

Global Arbitration Review

# The Guide to Construction Arbitration

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General Editors

Stavros Brekoulakis and David Brynmor Thomas QC

Third Edition

# The Guide to Construction Arbitration

Third Edition

Editors

Stavros Brekoulakis and David Brynmor Thomas QC

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This article was first published in October 2019

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Published in the United Kingdom  
by Law Business Research Ltd,  
Meridian House,  
34-35 Farringdon Street,  
London EC4A 4HL, UK  
© 2019 Law Business Research Ltd  
[www.globalarbitrationreview.com](http://www.globalarbitrationreview.com)

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ISBN 978-1-83862-211-4

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# Acknowledgements

The publisher acknowledges and thanks the following firms for their learned assistance throughout the preparation of this book:

39 ESSEX CHAMBERS

3 VERULAM BUILDINGS

ADVOKATFIRMAN RUNELAND AB

AKIN GUMP STRAUSS HAUER & FELD LLP

ANKURA

ARGOS CONSTRUCTION

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# Introduction

**Stavros Brekoulakis and David Brynmor Thomas QC<sup>1</sup>**

It is a pleasure to introduce the third edition of *The Guide to Construction Arbitration*. The *Guide* has evolved since its first edition to form, we hope, a valuable resource for clients, in-house counsel, experts and external counsel involved in construction arbitration, whether they are dealing with construction arbitration for the first time or have extensive experience in it.

The construction industry is a major contributor to economic growth worldwide. In the United Kingdom it has been estimated that every £1 investment in construction output generates £2.84 in total economic activity.<sup>2</sup> In India, the BJP, which now forms the government, proposed infrastructure spending of 100 lakh crore rupees (over US\$1,300 billion) over the next five years in its 2019 manifesto.

The industry covers a wide range of different types of projects, from building offices, factories and warehouses, shopping malls, hotels and homes to major infrastructure projects that involve more complex civil engineering works such as the construction of harbours, railroads, mines, highways and bridges. Other construction projects involve specialist engineering works such as shipbuilding; bespoke plant and machinery such as turbines, generators and aircraft engines; or works that aim to support energy projects such as upstream oil and gas projects or renewables (wind, wave, solar) and nuclear plants.

These complex construction projects are rarely completed without encountering risks that lead to changes to the time and cost required for their execution. Those changes in turn give rise to disputes, the majority of which (possibly the vast majority) are submitted to alternative dispute resolution (ADR) processes and eventually arbitration. The reasons that lead construction parties to choose ADR and arbitration owe as much to the (perceived or

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2 Report of Economic Consultants LEK for the UK Contractors Group.

real) inefficiencies of national courts as to the (perceived or real) advantages of out-of-court dispute resolution. For example, with a few notable exceptions such as the Technology and Construction Court in England and Wales, most national courts lack construction specialist departments or judges with construction expertise and experience. Arbitration, on the other hand, allows construction parties to appoint arbitrators with the necessary specialised knowledge and understanding of complex construction projects. Importantly, arbitration allows construction parties to ‘design and build’ (to stay in tune with the theme of *The Guide to Construction Arbitration*) the dispute resolution procedure in a way that addresses a number of procedural challenges in construction arbitrations, including the typically large volume of documentary evidence, the most effective use of experts to address delay and quantum, as well as complex technical issues, and programme analysis. While the use of some ADR methods such as dispute adjudication boards has spread relatively recently,<sup>3</sup> arbitration has traditionally been included as the default dispute resolution mechanism for disputes arising out of international construction contracts.<sup>4</sup>

A question that often arises is: what is special about international construction disputes that they require specialist arbitration knowledge? In the first place, construction projects are associated with considerably more risk than any other typical commercial transaction, both in terms of the amount of risk allocated under them and the complexity of that risk. Their nature and typically long duration lead to risks including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks (such as political riots, governmental interventions and strikes) and legal risks (such as amendments in law or failure to secure legal permits and licences).

Further, time is very often critical in construction projects. An Olympic Games stadium must be delivered before the hard deadline that is the date of the games. If a shopping mall is not ready for the commercially busy Christmas period, significant amounts may be lost in seasonal retail trade. The late delivery of a power station can disrupt the project financing used to fund it.

Moreover, arguments as to causation, especially of delay, in construction projects are typically complex. Many phases of a construction project can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical paths and global claims are unique to construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but several subcontractors, a project manager, an engineer and architect, specialist professionals such as civil or structural engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dispute arising on one subcontract may lead to disputes under other subcontracts and the main construction contract, and may have financial and legal consequences for many of the above parties, triggering disputes under much wider documentation such as shareholder agreements, joint operating agreements, funding documents and concessions. That often

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3 Dispute adjudication boards were first introduced in FIDIC contracts (in the Orange Book) in 1995 and in ICE contracts as recently as in 2005.

4 Arbitration has been included in FIDIC contracts since the publication of the first FIDIC contract in 1957.

gives rise to issues about multiparty arbitration proceedings and third-party participation in arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. While the resolution of most construction disputes will depend on the factual circumstances and the provisions of the contractual agreement of the parties, legal issues may often arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers,<sup>5</sup> statutory prohibition of the pay-when-paid and pay-if-paid provisions<sup>6</sup> and, of course, mandatory legislation on public procurement.<sup>7</sup>

Finally, as already mentioned, construction disputes are technically complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction disputes have given rise to the use of tools, such as Scott Schedules (used to present fact intensive disputes in a more user friendly format), that are unique in construction arbitrations.<sup>8</sup>

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what *The Guide to Construction Arbitration* aims to provide.

*The Guide to Construction Arbitration* is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts, so it can provide a ready resource for specialist construction arbitration practitioners who already have a view of the information they seek. Beyond that, it has been compiled and written to offer practical information to practitioners who are inexperienced in international construction contracts or dispute resolution in construction disputes. For example, in-house lawyers who may be experienced in negotiating and drafting construction contracts but not in running disputes arising from them, or construction professionals who may have experience in managing construction projects but may lack experience in the conduct of construction arbitration, will find *The Guide to Construction Arbitration* useful. Lawyers in private practice who are familiar with arbitration, but lack experience in construction will also benefit. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

While the main focus of *The Guide to Construction Arbitration* is the resolution, by arbitration, of disputes arising out of construction projects, Part I is devoted to important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

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5 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.

6 For example, in the United Kingdom with the UK Housing Grants Construction and Regeneration Act 1996.

7 For example, EU Directive 2014/24.

8 J. Jenkins and K. Rosenberg, 'Engineering and Construction Arbitration', in Lew et al. (editors) *Arbitration in England*, Kluwer (2013).

Thus, this book is broadly divided in four parts. Part I examines a wide range of substantive issues in construction contracts, such as *The Contract: the Foundation of Construction Projects*, *Bonds and Guarantees*, *An Introduction to the FIDIC Suite of Contracts*, *Allocation of Risk in Construction Contracts*, *Contractors' and Employers' Claims, Remedies and Reliefs*. Chapters valuably address the quantification of delays, the role of programmes and the various methods used for the computation of costs and damages in construction arbitrations, while an entire chapter is devoted to an examination, from a comparative law perspective, of the practically critical topic of concurrent delay.

Part II then focuses on dispute resolution processes in construction disputes. The aim of this Part is to look into special features of construction arbitration, and the following chapters are included: *Suitability of Arbitration Rules for Construction Disputes*, *Subcontracts and Multiparty Arbitration in Construction Disputes*, *Interim Relief, including Emergency Arbitrators in Construction Arbitration*, *Organisation of the Proceedings in Construction Arbitrations*, *Documents in Construction Disputes and Awards*, and the role and management of expert evidence.

Part III examines a number of select topics in international construction arbitration by reference to some key industry sectors and contract structures, including the nuclear sector, energy sector, concession contracts and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries

We have taken the opportunity to add to the chapters in this third edition, to address matters identified by users of the first two editions. These include chapters examining dispute boards, ADR in construction contracts, agreements to arbitrate and interim relief in detail. There are chapters on pricing and payment, investment treaty arbitration in the construction sector, a discussion of the typical parties to a construction contract, further discussion of the organisation of expert testimony and a chapter on construction arbitration in Brazil.

Overall, the third edition of *The Guide to Construction Arbitration* builds upon the success of the first two editions and has been further expanded. The structure and organisation of *The Guide to Construction Arbitration* is broadly based on the LLM course on International Construction Contracts and Arbitration that we teach at Queen Mary University of London. The course was first introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 20 years. Humphrey has been an exceptional source of inspiration for hundreds of students who followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to *The Guide to Construction Arbitration*. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Gemma Chalk, Bevan Woodhouse and Hannah Higgins for all their hard work in the commission, editing and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

# Part II

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## Dispute Resolution for Construction Disputes

# 17

## Interim Relief, Including Emergency Arbitrators in Construction Arbitration

**Philip Norman and Leanie van de Merwe<sup>1</sup>**

### Introduction

Parties in dispute sometimes require urgent legal support prior to the final determination of their case to ensure that justice can be done and that the integrity of the arbitral process is maintained.<sup>2</sup> The solution to this need for urgent assistance is for arbitral tribunals or courts to order interim relief (also called interim measures or conservatory measures).

This chapter considers the nature and most common types of interim relief applied for in construction arbitrations and the basis and procedures for those applications. It then considers the use of Emergency Arbitrators (EAs) to grant interim relief in advance of the formal arbitration panel being constituted.

### Defining interim measures and interim relief

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended (the Model Law), refers to interim relief as ‘interim measures’ and defines them as being temporary measures that are granted prior to the final arbitration award, which orders a party to:

- maintain or restore the status quo;
- take or desist from action that may or is causing harm or prejudice to the arbitral process;
- preserve assets that may be used to satisfy the future final award; or
- preserve evidence that may be material to the arbitration.

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1 Philip Norman is a partner and Leanie van de Merwe is an associate at Covington & Burling LLP.

2 In the Privy Council case of *National Commercial Bank Jamaica Ltd. V. Olint Corp Ltd (Practice Note)* [2009] UKPC 16, Lord Hoffmann stated in relation to court injunctions and which are analogous to interim measure in arbitration: ‘The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.’

The Model Law is one of a few sources where an express definition of interim measures is given. Most statutes, institutional rules and court rules have not provided a definition or adopted the one in the Model Law.

The more common approach to understanding what interim measures are is by reference to the powers granted to an arbitral tribunal or court to award such measures. The nature and type of these statutorily conferred powers vary from country to country. French legislation allows an arbitral tribunal to award any interim measures, except for conservatory attachments or judicial security,<sup>3</sup> whereas the English Arbitration Act of 1996 is narrower and gives default powers to arbitral tribunals to order security for costs and to make orders for the inspection, preservation, custody and sampling or production of property or evidence related to the dispute.<sup>4</sup> The English Act then requires parties to expressly opt in to provisions allowing arbitral tribunals to make provisional orders for payment of money or disposition of property.<sup>5</sup>

However, most countries' legislation is permissive about what interim relief powers parties can give to arbitrators. Most parties tend to confer broad powers by adopting published arbitration rules. These rules define the extent of the powers differently: Article 26 of the UNCITRAL Arbitration Rules (2013) gives arbitral tribunals the same powers as described in the Model Law; Rule 30.1 of the Singapore International Arbitration Centre Rules (2016) gives arbitral tribunals the power to grant 'an injunction or any other interim relief it deems appropriate'; and Article 25 of the London Court of International Arbitration Rules (2014) allows arbitral tribunals to grant interim relief, including orders requiring a party to provide security for the amount in dispute, preserving or disposing of goods, property and documents, or granting any other relief it could have granted as final relief in an award.

The International Chamber of Commerce Arbitration Rules (the ICC Rules), which arguably have become the most widely used arbitration rules in construction arbitrations (in part due to their inclusion in the FIDIC standard forms of contract) does not define what interim measures are and does not list the types of interim measures that an arbitral tribunal may order. Article 28 of the ICC Rules contains default powers given to an arbitral tribunal to order 'conservatory and interim measures' and describes these powers as being to:

*order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party.*

Types of interim relief that have been applied for in construction arbitrations

Notwithstanding a lack of definition, practice has shown that the most common interim or conservatory measures sought in ICC (construction) arbitrations are for the preservation of the status quo, preservation of evidence and assets, provision of security for costs, measures to secure the enforcement of any final award and orders for interim payments.<sup>6</sup>

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3 See Article 1468 of French Decree No. 2011-48, incorporated into the Code of Civil Procedure.

4 See Section 38 of the English Arbitration Act 1996.

5 See Section 39 of the English Arbitration Act 1996.

6 See Secretariat's Guide to ICC Arbitration (2012), paragraph 3-1036.

Below are a few non-exhaustive examples of the most common types of applications for interim relief.

#### Keeping the status quo to ensure parties continue to perform their obligations

An arbitral tribunal may order a party to continue performing its obligations on a construction project pending resolution of the dispute to ensure that there are no delays to the completion of the project. For example, the contractor may want interim payment applications to be processed without delay so that it has cash flow to continue its works pending a final award, or an employer may wish to prevent suspension of works so as not to cause further delays to completion.

Another example is where a party seeks an interim order to compel a joint venture partner to make financial contributions in circumstances where the non-defaulting partner cannot afford to make those contributions, and payment defaults will put the project, and potentially the solvency of the non-defaulting partner, at risk.

#### Reinstating and preventing the removal of personnel engaged in the project

Some construction contracts, particularly in the Middle East, give the employer the right (without a need to show cause) to instruct a contractor to remove personnel from working on the project. This right tends to be exercised against a contractor's senior personnel.

This right is sometimes, cynically, exercised to undermine the arbitration process by ensuring that a primary witness for the contractor is made unemployed, thereby potentially causing a contractor to have to decide whether to continue employing that member of staff (unproductively), or dismissing them and potentially losing a witness.

In this scenario, a contractor may wish to apply for an interim remedy, requiring the prevention of removal of its staff.

#### Preserving evidence

In cases where a contractor has been terminated and information (documentary or stored on servers or external drives) detained or removed from site, parties might apply for an order to preserve evidence and to provide access to that information. That evidence may be relevant and possibly material to the matters in dispute, such as site logs, diaries or journals kept by site personnel, site instructions, manpower record and cost information.

#### Preserving property

Where a party has been terminated, or suspended and prevented from gaining access to the project site, it may wish to obtain an order that preserves its materials, equipment and facilities and prevents them from being used by others.

#### Stopping parties making bond calls or to order parties to deposit proceeds of bond calls in a particular account

In different parts of the world, the purpose of the performance bond or advance payment security given under a construction contract is viewed differently. Some employers consider that that security can be liquidated for any perceived breach, no matter how trivial, whereas others may liquidate that security as part of a negotiation strategy to put pressure

on a contractor to agree to less favourable settlement terms. A contractor may seek an order to stop the bond call, or more likely, to freeze the proceeds of a call, where such a call is shown not to be justified or, in extreme cases, is fraudulent.

### Freezing assets

If there is a threat that assets may be dissipated or hidden, which may therefore render any arbitration award worthless, an order may be sought to freeze those assets. This may be a real issue where international parties are involved or complex corporate structures are put in place by one party. In these circumstances it may be easy to hide money or assets in foreign bank accounts and/or divert them to different corporate entities.

If granted, such an order will ensure those assets are preserved, but it is likely that the applicant will have to provide security for obtaining that order, if ultimately the final award concludes that the freezing order was not justified.

### Providing for interim payment where it would be unfair or detrimental to keep a party out of its money

This type of relief is sought when matters of liability are not in issue (or not seriously in issue) and quantum is the main point of contention. In that case, a partial payment could be made if there are good reasons for that payment to be made early, for example, if a contractor needs cash to pay its sub-contractors and suppliers on the project.

### Providing security for costs

Where a party has reason to believe that the other party may not have sufficient funds to satisfy an adverse cost order or award, it may apply for security for costs. These applications usually arise in the context of frivolous claims or claims brought by bankrupt parties.

An application for security for costs generally represents the applicant's anticipated arbitration costs, such as tribunal fees, legal, expert and counsel fees, the cost of the arbitral institution and other non-legal costs (such as the cost of hearing venues, printing, stenographers, etc.). This money is then held in an escrow account until the tribunal issues its final award, which includes the cost award.

### **How is the discretion to be exercised?**

The 2006 amendments of the Model Law (and consequently amendments to the UNCITRAL Arbitration Rules) added parameters on how an arbitral tribunal should exercise its discretion. Article 17A places the burden on the applicant to satisfy the arbitral tribunal that the interim measures applied for:

- are required to prevent harm that is not adequately reparable by an award of damages, and that such harm outweighs the harm caused to the counterparty by the award of the interim measure (the balance of convenience); and
- that the applicant has a reasonable possibility to succeed on the merits of its claim (a *prima facie* case).<sup>7</sup>

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<sup>7</sup> Article 17A(2) modifies these requirements for application relating to the preservation of evidence.

Institutional rules do not contain similar parameters on how the discretion should be exercised. A reason for this could be that, as Lord Diplock opined in the English case of *American Cyanamid*:<sup>8</sup>

*It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.*

That said, there appears to be a practical acceptance that: ‘provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitively lost.’<sup>9</sup> This approach is consistent with how some national courts apply their discretion in determining whether to grant interim remedies or injunctions.<sup>10</sup>

### **Applying for interim measures under the ICC rules**

The process

Article 28 of the ICC Rules, which provides power to grant conservatory or interim measures, does not define a procedure to be adopted by an applicant. However, Article 22.2 of the ICC Rules, which gives arbitral tribunals general powers in relation to procedures, applies and requires the arbitral tribunal to consult with the parties and adopt procedures it considers appropriate. In this sense, given the urgency associated with some types of interim relief, the procedural timetable for submissions and determination is likely to be short (and in the case of an Emergency Arbitrator under the ICC Rules, the period from transmitting the file to the arbitrator to a reasoned order being issued is 15 days).

Any application for conservatory or interim measures should generally be made as soon as possible. The very nature of the application suggests that there is an urgency in obtaining protection prior to a final award and an arbitral tribunal may consider any delay as an indication of there being no real urgency for the relief sought. More importantly, any delay may result in the subject matter of the interim measure being lost, such as evidence being destroyed, assets being dissipated or bonds being called.

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8 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, p.408.

9 *Redfern and Hunter on International Arbitration*, Sixth edition, paragraph 5.31.

10 See footnote 2 above. Lord Hoffmann continued in relation to whether a court should grant an injunction/interim measure:

*As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

*In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.*

Applications are usually made in writing with a copy to the responding party and the ICC Secretariat. The application should contain the applicant's submissions, which will identify in clear terms the nature of the interim relief being claimed,<sup>11</sup> together with legal authority and the factual basis for such an application. In particular, the application should define the harm that will occur if the conservatory or interim measure is not granted and make submissions as to the balance of convenience. It should also state why the applicant considers it will succeed on the merits of the case. The application must be supported by evidence: this can be a mix of documentary, technical/expert and witness evidence. The respondent will then be given an opportunity to reply.

During its deliberation, the arbitral tribunal can consider a variety of factors, including:

- whether the interim relief claimed is of the type available in the courts at the seat of the arbitration;
- whether the relief sought is too wide;
- whether the manner in which the draft order has been prepared has the effect intended;
- whether the relief is being sought for tactical advantage during the arbitration process or whether there is a genuine interest to be preserved; and
- what the duration of that relief should be.

It is for the applicant to establish the legal and evidential basis for its application, and it bears the burden of proof. An arbitral tribunal will have to consider the nature of that burden of proof that has to be discharged in the context of the relevant law and the type of relief being applied for: is it to be assessed on the balance of probabilities, or on the more demanding standard of 'beyond reasonable doubt'?

An arbitral tribunal will also consider whether the applicant should provide some form of security in support of the grant of any order. If the application is for the conservation of a significant amount of hard copy documents, then an arbitral tribunal might seek an undertaking that the applicant pays for the cost of storing those documents. Alternatively, if the application is for an injunction requiring the other party to desist from doing something, then the arbitral tribunal might ask for an undertaking as to damages from the applicant. This typically involves the payment of an amount of money into escrow, or the provision of some other security instrument that will provide some compensation if the interim relief was found later to be unnecessary and caused harm.

After the arbitral tribunal has determined the application, it must grant or decline the application in a reasoned order or award (see Article 28.1 of the ICC Rules).

### Enforcement of an order or interim award

Pursuant to Article 22.5 of the ICC Rules, the parties to the arbitration agree to comply with any order or award made by the arbitral tribunal and generally parties tend to comply. However, if they do not, the ICC Rules are silent on the remedy and an arbitral tribunal does not have the same coercive powers as a court to compel compliance with its order.

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<sup>11</sup> Parties will often describe this in a draft order attached to its application for interim measures.

Article 17H of the Model Law proposes that, absent voluntary compliance, interim measures that have been ordered should be enforced by a competent court, irrespective of the country in which the order was made.

The legislation of various countries provides arbitral tribunals with various powers of sanctions if a party does not comply with its orders. The English Arbitration Act 1996 gives express powers to the arbitral tribunal (unless these powers are excluded by the parties) to issue peremptory orders that repeat the interim measures granted and include a final deadline for compliance.<sup>12</sup> The Act lists sanctions for failing to comply with such peremptory orders, which include a dismissal of the claim or counterclaim if a security for costs order is not complied with, or in the case of other types of interim relief to, among others, draw adverse inferences, exclude evidence or make a cost order that takes into account such non-compliance.<sup>13</sup>

### Court support of interim measures

Notwithstanding the ability of arbitral tribunals to impose sanctions pursuant to statutes that might apply, competent courts retain concurrent jurisdiction in relation to interim relief.

Competent courts can also act where an arbitral tribunal is not yet constituted and there are no provisions for the appointment of an Emergency Arbitrator (see below), or where the nature of the interim relief sought is urgent, or may need to be applied for *ex parte*, or may need a court's coercive powers of enforcement. Those applications can be made to the courts<sup>14</sup> without undermining the parties' agreement to arbitrate.

Competent courts will also be the more appropriate forum for seeking interim relief that will impact third parties. On the basis that arbitration is a creature of contract that only binds the contracting parties, there is no obvious authority by which an arbitral tribunal can compel non-contracting parties to obey its interim orders. For example, a contractor may wish to obtain information from a consultant engaged by the same employer to support its case. Where the employer is not in possession of the consultant's information and where there is no direct contractual link between the contractor and consultant, the contractor may be better served by making an application to the court to order production of that information.

### *Ex parte* applications

It may also be appropriate for a party to apply to a court when it seeks an *ex parte* application (without notice to, or participation of, the other party) for conservatory or interim measures. If there is a real risk that a party is likely to dissipate or divest itself of assets, or destroy information necessary to the arbitration quickly, then secrecy and urgency are key to the preservation of the information.

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12 Section 41(5) of the Arbitration Act 1996.

13 See Sections 41(6) and (7) of the Arbitration Act 1996.

14 As anticipated by Article 28.2 of the ICC Rules.

The very nature of ex parte interim measures is that they are initially made without complying with two tenets of due process:

- notification of the application; and
- a right to be heard.

Consequently, most arbitral tribunals will not want to accept applications on an ex parte basis. However, there is some support for the proposition that arbitral tribunals can, in exceptional circumstances, act on an ex parte application. Article 17B(2) of the Model Law provides the arbitral tribunal with the power to make a 'preliminary order' without disclosure of the application to the party to whom it is directed. Those preliminary orders are temporary in nature, lasting for 20 days,<sup>15</sup> but can be modified after their notification to the party against who it is directed and that party has had an opportunity to present its case.

In term of institutional rules, the Swiss Rules of International Arbitration allow arbitral tribunals to make ex parte preliminary orders<sup>16</sup> in a similar way to that contemplated in the Model Law. A different approach is taken in the Arbitration Rules of the Arbitrator and Mediators Institute of New Zealand, which allows for the appointment of an Emergency Arbitrator to issue preliminary orders without notification to the other party where advance notice of the application for interim measures would 'defeat the entire purpose of the application'.<sup>17</sup>

However, an ICC Task Force in 2019 concluded that:

*true ex parte emergency Orders, where the respondent was not notified, was not given the opportunity to be heard and in which the EA issues a final EA Order are incompatible with the ICC EA Provisions.*<sup>18</sup>

In that situation and assuming the ICC Rules have been adopted by the parties, an application should be made to a competent court.

### **Emergency arbitrator proceedings under the ICC Rules**

As described above, there is, on occasion, a need to obtain an interim remedy in advance of an arbitral tribunal being constituted. Prior to the adoption of emergency arbitrator procedures, parties would have to rely on competent courts and this would require them to work their way through a court procedure and make matters public that they may have hoped to keep private.

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15 Article 17C(4) of the Model Law.

16 See Rules 26(3) and 44 of the Swiss Rules of International Arbitration.

17 Article 50.2 of the AMINZ Arbitration Rules, which deals with the application for an appointment of an Emergency Arbitrator to award interim measure or provisional orders, states that such an application 'should be made electronically and in the case of an application for preliminary orders must, save where to give notice would defeat the entire purpose of the application, be copied to the other Parties at the same time as it is submitted to AMINZ'.

18 See paragraph 106 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

This need has been addressed in Article 29 of the ICC Rules, which provides that, where a party requires urgent interim or conservatory measures in advance of the arbitral tribunal being constituted and the arbitration file being transmitted, that party can apply for an emergency arbitrator to be appointed to consider its application.

The Emergency Arbitrator Procedure is now a standard provision in the ICC Rules, and will be available unless the parties have opted out or have chosen different pre-arbitral procedures, or the arbitration agreement was executed prior to 1 January 2012,<sup>19</sup> or the relief sought is against a party that has not signed the arbitration agreement.<sup>20</sup> Together, these criteria are known as the ‘applicability test’.

### Applicability test

An application for an emergency arbitrator should be made to the president of the ICC Court,<sup>21</sup> who will determine if the applicability test is met. It is rare for the president to decline applicability,<sup>22</sup> save for obvious cases of in-applicability. In ambiguous cases the question of applicability has been left to the emergency arbitrator. An example in the construction context is whether a dispute board established under the construction contract, and which has powers to make conservatory and interim orders, operates as an implied opt-out of the Emergency Arbitrator Procedures.<sup>23</sup>

If the president is satisfied that the Emergency Arbitrator Procedure is applicable, an emergency arbitrator will be appointed and the file transmitted. At that point the emergency arbitrator assumes responsibility for jurisdictional and admissibility issues.

### Jurisdiction challenges

The emergency arbitrator has first to consider if he or she has jurisdiction to act. Jurisdiction is considered on the same basis as it would be by a fully constituted arbitral tribunal. In one ICC case,<sup>24</sup> the emergency arbitrator held that a multi-tier dispute resolution clause, which contained a 90-day negotiation period, was a condition precedent to commencement of arbitration proceedings and a ‘limitation on the parties’ consent to arbitrate’. He determined that the Emergency Arbitrator Procedure was an inherent part of arbitration and not something that is separate or distinct, and thus a failure to comply with the conditions precedent deprived the emergency arbitrator of jurisdiction in that case.

### Admissibility challenges

The Emergency Arbitrator has to determine whether the interim relief sought can be admitted into the Emergency Arbitrator Procedure. Article 29(1) of the ICC Rules stipulates the admissibility threshold as being:

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19 See Article 29(6) of the ICC Rules. This is the ‘applicability test’.

20 See Article 29(5) of the ICC Rules.

21 Article 1.5 of Appendix V of the ICC Rules.

22 See paragraph 71 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

23 See paragraphs 77 and 87(e) of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

24 ICC EA Case No. 26, referred to in paragraph 87(c) of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

- the need for the interim measure being urgent; and
- that it cannot wait for the arbitral tribunal to be constituted.

Emergency arbitrators have considered these two questions as being separate. Further, they have considered them as being a threshold enquiry as to admissibility, as well as being a substantive enquiry as to the merits of the application (i.e., whether the application was justified on its merits as being urgent, so that the application could not wait to be made to the arbitral tribunal).<sup>25</sup>

### Merits of the application

Assuming that an emergency arbitrator accepts jurisdiction and admissibility of the application, then he or she will have to consider the merits of the application. Interestingly, in the first 80 ICC Emergency Arbitrator cases,<sup>26</sup> very few disputes have arisen over what applicable law should apply to the Emergency Arbitrator Procedure or on the issue of burden and standard of proof. The general proposition arising from those decisions is that the party asserting facts, must prove those facts to a prima facie standard.

An emergency arbitrator can establish a procedure for submissions that is consistent with his or her obligation to publish a reasoned order within 15 days from the date the file was transmitted to him or her.<sup>27</sup> Whatever the procedure adopted, he or she must act as an arbitral tribunal, by being fair and impartial and ensuring each party has an opportunity to present its case, albeit within an abridged time period.

### Compliance and enforcement of the order

Once the order is made, parties typically comply with it on a voluntary basis, but if not, issues of enforcement may arise. At that stage, it will be open to seek enforcement via a competent court and possibly also through an arbitral tribunal if it has been constituted by then. However, there may be challenges as to the status and effect of that order and as to whether an emergency arbitrator is in fact an arbitrator for the purposes of national laws.

The ICC Commission Report on Emergency Arbitrator Proceedings notes that as part of its analysis into these proceedings, national reports from 45 countries revealed that:

*a wide range of interpretations emerge from expressing an unequivocal view that the EA is an arbitrator and that provisions applicable to the arbitral tribunal should apply to EAs, to others that consider that EA proceedings cannot be equated to proceedings before an arbitral tribunal.*<sup>28</sup>

*The doubts that have been expressed regarding the purported lack of enforceability of an EA's decision also stem from the fact that i) the EA's decision may be given as an order rather than an award, and ii) the decision of an EA may be viewed as lacking the finality requirement under the New York Convention.*<sup>29</sup>

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25 See paragraph 83 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

26 See paragraphs 130–133 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

27 Article 6 Appendix V to the ICC Rules.

28 See paragraph 185 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

29 See paragraph 192 of the ICC Commission Report on Emergency Arbitrator Proceedings, April 2019.

Over time, as the Emergency Arbitrator Procedure becomes more widely used and tested, further jurisprudence will emerge. It may be that more national laws will also provide supportive powers to the Emergency Arbitrator Procedure or more clearly defined mechanisms to enforce orders made by the emergency arbitrator.

## **Conclusions**

It is now well established through legislation and arbitration rules that arbitral tribunals have the power to grant interim relief, and practice suggests that parties will make those applications to arbitral tribunals and not only rely on competent courts for that support.

Parties will obviously have to make strategic decisions whether they make their applications to an arbitral tribunal, an Emergency Arbitrator or a court. There are advantages and disadvantages in each forum.

An arbitral tribunal will have access to greater detail about the underlying case, the process will be confidential, and it will be engaged throughout the arbitration process and able to track the parties' conduct. However, an arbitral tribunal may not have the full powers to grant the relief sought (for example, granting *ex parte* relief) and may not be able to appropriately sanction a defaulting party or engage with third parties that are not contractually bound to the arbitration proceedings.

An emergency arbitrator is able to consider applications on a confidential basis and, in the first instance, means parties do not have to engage with courts that may have convoluted or difficult procedures associated with applications for interim measures. However, the procedure is relatively new and the status of an emergency arbitrator's order is still to be clarified in various jurisdictions. Further, the ICC Emergency Arbitrator Procedure is subject to a US\$40,000 (in addition to party legal costs and disbursements), whereas a court procedure may be more cost-effective.

Courts may be powerful in compelling enforcement of interim orders or binding and compelling third parties (to the arbitration agreement) to comply with its order. A court will have broader powers and court fees are likely to be lower than fees payable to an arbitral tribunal or emergency arbitrator. However, a court will not be seized with the determination of the dispute as this will be a matter for the arbitral tribunal and thus may be reluctant to act. Moreover, proceedings are likely to be public and in accordance with a fixed procedure, not the procedure chosen by the parties. Finally, the appointed judge may not be familiar with the underlying trade context as chosen arbitrators might be, and this may require parties to engage in more detailed explanations of the underlying issues and how a *prima facie* case is shown to exist.

# Appendix 1

## About the Authors

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Philip Norman has been in practice for nearly 25 years, first as a barrister in independent practice and then as a partner in a firm specialising in international arbitration and dispute resolution. He has significant experience in mediation, expert determination and adjudication and extensive experience advising on matters in the construction, engineering, infrastructure, project finance, energy, oil and gas, and power sectors, as well as TMT infrastructure. Mr Norman also sits as an arbitrator.

Mr Norman's practice extends across many jurisdictions, including Saudi Arabia, United Arab Emirates, Egypt, Turkey, Iraq, Qatar, UK, Ireland, Italy, Greece, Spain, France, Romania, Russia, Nigeria, Kenya, Uganda, South Africa, Japan, Hong Kong, Vietnam and Singapore. In addition, he has spent time in-house with Black & Veatch in the UK, acting as general counsel for the EMEA region.

*Chambers Global* has described Philip Norman as 'very well established in the region [Middle East] and a very confident litigator ... he is excellent and possesses good client awareness' and acknowledges his extensive experience in a wide range of disputes, servicing clients in sectors such as finance, energy and infrastructure. He is also ranked in *The Legal 500* and has received a number of other accolades.

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Leanie van de Merwe specialises in international arbitrations and transnational litigation with a particular focus on construction, engineering and energy matters.

Ms van de Merwe qualified as an attorney in South Africa in February 2011 and started her career as legal counsel and analyst for the Competition Commission of South Africa, where she was responsible for investigating and prosecuting anti-competitive business practices. In 2014, Ms van de Merwe moved to the Middle East to take on a lecturing position

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Edited by the academics who run a course on construction contracts and arbitration at the School of International Arbitration, Global Arbitration Review's *The Guide to Construction Arbitration* brings together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. It has been written by leaders in the field from both the civil and common law worlds and other relevant professions.

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ISBN 978-1-83862-211-4