



Interim Measures under the Revised Swiss Rules

by Christian Oetiker¹

Under the heading of "Interim Measures of Protection", Art. 26 of the Swiss Rules 2012 provides as follows:

1. At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate. Upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative, the arbitral tribunal may also modify, suspend or terminate any interim measures granted.
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.
3. In exceptional circumstances, the Arbitral Tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.
4. The arbitral tribunal may rule on claims for compensation for any damage caused by an unjustified interim measure or preliminary order.
5. By submitting their dispute to arbitration under these Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority. A request for interim measures addressed by any party to a judicial authority shall not be deemed to be incompatible with the agreement to arbitrate, or to constitute a waiver of that agreement.
6. The arbitral tribunal shall have discretion to apportion the costs relating to a request for interim measures in an interim award or in the final award.

¹ For further references, see Christian Oetiker, Commentary on Art. 26 Swiss Rules, in: Zuberbühler/Müller/Habegger (Hrsg.), Commentary on the Swiss Rules of International Arbitration, Zürich 2006. The second edition of this commentary, taking into account the revision of the Swiss Rules, will be published later this year.

Art. 26(1) of the Swiss Rules 2012 confers on the arbitral tribunal the competence to grant interim measures. This is supported by Art. 183(1) of the Private International Law Statute ("PILS"), pursuant to which the arbitral tribunal may order provisional or protective measures.

Although not explicitly provided for, arbitral tribunals will usually grant interim measures only if the following conditions are satisfied:

- (i) the tribunal has prima facie jurisdiction;
- (ii) there is prima facie evidence of a risk of irreparable harm or injury to the requesting party;
- (iii) such harm or injury are imminent (urgency requirement);
- (iv) there is a reasonable chance of success on the merits; and
- (v) the requesting party provides appropriate security.

Art. 26(1) of the Swiss Rules 2012 does not restrict the content of the measures that can be imposed. The admissibility of certain types of interim measures and their possible content is governed by the law applicable to the dispute. In general, interim measures may contain any order which is necessary or appropriate to secure the purpose of the arbitration. There are four main types of interim measures:

- (i) measures aimed at preserving or restoring the status quo pending the determination of the dispute (e.g. an order to continue the performance of a contract, an order to secure the object of the dispute);
- (ii) measures aimed at preventing current or imminent harm to a party (e.g. an order to take appropriate action or to refrain from taking certain actions that are likely to cause such harm);
- (iii) measures to facilitate or to ensure the enforcement of a future award (e.g. an attachment of assets or a provision of security or other means of preserving assets out of which a subsequent award may be satisfied); and
- (iv) measures aimed at facilitating the conduct of arbitral proceedings (e.g. an order to preserve evidence).

Art. 26(1) of the revised Swiss Rules 2012 contains the arbitral tribunal's power to modify, suspend or terminate an interim measure granted at any time upon application of a party or, in exceptional circumstance, on its own initiative. In general it will do so if the circumstances have changed after the interim measure was granted, if it becomes aware that an interim measure was unjustified or if the interim measures became unnecessary. The arbitral tribunal's powers relate only to measures granted by itself, but not to measures issued by another arbitral tribunal or a state court, with one exception: preliminary orders ordered by the emergency arbitrator (Art. 43 of the Swiss Rules 2012).

Art. 26(3) of the Swiss Rules 2012 explicitly vests the arbitral tribunal with the competence to issue preliminary orders, i.e. to issue interim measures without having heard the affected party. The request must be communicated to the affected parties at the latest together with the preliminary order. Furthermore, the affected party must immediately be afforded an opportunity to be heard. This opportunity may be granted in writing or orally.

Art. 26(2) of the Swiss Rules 2012 allows the tribunal to order the provision of appropriate security. This encompasses the direct costs of the interim measures ordered by the tribunal. Further, the tribunal may order security for possible damage that the affected party may incur because of the measure. Art. 26(4) of the Swiss Rules 2012 now also establishes the jurisdiction of the arbitral tribunal to rule on claims for compensation of any damage caused by an unjustified interim measure or preliminary order.

In order to accommodate the need for interim measures to be granted by an arbitrator even before the arbitral tribunal dealing with a dispute has been constituted, Art. 43 of the Swiss Rules 2012 provides for the possibility to call upon an emergency arbitrator. In such a case, the Arbitration Court of the Swiss Chambers' Arbitration Institution will nominate an emergency arbitrator upon receipt of the case and after a prima facie review of the jurisdiction. The emergency arbitrator will hear the parties and issue his decision within 15 days from the receipt of the file. The requesting party is obliged to file the Notice of Arbitration which commences the main arbitral proceedings within ten days of the submission of the request for emergency relief. The interim measures ordered by the emergency arbitrator will remain in place during the main proceedings, but may be amended by the arbitral tribunal if necessary.



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