



# Transnational civil litigation and International commercial arbitration

*Arbitral Process – Provisional and Protective  
Measures in International Arbitration*

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# ARBITRAL PROCESS

## *Party Autonomy*

Parties are free to agree on the rules of procedure that must be applied by the arbitrators (art. 19 UNCITRAL Model Law – Art. 816-*bis* c.p.c.)

- Parties may exercise their **freedom to select the rules of procedure**
  - i. usually, in international arbitration, by referring in their arbitration agreement to the rules of arbitration of an arbitral institution, or
  - ii. by drafting themselves in their arbitration agreement (or in another written agreement concluded before the commencement of the arbitral process) the rules of procedure, or
  - iii. giving the arbitrators the power to use their discretion in determining the rules of procedure

In determining the rules of procedure applicable to the arbitral process parties and arbitrators must respect some mandatory procedural requirements

- Each party must be given the right to be heard and to present his/her case (due process)
- Procedural fairness and equal treatment (art. 18 UNCITRAL Model Law)

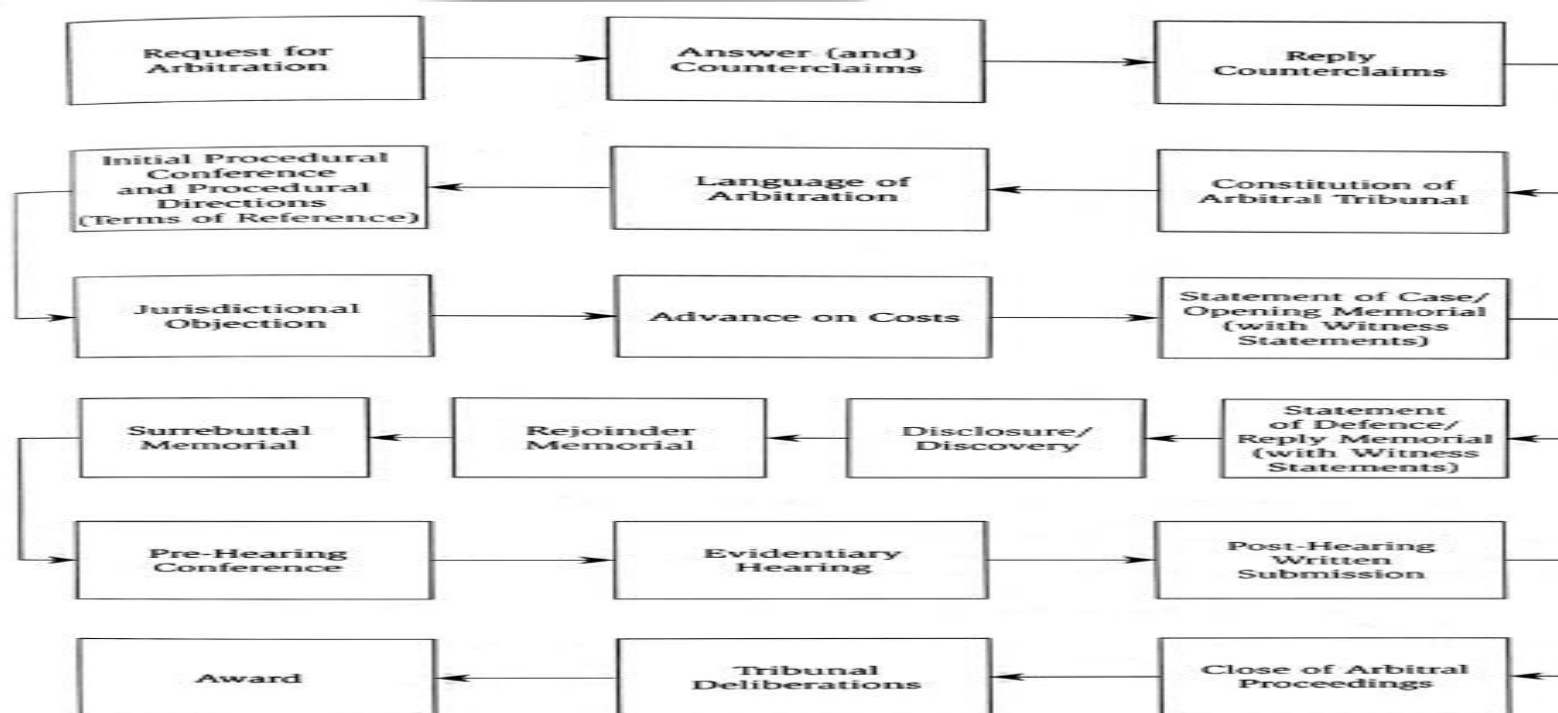


# ARBITRAL PROCESS

## *Party Autonomy*

- Rules of procedure agreed upon by the parties or determined by the arbitrators may refer to
  - i. the number, timing, sequence and format of the written submissions
  - ii. the scope and modalities of the production of documents and the filing by the parties of witness and expert evidence
  - iii. the organization and timing of the evidentiary hearings
- **Adversarial principle** and **equal treatment** of parties imply, in essence
  - balancing the parties' right of defence with the efficient management of the proceedings, in the context of a transparent and foreseeable procedure
  - granting each party an **equivalent procedural** status in respect of, *inter alia*, filing submissions, offering evidence and being present when evidence is gathered commenting on the counterparty's submissions and requests for admission of evidence commenting on any legal, factual or technical issue that the tribunal wishes to raise ex officio or that it believes relevant for its decision

# MAJOR PROCEDURAL STEPS IN INTERNATIONAL ARBITRATION





## REQUEST FOR ARBITRATION

- Even though the procedural rules set out by arbitral institution vary in much relevant aspects, an “average” arbitral proceedings governed by institutional rules of arbitration may be normally commenced by:
  - issuing a **request for arbitration** containing, *inter alia*
    - i. details of each of the parties
    - ii. a description of the nature and circumstances of the parties’ dispute and of the legal basis upon which the claims are made
    - iii. a statement of the relief sought
    - iv. indication of the arbitration agreement
    - v. applicant’s position as regards the place and the language of the arbitration and the composition of the Arbitral Tribunal
    - vi. nomination of an arbitrator if it is so required by the arbitration agreement or by the rules

## ANSWER TO REQUEST FOR ARBITRATION

- Even though the procedural rules set out by arbitral institution vary in much relevant aspects, an “average” arbitral proceedings governed by institutional rules of arbitration may provide that the respondent shall reply to the request of arbitration by:
  - filing an **answer to the request for arbitration** containing, *inter alia*
    - i. name and all other relevant details of the respondent
    - ii. comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made
    - iii. Response to the relief sought
    - iv. observation as regards the place and the language of the arbitration and the composition of the Arbitral Tribunal
    - v. nomination of an arbitrator if it is so required by the arbitration agreement or by the rules
    - vi. Any counterclaim, together with the indication as to the nature and circumstances of the dispute giving rise to the counterclaim and the basis upon which the counterclaim is made



## PROCEDURAL ORDER

- Once the arbitral tribunal was constituted, it is customary for arbitration rules set out by the major arbitral institutions to provide for the issuance of a procedural order by the arbitral tribunal, which usually contains indication as to
  - a. the number of exchanges of written submissions between the parties
  - b. the time limits for those exchanges
  - c. the way in which documentary evidence should be filed
  - d. the way in which witness (including expert witness) evidence should be presented
  - e. the need for organizing a hearing
  - f. To any other measures that may be adopted in respect of disputed procedural matters (bifurcation/consolidation of arbitral proceedings, adding new claims)

# PROVISIONAL AND PROTECTIVE MEASURES IN INTERNATIONAL ARBITRATION

## *Introductory Remarks*

- A great variety of terms, including ‘interim measures’, ‘conservatory measures’, ‘provisional measures’, ‘protective measures’, are used to describe the issue we will be discussing
  - All these terms, however, describes a situation where, prior to the final settlement of the case by the arbitral tribunal, the latter may be asked to render orders which have the aim of protecting and securing the rights of the parties just provisionally, during the time needed for the conclusion of the proceeding

**Provisional and protective measures are instruments to protect the rights of the parties while the final decision on the merits is pending**

- Article 17 (2) Uncitral Model Law offers a general and broad definition of what is meant by provisional or interim measures that may be granted by the arbitral tribunal



## PROVISIONAL AND PROTECTIVE MEASURES

### *Powers of Arbitrators*

#### *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.

## PROVISIONAL AND PROTECTIVE MEASURES

### *Powers of Arbitrators*

- In principle, it is up to the *lex arbitri* to determine if, to what extent and under which conditions arbitrators have the power to grant provisional measures
- When parties opt for institutional arbitration, the rules set out by the chosen institution may provide for the power of arbitrators to grant provisional measures
- If arbitrators do not have the power to grant *interim measures* in connection with disputes referred to arbitration, national state court will have jurisdiction to hear and decide such applications

**If arbitrators are given the power to render provisional measures, does it mean that state courts are prohibited from exercising jurisdiction in relation to an application for interim measures ? Or the either arbitrators and state court may exercise jurisdiction in this matter ?**



## PROVISIONAL AND PROTECTIVE MEASURES

### *National laws provisions*

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- Article **17(1)** and **article 17(J)** of **Uncitral Model Law**
- Article **818** of **Italian code of civil procedure** (c.p.c.)
- Article **1449** and article **1468** of **French Code of civil procedure** (see art. 1506(1) for international arbitration)
- Article **183 (1)** of **Swiss Private International Act** and article **374** of **Swiss code of civil procedure**
- Article **1041** of **German Code of Civil Procedure** (ZPO)
- Article **11** and article **23** of the **Spanish Arbitration Act 2023** and article **722** of the **Spanish Code of Civil Procedure** (Ley de enjuiciamiento civil 2000)

## PROVISIONAL AND PROTECTIVE MEASURES

### *Institutional Rules of Arbitration*

- Article **26** of **UNCITRAL Arbitration**
- Article **26** of **Arbitration Rules of Milan Chamber of Arbitration** (CAM)
- Article **28** of **Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce** (ICC)
- Article **29** of **Swiss Rules of International Arbitration**

**What happens if the seat of arbitration is in a State whose laws prohibit arbitrators from granting provisional measures and parties selected an arbitral institution whose rules give the arbitrators the powers to grant such measures ?**



## PROVISIONAL AND PROTECTIVE MEASURES

### *Emergency Arbitrator*

- In recent times almost all the arbitral institution have inserted in their arbitration rules specific provisions about emergency arbitrators

**Emergency arbitrators may be appointed for granting urgent interim relief before the constitution of an arbitral tribunal**

- ✓ Article 44 of **CAM Arbitration Rules**
- ✓ Article 29 of **ICC Arbitration Rules**

## PROVISIONAL AND PROTECTIVE MEASURES

### *Enforcement*

- Arbitrators lack power to coercively enforce provisional measures absent voluntary compliance by the aggrieved party
- To enforce provisional measures rendered by arbitral tribunals against the will of the aggrieved party assistance from State courts is needed
- As far as **domestic arbitral proceedings** is concerned, national laws may in principle provide for two main ways of enforcing provisional measures:
  - i. Allowing parties to obtain direct and immediate enforcement by state authorities, without the need of any intermediate proceedings (article 819-ter of Italian Code of Civile procedure)
  - ii. Requiring parties to first obtain an exequatur from the State Courts and solely thereafter proceed to actual enforcement (art. 17H and 17I of UNCITRAL Model Law)