Liability for Inappropriate Interim Measures in Commercial Arbitration

Yves HERINCKX
Avocat (Brussels), Solicitor (England and Wales),
Deputy Judge at the Court of Appeal of Brussels[1]

RÉSUMÉ

Une mesure provisoire entraîne-t-elle la responsabilité du requérant si elle cause un préjudice et s'avère ultérieurement avoir été inappropriée ? L'article examine les réponses données à cette question par la loi-type de la CNUDCI, les lois nationales de diverses grandes places d'arbitrage, et des règlements d'arbitrage institutionnels ; il étudie également la jurisprudence arbitrale. À partir de cette analyse comparative, l'article tente de discerner d'éventuelles communautés de vues quant à trois questions : qui a compétence pour établir une responsabilité et accorder des dommages et intérêts ? quelle est la loi applicable à cette responsabilité ? et quel est le critère constitutif de responsabilité ? Quelques suggestions pratiques sont également proposées.

SUMMARY

Does an interim measure give rise to liability of the applicant, if it causes damage and is later found to have been inappropriate? This article reviews the responses given to this question by the UNCITRAL Model Law, the domestic laws of some major arbitration jurisdictions, and institutional arbitration rules; it also looks at the arbitral jurisprudence. On the basis of this comparative analysis the article then attempts to identify common trends with regard to three issues: who has jurisdiction to assess liability and award damages? what is the law that governs the issue? and what is the criterion for liability? A few practical suggestions are also volunteered.

1. Interim measures have become a common feature of commercial arbitration. Most legal systems today accept that state courts and arbitral tribunals have concurrent jurisdiction to grant interim measures: a party to arbitration proceedings who needs an interim measure generally has the option to seek it from the arbitral tribunal or from the courts. In addition, many arbitral institutions now offer the possibility, as long as the arbitral tribunal has not been constituted, to apply to an emergency arbitrator whose sole function will be to rule on an application for an urgent interim measure.

1. www.herinckx.be

By definition, interim measures are not final. They are based only on a *prima facie* assessment of the case. It is entirely possible that the subsequent developments of the case, and in particular the final decision on the merits, will show that an interim measure was not appropriate.

For instance, if a principal unilaterally terminates a distribution agreement because of alleged poor performance by the distributor, the distributor may seek an interim decision ordering the continuation of supplies for the duration of the arbitration proceedings, or the principal may invoke a non-compete clause in the agreement and seek, also on an interim basis, an order prohibiting the former distributor from selling competing products. What if the distributor's application is granted, and it later turns out that termination was justified and that the interim continuation of the contract resulted in a loss of market share by the principal? What if a non-compete interim order is issued, and it is later decided on the merits that the non-compete clause was unenforceable on antitrust grounds? or that the principal's allegations of underperformance were fanciful and were made in bad faith, so that the non-compete clause did not apply because the principal was responsible for an unjustified termination? Does any liability bear on the party who obtained the interim measure?

2. That is the subject of this article: does an interim measure give rise to liability of the applicant, if it causes damage to the other party and is later found to have been inappropriate? The word "inappropriate" (rather than "wrongful" or "unjustified", for instance) is deliberately chosen so as to be as neutral as possible and to avoid any connotation at this stage as to the relevant degree of inadequacy of the measure: it may be that the *prima facie* analysis that supported the measure is later contradicted by the decision on the merits, or that the arbitrators hearing the merits of the case disagree with the judgment call initially made by a court or by an emergency arbitrator in respect of the balance of interests, or even that the applicant obtained the interim measure on the basis of deliberately misleading evidence. The author does not wish the choice of words to pre-empt the analysis of the conditions required to trigger liability.

The analysis will start with a review of those legal rules that exist on the subject, in the UNCITRAL Model Law, in the domestic laws of some major arbitration jurisdictions, and in institutional arbitration rules; it will also look at the available arbitral jurisprudence on the subject. On the basis of this comparative analysis the article will then attempt to identify common trends with regard to three questions: who has jurisdiction to assess liability and award damages? what is the law that governs the issue? and what is the criterion for liability? A few practical suggestions, eventually, will be volunteered.

I. – A comparative analysis

(1) The UNCITRAL Model Law and its legislative history

3. The 1985 version of the UNCITRAL Model Law on International Commercial Arbitration was silent on the question of liability for damages caused by an interim measure that, in retrospect, turns out to have been unwarranted. Article 17 merely

provided that "The arbitral tribunal may require any party to provide appropriate security in connection with such [interim] measure". If security is to be provided, this must mean that in certain circumstances the security may be called, and hence that there may be circumstances where the interim measure leads to liability. Apart from this truism, the 1985 Model Law offered no guidance.

4. Article 17 G of the Model Law was inserted as part of its 2006 revision. It reads:

> *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.*

The Model Law's legislative history is fully documented and available on UNCITRAL's website[2]. It is an essential source for the interpretation of this provision.

5. The process started in 1999 at the 32nd session of the United Nations Commission on International Trade Law. The Commission decided to launch a revision of the Model Law, and listed the issues that appeared to call for improvements. With regard to interim measures, the list only included the question of their enforceability: "It was generally agreed in the Commission that the question of enforceability of interim measures of protection issued by an arbitral tribunal was of utmost practical importance and in many legal systems was not dealt with in a satisfactory way"[3].

6. The Working Group in charge of drafting the amendments to the Model Law added to its tasks the introduction of *ex parte* interim measures. The desirability of *ex parte* interim measures in international arbitration proved highly controversial[4], and the idea only gained support subject to sufficient safeguards being put in place. This included a requirement that the provision of security by the applicant should be mandatory (it was at the discretion of the arbitral tribunal in the case of an *inter partes* application for interim measures)[5], and a principle that the applicant would in any event be bound to indemnify the other party if the measure was later shown to have been unjustified[6]. Initially, a rule about liability for inappropriate interim measures was thus contemplated only in the context of *ex parte* measures, where there is an inherent risk that the tribunal, having heard only one side of the

2. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html.

3. *Report of the United Nations Commission on International Trade Law on the work of its thirty-second session (17 May – 4 June 1999)*, document A/54/17, §§371 and 380.

4. See for instance H. van Houtte, "Ten Reasons Against a Proposal for *Ex Parte* Interim Measures of Protection in Arbitration", *Arb. Int'l*, 2004, p. 85. The controversy continues: when Belgium replaced its arbitration law in 2013 on the basis of the Model Law, the availability of *ex parte* interim measures was one of the very few points on which it chose to depart from the Model Law standard.

5. The final outcome of the Working Group discussions on this point is reflected in Article 17 E of the 2006 Model Law: in the case of *inter partes* measures, the tribunal "may require" security; in the case of *ex parte* measures, it "shall require" security unless it "considers it inappropriate or unnecessary to do so".

6. *Report of the Working Group on Arbitration on the work of its thirty-seventh session (Vienna, 7-11 October 2002)*, document A/CN.9/523, §§23 to 25 and 31.

case, issues orders that it would not have made had it received the benefit of full arguments. It was immediately noted that the determination of that liability should fall within the jurisdiction of the same arbitral tribunal[7].

The words first used were "strict liability"; they were later dropped because "the notion [...] was a term of art that was not understood in all jurisdictions", but the Working Group nevertheless insisted that the new Article should say "shall be liable" rather than "may be liable"[8].

The Working Group could not reach a conclusive view as to the proper test for the liability ground that it was creating: "Concern was expressed as to any draft which suggested that costs and losses arising from an *ex parte* interim measure should depend on the final outcome of the dispute. It was said that the question whether a requesting party should be liable for such losses or damages should be a question left to the discretion of the arbitral tribunal but disassociated from the final decision on the merits of the case. In this respect it was said that, even if a requesting party ultimately received an award in its favour in the arbitration, it might still be liable for losses or damages in respect of an *ex parte* interim measure of protection that was found to be unjustified", and further "It was said that further thought might need to be given to determining what the trigger for liability was, namely whether the provision was intended to cover the situation where the requesting party had acted negligently or fraudulently, or whether it also covered the situation where an arbitral tribunal had acted in error"[9].

7. One year and two sessions later, the Working Group agreed to apply this strict liability regime (the words had gone from the draft text, but the concept remained and the Working Group continued to refer to a strict liability) to both *ex parte* and *inter partes* measures[10]. It decided to instruct the UNCITRAL secretariat to research what liability regimes applied under national laws.

The Working Group attempted again to define the criterion giving rise to liability: "The Working Group considered the circumstances when damages might be payable in respect of an *ex parte* measure. [...] The prevailing view, however, was that the requesting party should be liable only if the measure was ultimately found to have been unjustified. Questions were raised as to the meaning to be attributed to the word 'unjustified' and whether the notion of an 'unjustified' measure should be considered *per se*, or in the light of the results on the merits. It was strongly felt in that respect that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not"[11].

The issue of jurisdiction was addressed again. The Working Group confirmed that the arbitral tribunal would have jurisdiction to deal with a liability claim resulting from interim measures (unless of course the claim originated from a third party not bound by the arbitration agreement), but noted a concern that such a claim "could be made by the responding party well after the final award had been rendered" and a proposal that the revised Model Law "should make it clear that

7. *Ibid.*, §31.
8. *Ibid.*, §66.
9. *Ibid.*, §§65 and 66.
10. *Report of the Working Group on Arbitration on the work of its thirty-ninth session (Vienna, 10-14 November 2003)*, document A/CN.9/545, §§59 and 60.
11. *Ibid.*, §65.

the jurisdiction only applied until the award was decided", by stating that the claim may be brought "at any time during the arbitration proceedings"[12].

8. The UNCITRAL secretariat duly prepared the requested research report, from which the Working Group in particular concluded that there was no reason to distinguish between *ex parte* and *inter partes* measures as far as liability was concerned[13].

The vexing question of the liability test arose once more. Fatigue prevailed, apparently, and the Working Group adopted the somewhat inconclusive wording that is now found in Article 17 G: "It was also suggested that the present conditions set out in paragraph [17 G] might be confusing and the requirement that made liability dependent on the final disposition of the claims on the merits might be inappropriate. In this respect, the Working Group was reminded that, at its thirty-ninth session, it was strongly felt that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not. For these reasons, a first proposal was made to replace the first sentence of paragraph [17 G] by the words 'The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted'. Support was expressed for that proposal"[14].

9. A brave attempt to reopen the question was made the following year, without much effect: "It was pointed out that, as drafted, the text did not appear to envisage liability in the situation where the requirements for the granting of the interim measure had been met but the measure was ultimately found to be unjustified. It was proposed that the words 'the interim measure should not have been granted' be replaced by the words 'the interim measure was unjustified'. That proposal was objected to on the ground that it might be seen as inviting discussion about whether or not the arbitral tribunal had been justified in granting the interim measure and potentially creating liability for the arbitral tribunal itself. After discussion, the proposal was not adopted"[15].

10. The revised Model Law was adopted by UNCITRAL on 7 July 2006, and by the General Assembly of the United Nations on 4 December 2006. The Model Law has now been implemented in more than 60 countries, of which about one fourth have updated their legislation in line with its 2006 revision[16].

11. Despite the sometimes hesitant records of the Working Group, the conclusion to be drawn from the drafting history of Article 17 G is that the Model Law does not create liability on the sole grounds that the subsequent decision on the merits shows the interim measure to have been unjustified[17]. The circumstance that the *prima*

12. *Ibid.*, §§71 and 72.

13. *Report of the Working Group on Arbitration on the work of its fortieth session (New York, 23-27 February 2004)*, document A/CN.9/547, §105.

14. *Ibid.*, §106.

15. *Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3-7 October 2005)*, document A/CN.9/589, §47.

16. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

17. L.E. Graham, "Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)", *in* A.J. van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, 2009 Vol. 14, Kluwer Law International, p. 539, at p. 557; P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, Sweet & Maxwell, 2010, No. 4A-087.

facie assessment of the applicant's legal position, on the basis of which the interim measure was granted, is later contradicted by the final decision, does not imply that the interim measure gives rise to liability. More is needed to trigger liability, for instance a lack of disclosure of critical facts by the applicant when seeking the interim measure, or an unfair overstatement by the applicant of the losses it would face absent the measure requested which led to an ill-informed decision about the risk of irreparable harm. Liability under the Model Law requires some form of improper conduct on the part of the applicant, and is not just a *quid pro quo* for the risk of causing damages that the applicant took in seeking an interim measure. It is a fault-based liability regime, not a risk-based strict liability regime.

(2) National laws and Unidroit

12. National laws, as one would expect, deal with the question in a variety of ways.

A few jurisdictions merely apply Article 17 G of the Model Law without noteworthy change. Article 1695 of the **Belgian** Judicial Code, in its new version effective from 1 September 2013, repeats Article 17 G *expressis verbis* (save for a few inconsequential changes of words due to the unavailability in Belgium of *ex parte* interim measures). The **Hong Kong** Arbitration Ordinance of 2011 simply provides, in its Section 42, that "Article 17 G of the UNCITRAL Model Law, the text of which is set out below, has effect". In **Australia**, Article 17 G of the New South Wales Commercial Arbitration Act 2010 only differs from the corresponding provision of the Model Law to the extent that the Act does not allow for *ex parte* interim measures. The Arbitration Law of 2008 applicable in the **Dubai International Financial Centre** repeats, in its Article 24(1)(e), the text of Article 17 G, save also for the omission of references to *ex parte* interim measures and save that it says "may be liable" where the Model Law says "shall be liable".

Many other countries apply their own local rules, with varying degrees of clarity.

13. The **Swiss** Code of Civil Procedure, which governs domestic arbitrations, provides that the beneficiary of provisional measures will be liable if the measures are "unjustified", subject to the tribunal's discretion if they were sought in good faith. The arbitral tribunal is granted jurisdiction to award damages. Article 374(4) of the Code reads:

> *The applicant is liable for the harm caused by unjustified interim measures. If he or she proves, however, that the application for the measures was made in good faith, the arbitral tribunal or the ordinary court may reduce the damages or relieve the applicant entirely from liability. The aggrieved party may assert his or her claim in the pending arbitration.*[18]

There is no equivalent provision in the Private International Law Act, which applies to international arbitrations. Article 183(3) of the PILA allows the arbitral

18. "Le requérant répond du dommage causé par des mesures provisionnelles injustifiées. Toutefois, s'il prouve qu'il les a demandées de bonne foi, le tribunal arbitral ou l'autorité judiciaire peuvent réduire les dommages-intérêts ou ne pas en allouer. La partie lésée peut faire valoir ses prétentions dans la procédure arbitrale pendante".

tribunal to order security for interim measures, but is silent as to the liability claims that may arise from the measures. The prevailing view is that the applicant incurs liability if the measures later appear to have been unjustified, and that the arbitral tribunal has jurisdiction to hear such claims[19]. A measure is unjustified for these purposes if, based on the circumstances that prevail at the later point in time when the liability issue is assessed, it appears that the measure should not have been granted. This will be the case if the applicant has in the meantime lost the proceedings on the merits. Even if the applicant has prevailed on the merits, liability may still arise if the applicant has for instance obtained an unjustified measure by improperly withholding relevant information as to the assessment of the urgency of the matter[20].

14. In **Germany**, the Code of Civil Procedure (*Zivilprozessordnung* or ZPO) deals comprehensively with the issue. Article 1041(4) of the ZPO provides that:

> *If a measure ordered under subsection 1 proves to have been unjustified from the outset, the party which obtained its enforcement is obliged to compensate the other party for damages resulting from the enforcement of such measure or from its providing security in order to avoid enforcement. This claim may be brought in the pending arbitral proceedings.*[21]

This rule was introduced in the ZPO with effect on 1 January 1998, and predates the 2006 revision of the Model Law. It extends to arbitration a principle that applies to German judicial procedure generally; under Article 954 of the ZPO, an applicant for an interim measure before the courts will be liable if it later turns out that the measure was unjustified from the outset. The same terms "unjustified from the outset" (*als von Anfang an ungerechtfertigt*) are used in both Articles.

If a judicial authority issues an interim measure in a context where the main proceedings are subject to arbitration, jurisdiction on the subsequent liability claim that may result from the interim measure also belongs to the arbitral tribunal[22].

15. The **French** decree of 13 January 2011 on arbitration expressly allows the arbitral tribunal to order conservatory and interim measures[23], but is silent on the consequences in the event that these measures are later found unjustified.

---

19. G. von Segesser and Chr. Boog, "Interim Measures", *in* E. Geisinger and N. Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., Kluwer Law International, 2013, p. 107, at p. 119; Chr. Boog, "Commentary on Chapter 12 PILS, Article 183 (Procedure: provisional and conservatory measures)", *in* M. Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, p. 118, at p. 120; M. Wirth, "Interim or Preventive Measures in Support of International Arbitration in Switzerland", *ASA Bull.*, 2000, p. 31, at p. 38; V.V. Veeder, "The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process", *in* A.J. van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Vol. 12, Kluwer Law International, p. 242, at p. 265.

20. Chr. Boog, *supra* n. 19.

21. "Erweist sich die Anordnung einer Maßnahme nach Absatz 1 als von Anfang an ungerechtfertigt, so ist die Partei, welche ihre Vollziehung erwirkt hat, verpflichtet, dem Gegner den Schaden zu ersetzen, der ihm aus der Vollziehung der Maßnahme oder dadurch entsteht, dass er Sicherheit leistet, um die Vollziehung abzuwenden. Der Anspruch kann im anhängigen schiedsrichterlichen Verfahren geltend gemacht werden".

22. R.H. Kreindler and J. Schäfer, "§1033 – Arbitration Agreement and Interim Measures by Court", *in* K.-H. Böckstiegel *et al.* (eds), *Arbitration in Germany: The Model Law in Practice*, Kluwer Law International, 2007, p. 168, No. 31.

23. Article 1468 of the Code of Civil Procedure, inserted by Decree 2011-48 of 13 January 2011.

The general law in respect of liability for interim measures ordered by judicial authorities was settled some years ago by the supreme court. In a judgment of 24 February 2006 rendered in plenary assembly, the *Cour de cassation* decided that "the enforcement of a judicial decision which is provisionally enforceable takes place at the risks of the party that pursues the enforcement, subject to the obligation for that party to compensate the ensuing damages if the title is subsequently modified"[24]. The case arose from the sale of a gas station, where the purchasers invoked a non-compete undertaking and obtained an interim injunction prohibiting the sellers from continuing a trade in fuel. The injunction was withdrawn on appeal in summary proceedings; on the merits, it was later determined that the non-compete clause was limited to the gas business and did not extend to fuel. The sellers claimed damages on the basis of a strict liability theory, and the purchasers raised as a defence that there could be no liability in the absence of fault on their part. The *Cour de cassation* unambiguously opted for the strict liability approach: the party which enforces an interim injunction at a time when it is still uncertain whether the ultimate outcome of the dispute will vindicate that injunction may perhaps not be committing a tort, but he assumes a risk and must bear the consequences.

A later judgment of the supreme court confirmed the principle in a situation where the interim injunction had not been reversed on appeal in summary proceedings, but had lapsed by reason of a subsequent contrary decision on the merits[25]. The case concerned the award of a licence to operate a local taxi and ambulance business. A competitor of the successful applicant sought the annulment of the licensing process and obtained on an interim basis an order of suspension of the licence, which resulted in the interruption of the operations of the licence holder. The annulment claim was subsequently dismissed, and the *Cour de cassation* held that this was sufficient to make the competitor liable to indemnify the licence holder for the business lost during the suspension period.

These cases rely on a statutory provision which now appears in Article L111-10 of the Code of Civil Enforcement Procedures: "enforcement may be pursued up to its term pursuant to a title which is provisionally enforceable. The enforcement is pursued at the creditor's risks. The creditor shall make the debtor whole, in kind or by equivalent, if the title is subsequently modified"[26].

16. A judgment of 23 April 2013 of the French supreme court, in the case of *Kura Shipping v Delta Lloyd Schadeverzekering*, touches on the question of the arbitrators' jurisdiction to grant damages for an unjustified interim measure ordered by a State court[27]. The dispute related to a sale of raw sunflower oil, to be transported by sea

24. "Attendu que l'exécution d'une décision de justice exécutoire à titre provisoire n'a lieu qu'aux risques de celui qui la poursuit, à charge par lui, si le titre est ultérieurement modifié, d'en réparer les conséquences dommageables"; Cass., *ass. plén.*, 24 February 2006, appeal No. 05-12.679, *Alain X v Époux Y*, with report of judge Blatman and opinion of adv. gen. de Gouttes, www.courdecassation.fr.

25. Cass., 2nd civ. ch., 9 September 2010, appeal No. 09-68.120, *X v Ambulances et Taxis des 4 Villages*, www.legifrance.gouv.fr.

26. "[...] l'exécution forcée peut être poursuivie jusqu'à son terme en vertu d'un titre exécutoire à titre provisoire. L'exécution est poursuivie aux risques du créancier. Celui-ci rétablit le débiteur dans ses droits en nature ou par équivalent si le titre est ultérieurement modifié". The Code was created by Ordinance 2011-1895 of 19 December 2011.

27. Cass., 1st civ. ch., 23 April 2013, appeal No. 12-12.101, *Kura Shipping v Delta Lloyd Schadeverzekering*, *Rev. arb.*, 2013, p. 541: "Attendu qu'en statuant ainsi, par des motifs impropres

from Argentina to France. Upon arrival the oil appeared spoiled. The purchaser alleged that the oil's pollution was due to an inadequate cleaning of the ship's tanks by the maritime carrier, and obtained from a French court the preliminary authorisation to arrest the ship. On the merits, both the carrier and the seller of the oil subsequently claimed damages for wrongful arrest (in the case of the seller, because the ship was due to sail on and deliver part of the oil cargo to other customers). The court of appeal decided that the carrier was liable for the pollution of the sunflower oil, but that the arrest of the ship was nevertheless abusive and that the purchaser was liable in damages to the carrier and the seller. The court of appeal took the view, despite the arbitration clause in the sale agreement, that it had jurisdiction because the damage claim derived from the arrest of the ship and not from the sale of the oil. On this last point, and in relation only to the damage claim of the seller, the supreme court vacated the judgment of the court of appeal, on the grounds that the arbitration clause did not manifestly rule out the arbitrators' power to deal with the consequences of a wrongful arrest of the ship which aimed at protecting the rights of the purchaser under the sale agreement.

The case must be read in the context of the specific French approach to the competence-competence principle. The supreme court did not decide that the determination of liability and damages belonged to the jurisdiction of the arbitrators; rather, it said that this question of jurisdiction had to be determined first by arbitrators, and that the court of appeal had no power to look at the question at this stage because it was not manifest that arbitrators would lack jurisdiction. In France, the negative effects of the competence-competence principle mean that a court, when faced with an arbitration defence, may not itself examine whether the alleged arbitration agreement is valid and applicable, and must instead leave it to arbitrators to decide on their own jurisdiction, unless the arbitral tribunal has not been constituted yet and the arbitration agreement is manifestly invalid or inapplicable[28].

Kura Shipping therefore does not mean that arbitrators necessarily have jurisdiction to hear a claim for damages resulting from interim measures ordered by a court; technically, it merely means that the argument for their jurisdiction is not manifestly hopeless. However, given that this hurdle was passed in circumstances where the connection between the arbitration agreement and the interim measure was remote (the measure was not taken against the seller of the sunflower oil but against the third-party maritime carrier, and it was taken outside the context of any pending or prospective arbitration), and where the question appeared to revolve around a point of law rather than facts, one can infer from *Kura Shipping* that French law recognises a broad jurisdiction to arbitrators in respect of damages arising from interim measures.

à établir le caractère manifeste de la nullité ou de l'inapplicabilité de cette clause, seul de nature à faire obstacle à la compétence prioritaire des arbitres pour statuer sur l'existence, la validité et l'étendue de la convention d'arbitrage, laquelle soumettait à l'arbitrage tout litige en rapport avec le contrat de vente, sans exclure de manière manifeste la possibilité pour les arbitres de statuer sur les conséquences dommageables pour le vendeur d'une saisie conservatoire abusive de navire ayant eu pour objet de garantir l'exécution de ses obligations envers l'acheteur saisissant, la cour d'appel a violé le principe [compétence-compétence]".

28. Article 1448 of the Code of Civil Procedure; Ph. Fouchard, E. Gaillard and B. Goldman, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer, 1999, No. 672; Chr. Seraglini and J. Ortscheidt, *Droit de l'arbitrage interne et international*, Lextenso éditions, 2013, No. 166 to 171.

17. The **English** Arbitration Act 1996 does not by default give arbitrators the power to grant interim relief. They only have that power if the parties have agreed to give it to them[29]. Logically, the Act is thus silent on the consequences of an unjustified interim measure.

18. In the case of interim injunctions sought from the courts, the principle is that an injunction will not be issued unless the claimant voluntarily gives an undertaking (often called "cross-undertaking") in damages. This is currently set out in a Practice Direction that supplements Rule 25 of the Civil Procedure Rules. Paragraph 5.1(1) of the Practice Direction reads "Any order for an injunction, unless the court orders otherwise, must contain [...] an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay". Paragraph 5.1A adds that "when the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order". A standard wording for the undertaking is included as an annex to the Practice Direction: "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make". The court may require the undertaking to be backed by security.

The courts do not directly have the power to impose an undertaking upon the claimant, which remains free not to give it – but of course the power to withhold the injunction as long as an undertaking is not forthcoming is a very effective lever. The undertaking is given to the court and not to the respondent; this explains that the court retains a discretion ultimately not to enforce the undertaking if it would be inequitable to do so, even if the injunction has in the meantime proved unjustified. Interestingly, the technique of the voluntary undertaking has developed because English law does not otherwise provide a cause of action to compensate the person who suffers losses as a result of an unjustified interim injunction. The law was set out as follows by the House of Lords in *F. Hoffmann La Roche v Secretary of State*:

> *An interim injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined [...] [A]t the time of the application it is not possible for the court to be absolutely certain that the plaintiff will succeed at the trial in establishing his legal right to restrain the defendant from doing what he is threatening to do. If he should fail to do so the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be* damnum absque injuria *for which he could not recover damages from the plaintiff at common law. So unless some other means is provided in this event for compensating the defendant for his loss there is a risk that injustice may be done.*
>
> *It is to mitigate this risk that the court refuses to grant an interim injunction unless the plaintiff is willing to furnish an undertaking [...]*

29. Arbitration Act 1996, s. 39(4).

The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so[30].

The condition for a subsequent order to pay damages is that the interim injunction was wrongly granted, *ie* that with hindsight, given the outcome of the case on the merits, it ultimately appears that the claimant was not entitled to the relief that he obtained on an interim basis. No fault on the part of the claimant is required[31].

If the common law does not give a cause of action to a respondent who suffers from an injunction wrongly granted by a court, it must follow that there is no cause of action either if the injunction was wrongly granted by an arbitral tribunal. The same logic should therefore push an arbitral tribunal sitting in England[32] to make any interim relief subject to the condition that the claimant provides an appropriate undertaking in damages[33].

19. In the **United States**, Rule 65 of the Federal Rules of Civil Procedure applies equally to arbitration[34], and provides that a court (or an arbitral tribunal) "may issue a preliminary injunction or a temporary restraining order only if the movant [the applicant] gives security in an amount that the court [the tribunal] considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained".

The rationale is the same as in England: in the words of the Supreme Court, "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond"[35]. A security is therefore

30. *F. Hoffmann La Roche v Secretary of State* [1975] AC 295 at 360 and 361 *per* Lord Diplock. See also *SmithKline Beecham Plc, GlaxoSmithKline UK Ltd and others v Apotex Europe Ltd and others* [2006] EWCA Civ 658 (23 May 2006) at paras. 23 to 26, 57, 109, and [2005] EWHC 1655 (Ch) (26 July 2005) at paras. 25, 38, 42 to 44, 74 and 78.

31. *Yukong Line Ltd (SK Shipping Limited) v Rendsburg Investments Corporation and others* [2000] EWCA Civ 358 (21 December 2000) at paras. 32 to 34; *SmithKline Beecham Plc, GlaxoSmithKline UK Ltd and others v Apotex Europe Ltd and others* [2005] EWHC 1655 (Ch) (26 July 2005) at para. 44. With regard to the situation where the applicant ultimately prevails on the merits, but on other grounds than those based on which the interim measure was granted, see *Dadourian Group International Inc and others v Simms and others* [2009] EWCA Civ 169 (13 March 2009).

32. The words "sitting in England" are used here for the sake of brevity; this article will show later (section II(2)) that an English seat of the tribunal does not necessarily lead to the application of English law to issues of liability.

33. J. Lew, L. Mistelis and St. Kröll, "Interim and Conservatory Measures", *in* J. Lew, L. Mistelis *et al.* (eds), *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 585, para. 23-81; P. Turner and R. Mohtashami, *A Guide to the LCIA Arbitration Rules*, Oxford University Press, 2009, para. 6.138.

34. Pursuant to Rule 81(a)(6) of the Federal Rules of Civil Procedure.

35. *W.R. Grace & Co. v Rubber Workers*, 461 U.S. 757 (1983), 770 n. 14; *Russell v Farley*, 105 U.S. 433 (1881), 437, 438: "Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable

necessary to permit a later claim in damages. By contrast with the English undertakings in damages, the US security is provided – usually in the form of a bond – for a fixed amount, which operates as a cap on the applicant's liability: "a party wrongfully enjoined has recourse only against the bond"[36]; "the theory underlying [Rule 65(c) is] that the applicant [for the injunction] consent[s] to liability up to the amount of the bond, as the price for [the injunction]"[37].

The courts (or arbitral tribunals) have a discretion not to require security, but "[w]hile there are exceptions, the instances in which a bond may not be required are so rare that the requirement is almost mandatory"[38]. In *Doctor's Associates*, the district court had compelled the parties to arbitrate and issued an anti-suit injunction enjoining the defendants from prosecuting proceedings before the courts of Illinois, and had not required security. The Court of Appeals confirmed that dispensing with security was proper in the circumstances because the defendants "have not shown that they will likely suffer harm absent the posting of a bond"[39]. The strength of the applicant's case, and the resulting likelihood that the interim measure will be vindicated by the decision on the merits, can also justify not to require security: "it makes sense to consider the likelihood that this Court or an appellate court will find that an injunction should not have issued in this case. The greater plaintiff's likelihood of success on the merits, the lower the probability that an injunction in plaintiff's favor will later be determined to have been issued in error, and consequently that [defendant] will be found to have wrongfully suffered harm"[40].

20. The wrongfulness of the interim relief, which entitles the defendant to recover damages up to the amount of the security, depends on the final decision

---

and just [...] the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court as a court of equity, and has been exercised from time immemorial".

36. *Sprint Communications Company L.P. v Cat Communications International, Inc*, 335 F.3d 235 (3rd Cir. 2003), para. 16. See also *Nokia Corporation v InterDigital, Inc. and others*, 645 F.3d 553 (2nd Cir. 2011); *Mead Johnson & Co. v Abbott Laboratories*, 209 F.3d 1032 (7th Cir. 2000), para. 3; *Continuum Co. v Incepts, Inc.*, 873 F.2d 801 (5th Cir. 1989) (where the Court of Appeals nevertheless required the applicant to "fil[e] an undertaking with this court that the amount of the bond will not limit the amount of damages for which it might be liable, should it be liable for any, as a result of a wrongful issuance of the injunction").

37. *Blumenthal v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2nd Cir. 1990), para. 27.

38. *Frank's GMC Truck Center, Inc. v General Motors Corporation*, 847 F.2d 100 (3rd Cir. 1988), 103.

39. *Doctor's Associates, Inc. v Donald A. Stuart and Martin Schwarze*, 85 F.3d 975 (2nd Cir. 1996).

40. *Eastman Kodak Co. v Collins Ink Corp.*, 821 F. Supp. 2d 582 (W.D.N.Y. 2011), 590. See also *Rex Medical L.P. v Angiotech Pharmaceuticals (US), Inc.*, 754 F.Supp.2d 616 (S.D.N.Y. 2010), 627: "I have already concluded that Angiotech is highly unlikely to prevail in arbitration; that militates against the posting of any bond [...] if the arbitrator rules as this Court believes he will rule, then the 'damage' to Angiotech is nonexistent" (the court then, somewhat surprisingly, estimated the probability of ultimate success of Angiotech at 5% and required a bond in an amount equal to 5% of the losses that Angiotech alleged it would suffer as a consequence of the injunction); *New York City Triathlon, LLC v NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305 (S.D.N.Y. 2010), 345.

on the merits: a preliminary injunction is wrongful for the purposes of Rule 65(c) if it is ultimately found that the defendant is entitled to do what he was enjoined from doing, or is not obliged to do what he was ordered to do on an interim basis. It may well be that granting the interim relief was, at the time and on the basis of the limited evidence then available, the right thing to do and that the judge who issued the injunction made a wise exercise of his discretion; finding the injunction wrongful does not imply that the judge who issued it made a wrong judgment call. This criterion was most clearly expressed by the Court of Appeals for the Second Circuit in *Blumenthal v Merrill Lynch*:

> *A party has been "wrongfully enjoined" under Fed.R.Civ.P. 65(c) if it is ultimately found that the enjoined party had at all times the right to do the enjoined act. The conclusion that an injunction later dissolved was "wrongful", in the sense that the party had the right to do the enjoined act, does not necessarily imply that the district court abused its discretion in granting the relief in the first place. "[A] temporary injunction may be wrongfully issued although the issuance may not have been improvident as an abusive exercise of the trial court's discretion." The focus of the "wrongfulness" inquiry is whether, in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have [been] issued in the first instance. This conclusion is supported by the plain meaning of Rule 65(c) and the theory underlying it, that the applicant "consent[s] to liability up to the amount of the bond, as the price for [the injunction]". The injunction bond is designed "to cover any damages that might result if it were later determined that [the applicant] was not entitled to an injunction".*[41]

Blumenthal was about an alleged non-compete obligation of two employees who resigned from Merrill Lynch and joined a competitor. Merrill Lynch obtained a preliminary injunction preventing Blumenthal and his colleague from doing business with their former Merrill Lynch customers. The arbitral tribunal dealing with the merits of the dispute later decided that the two former employees had the right to continue doing business with these customers. The Court of Appeals concluded that the injunction was therefore "wrongful" and that Blumenthal and his colleague were entitled to recover damages from the bond posted by Merrill Lynch. The Court also determined that the allocation of damages fell within its jurisdiction rather than that of the arbitrators: "A motion for wrongful injunction against a bond under Fed.R.Civ.P. 65(c) is a separate and distinct claim from the merits of the underlying controversy, and was not even available until after the arbitrators decided that Merrill Lynch was not entitled to injunctive relief".

The same criterion has been adopted by Courts of Appeals for other Circuits[42].

---

41. *Blumenthal v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2nd Cir. 1990), internal citations omitted. See also A.S. Rau, "Provisional Relief in Arbitration: How Things Stand in the United States", *J. Int'l Arb.*, 2005, p. 1, at p. 35.

42. *Nintendo of America, Inc. v Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir. 1994), para. 27 and n. 4: "a party has been wrongfully enjoined within the meaning of Rule 65(c) when it turns out the party enjoined had the right all along to do what it was enjoined from doing", and "We prefer the wording of Rule 65(c), which speaks in terms of a party who has been 'wrongfully enjoined', rather than the wording in some cases in other circuits which refers to an injunction as having been

21. The Supreme Court added a refinement to this criterion in *Grupo Mexicano de Desarrollo*, in which it held that an injunction can be wrongful and give rise to damages even where the applicant later prevails on the merits, if the injunction was unlawful in any event irrespective of the final outcome. The case related to a default of payment by Grupo Mexicano de Desarrollo on its debt securities; creditors accelerated the debt and obtained a preliminary injunction freezing the assets of the debtor. The creditors subsequently prevailed on the merits of the debt and were granted a permanent injunction, but Grupo Mexicano de Desarrollo argued that as a matter of law a freezing injunction cannot be ordered on a preliminary basis pending adjudication of a monetary contract claim. The Supreme Court agreed:

> *in the present case [...] (according to petitioners' claim) the substantive validity of the final injunction does not establish the substantive validity of the preliminary one. [...] it is the essence of petitioners' claim that such an injunction can be issued only after the judgment is rendered. If petitioners are correct, they have been harmed by issuance of the unauthorized preliminary injonction – and hence should be able to recover on the bond – even if the final injunction is proper.*[43]

The same analysis was expressed by the Court of Appeals in *Slidell*, citing *Grupo Mexicano de Desarrollo*; the Court of Appeals, however, declined to apply this theory in the particular case and suggested that there will not be many instances of application:

> *If a party prevails on the merits of the case, a preliminary injunction issued on its behalf could not have been wrongful unless the basis for arguing that the preliminary injunction was wrongfully issued is independent of the claim on the merits. This is not one of those rare cases.*[44]

22. State law generally follows a similar approach. In New York, for instance, Rule 6312(b) of the Civil Practice Law and Rules provides that:

> *[...] prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction [...]*[45]

23. **Mexico**, when amending its arbitration law in 2011, adopted a most unusual approach. Article 1480 of the Commercial Code now provides that unjustified

---

'wrongfully issued'. A court that complies with the applicable law in issuing a preliminary injunction does not 'wrongfully' issue it".

Global NAPs, Inc. v Verizon New England, 489 F.3d 13 (1st Cir. 2007), para. 46 and n. 7: "a party is wrongfully enjoined when it had a right all along to do what it was enjoined from doing", and "an injunction can be 'wrongful' for Rule 65(c) purposes even when the initial issuance of the injunction was proper".

See also *Slidell Inc. v Millennium Inorganic Chemicals Inc.*, 460 F.3d 1047 (8th Cir. 2006).

43. *Grupo Mexicano de Desarrollo, S.A. v Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), 315.

44. *Slidell Inc. v Millennium Inorganic Chemicals Inc.*, 460 F.3d 1047 (8th Cir. 2006), para. 48.

45. Rule 6312 is made applicable to court injuctions in support of arbitration by Rule 7502(c).

interim measures give rise to liability not only for the party that requested the measure, but also for the arbitrators who ordered it:

> *The person who demands an interim measure, as well as the arbitral tribunal that issues such measure, are liable for the losses and damages caused by it.*[46]

It seems unclear whether arbitration rules, or terms of reference, can validly exclude the arbitrators' liability in this respect[47].

24. Other jurisdictions merely provide for security as a possible condition to granting interim measures, but say nothing more as to liability and actual calls on the security. This is the case in Austria[48] and in Sweden[49]; this is also the approach followed by the draft arbitration law currently considered by the Dutch Parliament[50].

25. The **Unidroit** Principles of Transnational Civil Procedure, adopted in 2004, state that "An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation"[51]. No details are given as to the test for liability; on the contrary, the commentary indicates that this question should be left to the law of the forum[52].

(3) Institutional arbitration rules

26. Most institutional arbitration rules provide that arbitral tribunals have the power – at their discretion – to require security as a condition to issuing interim measures, but say nothing as to the substantive liability regime that may or may not attach to an inappropriate interim measure. This is the case of the ICC 2012 Rules of Arbitration[53], the LCIA Arbitration Rules (not very clearly in their 1998 version,

46. "De toda medida cautelar queda responsable el que la pide, así como el Tribunal Arbitral que la dicta, por consiguiente son de su cargo los daños y perjuicios que se causen".

47. Cl. von Wobeser, "Mexico" chapter, *in* K. Nairn and P. Heneghan (eds), *Arbitration World, The European Lawyer Reference Series*, 4th ed., 2012, p. 573, at p. 578.

48. Article 593(1), *in fine*, of the Code of Civil Procedure: "The arbitral tribunal may require any party to provide appropriate security in connection with such measure" ("Das Schiedsgericht kann von jeder Partei im Zusammenhang mit einer solchen Maßnahme angemessene Sicherheit fordern"). Article 593(5) adds that the court ruling on the enforcement of the measure has no jurisdiction to rule on claims for damages, from which it is inferred that the power to do so belongs to the arbitral tribunal; see A. Yesilirmak, "Provisional and Protective Measures under Austrian Arbitration Law", *Arb. Int'l*, 2007, p. 593, at p. 597.

49. Section 25, *in fine*, of the Swedish Arbitration Act of 1999: "The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure".

50. Article 1043b(3) of the draft act on the modernisation of arbitration law: "The arbitral tribunal [...] may demand that security is provided by either party relating to the interim measure" ("Het scheidsgerecht [...] kan in samenhang met de voorlopige voorziening van iedere partij het stellen van afdoende zekerheid verlangen").

51. Principle 8.3.

52. Paragraph P-8F.

53. Article 28(1): "The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party".

and without any ambiguity in their draft 2014 revision)[54], the WIPO Arbitration Rules[55], and the ICDR International Arbitration Rules[56], for instance.

27. In some rarer cases the rules add that the arbitral tribunal has jurisdiction to deal with liability claims arising from interim measures. The ICC 2012 Rules of Arbitration, for instance, provide in connection with measures taken by an emergency arbitrator that "The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including [...] any claims arising out of or in connection with the compliance or non-compliance with the order"[57]. The Swiss Rules of International Arbitration, since their 2012 revision, contain a similar provision[58].

28. The UNCITRAL Arbitration Rules of 2010, in keeping with the revised Model Law, provide in their Article 26(8) that "The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings". Two differences between the wording of the Model Law and that of the Rules, however, are worth noting.

29. Firstly, the words "then prevailing" do not appear in the Model Law and were added in the Rules. This is the result of a continuation of the debate, within the UNCITRAL Working Group, about the criterion for liability. As indicated above (para. 6 to 9), the Working Group had great difficulties reaching a clear and conclusive consensus on this point when working on the draft Model Law. Two diverging views continued to be expressed within the Working Group on the occasion of the drafting of the revised Rules: one view held that a successful applicant for interim measures should not be held liable for damages if it had "disclosed in good faith all the information and documents in its possession"; another view was that the applicant "took the risk of causing damage" and should

54. Article 25.2 of the 1998 Rules; see P. Turner and R. Mohtashami, *supra* n. 33, para. 6.139 as to the lack of clarity of the rules on this point. Article 25.1, last paragraph, of the draft 2014 revision provides for both security and cross-indemnity: "Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration".

55. Article 46(a): "The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party".

56. Article 21(2): "Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures"; Article 37(7): "Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security". Equivalent language appears in Rules 37(b) and 38(g) of the AAA Commercial Arbitration Rules, and in Articles 6(6) and 24(2) of the draft 2014 revision of the ICDR International Arbitration Rules.

57. Article 29(4). See also the draft 2014 revision of the LCIA Arbitration Rules quoted in n. 54.

58. Article 26(2): "Interim measures may be granted in the form of an interim award. The arbitral tribunal shall be entitled to order the provision of appropriate security". Article 26(4), inserted on the occasion of the 2012 revision of the Swiss Rules, adds that "The arbitral tribunal may rule on claims for compensation for any damage caused by an unjustified interim measure or preliminary order"; the scope of this provision, however, extends only to the issue of jurisdiction of the arbitrators and does not relate to the substance of a possible liability (Ph.A. Habegger, "The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes", *ASA Bull.*, 2012, p. 269, para. 6.4).

bear the consequences if the measure was later found not to have been justified[59]. The alternatives were clearly set out: fault-based liability under the first view, or risk-based strict liability under the second. The strict liability approach was rejected when the Working Group refused a proposal to add a provision to the effect that the determination of liability should be made "in light of the outcome of the case"[60]. At the session that finally closed the discussion on the subject, the Working Group again rejected the strict liability option: there was a proposal to replace the words "the measure should not have been granted" by the words "the measure was not justified", in order "to better cater for the situation were a measure was granted in compliance with all conditions, but was later found to cause damages", and this proposal was not accepted; rather, the Working Group decided to add the words "then prevailing", which make it clear that liability depends on the situation at the time the measure was granted, and not on the subsequent award on the merits[61]. The UNCITRAL Arbitration Rules, therefore, establish a fault-based liability regime in respect of interim measures; the mere fact that an interim measure turns out to have been unjustified, given the later outcome on the merits, is insufficient to trigger liability[62]. The Rules are consistent in this respect with the Model Law. In practice, one can expect that liability will only arise in fairly extreme circumstances.

The choice of words, however, is unfortunate: "then" is ambiguous and can be read as referring either to the later time when the tribunal determines liability or to the earlier time when the measure was granted, depending on whether the reader links the words "in the circumstances then prevailing" to the proposition "the arbitral tribunal later determines" or to the proposition "the measure should not have been granted". Given the surrounding discussions, there should be no doubt that "then" refers to the time of issue of the interim measure[63]. The grammar of the sentence, also, would be awkward if it was to be read as meaning that "in the circumstances prevailing when the arbitral tribunal later determines liability, the measure should not have been granted"[64]. The ambiguity is nevertheless problematic: a commentator who was closely involved with the revision of the

59. *Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007)*, document A/CN.9/641, §49; see also *Note by the Secretariat*, 10 December 2009, document A/CN.9/WG.II/WP.157/Add.1, §28.

60. *Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009)*, document A/CN.9/669, §116.

61. *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session (New York, 1-5 February 2010)*, document A/CN.9/688, §§92 to 95.

62. D.D. Caron and L.M. Caplan, *The UNCITRAL Arbitration Rules, A Commentary*, 2nd ed., Oxford University Press, 2013, p. 528; Th.H. Webster, *Handbook of UNCITRAL Arbitration Arbitration: Commentary, Precedents and Models for UNCITRAL Based Arbitration Rules*, Sweet & Maxwell, 2010, No. 26-97; P. Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules*, Sweet & Maxwell, 2013, No. 26-059 and 26-060. Caron and Caplan also note, *eod. loc.*, that security provided under Article 26(6) of the 2010 UNCITRAL Rules covers the costs and damages that arise in connection with the impact of the interim measure, in contrast with the liability regime of Article 26(8) which depends on the lack of justification of the measure. Webster does not make that distinction and writes (No. 26-92) that the amount of the security to be provided under Article 26(6) should match the amount that the applicant may be required to pay under Article 26(8).

63. Th.H. Webster, *supra* n. 62, No. 26-97.

64. The word "alors" in the French version of the Rules conveys the same ambiguity, and the French grammar would be equally awkward if the word referred to the time of the later decision on liability.

Rules supports the opposite interpretation of Article 26(8) to that proposed above, and wrote that "The provision is carefully worded [...] to make clear that the original grant of interim measures is not impugned: what is required is a fresh determination of the situation in the light of the circumstances which the tribunal possesses at that later point in time", and "An example would be a case where the underlying claim on the merits is ultimately held to have been unfounded"[65].

30. The second difference is the replacement of the words "shall be liable" (in the Model Law) by the words "may be liable" (in the Rules). This is odd. The initial drafts of the revised Rules retained the words "shall be liable"[66]. A new draft produced by the Secretariat after the February 2008 session of the Working Group suddenly contained the words "may be liable"; no reason was given, and on the contrary the comment to this new draft continued to state (as it did in respect of the earlier drafts) that the relevant provision was "modelled on the provisions on interim measures contained in chapter IV A of the Model Law"[67]. The same commentator wrote that "This was to reflect that liability must be founded on a law (and not all national laws provide for such liability) while the function of the corresponding provision in the Rules was primarily to serve as the vehicle through which that liability, when provided for by law, would deploy its effects"[68]. This has the merit of providing an explanation for something that would otherwise remain a mystery; the explanation does not entirely convince, however, because it is difficult to reconcile with the clear wish of the Working Group, discussed above in paragraph 29, to set out substantive rules with regard to the liability criterion[69].

31. Other arbitration rules are silent on the questions of liability and security. The ICSID Arbitration Rules[70] and the Belgian CEPANI rules[71], in particular, do not contain any express provision in this respect.

(4) The arbitral jurisprudence

32. The small number of published awards dealing with issues of liability for an interim measure does not make it possible to identify a consistent practice in this respect. Most of these awards only dealt with the question whether, at the time of ordering interim measures, security should be required from the applicant. Security

65. G. Petrochilos, "Interim Measures under the Revised UNCITRAL Arbitration Rules", *ASA Bull.*, 2010, p. 878, at p. 886. About the lack of clarity of the Model Law and the Rules in this respect, see J. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, p. 639.

66. *Note by the Secretariat*, 6 December 2006, document A/CN.9/WG.II/WP.145/Add.1, p. 12; *Note by the Secretariat*, 30 November 2007, document A/CN.9/WG.II/WP.149, p. 8.

67. *Note by the Secretariat*, 6 August 2008, document A/CN.9/WG.II/WP.151/Add.1, p. 9 and §14.

68. G. Petrochilos, *supra* n. 65.

69. Also, alternative language had been suggested that "did not deal with the conditions triggering liability for costs and damages, and left those aspects to be dealt with under applicable law", and was not adopted by the Working Group: *Report [...] of its fiftieth session*, document A/CN.9/669, §117. Caron and Caplan (*supra* n. 62) reject the idea that Article 26(8) merely refers the conditions triggering liability to the applicable law.

70. Rule 39 of the ICSID Arbitration Rules allows ICSID tribunals to grant provisional measures, but contains no mention of security in that respect.

71. Articles 26 and 27 of the 2013 CEPANI Arbitration Rules.

was generally refused – save in two cases where the interim measure consisted in an order for payment of a provision on account of the main claim, but even then the arbitrator decided in one of these cases that the interim measure should be obeyed first and that the security could be provided later. The available sample, however, is not statistically meaningful and does not permit to infer any general trend[72].

33. ICC case 12196 concerned a claim for the payment of supplies delivered by the Finnish claimant to the Indian respondent. The seat of the arbitration was in Singapore, the governing law of the dispute is not reported. During the arbitration, an Indian court issued a consent order requiring the respondent to deposit part of the amount in dispute with the court. The claimant then sought an interim award ordering the immediate release to its benefit of the sum deposited with the court. The sole arbitrator granted the measure requested and refused to order security, relying on the financial strength of the claimant (and also seemingly reversing the burden of proof):

> *In my judgment, it is not appropriate in the present case for me to order the Claimant to furnish security. As I have already indicated, without expressing any definitive view on the ultimate outcome of the arbitration, the Respondent has not established on this application a sufficient evidential basis for its allegations to enable me to conclude that its defences or counterclaim "will in every likelihood succeed". The Claimant is accepted to be a substantial company and there is no reason to doubt that, if it fails by the final award to recover the sum of [the deposited amount], it will return the same to the Respondent.*[73]

34. NAI case 3310 also concerned a request for payment of a claim on an interim basis. It was handled under Dutch law by an emergency arbitrator sitting in Rotterdam before the constitution of the arbitral tribunal. The dispute arose from the termination of a licence agreement, pursuant to which the respondent was manufacturing and distributing footwear under the claimant's brand. The claimant sought immediate payment of outstanding royalties, which the respondent wanted to set off against alleged termination damages. The sole arbitrator ordered the immediate payment of the royalties against provision of a bank guarantee by the claimant; the payment was to be made first and the bank guarantee was to follow:

> *Any such payment will be made and security by means of a conditional bank guarantee will be ordered for any such amount paid. In order to avoid further disputes between the parties as to the text of the bank guarantee which may delay payment, payment will first be made. Upon receipt of the payment, Claimant, within a period of ten working days after receipt of the payment, will have issued by a prime Dutch bank a bank guarantee governed by Dutch law and providing for exclusive jurisdiction of the Dutch courts – as requested by Claimant in its amended request for relief – in favour of Respondent for the*

72. On the basis of a questionnaire sent to 45 leading international arbitrators, K. Hobér noted that "security is commonly requested from the party asking for the measure, and that failure to provide such security would sometimes, or always, result in the arbitrator denying a request for interim measure" (K. Hobér, "Interim Measures by Arbitrators", *in* A.J. van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 2006 Vol. 13, Kluwer Law International, p. 721, at p. 737).

73. Interim Award in Case 12196, April 2003, *ICC ICArb. Bull., Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration*, p. 56.

amount received which bank guarantee will become payable upon presentation of a copy of a settlement agreement or a copy of an arbitral award in the main arbitration proceedings providing that such amount for payment of royalties is not due. Any problems regarding the text of the bank guarantee may be referred to the arbitral tribunal on the merits or to courts having jurisdiction.[74]

35. ICC case 7544 arose after a construction contract was terminated by the employer due to alleged delays by the contractor. The contractor demanded an interim order for the immediate payment of the works carried out pre-termination, and the principal argued that these payments would ultimately be offset against damages owing from the contractor. The tribunal, sitting in Paris and applying French law, ordered the payment requested against delivery of a corresponding bank guarantee:

in order to cover the risk that the final decision might not be consistent with the decision reached in this award, and not to prejudice the right of set-off, the Tribunal considers that it is appropriate that the party in whose favour the decision on an interim payment is made provide a guarantee of like amount.[75]

36. Another NAI emergency arbitrator, sitting in the Hague in a contract dispute governed by Dutch law, had to deal with a demand for an immediate monetary payment. The claim arose from the termination by the employer of a contract for the construction of a plant. The contractor, because it was in turn obliged to pay termination indemnities to various subcontractors, applied for an interim measure ordering payment by way of an advance on its claim. The sole arbitrator granted the measure requested and rejected the respondent's demand for security, on the basis of the apparent strength of the contractor's case:

[I]t is unlikely that in the arbitration on the merits the claimant will be ordered to reimburse respondent wholly or partially for the amount in question. Accordingly, the Sole Arbitrator rejects respondent's request.[76]

37. Various tribunals have decided not to grant security on the grounds that the interim measure that they ordered was innocuous in any event.

An interlocutory award in ICC case 10596 arose in the context of the termination of an agreement for the distribution of pharmaceutical products. The manufacturer, respondent in the arbitration, demanded an interim measure ordering the delivery of certain documents (a registration certificate and a pricing approval) in the possession of the former distributor that were necessary for the further commercialisation of the products in the territory. The seat of the arbitration was in Paris and Swiss law governed the distribution agreement. The tribunal ordered the delivery of the documents as an interim measure, and refused to order security on the grounds that the measure was not susceptible to cause losses:

[Distributor] requests security in the amount of US$ 1,000,000. However, it fails to substantiate any risk of loss which may arise out of the interim relief. The possibility of a loss is all the more so unlikely, considering that [Distributor]

74. Award in summary arbitral proceedings, NAI Case No. 3310, 15 October 2002, *Yearbook Comm. Arb.*, 2008, vol. XXXIII, p. 160.

75. Interim Award in Case 7544, *ICC ICArb. Bull.*, Vol. 11 No. 1 (2000), p. 56.

76. Award, NAI case No. 2212, 28 July 1999, *Yearbook Comm. Arb.*, 2001, vol. XXVI, p. 198.

does not own the documents and that they have no intrinsic value, which is not dispute[d]. Under these circumstances, the tribunal dismisses [Distributor]'s request.[77]

38. A similar rationale inspired the tribunal in ICC case 10973, relating to the termination of a loan and the possible enforcement of collateral held by the lender. The arbitration was held in Paris, the substantive governing law is not known. The borrower asked, as an interim measure, that the securities and cash held as collateral by the lender should be transferred to an escrow account controlled by the chairman of the arbitral tribunal. The tribunal granted the measure, first in the form of a procedural order and later in the form of an award, and decided that security was not necessary:

The respondents stated during the hearing that they have already placed the assets in a 'frozen' account. In ordering that the assets are to be placed in an escrow account, the arbitral tribunal does not really change the positions of the parties. The tribunal merely applies the fair principle that the assets be placed in a 'neutral zone', pending the arbitration, and not in a zone being controlled by one of the parties. The arbitral tribunal does not find that it is necessary in these circumstances, that a security is furnished by the claimants.[78]

39. In *Paushok v Mongolia*, an *ad hoc* investment arbitration held under the UNCITRAL Arbitration Rules, the claimant – the Russian owner of a Mongolian gold mining company – disputed the legitimacy of a windfall profit tax law adopted by Mongolia. The tribunal issued an Order on Interim Measures which suspended payment of the tax, prohibited Mongolia from taking enforcement actions and the company from moving assets out of the country, and ordered the claimant to provide security (in the alternative form of an escrow account or a bank guarantee) in a gradually increasing amount in order to cover part of the tax claim. The tribunal expressly noted that it derived its authority to order these measures from Articles 15(1), 26(1) and 26(2) of the UNCITRAL Arbitration Rules which "leaves wider discretion to the Tribunal in the awarding of provisional measures than under Article 47 of the ICSID Rules". The interim measure subsequently expired as a result of the claimant's failure to provide the required security[79].

40. A liability claim for an allegedly unjustified interim measure was made in ICC case 12363. The case related to the termination by a German licensor of a license agreement for the manufacturing and distribution of medical products. The agreement contained a provision preventing the Italian licensee from manufacturing or distributing competing products for a period of three years

77. Interlocutory award in case 10596 of 2000, *Yearbook Comm. Arb.*, 2005, vol. XXX, p. 66, and *Collection of ICC Arbitral Awards 2001-2007*, Kluwer Law International, 2009, p. 315.

78. Interim award in case 10973 of 2001, *Yearbook Comm. Arb.*, 2005, vol. XXX, p. 66, and *Collection of ICC Arbitral Awards 2001-2007*, p. 77.

79. *Sergei Paushok and others v the Government of Mongolia*, Order on Interim Measures of 2 September 2008 and Award on Jurisdiction and Liability of 28 April 2011, available on www.italaw.com. For a commentary on the case, see J. Matthews and K. Stewart, "Time to Evaluate the Standards for Issuance of Interim Measures of Protection in International Investment Arbitration", *Arb. Int'l*, 2009, p. 529, spec. at p. 551 with regard to the requirement of posting security. The tribunal was composed of the Hon. Marc Lalonde (chair), Dr. Horacio Grigera Naón and Prof. Brigitte Stern.

after termination. The licensor alleged a breach of the non-compete undertaking and obtained from a court in Milan an interim injunction prohibiting the former licensee from manufacturing, advertising or selling the products. In the subsequent arbitration, the licensee argued that the non-compete clause was invalid under Italian competition law, and made a counterclaim for damages resulting from the Milan court injunction. Swiss law governed the license agreement, and the arbitration was held in Geneva.

The published partial award addresses only the question whether the arbitral tribunal had jurisdiction over this damage claim, and concludes that it did. The tribunal left for a further stage of the proceedings the question of the law applicable to the claim as well as its merits. As to jurisdiction, the tribunal came to its decision on the basis of an interpretation under Swiss law of the scope of the arbitration agreement, and of a risk of contradictory decisions if the issue of liability was to be decided by another body:

> *The question of whether or not the arbitration clause of article 17 of the agreement encompasses with extra contractual claims depends on the scope to be given to the arbitration agreement. [...] this issue is to be decided according to Swiss arbitration law [...] it is the view of Swiss law that in the absence of any express limitation contained in the arbitration clause, a broad interpretation of the same should prevail upon a narrow one [...] In the present case, the arbitration clause of article 17 of the agreement refers to any dispute 'in relation' or 'in connection with this agreement' and such a drafting which corresponds to the standard ICC arbitration clause should confer the widest possible jurisdiction on the Arbitral Tribunal [...]. Therefore, article 17 of the licence agreement undoubtedly empowers the Arbitral Tribunal to rule on questions of extra-contractual nature [...]*
>
> *[I]t should be emphasised that the alleged tortuous conduct of Claimant is deeply rooted in the agreement since Claimant obtained an interim injunction on the sole basis of an alleged violation by Respondent of article 14.3* [i.e. the non-compete undertaking] *of the agreement. [...] the Arbitral Tribunal is the sole competent jurisdiction to decide on the validity of the said clause; but the resolution of this issue constitutes for the Arbitral Tribunal the preliminary and necessary step prior to entering into the merits of Respondent's counterclaim because the question of an extra-contractual liability of Claimant would arise if and only if the aforesaid contractual provision is declared null and void by the Arbitral Tribunal; in the negative, Respondent's counterclaim would lack any legal basis. Therefore, being the sole jurisdiction to decide on the issue of the validity of article 14.3 of the licence agreement, the Arbitral Tribunal and no other judicial body should be empowered to rule on a claim resulting from an alleged unjustified interim injunction even ordered by a State Court, provided however that the said order is exclusively based upon a 'prima facie violation' of an agreement which refers all disputes to arbitration. As stated before, this condition is obviously met in the present case. On the other hand, a denial by the Arbitral Tribunal of its competence with respect to Respondent's counterclaim would cause Respondent to address the said claim to the ordinary jurisdiction designated by the rules of international conflict of jurisdiction with the consequence that two judicial authorities, i.e. the Arbitral*

Tribunal and a State Court would be called to decide on a same issue, i.e. that of the validity of article 14.3 of the licence agreement; such a consequence may involve the risk of contradictory decisions which can only be avoided if the Arbitral Tribunal's exclusive jurisdiction on Respondent's counterclaim is affirmed.[80]

41. The question of the allocation of the costs of ancillary court proceedings in respect of interim measures has come up more frequently than the question of damages for losses caused by these measures.

The validity under Italian competition law of a non-compete undertaking (included in an M&A agreement) was also in dispute in ICC case 14046. The claimant had obtained from the Milan courts a preliminary injunction ordering the respondent to comply with the undertaking. After determining that the non-compete undertaking was valid (although for a reduced period of time) and had been breached by the respondent, the arbitral tribunal awarded to the claimant the costs incurred in the court proceedings. The tribunal noted that the agreement contained an express indemnity for "any [...] proceedings"[81].

ICC case 15248 concerned a dispute between the shareholders of a joint-venture company, where the claimant successfully objected to a dividend extracted from the joint-venture by the respondent for its sole benefit. The claimant had obtained from a Mexican court a conservatory attachment of the respondent's shares in the joint-venture as security for the claims filed in the arbitration. The arbitral tribunal decided that the claimant could recover in the arbitration the costs of the attachment, being the banking fees paid on the bond that the Mexican court required as a condition to the attachment and the currency losses incurred on collateral posted to the bank that issued the bond[82].

The tribunal in ICC case 8445 took a different view. The dispute was about a technology license agreement between a German licensor and an Indian licensee. The agreement was governed by Indian law, with an arbitration in Zurich. The tribunal accepted the licensee's claim that the licensor had failed to transfer the technology in accordance with the agreement. The licensee had also sought from the Indian courts an interim injunction preventing the licensor from contracting with third parties for the same technology; the injunction was granted in first instance and vacated on appeal. The licensee unsuccessfully claimed in the arbitration the costs of these court proceedings:

With respect to the lawsuit commenced by the claimant before the local court in [India], such lawsuit was ostensibly for conservatory relief only. Such application for conservatory relief is specifically authorized under the ICC Rules and cannot be considered, in and of itself, a breach of the Agreement. The local court in [India] initially granted the injunction requested. Upon appeal, the Appellate Court vacated such decision, and dismissed the application. The Appellate Court, presumably in accordance with that court's discretion and local rules of procedure, determined that no costs be assessed. It is not within

80. Partial Award, ICC Case No. 12363, 23 December 2003, *ASA Bull.*, 2006, p. 462.
81. Final Award, ICC Case No. 14046, *Yearbook Comm. Arb.*, 2010, vol. XXXV, p. 241.
82. Final Award, ICC Case No. 15248, *Yearbook Comm. Arb.*, 2013, vol. XXXVIII, p. 127.

the purview of this Arbitral Tribunal's authority to reconsider, or take other decisions with respect to, such court related costs.[83]

ICC case 10509 was about the payment of a commission allegedly due by a Romanian principal to its German agent. The agent obtained from a State court an interim attachment order. The arbitral tribunal decided that it had jurisdiction to rule on the costs of the attachment[84].

Most of the above awards that granted the costs of the interim court proceedings (the award in ICC case 10509 being the exception) did so on the basis that these costs were incurred as a result of a breach of contract by the other party, and should be granted as compensation for the breach. The question was not, therefore, whether the costs of ancillary court proceedings are recoverable as costs of the arbitration (commentators generally take the view that they are not)[85].

II. – Are there common trends?

42. Does the comparative analysis conducted in Part I of this article show any common trend across jurisdictions and in the international arbitration practice? The answer varies depending on the theme: jurisdiction, applicable law, and substantive liability test. Each of these three themes will be examined in turn.

(1) Jurisdiction

43. The question which logically comes first is that of jurisdiction: who decides whether an inappropriate interim measure gives rise to liability? Is it the court or the arbitral tribunal that ordered the measure in the first place? Or is it the arbitral tribunal with jurisdiction on the merits?

On this point at least there seems to be some common trend: the arbitral tribunal has jurisdiction to assess liability arising from an inappropriate interim measure, whether the measure was granted by the tribunal itself, by an emergency arbitrator or by a court. There is one exception: demands on a cross-undertaking in damages, or on a security bond, in respect of a court-issued interim measure must be made before the court.

44. In the case of interim measures issued by an arbitral tribunal or an emergency arbitrator, the jurisdiction of the arbitral tribunal in this respect is consistently affirmed by the Model Law[86] and by those laws[87] and arbitration

83. Final Award, ICC Case No. 8445, 1994, *Yearbook Comm. Arb.*, 2001, vol. XXVI, p. 167.

84. Final Award, ICC Case No. 10509, 2000, summarised in E. Jolivet, "Quelques questions de procédure dans l'arbitrage commercial international, Chronique de jurisprudence arbitrale de la CCI", *Cah. arb., Gaz. Pal.*, No. 311-312, 7-8 November 2003.

85. J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC, 2012, No. 3-1491; B. Hanotiau, "The parties' costs of arbitration", *Dossier of the ICC Institute of World Business Law: Evaluation of Damages in International Arbitration*, 2006, p. 213, at p. 215; Y. Derains and E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed., Kluwer Law International, 2005, p. 366.

86. Article 17 G, last sentence.

87. See section I.(2) above: Swiss CPC, Art. 374(4); German ZPO, Art. 1041(4).

rules[88] that address the question[89]. There are far fewer sources relating to the case of interim measures issued by a State court; the very scarce arbitral jurisprudence[90] confirms the powers of the arbitral tribunal, but legal commentators are split[91].

The author believes that the arbitral tribunal has jurisdiction in either case[92], irrespective of the origin (court or arbitrators) of the interim measure. Firstly, this is in line with the principle of broad interpretation of the scope of arbitration agreements, accepted in most jurisdictions[93]. According to the US Supreme Court, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"[94]; in the words of the English House of Lords, "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"[95]; in Switzerland, the Federal Court "starts from the idea that the parties intended the arbitral tribunal to have a broad jurisdiction"[96]; in France, leading commentators wrote that it is the essence of an arbitration agreement to offer "one" method of resolution of "all" disputes that may arise from a contract[97].

Second, the arbitrators will generally be better placed to make an efficient decision on the issue of liability. If the applicable law provides for a risk-based liability regime, where the criterion for liability is the outcome of the dispute on the merits (as is the case for instance in the United States, in England and in France), it is the arbitrators' award that will be determinative and they can immediately draw the consequences of their own decision. If the applicable law, by contrast, refers to some sort of fault or impropriety in the proceedings for obtaining the interim

88. See para. 27 and 28 above: ICC 2012 Rules of Arbitration, Art. 29(4); Swiss Rules of International Arbitration, Art. 26(4); draft 2014 LCIA Arbitration Rules, Art. 25.1, last paragraph.

89. See also A. Yesilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, 2005, No. 5-104 and footnote 110. E. Schwartz wrote in 1993 that "any claim, in this connection, should normally fall within the arbitral tribunal's Terms of Reference if it is to be dealt with in an ICC arbitration" ("The Practices and Experience of the ICC Court", *ICC ICArb. Bull., Special Supplement 1993: Conservatory and Provisional Measures in International Arbitration*, p. 45, at p. 54).

90. See para. 40 above and n. 80.

91. G.B. Born takes the view that "A tribunal's authority should also extend to the consideration of damages claims to be satisfied from any security fund, for losses resulting from conduct required pursuant to an order for provisional measures (including where such order is granted by a national court)" (*International Commercial Arbitration*, Kluwer Law International, 2014, p. 2508). In Germany, the view of R.H. Kreindler and J. Schäfer (*supra* n. 22) is that the arbitral tribunal has jurisdiction. In Switzerland, Chr. Boog (*supra* n. 19) is of the opposite opinion unless the parties have expressly given powers to the arbitral tribunal in this respect, but mentions in his footnotes the existence of dissenting views among authors; D. Girsberger and N. Voser (*International Arbitration in Switzerland*, Schulthess, 2012, p. 252) support in uncertain terms the jurisdiction of international arbitration tribunals in this respect.

92. Unless of course the parties have expressly agreed otherwise.

93. G.B. Born, *supra* n. 91, p. 1326.

94. *Moses H. Cone Memorial Hospital v Mercury Construction*, 460 U.S. 1 (1983); *Mitsubishi v Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

95. *Fiona Trust v Privalov sub nom. Premium Nafta Products Limited and others v Fili Shipping Company Limited and others*, [2007] UKHL 40.

96. Fed. Trib., 15 March 1990, *Sonatrach v K.C.A. Drilling*, *Rev. arb.*, 1990, p. 921 ("il faut au contraire partir de l'idée que les parties désirent une compétence étendue du Tribunal arbitral").

97. Chr. Seraglini and J. Ortscheidt, *supra* n. 28, No. 185: "l'essence de la convention d'arbitrage est *a priori* de fournir *un* mode de règlement de *tous* les différends pouvant surgir relativement au contrat liant les parties" (emphasis in the original).

measure (as the Model Law does), the assessment of that fault will often require a comparison of the allegations and evidence initially submitted by the applicant when requesting the interim measure against the full facts and evidence that came out of the arbitral proceedings on the merits; the tribunal, which will just have looked at those full facts and evidence, is again better placed to make the analysis[98].

45. A liability claim may arise after the arbitral proceedings are completed, at a time when the arbitrators are *functus officio*. In that case a new arbitral tribunal may need to be constituted. Jurisdiction does not switch back to the courts at the end of the arbitration: the issue of liability is within the scope of the arbitration agreement and that agreement survives the end of the proceedings[99]. It is in that sense that the statement made in the *travaux préparatoires* of the Model Law, to the effect that "jurisdiction only applied until the award was decided"[100], must be read.

A party who anticipates further losses could also request the sitting arbitral tribunal to retain jurisdiction in this respect, so as to determine liability and grant damages in a subsequent award after its decision on the main dispute[101].

46. The enforcement of an undertaking in damages, or of a security bond, is different. If the undertaking or the bond was given on the occasion of an interim measure ordered by the arbitral tribunal, or by an emergency arbitrator, then of course it is the tribunal which will deal with allegations of unjustified measures and with demands for payment under the undertaking or the bond. But if the interim measure originated from a national court, then that court will also be the body with jurisdiction to follow up on the undertaking or the bond, and to order payment if applicable.

The reason is that (in England) an undertaking in damages is not given to the other party, but to the court itself, and is sanctioned as contempt of court[102]. The standard wording of the undertaking ("If the court later finds [...] the Applicant will comply with any order the court may make") also implies the continuing jurisdiction of the court. US case law also retains jurisdiction in this respect within the judicial institution[103].

(2) Applicable law

47. Having identified who has jurisdiction to determine liability, the next question is that of the applicable law: which law governs whether and when an

98. There is one procedural configuration where efficiency would point the other way. When an interim measure is ordered by a court in first instance and overturned on appeal, the court of appeal may be able to more efficiently assess whether the measure should give rise to damages, if only because the arbitral tribunal may not yet be constituted, and may never be. This situation seems too specific, however, to justify restricting the arbitrators' jurisdiction in all cases of court-issued interim measures.

99. Ph. Fouchard, E. Gaillard et B. Goldman, *supra* n. 28, No. 738-1.

100. See para. 7 above, and n. 12.

101. D.D. Caron and L.M. Caplan, *supra* n. 62, p. 529.

102. See the citations from *F. Hoffmann La Roche v Secretary of State* at para. 18 above, and n. 30.

103. See the citations from *Blumenthal v Merrill Lynch, Pierce, Fenner & Smith, Inc.* at para. 19 above, and n. 41. Apart from the enforcement of a security imposed by a court, U.S. law accepts that arbitrators have jurisdiction to award damages for wrongfully obtained court-ordered provisional relief: *Warth Line, Ltd. v. Merinda Marine Co., Ltd.*, 778 F.Supp. 158 (S.D.N.Y. 1991); G.B. Born, *International Commercial Arbitration in the United States*, Kluwer, 1994, p. 822.

inappropriate interim measure gives rise to liability? The analysis made in Part I of this article has not indentified any response to the question, which seems to have been raised only in ICC case 12363[104], and even then the published partial award reserved its decision for a later stage.

(a) Generally: Rome II, in the European Union

48. Within the European Union[105], the applicable law falls to be determined in accordance with the principles set out in the Rome II Regulation on the law applicable to non-contractual obligations (leaving aside for the moment the question whether a cross-undertaking in damages should instead be regarded as a contractual obligation, which falls under Rome I rather than Rome II)[106]. Even though international arbitrators are in theory free to set their own rules of conflicts[107], when all relevant factors of an international arbitration are confined within the European Union the arbitration is in some way a domestic arbitration at that level, and there seems to be no reason why the arbitrators – who must apply the law – should be dispensed from following the rules of European private international law[108].

Rome II in principle provides for the application of the law of the place where the damage occurs, but falls back on another law if there is a manifestly closer connection with that other law. Article 4 reads:

> *1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *2. [...]*[109]
>
> *3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.*

---

104. See para. 40 above and n. 80.

105. Except Denmark, Art. 1(4) Rome II.

106. Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

107. P. Mayer, "La liberté de l'arbitre", *Rev. arb.*, 2013, p. 339, No. 24 to 27, and "The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator", *Dossier of the ICC Institute of World Business Law: Is Arbitration Only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator*, 2011, p. 47; E. Gaillard, "The Role of the Arbitrator in Determining the Applicable Law", *in* L.W. Newman and R.D. Hill (eds), *The leading arbitrators' guide to international arbitration*, Juris Publishing, 2008, p. 171, at p. 187.

108. The author readily acknowledges that this proposition may be controversial and would deserve deeper reflection. In the context of this article, the reader is kindly requested to forgive the bluntness of the point.

109. Article 4(2) provides for an exception if both parties have their residence in the same jurisdiction, of which the law will then apply. This situation is unlikely to apply much in arbitration, other than in purely domestic cases where issues of conflicts of laws would not arise in any event.

49. The concept of place of occurrence of the damage has been clarified in various judgments of the European Court of Justice. These judgments were issued in respect of the Brussels I Regulation on jurisdiction, and its predecessor Brussels Convention[110]; they are nevertheless relevant for the interpretation of Rome II. Article 5(3) of Brussels I gives jurisdiction, "in matters relating to tort, *delict* or *quasi-delict*, [to] the courts for the place where the harmful event occurred or may occur". The European Court of Justice interprets the expression "place where the harmful event occurred" as covering both the place where the damage occurred and the place of the event giving rise to it, so that the plaintiff has the option to sue in either place[111] (the plaintiff may also in all cases opt to sue in the place of the defendant's domicile). A series of judgments have interpreted the first leg of this option, *ie* the place where the damage occurred[112], and in view of the identity of concept these judgments should be authoritative for the interpretation of Article 4(1) of Rome II as well[113].

The Court defines the place of occurrence of the damage as the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-

110. Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

111. CJEU, 30 November 1976, case 21-76, *Bier v Mines de potasse d'Alsace*, para. 19; 11 January 1990, C-220/88, *Dumez France and Tracoba v Hessische Landesbank*, para. 10; 7 March 1995, C-68/93, *Shevill*, para. 20; 19 September 1995, C-364/93, *Marinari v Lloyds Bank*, para. 11; 27 October 1998, C-51/97, *Réunion européenne v Spliethoff's Bevrachtingskantoor*, para. 28; 5 February 2004, C-18/02, *DFDS Torline v SEKO Sjöfolk Facket för Service och Kommunikation*, para. 40; 10 June 2004, C-168/02, *Kronhofer v Maier*, para. 16; 16 July 2009, C-189/08, *Zuid-Chemie v Philippo's Mineralenfabriek*, para. 23; 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and others*, para. 41; 19 April 2012, C-523/10, *Wintersteiger v Products 4U Sondermaschinenbau*, para. 19; 25 October 2012, C-133/11, *Folien Fischer and Fofitec v Ritrama*, para. 39; 16 May 2013, C-228/11, *Melzer v MF Global UK*, para. 25; 18 July 2013, C-147/12, *ÖFAB v Koot and Evergreen Investments*, para. 51; 3 October 2013, C-170/12, *Pinckney v KDG Mediatech*, para. 26; 16 January 2014, C-45/13, *Kainz v Pantherwerke*, para. 23; 3 April 2014, C-387/12, *Hi Hotel HCF v Spoering*, para. 27.

112. The location of the damage is all the more relevant under Brussels I because a court which is seized on the basis of this criterion has jurisdiction in respect only of the harm arising locally in its own country, by contrast with the courts of the place of the event giving rise to damages or those of the defendant's domicile, which may rule in respect of any harm incurred worldwide. See *Shevill*, paras. 30 to 33; *eDate Advertising GmbH and others*, paras. 51 and 52 (adding that, in the case of an alleged infringement of personality rights by means of content placed online on an internet website, the plaintiff may also claim worldwide damages before the courts of the place of the centre of his interests; Rome II, however, does not apply to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation", Art. 1(2)(g)).

113. The European Court of Justice's case law with regard to Brussels I states that jurisdiction based on the place of the harmful event, being a derogation from the fundamental principle attributing jurisdiction to the courts of the defendant's domicile, must be interpreted restrictively (*Kronhofer v Maier*, para. 14; *Zuid-Chemie v Philippo's Mineralenfabriek*, para. 22; *Melzer v MF Global UK*, para. 24; *Pinckney v KDG Mediatech*, para. 25; *Kainz v Pantherwerke*, para. 22; *Hi Hotel HCF v Spoering*, para. 26). Under Rome II the place of occurrence of the damage is the general rule, so that a restrictive interpretation is not called for. It appears unlikely, however, that this will lead to a divergent interpretation of the same concept for the respective purposes of the two Regulations. The European Commission's Explanatory Memorandum to the draft Rome II Regulation (document COM(2003) 427 final) confirms that "the 'Brussels I' Regulation, the Rome Convention and the Regulation proposed here constitute a coherent set of instruments covering the general field of private international law in matters of civil and commercial obligations" (p. 8) and expressly refers to the Brussels I case law as a source for the interpretation of the new Rome II Regulation (pp. 8 and 11, in particular); recital 7 of Rome II also insists on the consistency of Rome II with Brussels I.

delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event[114]. The central component of the definition (*ie* the place where the event produced its harmful effects) is somewhat tautological[115]. The additional element, referring to the direct character of the causation and the immediacy of the link with the victim, adds specificity to the definition and is essential. The Court said on several occasions that the concept of the place of occurrence of the damage "cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere"[116]. Article 4(1) of Rome II expressly repeats this requirement, initially developed by the Court, by stating that the applicable law is to be determined "irrespective of the country or countries in which the indirect consequences of that event occur".

50. This immediacy criterion is particularly relevant in the case of financial losses, which can be ubiquitous and are often the last item in a sequence of consequences. If, for instance, an inventory of wares is destroyed by arson, the first item in the sequence of losses is the physical destruction of the goods; the financial damage arising from the lost profits on the sale of the wares, or from the need to reconstitute the inventory at a higher cost, only comes later in the sequence. Several cases of the European Court of Justice show that the Court focuses on the component of the damage which chronologically or logically comes first. The words "initial damage" are often used and epitomise the Court's approach.

The first such case was *Dumez France and Tracoba v Hessische Landesbank*. The defendant banks had terminated credits granted to a property developer for a project in Germany. The plaintiffs were the French shareholders of German project contractors; they sued the banks for wrongful termination of the credits and sought recovery of their own financial losses. They did so before the courts of Paris because, in their view, this was the place where their interests were adversely affected. The French courts and the European Court of Justice all disagreed. The ECJ decided to have regard to "the place where the initial damage manifested itself", and that "a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act [cannot] bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets"[117].

Marinari v Lloyds Bank arose from the arrest (and later release) of Mr. Marinari by the British police, further to an information from Lloyds Bank about suspected fraud. Mr. Marinari claimed against the bank various heads of losses, including for breach of several contracts and damage to his reputation. He did so before the courts of his Italian domicile on the basis that the decrease in his assets (*diminution du patrimoine, diminuzione del patrimonio*) had taken place in Italy. The Court rejected the argument and decided that the place of occurrence of the damage

114. *Dumez France and Tracoba v Hessische Landesbank*, para. 20; *Shevill*, para. 28.

115. A shorter version of the definition appears in *Zuid-Chemie v Philippo's Mineralenfabriek*, para. 26 and in *Wintersteiger v Products 4U Sondermaschinenbau*, para. 21: "it is the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage". This is circular and does not add much to the intelligibility of the concept.

116. *Marinari v Lloyds Bank*, para. 14; *Réunion européenne v Spliethoff's Bevrachtingskantoor*, para. 30; *Kronhofer v Maier*, para. 19.

117. *Dumez France and Tracoba v Hessische Landesbank*, paras. 20 to 22.

"cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State"[118].

In *Kronhofer v Maier*, the Austrian plaintiff claimed against a German broker losses suffered on option trades. Even though his securities account was held with the broker in Germany, he attempted to sue before the Austrian courts on the grounds that his financial losses had affected the whole of his assets and that the damage thus occurred in the place where his assets were concentrated (*centre de son patrimoine, Ort des Mittelpunkts seines Vermögens*), *ie* at his domicile. The Court disagreed: the damage first arose in Germany, and its subsequent consequences on the plaintiff's assets as a whole were too remote[119].

Zuid-Chemie v Philippo's Mineralenfabriek was a product liability case. The plaintiff was a Dutch manufacturer of fertiliser. It bought from the Belgian defendant a component product used in its production process. The chemical composition of that product was incorrect, with the result that the fertiliser, which had in the meantime been produced and delivered to customers, was useless. Zuid-Chemie claimed various items of losses before the Dutch courts, and Philippo's objected on the basis that the place where Zuid-Chemie took delivery of the defective component was in Belgium so that jurisdiction belonged to the Belgian courts. The Court allocated jurisdiction to the Dutch courts: "The place where the damage occurred [...] is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself", "the place where the damage occurred cannot be any other than Zuid-Chemie's factory in the Netherlands where [...] the defective product was processed into fertiliser, causing substantial damage to that fertiliser which was suffered by Zuid-Chemie and which went beyond the damage to the [defective product] itself", and more generally "in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended"[120].

51. The criterion of the place of occurrence of the damage may lead to the application of several governing laws when the losses occur in different countries. This was acknowledged in the Commission's Explanatory Memorandum: "The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as 'Mosaikbetrachtung' in German law"[121].

52. Article 4(3) derogates from the general rule applying the law of the place of occurrence of damage when another law shows a manifestly closer connection with the circumstances of the case. This connection, according to the Regulation, "might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question". Recital 18 clarifies that "Article 4(3) should be understood as an 'escape clause'

118. *Marinari v Lloyds Bank*, paras. 14 to 21.
119. *Kronhofer v Maier*, paras. 17 to 21.
120. *Zuid-Chemie v Philippo's Mineralenfabriek*, paras. 27 to 32.
121. Explanatory Memorandum, *supra* n. 113, p. 11.

from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country".

The Commission's Explanatory Memorandum justifies this derogation because "the application of the basic rule might well be inappropriate where the situation has only a tenuous connection with the country where the damage occurs". It provides useful guidance:

> *[...] paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.*
> *Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. [...] To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be "manifestly more closely connected" with another country.*
> *Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly closer connection with a country other than the one designated by the strict rules. But the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.*

53. Given the above analysis, should an arbitral tribunal before which a liability claim is made in respect of an allegedly inappropriate interim measure apply the law of the place of occurrence of the damage in accordance with Article 4(1), or should it apply the law of the agreement in dispute in accordance with Article 4(3)? There is no absolute response to this question; either approach may be justified depending on the circumstances.

When the interim measure is issued by a state court, the place of occurrence of the damage will often be in the country of that court. This is because interim measures are generally sought from the courts of the place where they have to take effect, in order to shortcut the difficulties and delays of cross-border enforcement. Any damage is thus likely to arise in the first place in the jurisdiction of the court involved. Since a local court that grants an interim measure almost invariably does so in accordance with its own standards and practice, it makes sense to keep the subsequent question of liability under the substantive law of that court, and hence generally to apply the law of the place of occurrence of the damage. A French court, for instance, which operates in a legal environment where interim measures lead to strict liability if they are later found unjustified, will not demand a cross-undertaking in damages. If English law were to apply to the consequences of a French court measure, the applicant would always escape liability, even in circumstances where each of the two domestic laws would on its own have granted damages: he would escape liability under the French strict liability rule because French law is declared not applicable, as well as under English law because the situation is seen in England as a *damnum absque injuria* and no cross-undertaking was given.

Solid arguments may also favour the law of the underlying agreement. In the context of commercial arbitration, most if not all cases arise from a contract and

interim measures are generally based on a *prima facie* determination of the parties' rights and obligations under that contract. When, for instance, the interim measure consists in ordering a party to continue performance of the contract pending arbitration of whether the termination was proper, or to comply with a non-compete commitment pending arbitration of the commitment's validity, it makes perfect sense to assess the damages resulting from that interim measure under the same law as those that result from breaches of the same contract[122].

When choosing between both approaches, an arbitral tribunal does not have full discretion and may not merely select the one that appears more appropriate in the circumstances. Rome II provides for a clear hierarchy: in principle, the law of the place of the damage, *ie* Article 4(1), must be applied. The alternative application of Article 4(3) may only be "exceptional", which implies firstly that the connection of the circumstances with the place of the damage is "tenuous" only, and secondly that the connection with the alternative country is "manifestly" closer. This is a high hurdle to pass, but it is not insurmountable.

54. Irrespective of the choice made, the determination whether the party applying for an interim measure behaved properly or not in the proceedings leading to that measure must also be influenced by the rules of ethics and professional conduct applicable to those proceedings. The extent to which evidence adverse to one's case must be voluntarily disclosed to a court, in particular, varies considerably across jurisdictions[123]. It would not make sense to apply the English standards of disclosure to the behaviour of a party and its counsel before French courts, for instance, or conversely.

Article 17 of the Rome II Regulation makes it possible to take these local rules of conduct into account:

> *In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.*

The impact of these rules is limited to the assessment of the conduct of the alleged perpetrator. For the rest, the applicable law determined on the basis of the place of occurrence of damage, or of the manifestly closer connection, will govern[124].

---

122. In theory one could also make an argument that an inappropriate interim measure has a manifestly closer connection with the law of the seat of the court or the arbitral tribunal that granted the measure. In practice, it would probably take very unusual circumstances for the connection with the seat to be stronger than both the connection with the place of occurrence of the damage and that with the governing law of the underlying agreement, and to be so to a manifest degree.

123. In arbitration, the 2013 *IBA Guidelines on Party Representation in International Arbitration* attempt to set common standards in this respect; see Guidelines 12 to 17 and accompanying comments.

124. Explanatory Memorandum, *supra* n. 113, p. 25: "The rule in Article 13 [now 17] is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages".

(b) The specific case of a cross-undertaking in damages

55. In England and in the United States, an unjustified interim measure does not give rise to liability in tort. The situation is regarded as *damnum absque injuria*, *ie* a loss without an injury. Compensation is provided by way of a workaround, through cross-undertakings in damages or security bonds (see paras. 18 and 19 above).

Is the obligation assumed under a cross-undertaking or a bond non-contractual in nature, so that Rome II and the above analysis apply, or is it contractual and does it fall under Rome I? Under English law, a cross-undertaking is not a contract: "The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract"[125]. This is not conclusive, however, because the concept of "contractual matters" in the context of European conflicts of laws is an autonomous concept and "cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law"[126]. The defining criterion developed by the European Court of Justice is that of the obligation freely assumed by one person towards another: a contractual matter "presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based"[127]. Any other liability claim is non-contractual: "the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract'"[128].

56. An undertaking in damages should therefore be regarded as being contractual for the purposes of the application of the European rules of conflicts of laws. It is an obligation that the applicant freely consents to assume for the benefit of the other party. The circumstance that the obligation is assumed unilaterally, rather than in the form of a bilateral contract, is irrelevant in this respect[129].

---

125. *F. Hoffmann La Roche v Secretary of State*, para. 18 and n. 30 above.

126. CJEU, 13 March 2014, C-548/12, *Brogsitter v Fabrication de Montres Normandes and Fräßdorf*, para. 18. See also CJEU, 22 March 1983, C-34/82, *Martin Peters Bauunternehmung v Zuid Nederlandse Aannemers Vereniging*, para. 9 and 10; 8 March 1988, C-9/87, *Arcado v Haviland*, para. 10 and 11; 27 September 1988, C-189/87, *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst und Co.*, para. 15 and 16; 26 March 1992, C-261/90, *Reichert v Dresdner Bank*, para. 15; 17 June 1992, C-26/91, *Jakob Handte & Co. GmbH v TMCS*, para. 10; *Réunion européenne v Spliethoff's Bevrachtingskantoor*, para. 15; 17 September 2002, C-334/00, *Fonderie Officine Meccaniche Tacconi v Heinrich Wagner Sinto Maschinenfabrik*, para. 19; 5 February 2004, C-265/02, *Frahuil v Assitalia*, para. 22; 20 January 2005, C-27/02, *Engler v Janus Versand*, para. 33; 14 March 2013, C-419/11, *Česká spořitelna v Feichter*, para. 45; 18 July 2013, C-147/12, *ÖFAB v Koot and Evergreen Investments*, para. 27.

127. *ÖFAB v Koot and Evergreen Investments*, para. 33. See also *Reichert v Dresdner Bank*, para. 16; *Jakob Handte & Co. GmbH v TMCS*, para. 15; *Réunion européenne v Spliethoff's Bevrachtingskantoor*, para. 17; *Fonderie Officine Meccaniche Tacconi v Heinrich Wagner Sinto Maschinenfabrik*, para. 23; *Frahuil v Assitalia*, para. 24; *Engler v Janus Versand*, para. 50 and 51; *Česká spořitelna v Feichter*, para. 46 and 47.

128. *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst und Co.*, para. 17. See also CJEU, 11 July 2002, C-96/00, *Gabriel*, para. 33; *Fonderie Officine Meccaniche Tacconi v Heinrich Wagner Sinto Maschinenfabrik*, para. 21; *Engler v Janus Versand*, para. 29; *ÖFAB v Koot and Evergreen Investments*, para. 32; *Brogsitter v Fabrication de Montres Normandes and Fräßdorf*, para. 20 and 27. Recital 11 of Rome II confirms that the Regulation also covers non-contractual obligations arising out of strict liability.

129. In *Engler v Janus Versand*, the ECJ stated that the expression "matters relating to a contract" does not require the conclusion of a contract (para. 45); the case was about a unilateral promise of a prize offered by a mail order company. In *Česká spořitelna v Feichter*, the ECJ decided that the giver of an *aval* on a promissory note is subject to a contractual obligation because "[h]is obligation to guarantee those obligations was thus, by his signature, freely accepted" (para. 48).

Consequently, the applicable law falls to be determined in accordance with Rome I and its cascade of criteria: express choice of law if any (undertakings in damages usually do not contain a choice of law clause), place of habitual residence of the party required to effect the characteristic performance of the contract (*ie* the place of central administration or principal place of business of the applicant who gives the undertaking), or country of closer or closest connection with the contract[130].

The applicable law will determine the legal effects of the undertaking. This covers in particular the question whether the applicant is strictly liable for the consequences of the interim measure if he later loses on the merits, or whether he is only liable in case of improper behaviour on his part[131]. In the absence of an express choice of law in the undertaking, the primary Rome I criterion leads to the application of the law of the applicant's place of central administration or principal place of business. There is no obvious logical connection, however, between that place and the liability question: why should the right to indemnification of the party who suffered from an inappropriate interim measure issued by a court or an arbitral tribunal sitting in a particular jurisdiction, the effects of which occurred in another (or the same) particular jurisdiction, depend on the law of the country of origin of the party who applied for the interim measure? When this criterion would lead to a counterintuitive solution, the alternative criterion offered by Rome I is available and makes it possible to fall back on a more closely connected law: law of the place of occurrence of the damage, law of the underlying agreement, or law of the forum[132]. Recital 16 of Rome I states that "the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation". Here is a case for making use of that discretion.

130. Rome I Regulation, Art. 3(1), 4(2) to (4) and 19(1).

131. The author considered and dismissed the following alternative line of reasoning: because of the manner in which undertakings in damages are usually worded, at least in the English court practice (see the wording recommended in the Practice Direction, para. 18 above), the impact of the applicable law selected in accordance with Rome I will be very limited. An undertaking is actually a promise to pay whatever the court may decide should be paid. The object of the undertaking is just about compliance with a decision to be made by the court, it is not about the determination of the conditions and scope of the applicant's liability in respect of the interim measure. The core of the potential controversies, and in particular the question whether the applicant is strictly liable for the consequences of the interim measure if he later loses on the merits or whether he is only liable in case of improper behaviour on his part, does not depend on the legal effects to be attributed to the undertaking in accordance with its governing law. These issues belong to the court's discretion.

The flaw of this reasoning, however, is that when the court rules on liability, its only legal basis for doing so is the undertaking itself. Save for the undertaking in damages, there is no cause of action for the damage arising from an inappropriate interim measure. English law does not say whether the applicant is strictly liable or liable in tort only, it says that the applicant is not liable but for its undertaking. A determination of the extent of his liability is thus necessarily a determination of the legal effects of the undertaking, and this falls under the governing law of the undertaking.

132. The point was made in n. 122 that the law of the forum, *ie* the law of the seat of the court or the arbitral tribunal that granted the measure, should normally not be retained because the connection with that law will in most circumstances be weaker than that with the place of occurrence of the damage or with the governing law of the underlying agreement. The situation is different, however, when there is an undertaking in damages. Firstly, the undertaking is closely linked to the issuing court's procedural rules (Practice Direction supplementing Rule 25 of the Civil Procedure Rules in England, Rule 65 of the Federal Rules of Civil Procedure in the United States). Second, the connection with the forum is hierarchically subordinated to the connection with the place of occurrence of the damage under Rome II, whilst they both stand at the same rank under Rome I (where the higher ranking criterion is that of the habitual residence of the party effecting the characteristic performance).

(c) Conclusion on the applicable law

57. In conclusion on this point, the choice of applicable law, with regard to the liability that may arise from an inappropriate interim measure, is equivocal. The proper law (assuming a European Union context) will generally be that of the place of occurrence of the damage, but may instead be the governing law of the underlying agreement in dispute or (when there is an undertaking in damages) the law of the forum. In addition, if the interim measure was granted by a court, the local rules of ethics and professional conduct of that court will be relevant to assess the behaviour of the applicant.

The applicable law is thus not *per se* the law of the seat of the court or arbitral tribunal that granted the interim measure.

(3) Substantive liability test

58. Most arbitration rules do not attempt to set any substantive liability criterion in respect of the inappropriate interim measures that may be issued in the course of their proceedings. They leave this to the applicable law, whichever it may be. The UNCITRAL Arbitration Rules of 2010, by way of exception, touch on the question of substance but only do so with some hesitation: the test they set (fault by the applicant) is hidden in the *travaux préparatoires* rather than being expressly mentioned, and their wording is sufficiently ambiguous for some commentators to have concluded that the Rules actually contain no substantive test at all and merely defer to the applicable law.

59. National laws often define the conditions under which an inappropriate interim measure may give rise to liability, in the context of court-ordered measures and subsequent court proceedings on the merits. The criteria they set can then equally be applied in the broader context of arbitration, whether the interim measures are ordered by arbitral tribunals or are ordered by state courts in support of arbitration proceedings on the merits. There are three approaches[133], and they are very different.

The first approach is based on the idea of tort. Seeking a decision from a court or an arbitral tribunal is not wrong in itself; on the contrary, it is the civilised way of settling disputes. An interim measure should therefore normally not give rise to liability, even if it is later overturned or contradicted by the final decision on the merits. The beneficiary of the measure will be liable, however, if he did not play fairly: non-disclosure of critical facts by the applicant when seeking the interim measure, or gross exaggeration of the risks faced by him in the absence of measure, for instance, can constitute a wrongful behaviour and in that case they entail liability. This is the approach adopted by the UNCITRAL Model Law of 2006 (also with some hesitation and in the form only of statements in the *travaux préparatoires*).

133. A fourth approach is proposed by A. Yesilirmak (*Provisional Measures in International Commercial Arbitration*, No. 5-105), who writes that "In assessing whether the measure is unjustified, the tribunal should use its discretion and consider whether or not (1) there was, indeed, a real urgency, (2) the request for the measure was aimed at delaying or obstructing the arbitration proceedings, and (3) the moving party claims were ultimately unsuccessful". The author does not think that, absent an express power to act as *amiable compositeurs*, arbitrators hold the power to grant damages on the basis of their sole discretion and without any reference to a rule of applicable law.

The opposite approach is based on the idea of risk. An interim measure is, by definition, based on a *prima facie* assessment of the case and is thus susceptible to be wrong. One party or the other must assume the consequences if it later turns out that the measure was inappropriate. In fairness, and as a matter of policy in order to discourage unjustified applications, this risk should bear on the applicant since he is the party who made the choice to seek the measure in the first place. The applicant is thus strictly liable for any damage caused by the interim measure if the outcome of the case on the merits shows that he was actually not entitled to it. This risk-based liability regime is established by statute in Germany, and by case law in France.

The third approach starts from the same intellectual premise as the first one (there is nothing wrong in going to court or to arbitrators, and thus there is no liability for having done so), and ends with the same policy considerations as the second one (the applicant should bear the consequences of the risks he creates): hence, in England and in the United States, the construction of the undertaking in damages or of the security bond which must be voluntarily provided by the applicant if he wishes the court to be receptive to his application. The two systems differ in an important respect: in the United States, the amount of the security operates as a liability cap, whilst in England an undertaking in damages is open-ended.

Clearly, there is no single common trend here.

III. – A few practical recommendations

60. At the end of this analysis, the author would venture to suggest a few practical recommendations, at the risk of professing platitudes. These suggestions concern equally counsel who apply for an interim measure, counsel who oppose such an application, and arbitrators who decide whether to grant the requested measure.

61. Firstly, **always consider possible damage and liability**. Practitioners are influenced by their own legal background, and in many legal systems they need not ask themselves in advance a "what if" question about the hypothesis that the interim measure later turns out to have been inappropriate. This is because their domestic system offers a response by default (for instance strict statutory liability in Germany), on which they intuitively rely. This reliance is misplaced, however, in an international arbitration context. If counsel for an applicant comes from a Model Law-type background, where liability only arises if the application is in some way negligent, he may for instance overlook the risk that the interim measure could backfire and expose his client to damages under a strict liability regime. Conversely, an arbitrator who comes from a background where strict liability is the norm may, when deciding to grant the requested interim measure, make an incomplete assessment of the balance of interests if he just assumes that the respondent will in any event be compensated for all losses in the event that the final decision on the merits goes the other way, whilst the circumstances are such that there will actually be no liability without fault of the applicant.

62. Second, **do not make assumptions**. It is not necessarily so, because an interim measure is sought from an arbitrator sitting in France or even from a French court, that the French strict liability regime will apply and that counsel for the respondent should not insist on obtaining an undertaking in damages. The rules of conflicts of laws are complex and their results occasionally defeat one's intuition. Shortcuts in the analytical process are dangerous and counsel as well as arbitrators should, at least each for themselves, have indentified the rules of the game they are playing.

63. **If in doubt**, an undertaking in damages is always possible. The analysis recommended in the preceding paragraph may yield an uncertain outcome: the rules of conflicts are sometimes equivocal, and the import of certain substantive laws or arbitration rules is subject to scholarly debates. An undertaking in damages can in these circumstances be a convenient way to ensure clarity. At worst it will be duplicative with a remedy already offered by law.

64. Eventually, insert a **choice of law clause** in any undertaking in damages. This can only add to the clarity of the solution, given the cascade of alternative criteria that would otherwise apply.

Conclusion

65. Interim measures are based on a *prima facie* assessment of the situation. A full assessment of the case will not necessarily confirm the initial views, and an interim measure may for a variety of reasons later turn out to have been inappropriate. In the meantime, the measure may have caused harm. Whether this gives rise to liability depends on the applicable legal system: some laws apply a risk-based strict liability regime and award damages when the subsequent decision of the arbitrators on the merits contradicts the initial *prima facie* analysis; other laws, including the UNCITRAL Model Law, are tort-based and only award damages if the application for the interim measure was abusive in some form; other systems achieve a strict liability regime by requiring the applicant to give an undertaking in damages or to provide security.

Whether the inappropriate interim measure was granted by an arbitral tribunal or by a state court, it will generally be the arbitral tribunal who must decide on the ensuing damages. The tribunal will first need to select the law applicable to the issue, and this is not self-evident; the law of the seat of the tribunal, or of the court that issued the measure, is not necessarily the proper law.

Counsel and arbitrators should consider, when they seek, defend or grant interim measures, the liability rules that will apply if the measure is later found to have been inappropriate. These rules may vary significantly depending on the circumstances of the case.