chapter will discuss the importance of national courts in the granted interim measures, by assistance and oversight, what the clauses about this in this act , and what is the role of the national court judge in applying it.

Part 1

The importance of national courts in the granted interim measures

Judicial review at the arbitral sites enhances efficient control of the aberrant arbitral behavior, promoting confidence within the commercial community that arbitration will not be a lottery of erratic results. Such court scrutiny occurs relatively soon after the proceedings, when documents and witnesses are more readily available and before recollections become stale.

Situs review also enhances efficient arbitration by furthering respect for awards abroad. Without a right to have procedurally unfair awards vacated at the situs, victims of injustice must prove an award's illegitimate character de novo whatever it might be presented for recognition. This concern lay at the heart of France's international arbitration decree, promulgated after court decisions held that French judges lacked power to vacate awards made in international arbitrations. By allowing award annulment for procedural irregularity, excess of authority, and violation of public policy, the decree addressed fears that a complete absence of judicial control might lead foreign courts to hesitate to enforce French awards.²⁸

When Arbitration must have legal foundation in a particular country and judicial seat then it should be carried out accordingly. Nonetheless, Arbitration laws in modern states, particularly those following Model law, apply two fundamental principles. These are, firstly, parties should agree on the manner on how their dispute should be resolved; secondly, State courts should intervene but at a low level. Though courts are

²⁸William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press, 2006) p. 151.

involved in lower degree, they have a significant role in supporting the arbitral process. For example, assist in the enforcement of arbitral decisions, obtain an interim measure till the arbitration process is finalized and assist in the appointment and removal of arbitrators.

However, court can and have the power to review and decide whether to enforce an arbitration award or set it aside (refuse enforcing it)²⁹

Generally speaking, the courts role in the proceeding of granting an interim measure could be one of two but it will end under the supervision of the state courts.

I mean, if a party who seeks an interim measure went to court directly, and obtained a one , then the court already knows that it is the one who published this award and will not check it again in the executive stage of enforcement,

But if a party who obtained an interim measure from an arbitral tribunal, then it will not be able to enforce it without validating and confirming it form the national court, the relationship between the national courts and arbitration is not only assistance and support but also control and supervision ;this proves the important role that courts can play in the arbitration procedure ,national courts are the responsible organ in validating , confirming and issuing a the legal action that the arbitral tribunal is doing , we can see this clearly in the Palestinian arbitration act were the law has given the power to the national courts to supervise the arbitration agreement and the awards that is issued by the tribunal.

This is clear when the party\parties who obtains an award or an interim award has to go to the national court to get this award validated and confirmed , otherwise it will have no power and no way to enforce it unless the targeted party obeys this award,

²⁹ PHILLIP CAPPER, INTRNATIONAL ARBITRATION:A HAND BOOK Third edition lovells 2004 introduction,

more than this, the role of the national courts in modern arbitration laws is no longer limited to ordering the execution, but resolving difficulties concerning the composition of the arbitral tribunal and during the course of litigation and arbitration after the arbitrator's award and the purpose of adoption of modern arbitration laws is to expand the scope of assistance and support that can be provided by the elimination of arbitration.³⁰

More about the role of the national courts in assistance and support to the arbitration proceedings, this control and supervision in implementing the interim measure can expand to other parties who are not part in the arbitration such as banks, governmental departments, whom will not obey and take it into consideration unless it is validated and confirmed by the national courts and has the executive formula.³¹

By giving this order the execution format, as this means that the national court has checked the legality by the following steps:³²

Check the availability of formal and substantive requirements

First: the substantive requirements:

1 - the interim measure must come out from the Arbitral Tribunal in regard under the arbitration agreement or arbitration clause should fulfill the legal requirements of a legal contract in Palestine which excludes any dispute that is prohibited to resolved in arbitration

³⁰ Adv. Moataz Nabegh Canaan Study in the provisions of the urgent and temporal resolutions in disputes before the arbitration <http://www.lawjo.net/vb/showthread.php?p=30385> last visited 20 feb 2010 (the original text is in Arabic language.)

³¹ Adv. Moataz Nabegh Canaan Study in the provisions of the urgent and temporal resolutions in disputes before the arbitration In accordance with the provisions of the Arbitration Act No. 31 of Jordan for the year 2001 <http://www.lawjo.net/vb/showthread.php?p=30385> last visited 20 feb 2010 (the original text is in Arabic language.)

³² Supra

and the agreement to arbitrate that does not fulfill the legal substantive requirements, and the national court has the power to refuse validating and confirming such an interim award .

Such as matters of personal status and responsibility on Criminal actions or if the agreement is not in writing or if it is against the public police and orders.³³

2 - the interim measure must be related to the right to be protected, for example to maintain a proof that has connection to the subject matter of arbitration for example the request to confiscate money and goods to ensure paying, or hearing a witness or might die or leave,³⁴

3 - There must be in the arbitration agreement what authorizes the arbitral tribunal to issue a temporary decision in urgent matters. If there is no authorization in this agreement then competent judiciary is the only resolution to give urgent measure.³⁵

4 - It should not give resolution to the subject matter of the dispute or the origin of prejudice to the right or the legal status of substantive,

if the judicial protection being made in urgent circumstances and the success depends on the speed met before the damage was caused or exacerbated by the effects

, especially as the other party who is intended to take action against him does not have any defense where the decision has been taken in his absence for reasons of urgency , and if the interim measure was on the origin of the arbitration dispute, then the court will refused to give it to implementation.³⁶

Second: the formal requirements³⁷

³³Supra

³⁴Supra

³⁵Supra

³⁶Supra

³⁷Supra

A party who seeks to obtain and validate and confirm an arbitral order from the national court should besides the substantive requirements obtains the following formal requirements: submitted to the court are as follows:

First: the decision of the arbitral tribunal granting that party an interim award and prove it by a written document that contains the decision of the arbitral tribunal.³⁸

Second: you must obtain permission from the tribunal of the Party applying for an implementation to go to court for an order effect, failed to obtain permission was not granted the execution order and this is clear in the text of Article 23 / A of the Arbitration Act, Jordan, and is done by a written document issued by the arbitration.³⁹

Third: the granted party must have done any obligation the arbitral tribunal has put on him, in connection with approval of the request of the decision-making, such as providing a sufficient bail and/or security to cover the costs of these measures .⁴⁰

³⁸ Supra

³⁹ Supra

⁴⁰ Supra

Chapter 5. The Res Judicata of the arbitral interim measures and its expiry

This chapter will discuss the Res Judicata of the arbitral interim measures, and the expiry of a granted interim measure .

Part 1

. The Res Judicata of the arbitral interim measures

While emergency and urgency are the basic reasons and requirements for the national courts or the arbitral tribunal to issue an interim measure for a party, moreover these measures should address these conditions and not target the subject matter of the dispute .but holds a kind of temporary Res Judicata that permits judge who has issued it - in light of new circumstances- reconsider or modify them, for example if the judge or the arbitral tribunal who had issued an interim grant appointing a guardian for a disputed money, this decision can come to an end, if the danger which is threatening this money no longer exists.⁴¹

But the question that arises here is' who has the right and the jurisdiction to change or delete the interim measure that was granted, in the case it was issued by the tribunal and validated and confirmed by the national court? Is the tribunal the only one who can do that or the national courts can do that as well?

⁴¹ Adv. Moataz Nabegh Canaan Study in the provisions of the urgent and temporal resolutions in disputes before the arbitration In accordance with the provisions of the Arbitration Act No. 31 of Jordan for the year 2001 <http://www.lawjo.net/vb/showthread.php?p=30385> last visited 20 feb 2010 (the original text is in Arabic language.)

For consideration of amendment or repeal of the urgent resolution of the arbitral tribunal and the implementation of the issued order whether it is the arbitral tribunal or the court which issued the execution order, or both together has the power to do so?

The Palestinian arbitration executive act No 39 for the year 2004 has given a clear solution for this situation by saying;

"If the competent court validated and confirmed any interim or protective measure taken by the arbitral tribunal , then this competent court can validate this order but without effecting the subject matter of the dispute, and must cancel this measure when the arbitral tribunal ask it to do so".

This is a wise and advanced provision, in a way that the arbitral tribunal –who had issued an interim measure can know the real need of the parties, because it is the one whom the measure under its view and in the light of surrounding circumstances. the basis of judicial authority and in light of new circumstances the judge may obey the tribunal decision, such as a threat to the right and the possible loss of evidence and in the light of the inferred from the case papers and documents, which does not overturn the Court of Appeal by the exporter is implementation with regard to the discretionary authority to make that decision.

As a summary I can say that the interim measure has a limited and temporary Res Judicata for the orders it was issued for and this Res Judicata is limited for this order and this dispute and does not goes for more than this , as this Res Judicata is very fragile and can be changer if the circumstances that was issued upon were changed ,it is use could be useful if a harmed party will seek for damages , it can be a good base for damages if it was on un true circumstances or the claimant could not prove its claim .

Part 2

.The expiration of the preliminary decisions.

As for the expiration of the interim measure issued by the tribunal

It will expire in several cases, including:⁴²

1 - not filed before the judicial authorities in the State in respect of decisions urgent or temporary conflicts that have been agreed to submit to arbitration within eight days of starting from the day following the date of issuance of the interim measure, in other words ,the failure of one party to the arbitration to take an action that opens the dispute during the eight-day fall in judge's decision, ⁴³

2 –it expires if there is a change in the legal status of the parties and the circumstances that the interim measure were based on .⁴⁴

3 – it also expires after the 20 days period that is mentioned in the 17 article as in the adopted amendments of the UNCITRAL Model Law 2006.⁴⁵

I mean by the expiration or expiry of an interim measure:

Is when a party who is granted an interim measure by an arbitral tribunal or a national court judge and did not take any action to start the proceedings in the eight-day period (this period is referred to the Palestinian Civil and commercial procedures act) then this award will expire.

It expires by drawing it back upon a request of a party by the judge or the arbitral tribunal, who issued it,

⁴² Supra

⁴³ Supra

⁴⁴ Supra

⁴⁵ UNCITRAL Model Law as amended in 2006

This happens when the legal status of the parties and/or the circumstances that the interim measure was issued for has changed.

And also if the case is dismissed or denied and the one who seek interim measure has no right in it.

Conclusion

while the introducer chapter of this thesis mention a brief historical overview about the development of arbitration in Palestine and how the Palestinians are seeking in their independence and in spite of the major political difficulties and the unstable political situation to have an advanced laws to cope with the international community it is such a good approach the Palestinian legislature has made by adopting the UNCITRAL Model Law theme of what this contains a harmonized provisions that will help in enforcing the Palestinian arbitration awards in other countries that follows the same method.

At the end of this thesis it became clear that the relation ship between arbitral tribunal and national courts is that kind of relation ship which could be assistance and to the supervision of the tribunal by assistance and oversight and how the Palestinian gave most of the powers to the parties in their agreement and in the case they did not agreed on details the there are some details that applies which gave the powers to the arbitral tribunal to grant an interim measure to the party who seeks it unless otherwise agreed.

The restrictions for this are the public policy and urgency and that the interim measure should not be on the subject matter of the dispute

Recommendation

After I finished this thesis I would recommend the following:

Showing the advantages that the arbitration system can provide with

Harmonizing the domestic Palestinian legislation to cope with the international community

Establishing a specialized institutions that teaches and discusses and show the advantages that the arbitration has.

Providing the Palestinian judiciary system and all the law practitioners with some training for dealing with the arbitration matters. Lectures, publications, conferences, etc

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matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement³

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

*Section 5. Court-ordered interim measures**Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

³The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.