

A GLANCE INTO HISTORY FOR THE EMERGENCY ARBITRATOR

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Newly appointed as an emergency arbitrator in an international commercial arbitration filed only three days earlier, the diligent appointee searches the web for a best practices guideline and comes away empty-handed, or nearly so.¹ The appointee may be tempted to invoke domestic judicial standards for the granting of provisional relief that seem arguably relevant based on the nationalities of the applicant and the respondent. But she will rightly follow an instinct to be constrained by her knowledge that the law of provisional relief in international commercial arbitration has evolved over decades as an amalgam drawn from the practice of international courts applying international law in state-to-state disputes, the work of international arbitral tribunals deciding investor-state disputes under the ICSID Convention or the UNCITRAL Arbitration Rules, the standards-setting process of the UNCITRAL itself in its revisions of its Rules and Model Law, and the case-by-case integration of international and

1. She will find the web rather full of nuts-and-bolts summaries of emergency arbitrator rules and procedures. *See, e.g.*, Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure in Action*, DISP. RESOL. J. 1-8 (2008). Recent attempts at furnishing compact guidance for interim measures practice more generally do exist, notably the CHARTERED INSTITUTE OF ARBITRATORS' INTERNATIONAL ARBITRATION PRACTICE GUIDELINE, APPLICATIONS FOR INTERIM MEASURES, <http://www/coarb/prg/docs/defaultsource/ciarbdocuments/guidamnce-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015applicationinterimmeasures.pdf> (last visited Nov. 29, 2016).

domestic practice in the precedent-free context of commercial arbitrations. An hour or less of web-surfing will yield multiple references to “*prima facie jurisdiction*,” “*prima facie case*,” and “*irreparable*” or (in a turn of phrase to be well noted and pondered) “*not adequately reparable*” harm, but little in the way of satisfactory texture and content for the wise application (or non-application) of these concepts.² A not easily surmounted difficulty for our appointee is that the international arbitration law of provisional measures lacks a universal *lingua franca*, and so terms like “*prima facie*” and “*irreparable*” may be appreciated in materially different ways, based on the arbitrator’s or advocate’s choice of legal culture and context. In this short Essay, I survey some of the historical reference points for these terms in the international law of provisional relief, with the purpose of making the potential subtleties of meaning in these critical phrases more apparent to the beleaguered emergency arbitrator for whom the luxury of time for study and reflection may not exist.

I. PRIMA FACIE JURISDICTION

Although it is not addressed in any of the important providers’ rules concerning emergency arbitration, it has become widely established that if the party against whom an emergency provisional measure is sought raises an objection to the emergency arbitrator’s jurisdiction by way of a prospective objection to the jurisdiction of the not-yet-constituted arbitral tribunal over the merits of the dispute, the emergency arbitrator may entertain the application if she is satisfied “*prima facie*” that an arbitral tribunal duly constituted under the arbitration agreement relied on by the applicant may have (or perhaps would have) jurisdiction to hear the merits. Nothing in the ICDR Rules³ and ICC Rules⁴ (to take only two prominent examples,

2. The same endeavor will yield mention of “urgency” and “necessity” with equivalent lack of nuanced guidance. But in a paper of modest proportions, I will discuss only the three terms mentioned in the text.

3. That is to say, the International Arbitration Rules of the American Arbitration Association (“AAA”), applied in cases administered by the AAA’s International Centre for Dispute Resolution (“ICDR”).

4. See INT’L CHAMBER OF COMMERCE, ARBITRATION RULES & MEDIATION RULES (2017), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-English-version.pdf> (last visited April 11, 2017).

but there are many others) clearly instructs the emergency arbitrator to proceed in this fashion. Indeed, an initial reading of the Rules might suggest that a more fulsome and decisive analysis of arbitral jurisdiction is required. Thus Article 6(3) of the ICDR Rules provides that “[t]he emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 19, including the authority to rule on her/his own jurisdiction . . .” – and the referenced Article 19 also includes (in Art. 19(2)) “. . . the power to determine the existence or validity of a contract of which an arbitration clause forms a part.” Should one read the words “rule” and “determine” to connote that the emergency arbitrator is expected (perhaps not required) to approach the question of arbitral jurisdiction with the same vigor and definiteness of conclusion as she would in writing a Final Award? A look back in time at international law jurisprudence suggests that a very limited approach is in order.

As it happens, there is a considerable history surrounding the jurisdiction of the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) to decide upon provisional relief when the tribunal’s jurisdiction over the merits is contested. But before we look at what “prima facie” has come to mean in that context, it is useful to ask: On what legal basis does the emergency arbitrator sitting in an ICC or ICDR case invoke ICJ jurisprudence about “prima facie” jurisdiction for purposes of provisional relief as an appropriate legal standard?

Summarizing the “test” that may be said to emerge from the ICJ case law over five decades beginning with the *Anglo-Iranian Oil Co. v. Iran* case, Professor Rosenne states:

The concept of prima facie jurisdiction means little more than the Court’s appreciation from the proceedings to date, that it appears that the Court might or could have jurisdiction over the merits and that the absence of that jurisdiction is not manifest. Although ambiguous (and perhaps deliberately so), that is sufficient for the Court to be able to deal with a request for provisional measures of protection. It is a low threshold, nothing more than a hypothesis. The Courts’ findings in provisional measures proceedings, whatever the extent of the arguments on the matter, are provisional. They imply no more than that the applicant has presented an arguable case for jurisdiction over the merits, enough for the court to be in a position to deal with the request for provisional measures, and in due course and without

reference to the earlier decision to decide whether it can deal with the merits.⁵

Professor Rosenne makes the additional point, however, that the principle of *prima facie* jurisdiction does not entail that the Tribunal necessarily makes a less thorough analysis of the jurisdiction issue than it would at the merits phase, but only that its examination of the jurisdiction issue can only be as fulsome as the submissions of the parties and the urgency of the circumstances will allow. “[T]he Court’s *prima facie* jurisdiction to indicate provisional measures has to be established from such judicial examination of the title of jurisdiction and of the objections to it that is feasible in the short time available within which the decision on the provisional measures has to be made.”⁶

The emergency arbitrator, given her uniquely temporary role in the commercial arbitration, and depending on the nature of the emergency, would be well justified in applying a standard that is much more flexible, given that the urgency itself might prevent meaningful presentation by either party or study of the jurisdiction question by the emergency arbitrator. Not infrequently, the respondent will advance an objection to arbitral jurisdiction bluntly rather than articulately, by a tactical boycott of the emergency arbitration proceeding, and it would be questionable for the emergency arbitrator to draw very definite adverse inference about the merits of an objection on arbitral jurisdiction lodged in this fashion. By taking a presumptive rather than fully analytical approach to the question of arbitral jurisdiction in this context, the emergency arbitrator protects the ability of the unconstituted full tribunal to address the question of continued interim relief, while avoiding a position of advocacy on the subject that the full tribunal might find persuasive. Such an approach finds support in the temporary provisional relief practice of the Iran-US Claims Tribunal, where Judge Charles N. Brower remarked in an oft-cited concurrence that “the benefit of the doubt given a Claimant as to the existence of

5. See SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW* 121-22 (2005).

6. See *id.* at 121. Professor Rosenne further states: “The concept of *PRIMA facie* jurisdiction means little more than the Court’s appreciation from the proceedings to date, that it appears that the Court might or could have jurisdiction over the merits and that the absence of that jurisdiction is not manifest. . . . It is a low threshold, notion more than a hypothesis. The Court’s findings [on jurisdiction] in provisional measures proceedings imply no more than that the applicant has presented an arguable case for jurisdiction over the merits . . .” *Id.* at 121-22.

jurisdiction when interim measures are considered . . . must be given all the more where temporary restraints are sought to preserve the Tribunal's power to consider such interim measures."⁷ In such a context the *prima facie* jurisdiction question may well be limited to asking whether (again in the words of Judge Brower) "there is a manifest lack of jurisdiction."⁸

It is a good indication of the utility of ICJ provisional relief jurisprudence as a guide to commercial arbitration practice that the ICJ's declamation of this test for *prima facie* jurisdiction, in the 1984 Nicaragua case, resonated with the Iran-US Claims Tribunal, which, as Professor Caron notes, quickly adopted the same *prima facie* test in its own provisional measures jurisprudence.⁹ Surely there was natural affinity between international jurists sitting on tribunals located in the same place (the Hague) at the same time (the mid-1980s), presumably taking good advantage of their proximity. But it is also instructive that a treaty-based tribunal adjudicating rights and duties between private US investors and the Iranian State adopted unhesitatingly the legal standard applied by the ICJ to state-to-state controversies. Although the basis for doing so was not fully explained, it is evident that a principle of effectiveness was shared between the two tribunals, i.e. that the *prima facie* approach to jurisdiction at the stage of temporary provisional relief served to protect the ability of the full tribunal to address jurisdiction anew at a subsequent stage, and the objection of preserving the effectiveness of the full tribunal applied without material distinction to state-to-state and investor-to-state tribunals. The same principle of effectiveness would appear in principle to be applicable to the relationship of the emergency arbitrator and the full tribunal in a commercial arbitration, and so the same approach to *prima facie* jurisdiction logically should be adopted.

ICSID investor-state arbitration case law on provisional relief does not appear to have contributed materially to a more fulsome understanding of what degree of probability that the tribunal will have jurisdiction of the merits is sufficient for the tribunal to grant provisional relief, the most oft-cited cases having gone not much

7. David D. Caron, *Interim Measures of Protection: Theory and Practice In Light of the Iran United States Claims Tribunal*, 46 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 465, 484 (1986) (quoting Judge Brower's concurring opinion in *Component Builders v. Iran*, 8 Iran-U.S. Cl. Trib. 216 (1985)).

8. Caron, *supra* note 7.

9. *Id.* at 489-90.

further than to declare that a respondent's objection to jurisdiction shall not be an obstacle to provisional relief and that a full and final determination of jurisdiction is not a precondition to provisional relief. Thus in Procedural Order No. 1 in the *Biwater Gauff v. Tanzania* arbitration,¹⁰ the Tribunal (Born, Landau and Hanotiau) remarked: "It is also clear, and apparently not in issue between the parties here, that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction."¹¹ The Chartered Institute of Arbitrators practice guideline endorsing a *prima facie* approach to jurisdiction with regard to provisional relief in commercial arbitrations (possibly the most recent "soft law" pronouncement on the subject in the commercial arbitration realm) makes no effort to go further in developing what is meant by *prima facie*, *i.e.* how much hesitation about the existence of jurisdiction is sufficient to turn the tables against provisional relief.¹²

Perhaps we should not be troubled that this excavation fails to unearth a more definite understanding of *prima facie* jurisdiction. If it is universally understood in the community of emergency arbitrators, and among the provider organizations that appoint them, that an objection to arbitral jurisdiction is not an insurmountable obstacle and that a comprehensive analysis of the jurisdiction objection need not be compressed into the narrow interval for completing the emergency arbitrator's assignment, and that the language of arbitration rules giving emergency arbitrators the same powers as duly constituted arbitral tribunals to "rule" and "determine" in relation to jurisdiction do not imply otherwise, then an important principle of emergency

10. *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No^o 1 (Mar. 31, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0087.pdf>.

11. *Id.* at para. 70. See, as well, an ICSID Tribunal's decision on provisional relief in *PNG Sustainable Development Program, Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Claimant's Request for Provisional Measures, para.118-19 (Jan. 21, 2015), <http://www.italaw.com/sites/default/files/case-documents/italaw4108.pdf>, where the Tribunal observes that it generally will not suffice for an ICSID Tribunal to rely for *prima facie* purposes on the fact that the ICSID Secretariat regarded the Claimant's assertion of jurisdiction as sufficient for the case to be registered. But the Tribunal stopped short of an indication of how much more rigor is in order: "The determination of the *prima facie* jurisdiction for provisional measures is a somewhat higher threshold than that to be applied at the registration stage, although it of course also falls short of a final decision on jurisdiction." At a later point in this Decision the Tribunal referred to the requirements of *prima facie* jurisdiction and *prima facie* case on the merits as "relatively undemanding." *Id.* at para. 125.

12. See CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 1, at 6.

arbitration “common law” will be very helpfully in place. And perhaps it is a desirable feature of this common law that the level of probability that jurisdiction may ultimately be found to exist, to constitute the required *prima facie* showing, should be variable and not fixed, taking into account the practical possibility of in-depth analysis of the jurisdiction issue presented, the intrusiveness and burden of the provisional measure proposed, and the ability of the applicant to provide assurance of compensation in case it turns out the measure was not justified.

*II. IRREPARABLE?, NOT ADEQUATELY REPARABLE?, OR
SUBSTANTIAL? HARM*

Should we be surprised, or merely distressed, that at such a relatively mature stage of the development of the international law of arbitral provisional relief, a concept as fundamental to the application of that law as “irreparable harm” lacks a well-settled universal meaning, and that this situation is explained, in large measure, by a seemingly perpetual impasse in the development of the law on a critical question: what law furnishes the standards applicable to the exercise of arbitral power to provide provisional relief? Further, shall we be distraught, or merely distressed, that emergency arbitrators in international cases, not specifically vetted by the appointing provider organizations for their immersion in these arcane points of arbitral provisional relief law, may more or less reflexively apply provisional relief standards that are most familiar to them from domestic judicial practice in the nation whose substantive law governs the contract? In the United States, where former domestic judges are admired as potential international arbitrators (by parties and providers alike) for their perceived prudence, fairness, and immersion in substantive principles of contracts, this problem is acute, and any arbitration practitioner who has advanced the position that international standards for provisional relief should apply in a New York-seated arbitration under a contract providing for application of New York law, to a tribunal composed of such judges, will attend to the enormity of the obstacle to be overcome.

Our perpetual predicament was well summarized recently by a prominent arbitration practitioner in Finland, based upon well-researched consultation of international sources:¹³

There is a general consensus among legal academics that the law governing the arbitrators' *power* to order interim measures is the *lex arbitri*. In contrast, different views have been expressed as to which law should provide the *standards* for a tribunal's decision whether to accept, or reject, a request for provisional measures. Three principal choices seem possible for the law governing the standards for arbitrator-ordered interim relief: (1) the *lex arbitri*; (2) the law governing the parties' underlying contract (*lex causae*), or (3) international standards.

As *Born* convincingly submits, there is little reason to conclude that *lex arbitri* provides the substantive standards for an arbitral tribunal's decision whether to issue provisional measures. This is so already for the reason that no national arbitration statute (other than the 2006 revisions to the Model Law) provides meaningful standards governing an arbitral tribunal's decision whether the order interim measures. Secondly, it seems equally insupportable to contend that *lex causae* provides the standards for granting arbitral interim relief: the fact that the parties have subjected their contract under a particular substantive law provides little, if any, indication as to their intentions regarding the granting of provisional measures. It follows that international sources – and not any national system of law, or decisions of national courts – should provide the standards for the grant of interim measures in international arbitration. The problem, however, is that there is no settled body of jurisprudence on this topic yet. On the contrary, the relevant standards are still evolving.¹⁴

The question of whether “international standards” apply is obviously closely linked to the question of “irreparable harm,” because that term has a rather definite meaning in common law countries. Yet it would be folly to assume that something other than “irreparable harm” in the common law sense is necessarily the applicable international standard, as the gravitational pull of common law concepts into international arbitration has followed from the ascendance of common law lawyers in the field. This conundrum having failed to be sorted out by the best and brightest minds in the

13. Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 *CROAT. ARB. Y.B.* 73, at 81–2 (2016) (citations omitted).

14. *Id.*

field over several decades, I do not hope to solve it here. But a brief historical tour may offer emergency arbitrators some context.

Thirty-five years ago¹⁵ upon the completion of the very first ICSID arbitration (a case that also entailed the first confrontation of an ICSID Tribunal with an application for provisional relief), Professor Lalive, in writing a memoir of his involvement as an advocate in that case, remarked that in the matter of provisional relief, “[a] large measure of discretion is granted here, as usual, to the arbitration tribunal, who will naturally be inclined, when exercising it, to follow the principles developed in international cases.”¹⁶ The large measure of discretion resulted from the decision of the drafters of the ICSID Convention to refrain from incorporating into Article 47 thereof, concerning the power to grant provisional relief, a set of standards for the granting of such relief to be uniformly applied.¹⁷ But it was not quite as inevitable as Professor Lalive would have willed us to believe that ICSID Tribunals would “naturally be inclined” to apply international standards. A decent respect for the legal traditions of the investor’s home State and the domestic law of the respondent State might have called for some infusion of such principles into the proceedings. But if an attempt to do so might force a choice between opposed legal standards, each commanding equal claim to applicability, was not the reasonable choice to resort to an international standard? Perhaps what Professor Lalive had in mind as

15. Historical evidence as to whether international tribunals tended to prefer civil law over common law in their early confrontations with interim relief has been found to be inconclusive. In a deeply-researched work on the history of provisional relief in international tribunals, Cameron Miles concludes that the practice of international courts and tribunals in the first half of the 20th Century seems to have drawn somewhat more on civilian rather than common law notions of interim relief in municipal legal systems but that no clear conclusions can be drawn: “[I]t may be tentatively inferred that international courts and tribunals in the early 20th Century drew on the civilian model of provisional relief in preference to the common law tradition of the interlocutory injunction, but anything more than this is mere speculation. Although a close connection between domestic and international concepts of interim relief might be suggested, the evidence required for a more specific and emphatic assertion is at present lacking.” Cameron A. Miles, *The Origins of the Law of Provisional Measures Before International Courts and Tribunals*, 73 HEIDELBERG J. INT’L L. 615, 672 (2013).

16. Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT’L L. 123, 133 (1980).

17. Article 47 provides, as it did at its inception, that “[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.” ICSID, ICSID CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, art. 47.

“natural” was this seemingly inevitable quest for a neutral set of principles whose adoption would not only serve the cause of equality of the Investor and State parties in a given case, but would also initiate the development of a *jurisprudence constante* of arbitral provisional measures.

Cycle forward five years, to 1986, and the Iran-US Claims Tribunal only five years into its lifetime had already experienced more than several dozen applications for provisional relief governed by its Rules adapted substantially without changes from the UNCITRAL Arbitration Rules of 1976. Professor Caron, as he then was,¹⁸ commenting on this jurisprudence, sounded a theme that still resonates and still challenges commercial arbitration tribunals: the relative status of municipal procedural law and customary international law when dealing concretely with an application for provisional relief. He noted that the absence of detail in Article 26 of the 1976 UNCITRAL Rules¹⁹ concerning the provisional measures standards to be applied by tribunals presented the Iran-US Claims Tribunal with a clear choice, and that this choice was made decisively in favor of international standards:

The Iran-United States Claims Tribunal consistently filled gaps in its procedural rules by reference to customary international arbitral practice and not, for example, by reference to Dutch law. This choice is the only means by which the UNCITRAL Rules will develop in a uniform fashion, and come to be a predictable and desired part of the international dispute settlement process. Indeed, such practice promotes the development not only of the UNCITRAL Rules, but also of a customary international arbitral procedure generally, whether such arbitration be public or private.²⁰

An early (in relative terms) exponent of caution in adopting the common law notion of irreparable harm into an international customary principle governing arbitral provisional relief, Professor

18. As of December 2, 2015, Professor Caron was appointed to replace Judge Charles Brower as a member of the Iran-US Claims Tribunal. See IRAN-U.S. CLAIMS TRIBUNAL <http://www.iusct.net> (last visited Feb. 22, 2017).

19. Article 26 as it then was provided: “At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.” G.A. Res. 31/98, UNCITRAL Arbitration Rules (Dec. 15, 1976).

20. Caron, *supra* note 7, at 472.

Caron in his 1986 survey (1) noted a mixed record of embrace and reluctance in the jurisprudence of the Iran-US Claims Tribunal; (2) took note of the risk of oversimplification of the common law concept of irreparable harm (non-compensability by an award of money) in its adoption into international jurisprudence, which might overlook more nuanced aspects of the common law (such as the exception for money damages not easily or precisely measured) that cause injury to be seen as irreparable despite the possibility of a monetary award; (3) cautioned that assumptions about effective enforcement and execution of monetary judgments in common law courts may be inapplicable to international arbitral awards; and (4) maintained that an inflexible insistence that provisional relief may only be issued if the injury is not compensable by money might often be at odds with the fundamental purpose of arbitral provisional relief to preserve the rights of the parties up to the time of a final award.²¹

Foreshadowing later developments in jurisprudence and in UNCITRAL's own texts, Professor Caron observed:

But if not irreparable prejudice, what circumstances are required by Art. 26 for the granting of interim measures? If the purpose of the measures is to conserve the respective rights in the dispute alleged by the parties, then all that should be required is an act prejudicing such rights. Given that interim measures proceedings are costly and often delay the adjudication of a claim, it is appropriate the such prejudice also be substantial. A substantial prejudice approach is appropriate given that an act prejudicial to a right should not be characterized as being acceptable simply because damages are available. The approach makes sense commercially given that the disruption to business relations and the waste resulting from such acts cannot truly be compensated by damages.²²

Cycle forward now 20 years to the adoption by UNCITRAL in 2006 of an amendment to the Model Law in regard to provisional measures by arbitral tribunals, to require that the applicant should satisfy the arbitral tribunal *inter alia* that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered”²³ The emergency arbitrator not already immersed in

21. Caron, *supra* note 7, at 492–93.

22. *Id.* at 493–94.

23. U.N. Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, Art.

the relevant history and compelled by the circumstances of the assignment to rely largely on instinct and experience could readily infer that the intention was to capture in its essence that common law concept of irreparable injury, and regard the difference in phrasing as a nuance not worthy of exploration. This would be unfortunate. An excavation into the UNCITRAL Working Group labors that resulted after several years in the 2006 version of Article 17A would yield the conclusion that the phrasing “not adequately reparable” was a push-back against the common law concept of irreparable injury as advocated by common law participants in the amendment process, notably the United States delegation. Delving as far back in time as UNCITRAL’s website will permit, we find that in 2000 the concept of elaborating standards for the granting of provisional relief in the Model Law was more or less launched with reference to a report by the International Law Association entitled “Provisional and Protective Measures in International Litigation” that made no reference to irreparable harm as a criterion for the granting of relief, but mentioned only the requirement of a plausible case on the merits and that the injury to plaintiff from denial of relief outweigh the harm to defendant from granting relief.²⁴ By 2002, a draft emerged that would have required the applicant to demonstrate likely “irreparable harm.”²⁵ But in 2004 there was resistance to that term within the UNCITRAL Working Group on a number of grounds; efforts by common law proponents to rephrase to more precisely capture the meaning of irreparable harm in common law jurisprudence did not find favor, and the rephrasing “harm not adequately reparable by an award of damages” was installed as an expansionary replacement for—not as a close proxy for—irreparable harm. On this matter it is worthwhile to quote the Working Group’s 2004 report in full text, as it is legislative history that emergency arbitrators and especially those from common law backgrounds should have engrained on their

17A(1)(a), U.N. Doc. A/40/17, annex I & A/61/17, annex I, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Jan. 5, 2017).

24. U.N. Secretary-General, *Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes*, ¶ 108, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V00/501/85/PDF/V0050185.pdf> (last visited January 5, 2017).

25. Working Group on Arbitration, *Report of the Working Group on Arbitration on the work of its thirty-sixth session*, ¶ 58, U.N. Doc. A/CN.9/508 (Apr. 12, 2002), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V02/533/86/PDF/V0253386.pdf> (last visited Jan. 6, 2017).

memories when their attention is directed to the “not adequately reparable” language in Article 17A of the Model Law:

88. In addition to the concerns expressed above [re lack of universal understanding of the meaning of “irreparable harm”], it was stated that, if the Model Law was to provide that interim measures of protection could be granted only to avoid harm that could not be compensated in monetary terms, there would be a risk that the provision would be interpreted in a very restrictive manner. As a result, interim measures in arbitration might be more difficult to obtain than similar measures in court proceedings, while parties seeking enforcement of such interim measures, would still need to engage in additional proceedings before the competent court. The question was raised as to whether it was the intention of the Working Group to adopt such a restrictive approach as to potentially exclude from the field of interim measures any loss that might be cured by an award of damages. It was also stated that, in current practice, it was not uncommon for an arbitral tribunal to issue an interim measure merely in circumstances where it would be comparatively complicated to compensate the harm with an award of damages.

89. With a view to providing a more flexible criterion, another proposal was made to replace the words “irreparable harm” by the words: “harm not adequately reparable by an award of damages”. It was stated that that proposal addressed the concerns that irreparable harm might present too high a threshold and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure. The Working Group found that proposal generally acceptable.²⁶

This evidently is the most significant piece of drafting history of Article 17A of the Model Law, showing the effective rejection, as too restrictive, of the US common law notion of irreparable harm as the *quid pro quo* for arbitral provisional relief.²⁷ And as a contemporary indication of the appreciation for that broader international standard, we can see today the new emergency arbitration rule in the JAMS International Arbitration Rules that became effective on September 1,

26. Working Group on Arbitration, *Report of the Working Group on Arbitration on the work of its fortieth session*, at 24, U.N. Doc. A/CN.9/547 (April 16, 2004), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V04/521/51/PDF/V0452151.pdf> (last visited January 6, 2017).

27. The Model Law’s “not adequately reparable” formulation in Article 17A was adopted *in haec verba* into Article 26 of the UNCITRAL Arbitration Rules in the amendments of those Rules effective in 2010.

2016, wherein Article 3 concerning emergency provisional relief provides in Article 3.3 that the emergency arbitrator “shall determine whether the party seeking emergency relief has shown that *immediate loss or damage* will result in the absence of emergency relief and whether the requesting party is entitled to such relief” (emphasis supplied).²⁸ The reluctance of arbitrators to be limited to a strict common law non-compensability notion of irreparable harm has also been seen in recent ICSID arbitration case law.²⁹

The foregoing should not be taken to suggest that the terminology of “irreparable harm” or its common law origins are in the process of becoming extinct from international provisional relief jurisprudence. But even where the term continues to be used, the reader must be cautious to assess whether a given tribunal intends to use it in its restrictive common law sense, or in the broader more flexible sense that contemporary jurisprudence and codifications support. The emergency arbitrator who is “on the clock” and in quest

28. As some further connective tissue, I note that the drafter of the JAMS 2016 Rules served as an arbitrator in 2014 case in which this author, as an advocate, applied for provisional relief and urged the Model Law Article 17A standard as the proper standard for international cases against the position of the adverse party that in a New York seated international arbitration governed by New York law, the New York judicial common law standard should control.

29. Commentators Mouawad and Silbert, reviewing the ICSID investment arbitrator case law on provisional measures, find that the notion of irreparable harm as found in the common law jurisprudence of interlocutory injunctions is not a necessary element for provisional relief in investment arbitration, being supplanted instead by a more flexible concept of substantial or not adequately reparable harm that might in some circumstances include harm that could be redressed by an award of money damages: “[T]hese concepts of ‘substantial’ or ‘irreparable’ harm are flexible under international law, and ‘[do] not necessarily require that the injury complained of not be remediable by an award of damages.’ Substantial harm may exist even if the party would still have recourse in damages.” Caline Mouawad & Elizabeth Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29(3) *ARB. INT’L* 381, 393 (2013). Writing even more recently about the ICSID caselaw and also non-ICSID investment arbitrations under the UNCITRAL Arbitration Rules, Luttrell also reports upon a divergence in the case law, with one group of decisions (and arbitrators) embracing a concept of irreparable harm closely akin to the common law concept of insufficiency of money damages, and another accepting that the harm should be either irreparable or substantial—the latter apparently for injury that a monetary award could address but in such an imprecise way that there would be large risk that even a large sum of money would not be a fair substitute for the property or right or investment itself. See Sam Luttrell, *ICSID Provisional Measures ‘In the Round’*, 31 *ARB. INT’L* 393, 403-06 (2015).

of clarity might reasonable rely on this formulation by an ICSID Tribunal chaired by Professor Born in the *Papua New Guinea* case:³⁰

[T]he party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable injury. There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of “irreparable” harm, or whether a demonstration of “serious” harm will suffice. In the Tribunal’s view, the term “irreparable” harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not a harm that is literally “irreparable” in what is sometimes regarded as the narrow common law sense of the term. The degree of “gravity” or “seriousness” of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures.³¹

III. PRIMA FACIE CASE ON THE MERITS

It is perhaps in regard to the strength of the applicant’s case on the merits—as must be demonstrated as a prerequisite for the obtaining of provisional relief—that there is the largest chasm between the approach of common law courts and the international customary standard. It is a matter of different normative priorities, and the leap from judicial culture to arbitral culture ought not to be a large one if emergency arbitrators coming from judicial backgrounds take instruction in the differences. In the common law courts, provisional relief prototypically in the form of a preliminary injunction historically has been a temporally-limited subset of the permanent final relief sought by the applicant and so the courts naturally have been concerned to receive a substantial showing of likely success before moving the relief needle in the plaintiff’s favor

30. *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, ¶ 109 (May 5, 2015).

31. This formulation was cited by an applicant for emergency relief and embraced by the emergency arbitrator in *Kompozit LLC v. Republic of Moldova*, Stockholm Chamber of Commerce Arbitration No. 2016/095, Emergency Award on Interim Measures, ¶ 86-88 (June 14, 2016).

upon a less than complete legal and factual record. At an opposite extreme, in international courts addressing state-to-state disputes, and especially in the years before provisional measures issued by such courts were clearly considered to be binding, the focal point of provisional relief was on non-aggravation of the dispute by unilateral action of one of the State parties, and considerations of respect for the positions of the respective sovereigns weighed heavily against any premature position-taking concerning the merits of the dispute.³²

Professor Kaufman-Kohler posits that there is now a “clear transnational standard” of “possibility of success on the merits” and explains the transnational retreat from the common law judicial norm:

[T]raditionally...this requirement is framed as the likelihood that the applicant will prevail on the merits. However, arbitral tribunals are reluctant to venture an assessment of the merits at an often early stage of the proceedings when the record is still scarce; they are concerned about prejudging and giving the impression that they have lost their objectivity. As a result, they soften the traditional requirement and tend to be satisfied with a showing that the claim is not manifestly without merit.³³

The notion that the international standard is a conscious “softening” of the common law standard may also be traced into the deliberations of the UNCITRAL Working Group concerning Article 17 A of the Model Law. For example, in a US delegation position paper in 2004 concerning *ex parte* interim measures, it was observed that the risk of prejudgment of the merits was a concern that exists with regard to all interim measures and not only those sought *ex parte*, and that “[t]he Working Group has responded to that concern by softening some of the conditions for interim measures precisely to forestall this risk of prejudgment. For example, the present draft of

32. Professor Caron commented on mainly ICJ practice 30 years ago. *See* Caron, *supra* note 7, at 490-91 (“Although the likelihood of success on the merits of the underlying claim is required for injunctive relief in many municipal systems, it rarely is articulated in public international arbitration as a factor to be considered in the granting of interim measures. It is a factor nonetheless, albeit sotto voce. It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous. The reluctance of tribunals to openly voice their consideration of this factor probably reflects in large part a desire to avoid embarrassment to a sovereign state party to the arbitration or accusations of pre-judging the case.”).

33. GABRIELLE KAUFMAN-KOHLER & ANTONIO RIGOZZI, *INTERNATIONAL ARBITRATION LAW AND PRACTICE IN SWITZERLAND* 343-44 (2015).

revised Article 17 provides that the tribunal need only be satisfied that ‘there is a *reasonable* possibility that the requesting party will succeed on the merits’ before issuing any interim measure.”³⁴ It is notable, however, that in some arbitral provisional relief contexts the merits of the case are nearly irrelevant, and perhaps the foremost example of this is when a party collaterally attacks the arbitral process by pursuing proceedings in another forum. This is perhaps more common in investor-state arbitration, where a sovereign may take criminal or other proceedings against the investor in its own courts.³⁵ But it is equally possible that a state- or non-state respondent in an international commercial arbitration will take proceedings against the claimant in another forum and that the request for arbitral provisional relief might take the form of a request for an arbitral anti-suit injunction. The “merits” issue, in such context, is not so much whether the claimant should prevail ultimately on its claimed substantive rights, but whether claimant is correct in asserting the exclusivity of the arbitral tribunal to address those rights and whether claimant is correct that the same rights are threatened to be adjudicated in, or impacted by proceedings in, a different and improper forum.³⁶

We may therefore understand “*reasonable possibility of success*” to have at least two dimensions. One concerns the degree of strength of the claim to ultimate final relief as a legal and factual matter – a softened approach to the common law probability of success requirement. This dimension of “reasonable possibility” is in play when (paradigmatically, but not only when) the requested provisional relief concerns the commercial relations of the parties during the arbitration. A second consideration is whether the interim measure requested is more related to the integrity of the arbitral process than it is to the interim status of business relations between the parties: when

34. James Castello, *Ex Parte Interim Measures of Relief: Summary of the Position of the U.S. Delegation at the Meeting of the UNCITRAL Working Group*, New York, February 23-27, 2004, <https://www.state.gov/s/l/2004/78113.htm> (last visited January 9, 2017).

35. See, e.g., Roberto Aguirre Luzi & Ginny Castelan, *International Energy Arbitrations, Criminal Proceedings and Provisional Measures*, GLOBAL ARB. REV. (Oct. 2, 2015), <http://globalarbitrationreview.com/chapter/1036054/international-energy-arbitrations-criminal-proceedings-and-provisional-measures>.

36. See Savola, *supra* note 13, at 11 (“[S]ome provisional measures typically require strong showings of serious injury, urgency and *prima facie* case (e.g., maintaining or restoring the status quo, or ordering performance of a contract or other legal obligation), while other provisional measures are unlikely to demand the same showing (e.g. preservation of evidence, or enforcement of confidentiality obligations).”).

the interim measure sought concerns preservation of evidence or proceedings in another forum, a lesser concern with the ultimate merits is reasonable because there is a smaller risk that the interim measure might impair the respondent's substantive rights if the respondent turns out to be the winner.

At least one other dimension of "reasonable possibility" is significant for the emergency arbitrator in a way that is distinct for that role. The full tribunal once constituted may promptly undo any relief granted by the emergency arbitrator, and can take such action on a more fulsome evidentiary record. The emergency arbitrator, having only a very temporary status, is not so much concerned with *prejudging* the merits as with having a disproportionate formative influence on the full tribunal's view of the merits. Respect for the ability of the arbitral tribunal to remain objective should dictate that the emergency arbitrator consider the merits only enough to satisfy herself that relief is not being enlisted in service of a vexatious claim. "Minimally reasonable" would therefore seem to be the correct guidepost for the emergency arbitrator in most circumstances.

Perhaps the argument could be made that the emergency arbitrator, having a temporary mandate only and no eventual role in the arbitral tribunal that will issue the final award, need not be overly concerned with her continuing objectivity or the parties' perceptions of it, and therefore might justifiably require a more substantial demonstration of a strong merits case as a condition of emergency relief. But the argument would seem to be unpersuasive, as the temporary nature of the emergency arbitrator's mandate and the entire reversibility of her determinations by the full arbitral tribunal once constituted militate in favor of the emergency arbitrator having the most minimal involvement with the merits of the case that the circumstances will permit. The mission of the emergency arbitrator is essentially to provide only so much temporary relief as is necessary to maintain the effective ability of the full arbitral tribunal to address continued provisional relief once it is constituted. And the provider organizations, in establishing the emergency arbitrator role, were mindful that in the US and other common law judicial systems, judicial provisional relief in aid of arbitration brings into play the judicial interlocutory injunction standard of likelihood of success on the merits: a standard that with its related extensive evidence-taking procedures is antithetical to the early stages of an international arbitral process.

CONCLUSION

Of course, under emergency arbitrator rules of many arbitral institutions, there is no strict necessity that the emergency arbitrator should invoke any of these well-developed notions of *prima facie* jurisdiction, irreparable or in adequately reparable or at least very substantial harm, and perhaps a good arguable case. Only where the UNCITRAL Model Law or provisions comparable to its Article 17A are in force as the *lex arbitri* at the arbitral seat may these requirements be considered as binding the decision-making of the emergency arbitrator. These rules designed to maximize flexibility avoid articulating standards and by this omission entrust the emergency arbitration with wide discretion to embrace or ignore, consciously or otherwise, decades of development of international law concerning the availability of provisional relief in international disputes. And so, as our colleague Anibal Sabater has pointed out, the extent to which these recognized criteria will be applied, explicitly or otherwise, in a particular emergency arbitration setting will vary with the urgency, the profile of the arbitrator, the briefing of issues by the parties, and the nature of the emergency relief sought—with possibly more attention to the jurisprudence of standards and criteria when the applicant seeks affirmative relief than when the applicant seeks to preserve the status quo and simply to direct that the respondent take no steps to alter the status quo.³⁷

The quality and predictability of the process will be enhanced, however, if emergency arbitrators in international cases come to their task armed with some historical context. The modest effort of this Essay has been to provide a resource for such use.

37. See Anibal Sabater (as panelist in), *Emergency Arbitrator Proceedings in Oil & Gas Disputes* (panel discussion at 2016 3rd Annual ITA-IEL-ICC Joint Conference on International Energy Arbitration). Juris Publishing, *Emergency Arbitrator Proceedings in Oil & Gas Disputes*, 10(2) WORLD ARB. & MEDIATION REV. 207, 222-24 (Andrea K. Bjorklund & R. Doak Bishop eds., 2016).