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by

Ali Yeşilırmak

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INTERNATIONAL COMMERCIAL ARBITRATION**

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A C.I.P Catalogue record for this book is available from the Library of Congress.

ISBN 90-411-2353-9

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kluwerlaw.com
<http://www.kluwerlaw.com>

Sold and distributed in North, Central and South America by
Aspen Publishers, Inc.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Turpin Distribution Services Ltd., Stratton Business Park,
Pegasus Drive, Biggleswade, Bedfordshire,
SG18 8TQ, United Kingdom

Printed on acid-free paper

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Printed in The Netherlands

FOREWORD

Interim Measures in International Commercial Arbitration by Dr Ali Yesilirmak is an essential and timely treatise. It will be welcomed, used and relied on by all those involved with international arbitration: whether as counsel, arbitrators, judges of national courts or scholars.

International arbitration has succeeded for two reasons. First, national courts are in most cases unsuited and are unacceptable as a venue for the settlement of international business transactions. Second, and by corollary, arbitration is specifically geared and structured to provide the dispute settlement structure for matters arising from transactions between parties from different countries.

International instruments, such as the New York Convention, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law have provided the basic standards for the effectiveness of international arbitration around the world. The flexibility needed for international arbitration explains the permissiveness of most national arbitration laws and international arbitration rules. They are there generally and increasingly to support and assist the system rather than to control it. Hence, parties have the possibility to determine the form and procedure for the arbitration, the number and authority of the arbitrators, place of arbitration and the law or rules to govern the arbitration.

Despite all the progress and developments, interim measures of protection remains one of the main areas where national laws and the jurisdiction of national courts cross one another regularly. Which jurisdiction or forum prevails for the consideration and grant of interim measures? What law should be applied to these issues? There is a constant conflict between the relevant national laws, the kinds of interim relief available, the circumstances in which interim relief may be appropriate, and the criteria according to which international tribunals may decide to grant interim relief.

Complications arise at different stages of the arbitration process: before the tribunal is established and when there is a tribunal dealing with the substantive dispute. For a party seeking relief there are practical questions: where should it go to seek the measures of protection it requires? It could go to any national court

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that has jurisdiction over the other party or its assets? This may facilitate the choice of a national jurisdiction which is sympathetic to the relief being sought. On the other hand, by identifying a specific arbitral forum for disputes between the parties, the arbitration agreement expressly excludes the jurisdiction of all national courts. Accordingly, in many situations, there is no justification for orders being granted by any national court.

Even more difficult to predict are the rules to be satisfied to obtain interim relief from an international arbitral tribunal. National courts follow their own law on what reliefs are possible and what risks or factors must be shown to satisfy the court that the interim relief is justified. By contrast, the international tribunal has no *lex fori* on which it can rely. In practice the tribunal may grant or refuse relief based on some national law, eg the law of the place of arbitration, or the law applicable to the substance of the dispute, or the law of the party against whom the orders are sought. Equally, in the absence of mandatory law to the contrary, arbitrators may rely on and apply transnational standards widely accepted in national laws, generally accepted or developed from international practice.

By their very nature the various forms of interim relief require orders that can be enforced and made effective. This is difficult in the international arena especially as the New York Convention only applies to final decisions in the form of awards; it does not apply to orders or decisions which are to maintain the *status quo* and which may be cancelled, withdrawn, varied or confirmed in the final award. Hence the current UNCITRAL project to amend the Model Law so that interim relief ordered can be effectively enforced.

International arbitration tribunals have no fixed regime. In determining the relevance and form of interim measures arbitrators have no regularly applicable law; it differs from case to case. Also relevant may be the law governing the arbitration, the applicable arbitration rules, and the origins of the arbitrators; the nationality or places of business of the parties; and the place where the substantive contract is to be performed. A tribunal will invariably have in mind that any order it makes should be effective (as no tribunal wishes to make an order which is unlikely to be accepted and obeyed and which challenges its authority).

In this book Ali Yesilirmak has provided much useful guidance as to the approach which international tribunals have and generally do follow where interim relief is sought. The analyses are based on the application of various national law provisions and different international arbitration rules. With reference to many international arbitration awards (many of which are unpublished) Dr Yesilirmak shows how the concepts, principles and rules have

been interpreted and applied. This is particularly important for two reasons. First, it will help parties and their lawyers to anticipate how arbitrators may react to certain situations, and may be a guide for arbitrators as well. Second, increasingly, parties in international arbitration are seeking to rely on and ask arbitrators to (or even argue that arbitrators must) follow convenient or pertinent decisions of other tribunals. However there is no formal precedent in international arbitration.

As with all international arbitration materials the book is based on comparative law, international instruments and arbitration practice. Dr Yesilirmak's book is a timely study of an area which is sparsely covered and which is an ever more important weapon and protection in international arbitration. This book will be an indispensable tool for those interested in interim measures of protection and international arbitration.

Julian D M Lew
London
July 2005

PREFACE

This book is a slightly amended and updated version of the author's PhD thesis submitted in 2003 to Queen Mary College, University of London. It provides guidance in respect of the problems and uncertainties concerning interim protection of rights in arbitration.

The author is grateful to the Schmitthoff Foundation for the grant of Mrs. Ilse Schmitthoff Scholarship that enabled him to initiate his doctoral studies.

He further wishes to express his gratitude to all those whose support and cooperation contributed greatly to this book, in particular the American Arbitration Association and the International Court of Arbitration of the International Chamber of Commerce for granting permission to research through arbitral decisions in their databases and to evaluate in this book the outcome of such research. The author is also thankful to the staff working in those institutions for their patience and invaluable assistance, particularly to William K Slate II, the late Michael Hoellering (former General Counsel), Luis M Fernandez, Eric Tuchmann and Laura Ferris Brown of the AAA, and Dr. Robert Briner, Dr. Horacio Grigera Naon (former Secretary General), Dominique Hascher (former General Counsel), Dr. Anne Marie Whitesell, Emmanuel Jolivet, Fernando Mantilla Serrano (former Counsel), Sylvie Picard Renue of the ICC.

Special thanks are due to Professor Alan S. Rau for the introduction of the subject of this book to the author, Carl Baudenbacher for his and his family's enormous support and friendship, and to Professors Hans Baade, Roy M. Mersky, Michael S. Sturley, Russell J. Weintraub and Mr. Jonathan Pratter of the University of Texas, School of Law, Professors Hasan Nerad and Hakan Pekcanitez of (formerly) the University of Dokuz Eylül, the late Professor John Adams of Queen Mary College, Centre for Commercial Law Studies, Professor Ian Fletcher of University College of London, Larry Shore of Herbert Smith for their kind assistance and support throughout the author's post-graduate studies. Thanks are also due to the staff, particularly Sue Sullivan and Sandra Baird at the Centre for Commercial Law Studies, Queen Mary College for their kind assistance and to Angie Raymond of the Centre as well as Vincent Verschoor of

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Kluwer Law International for their kind editorial assistance. Also, to the publisher of this book, Bas Kniphorst, whose patience and assistance is much appreciated. Finally, the author wishes to express his deepest indebtedness to his supervisors Professor Julian D. M. Lew, QC and Dr. Loukas Mistelis, for their guidance, support, encouragement and friendship.

The author devotes this book to his wife Arzu Aksaç, for small recognition of her everlasting support and patience.

This book endeavours to reflect the law as of 30 May 2005.

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TABLE OF ABBREVIATIONS

INSTITUTIONS AND ORGANISATIONS

AAA	American Arbitration Association
AFMA	American Film Marketing Association
AIA	Italian Arbitration Association
AR	Arbitration Rules
ASA	Swiss Arbitration Association
CIA	Chartered Institute of Arbitrators
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CANE	the Court of Arbitration of Northern Europe
CEPANI	Belgian Centre for Arbitration and Mediation
CCI	Chamber of Commerce and Industry of the Russian Federation
CIETAC	China International Economic and Trade Arbitration Commission
CMEA	Council for Mutual Economic Assistance (Eastern Europe) (COMECON)
CPR	Center for Public Resources
DIS	Deutsche Institution für Schiedsgerichtbarkeit
EAA	English Arbitration Act
ECA	European Court of Arbitration

Table of Abbreviations

ECAFE	United Nations Economic Commission for Asia and the Far East
EDF	European Development Fund
EU	European Union
FAA	French Arbitration Association
FOSFA	Federation of Oils, Seeds and Fats Associations
GAFTA	Grain and Feed Trade Association
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Center for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
JCAA	Japan Commercial Arbitration Association
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
LME	London Metal Exchange
MERCOSUR	Common Market of the Southern Cone
MIGA	Multilateral Investment Guarantee Agency
NAI	Netherlands Arbitration Institute
PCA	Permanent Court of Arbitration (The Hague)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
UCCET	Union of Chambers and Commodity Exchanges of Turkey
UNCC	United Nations Compensation Commission

UNCITRAL	United Nations Commission for International Trade Law
UNECE	United Nations Economic Commission for Europe
UNECAFE	United Nations Economic Commission for Asia and the Far East
UNIDROIT	International Institute for the Unification of Private Law
VJ	The Vindobona Journal
WIPO	World Intellectual Property Organisation

GENERAL ABBREVIATIONS

AA	Arbitration Act
AC	Law Reports, House of Lords (Appeal Cases)
AO	Arbitration Ordinance
AR	Arbitration Rules
Arb J	Arbitration Journal
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Arb Int	Arbitration International
ASA Bulletin	Swiss Arbitration Association Bulletin
BATİDER	Banka ve Ticaret Hukuku Araştırma Enstitüsü Dergisi

Table of Abbreviations

Boston U Int'l LJ	Boston University International Law Journal
BLR	Building Law Reports
BYBIL	British Yearbook of International Law
CA	Court of Appeal of England and Wales
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CCP	Code of Civil Procedure
ChD	Chancery Division
CLR	Common Wealth Law Reports
Clunet	Journal de droit international
Co	Company
Colum J Transnat'l L	Columbia Journal of Transnational Law
Comm	Commercial
Con LR	Construction Law Reports
Copenhagen Rules	International Law Association Arbitration Rules 1950
Corp	Corporation
CPR	Civil Procedure Rules
Croat Arbit Yearb	Croatian Arbitration Yearbook
DAC	Departmental Advisory Committee
Doc	Document
Dis Res J	Dispute Resolution Journal
EAA 1889	English Arbitration Act 1889
EAA 1934	English Arbitration Act 1934
English AA 1996	English Arbitration Act 1996
ECHR	European Convention on Human Rights

Table of Abbreviations

ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
EDNY	Eastern District of New York
EFTA	European Free Trade Area
EHRR	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ER	English Reports
EU	European Union
European Convention	European Convention on International Commercial Arbitration 1961
European Ct HR	European Court of Human Rights
EWCA Civ	Neutral Citation for England and Wales Court of Appeal civil division decisions
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
Fordham Int'l LJ	Fordham International Law Journal
F Supp	Federal Supplement
Geneva Convention	the Geneva Convention on the Execution of Foreign Arbitral Awards 1927
Geneva Protocol	the Geneva Protocol on Arbitration Clauses 1923
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics
Harv Int'l LJ	Harvard International Law Journal
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HKHC	Hong Kong High Court

Table of Abbreviations

HKLJ	Hong Kong Law Journal
HL	House of Lords
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999
ICC Int'l Ct Arb Bull	International Chamber of Commerce International Court of Arbitration Bulletin
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID Centre	International Centre for the Settlement of Investment Disputes
ICSID Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
IECL	International Encyclopedia of Comparative Law
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
Int ALR	International Arbitration Law Review
Inter-American Convention	Inter-American Convention on Arbitration of 1975
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
ILA Rep	International Law Association Report
ILM	International Legal Materials
ILR	International Law Reports
Iran	the Islamic Republic of Iran
Iran-US CTR	Iran-United States Claims Tribunal Reports

Table of Abbreviations

JBL	Journal of Business Law
J Int'l Arb	Journal of International Arbitration
J Law Soc Scotland	Journal of Law Society of Scotland
Juris-Classeur Pro Civ	Juris-Classeur Procédure Civile
J Mar L & Com	Journal of Maritime Law and Commerce
J World Inv	Journal of World Investment
KB	King's Bench
Korea	The Republic of Korea
Law & Policy in Int'l Bus	Law & Policy in International Business
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review
Mealey's IAR	Mealey's International Arbitration Reports
Minn L Rev	Minnesota Law Review
MLR	Model Law Review
MR	Master of Rolls
N. D. Cal.	United States District Court for the Northern District of California
NE	North Eastern Reporter
New LJ	New Law Journal
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NSWL	New South Wales Law Reports
NW J Int'l L & Bus	Northwestern Journal of International Law and Business

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NYAD	New York Appellate Division
NYLJ	New York Law Journal
NY L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
NYULQ Rev	New York University Law Quarterly Review
OJ	Official Journal of the European Communities
PC	Privy Council
PCIJ	Permanent Court of International Justice
Proposed Plan	Proposed Plan for Conciliation and Arbitration between Traders of Different Countries
QBD	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye/Collected Courses of the Hague Academy of International Law
RDAI/IBLJ	Revue de droit des affaires internationales/ International Business Law Journal
Register of Texts	Register of Texts of Conventions and Other Instruments concerning International Trade Law
Rev Arb	Revue de l'arbitrage
S Ct	Supreme Court of the United States
SDNY	South District of New York
SLR	Singapore Law Reports
SPIL	Swiss Private International Law
Register of Texts	Register of Texts of Conventions and Other Instruments concerning International Trade Law

Table of Abbreviations

TAM	Recueil des décisions des tribunaux arbitraux mixtes
Texas Int'l LJ	Texas International Law Journal
Tulane L Rev	Tulane Law Review
U Cin L Rev	University of Cincinnati Law Review
UCLA Law Rev	UCLA Law Review
U Ill L Rev	University of Illinois Law Review
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
U Miami Y B Int'l L	University of Miami Yearbook of International Law
U Rich LR	University of Richmond Law Review
UN	United Nations
UNCITRAL Notes	UNCITRAL Notes Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
US	United States of America
USFL Rev	University of San Francisco Law Review
Vanderbilt L Rev	Vanderbilt Law Review
WAMR	World Arbitration and Mediation Report
WL	Westlaw
WLR	The Weekly Law Reports
WTAM	World Trade and Arbitration Materials
Yale LJ	Yale Law Journal
YCA	Yearbook of Commercial Arbitration