



# Jurisdiction for Ordering Interim and Precautionary Measures in the Kingdom of Saudi Arabia and Comparative Laws



## Introduction and Background of the Problem

Interim relief or conservatory measures represent a form of temporary protection, taking the form of orders or rulings issued with a provisional nature until the dispute is definitively resolved. These measures serve various purposes, including preserving the status quo or restoring it to its previous state until a final decision is made, preventing tampering with evidence, or safeguarding assets that may ensure the enforcement of the final judgment.

The regulation and request for interim and conservatory measures are well-established in most modern judicial systems. Moreover, seeking such measures in arbitration proceedings has become increasingly common and is incorporated into numerous comparative legal systems. Additionally, interim relief is widely recognized in the rules of many leading international arbitration institutions, such as the International Centre for Dispute Resolution of the American Arbitration Association (AAA-ICDR), the International Court of Arbitration of the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), and the Saudi Center for Commercial Arbitration (SCCA). These institutions allow parties to request such measures either from the arbitral tribunal once it has been constituted or from an emergency arbitrator or interim measures arbitrator, who may be appointed to rule on these requests before the constitution of the arbitral tribunal.

Although requesting interim and conservatory measures has become available in modern arbitration proceedings, whether in ad hoc or institutional arbitration, seeking such measures from the courts still holds a particular appeal for many arbitration parties. One of the factors contributing to this appeal is that, in many comparative legal systems, interim measures can be requested through an ex-parte application without the need for a fully established adversarial proceeding. Additionally, court-ordered interim and conservatory measures can be enforceable

against third parties, as is the case with an order freezing a bank account with a financial institution<sup>1</sup>.

Comparative arbitration laws address situations where the parties have agreed to grant the arbitral tribunal the authority to rule on requests for interim and conservatory measures, as well as scenarios where such an agreement is absent. These laws also outline how parties can obtain interim and conservatory protection.

This paper examines the issue of jurisdiction over the issuance of interim and conservatory measures under the Saudi arbitration law and comparative laws, as well as the available options in both ad hoc and institutional arbitration.

## **Does the Arbitration Agreement Confer Jurisdiction on the Arbitral Tribunal to Consider and Issue Interim and Precautionary Measures?**

Although it has become well-established in practice that arbitration is now the natural forum for international trade disputes, an arbitration agreement remains an essential prerequisite for an arbitral tribunal to have jurisdiction over a dispute. Unlike state judiciary, arbitration is not always available or uniform; rather, it is the parties' agreement that establishes the deviation from the general jurisdiction of state courts and grants jurisdiction to the arbitral tribunal. The role of the state, in this regard, is to recognize the full effect of the parties' will as reflected in the arbitration agreement and to regulate its boundaries<sup>2</sup>. This means that an arbitration agreement has two effects; a negative effect, which prevents state courts from hearing the dispute, and a positive effect, which grants the arbitral tribunal jurisdiction to hear and decide the dispute with a binding and final award.

The key question that arises is whether the negative and positive effects of an arbitration agreement extend to interim and precautionary measures—meaning that the mere existence of

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<sup>1</sup> Nick Peacock, Hannah Ambrose and Vanessa Naish, Protecting Party Rights by use of Interim Measures: Traps for the Unwary in Obtaining Court-Ordered Relief, Legal Briefings, Herbert Smith Freehills, 21 February 2018.

<sup>2</sup> Dr. Dalia Hussein, Consent as the Basis of the Arbitration Agreement, PhD, Cairo University, P. 8.

an arbitration agreement automatically deprives state courts of jurisdiction to grant such measures and confers exclusive jurisdiction on the arbitral tribunal—or whether a specific agreement is required to this effect<sup>3</sup>? The following discussion will examine the position of the UNCITRAL Model Law and some comparative legal systems before analyzing the position of the Saudi Arbitration Law.

## Jurisdiction over Requests for Interim and Precautionary Measures Under the UNCITRAL Model Law

The UNCITRAL Model Law does not attribute a negative effect to an arbitration agreement that would prevent parties from seeking interim and precautionary measures from the courts before arbitration proceedings commence or from allowing courts to issue such measures in response to these requests<sup>4</sup>.

However, once arbitration proceedings have begun and the arbitral tribunal has been constituted, the Model Law permits the tribunal to issue interim measures at the request of either party, unless the parties have agreed otherwise<sup>5</sup>. Furthermore, the Model Law mandates that an interim measure issued by an arbitral tribunal be recognized as binding and enforced, regardless of the country in which it was issued<sup>6</sup>.

At the same time, the UNCITRAL Model Law does not deprive the judiciary of the power to issue interim measures during arbitration proceedings. It explicitly allows courts to grant such measures for the purposes of arbitration, irrespective of whether the arbitration is seated in the jurisdiction where the court is being requested to issue the interim measure<sup>7</sup>.

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<sup>3</sup> Dr. Abdelmoneim Zamzam, *Interim and Precautionary Measures Before, During, and After Arbitration Proceedings*, Dar Al-Nahda Al-Arabiya, 2007, p. 10.

<sup>4</sup> Article 9 of the UNCITRAL Model Law.

<sup>5</sup> Article 17(1) of the UNCITRAL Model Law

<sup>6</sup> Article 17 H.(1) of the UNCITRAL Model Law

<sup>7</sup> Article 17 J of the UNCITRAL Model Law

The Explanatory Note to the Model Law underscores that this provision—added in 2006—aims to eliminate any uncertainty regarding whether an arbitration agreement affects the authority of the competent court to issue interim measures. It clarifies that a party to an arbitration agreement remains free to request interim measures from the court, just as they are free to request them from the arbitral tribunal.

The overall implication of these provisions is that jurisdiction over interim and precautionary measures under the UNCITRAL Model Law is shared between courts and arbitral tribunals. The parties are free to choose either forum unless their arbitration agreement provides otherwise. Therefore, there is no requirement for a special agreement granting the arbitral tribunal authority to issue interim and precautionary measures; rather, the parties may explicitly exclude the tribunal from exercising such authority if they so agree.

## Jurisdiction Over Requests for Interim and Precautionary Measures in Comparative Laws

The English Arbitration Act allows parties to agree that the arbitral tribunal shall have the authority to issue interim and precautionary measures. However, this jurisdiction is contingent upon an explicit agreement between the parties granting the tribunal such authority. If no specific agreement is made, the tribunal does not have this power<sup>8</sup>.

Conversely, the English Arbitration Act grants the judiciary the authority to issue interim and precautionary measures in support of arbitration. This applies in cases where the arbitral tribunal does not have such authority or is unable to exercise it<sup>9</sup>.

Accordingly, the English Arbitration Act does not provide for shared jurisdiction between arbitral tribunals and courts regarding the issuance of interim or precautionary measures. Instead, it makes the tribunal's authority to grant such measures dependent on the parties' agreement. In

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<sup>8</sup> Article 39, English Arbitration Act.

<sup>9</sup> Article 44, Paragraph 2/e & 5, English Arbitration Act.

the absence of such an agreement, jurisdiction to issue interim and precautionary measures remains with the courts as part of their role in supporting arbitration proceedings.

Under French law, the existence of an arbitration agreement does not prevent parties from seeking interim and precautionary measures from the court as long as the arbitral tribunal has not yet been constituted<sup>10</sup>.

However, once the tribunal is constituted, jurisdiction over interim and precautionary measures generally shifts to the arbitral tribunal. Exceptions exist for certain types of interim measures, such as attachment orders and judicial guarantees “*Sûretés Judiciaires*”, which remain within the jurisdiction of the courts<sup>11</sup>.

Egyptian arbitration law allows the court, at the request of either party, to order interim or precautionary measures both before arbitration proceedings commence and during their course<sup>12</sup>.

Additionally, the law permits arbitration parties to agree that the arbitral tribunal may, at the request of either party, order any interim or precautionary measures it deems necessary based on the nature of the dispute. The tribunal may also require sufficient security to cover the costs of the ordered measure. If the party subject to the order fails to comply, the tribunal—at the request of the other party—may either authorize that party to take the necessary steps for enforcement or request the court to enforce the measure<sup>13</sup>.

These provisions indicate that Egyptian arbitration law considers the court's jurisdiction over interim and precautionary measures as an inherent authority that remains intact even after

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<sup>10</sup> Article 1449, Code de Procédure Civile, Livre IV.

<sup>11</sup> Article 1468, Code de Procédure Civile, Livre IV.

<sup>12</sup> Article 14 of the Egyptian Arbitration Law No. 27 of 1994

<sup>13</sup> Article 24 of the Egyptian Arbitration Law No. 27 of 1994

arbitration proceedings begin. This jurisdiction is only displaced if the parties explicitly agree to grant the arbitral tribunal the power to order such measures<sup>14</sup>.

## Jurisdiction over Requests for Interim and Precautionary Measures Under the Saudi Arbitration Law

The Saudi Arbitration Law grants the court the authority to order interim or precautionary measures at the request of one of the arbitration parties before arbitration proceedings commence or at the request of the arbitral tribunal during the arbitration process. The law also allows for the revocation of such measures through the same procedure, unless the parties have agreed otherwise<sup>15</sup>.

On the other hand, the Saudi Arbitration Law permits arbitration parties to agree that the arbitral tribunal—at the request of one of the parties—may order any interim or precautionary measures it deems necessary based on the nature of the dispute. The tribunal may also require the requesting party to provide appropriate financial security for the implementation of such measures. If the party subject to the order fails to comply, the tribunal—at the request of the other party—may authorize that party to take the necessary steps to enforce it, including requesting the competent authority to compel compliance<sup>16</sup>.

This indicates that the Saudi Arbitration Law allows the judiciary, in its role of supporting arbitration, to order interim and precautionary measures at the request of any party before arbitration proceedings commence. However, once arbitration has begun, the power to issue such measures is reserved for the arbitral tribunal, which evaluates the request to determine its validity and likelihood of success. If the tribunal deems the request justified, it may refer it to the court and request it to order the interim or precautionary measures; otherwise, it may reject it.

<sup>14</sup> Dr. Fahima Ahmed Ali Al-Qamari, *The Judiciary's Authority in Arbitration Proceedings*, Dar Al-Kutub wa Al-Dirasat Al-Arabia, 2017, p. 185.

<sup>15</sup> Paragraph 1 of Article 22 of the Saudi Arbitration Law.

<sup>16</sup> Article 23 of the Saudi Arbitration Law.



A challenge that arbitration parties may face in this regard is that the formation of the arbitral tribunal may occur after arbitration proceedings have officially commenced. According to Article 26 of the Saudi Arbitration Law, arbitration proceedings begin on the date one party receives the request for arbitration from the other party, unless they agree otherwise. Consequently, there may be a gap between the initiation of arbitration and the constitution of the tribunal during which parties are unable to obtain interim or precautionary protection from either the court or the arbitral tribunal.

While we believe that interim protection remains under the jurisdiction of the courts until the tribunal is formed, it may be advisable for the concerned party to assess the need for an interim or precautionary measure before initiating arbitration and, if necessary, request such measures from the court in advance of the commencement of arbitration proceedings.

## Interim and Precautionary Measures Under the Rules of the Saudi Center for Commercial Arbitration

The rules of the Saudi Center for Commercial Arbitration (SCCA) allow the arbitral tribunal—at the request of either party—to order any interim or precautionary measures it deems necessary<sup>17</sup>.

Additionally, and in line with many international arbitration institutions, the SCCA rules permit parties to request the appointment of an emergency arbitrator if urgent relief is required before the tribunal is constituted<sup>18</sup>.

To further regulate the process, the SCCA has dedicated an annex specifically addressing emergency arbitrator proceedings—Annex III of the rules. These proceedings are designed to ensure expedited timelines for appointing the arbitrator, reviewing the request, and issuing a

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<sup>17</sup> Paragraph 1 of Article 28 of the of the Saudi Center for Commercial Arbitration Rules.

<sup>18</sup> Article 7 of the of the SCCA Arbitration Rules.



decision. The total period for rendering an interim measure is limited to fourteen days from the date the case is referred to the emergency arbitrator.

It is noteworthy that, under Article 4 of the Saudi Arbitration Law, an agreement by the parties to arbitrate under the rules of an arbitration institution constitutes authorization for that institution to determine the appropriate procedures to be followed. This includes procedures that the law allows the parties to agree on—among them, the authority of the arbitral tribunal to issue interim and precautionary measures.

Some view the practice adopted by arbitration institutions of incorporating special provisions for emergency arbitrators as a means of effectively enhancing interim protection in arbitration proceedings<sup>19</sup>. In this regard, the English Supreme Court ruled that it lacked the authority to grant interim measures under the Arbitration Act when the parties had the option to request the appointment of an emergency arbitrator under the rules of the London Court of International Arbitration (LCIA). The court reasoned that the judiciary's jurisdiction to issue such measures is restricted to situations where the arbitral tribunal or other relevant bodies lack the authority or are unable to exercise such jurisdiction. Accordingly, the court found that the emergency arbitrator mechanism provides parties with a sufficient opportunity to obtain interim protection<sup>20</sup>.

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<sup>19</sup> Nick Peacock, Hannah Ambrose and Vanessa Naish, Protecting Party Rights by use of Interim Measures: Traps for the Unwary in Obtaining Court-Ordered Relief, Legal Briefings, Herbert Smith Freehills, 21 February 2018.

<sup>20</sup> English High Court, Gerald Meals SA v Timis, 2016, EWHC 2327 (Ch).

Before initiating arbitration proceedings, parties should carefully consider the limitations on the jurisdiction of both courts and arbitral tribunals in issuing interim or precautionary measures and take these into account when determining the timing of such requests. Institutional arbitration offers a valuable opportunity to secure interim and precautionary protection, whether through the application of emergency arbitrator provisions or the tribunal's authority to grant such measures.

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