INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary or appropriate.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to order the provision of appropriate security.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

4. The arbitral tribunal shall have discretion to apportion the costs relating to a request for interim measures in the interim award or in the final award.

Contents

Literature

BESSON Sébastien, Arbitrage international et mesures provisoires, Etude de droit comparé, Zurich 1998 (cit. BESSON, Mesures provisoires); BÖCKSTIEGEL Karl-Heinz, Experiences as an Arbitrator Using the UNCITRAL Arbitration Rules, in: Etudes de droit international en l'honneur de Pierre Lalive, Basel 1993, 423–436 (cit. BÖCKSTIEGEL, Experiences); KNOEPFLER François, Les mesures provisoires et l'arbitrage international, in: Kellerhals (ed.), Schiedsgerichtsbarkeit, Zurich 1997, 307–329 (cit. KNOEPFLER, Mesures provisoires); LEVY Laurent, Les astreintes et l'arbitrage international en Suisse, ASA Bull 1/2001, 21–36; PIRRUNG Jörg, Die Schiedsverfahrensordnung der UNCITRAL, RIW 1977, 513–519; REDFERN Alan, Interim Measures, in: Newman/Hill (ed.), The Leading Arbitrators' Guide to International Arbitration, New York 2004, 217–243; UNCITRAL, Interim measures of protection, Proposal by the International Chamber of Commerce (Working Group of Arbitration, 40th session, New York,

23–27 February 2004), A/CN.9/WG.II/WP.129 (cit. UNCITRAL, Proposal ICC); UNCITRAL, Report of the Working Group on Arbitration on the work of its 39th session (Vienna, 10–14 November 2003), A/CN.9/545 (cit. UNCITRAL, Report 545); UNCITRAL, Report of the Working Group on Arbitration on the work of its 40th session (New York, 23–27 February 2004), A/CN.9/547 (cit. UNCITRAL, Report 547); VAN DEN BERG Albert Jan, New York Convention of 1958, Consolidated Commentary, Cases Reported in Volumes XV (1990) – XVI (1991), ICCA Yearbook 1991, 432–520 (cit. VAN DEN BERG, Court Decisions); VAN HOUTTE Hans, The Reasons Against a Proposal for *Ex Parte* Interim Measures of Protection in Arbitration, ArbInt 1/2004, 85–95; VON SEGESSER/KURTH, Interim Measures, in: Kaufmann-Kohler/Stucki (ed.), International Arbitration in Switzerland, The Hague 2004, 69–87; WALTER Gerhard, Vorsorgliche Massnahmen bei fehlender Hauptsachezuständigkeit, in: Spühler (ed.), Vorsorgliche Massnahmen aus internationaler Sicht, Zurich 2000, 121–140 (cit. WALTER, Vorsorgliche Massnahmen); WIRTH Markus, Enforceability of a Foreign Security Award in Switzerland, in: ASA Special Series No 9, The New York Convention of 1958, Zurich 1996, 245–256; WIRTH Markus, Interim or Preventive Measures in Support of International Arbitration in Switzerland, ASA Bull 1/2000, 31–45; ZULEGER Christian, Die UNCITRAL-Schiedsregeln – 25 Jahre nach ihrer Schaffung: eine Untersuchung wichtiger Problemkreise unter besonderer Berücksichtigung der Rechtsprechung des Iran-U.S. Claims Tribunals und der Regelung ausgewählter Schiedsordnungen, Frankfurt am Main 2002.

Other Institutional Rules

Art. 23 ICC; Art. 25 LCIA; Art. 46 WIPO; Art. 21 AAA.
Concerning pre-arbitral interim measures: ICC Rules for a Pre-Arbitral Referee Procedure; AAA Optional Procedures for Emergency Measures of Protection (Art. O-1 to O-8 of the AAA Commercial Arbitration Rules and Mediation Procedures).

I. Comparison with UNCITRAL Rules

1 Art. 26(1) allows the tribunal to take the interim measures it deems necessary or appropriate. Under Art. 26(1) UNCITRAL, the tribunal may grant the 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"* (cf. Art. 26 N 7–8). Pursuant to Art. 26(2), the tribunal may *"order the provision of appropriate security"* and not only *"require security for the costs of such measures"* as provided for by Art. 26(2) UNCITRAL (cf. Art. 26 N 7 and 23). Finally, Art. 26(4) provides for the possibility to apportion the costs in the interim award, which does not exist under the UNCITRAL Rules (cf. Art. 26 N 34).

II. Competence to Decide on Interim Measures (par. 1)

2 Art. 26(1) confers on the arbitral tribunal the **competence to take interim measures**, thereby following a modern approach (REDFERN, 223–225). This approach is supported by Art. 183(1) PILS pursuant to which the arbitral tribunal may order provisional or conservatory measures. Other jurisdictions may be more reluctant in this respect (e.g. Art. 818 of the Italian Code of Civil Procedure: REDFERN, 226; cf. also POUDRET/BESSON, N 606).

3 Art. 26(1) only gives the tribunal the competence to decide upon interim measures, but not to enforce such measures (PILS (Basel)-BERTI, Art. 183 N 9). **Enforceability** is an issue which has to be dealt with by the law of the jurisdiction in which enforcement is sought (cf. Art. 26 N 18–21).

4 Art. 26(1) explicitly states that the arbitral tribunal may take interim measures only at the **request of a party**. The tribunal may not act on its own motion.

5 The competence to order interim measures lies with the tribunal, i.e. with **all members of the tribunal** together (ZULEGER, 156; PIRRUNG, RIW 1977, 518). However, since the tribunal may, pursuant to Art. 15(1), conduct the arbitration in such manner as it considers appropriate unless otherwise agreed by the parties, the tribunal may also confer the power to grant interim measures on its chairperson (PILS (Basel)-BERTI, Art. 183 N 13; VON SEGESSER/KURTH, 78; *contra* BESSON, Art. 31 N 27). In urgent cases, in which a common decision of all members of the tribunal is not possible within the time available, the sole competence of the chairperson will subsist even without express authorisation by the other members, subject to the confirmation of the order by the entire tribunal in due course (ZULEGER, 156).

III. Requirements to Order Interim Measures (par. 1)

6 The arbitral tribunal will usually grant interim measures only if the following **requirements** are satisfied (VON SEGESSER/KURTH, 71; POUDRET/BESSON, N 626; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 234–235):

(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.

Arbitral tribunals tend to take a more lenient approach with regard to the urgency requirement and the chance of success than state courts usually do.

7 The tribunal may take such interim measures it deems **necessary or appropriate**. The requirement of "appropriateness" was added in comparison to the text of the UNCITRAL Rules. This lowers the hurdle for the parties in requesting interim measures because they do not need to show necessity; appropriateness is sufficient. Equally, the tribunal does not need to establish necessity when ordering an interim measure. A measure is necessary or appropriate if it is required or apt in order to prevent imminent damage not easily reparable for the requesting party (PILS (Basel)-BERTI, Art. 183 N 7).

8 In comparison to the **UNCITRAL Rules**, Art. 26(1) furthermore omits the wording "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". Under the UNCITRAL Rules, it is the common understanding that the specific measures named are listed only by way of examples and that the list is not comprehensive (SANDERS, ICCA Yearbook 1977, 196; ZULEGER, 349; ADEN, 634). The Swiss Rules rightly leave out this redundant language on possible measures. The omission of the requirement that the tribunal deems the interim measure necessary in respect of the subject-matter is also justified. Such requirement would only lead to fruitless discussions on the question of what constitutes the subject-matter of the arbitration.

IV. Content of Interim Measures (par. 1)

9 Art. 26(1) does not restrict in any way the content of the measures to be ordered. The admissibility of certain types of interim measures and their possible content is governed by the law applicable to the dispute (PILS (Basel)-BERTI, Art. 183 N 7; VON SEGESSER/KURTH, 72; POUDRET/BESSON, N 624; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 236). 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 (REDFERN, 220; ADEN, 634; KNOEPFLER, Mesures provisoires, 309–310; VON SEGESSER/KURTH, 72–74; WIRTH, ASA

Bull 1/2000, 33–34; POUDRET/BESSON, N 628; UNCITRAL, Report 547, 17–18; UNCITRAL, Report 545, 6–10):

(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 [with regard to the admissibility of attachments under Swiss law, cf. PILS (Basel)-BERTI, Art. 183 N 12; VON SEGESSER/KURTH, 74] or a provision of security [e.g. security for costs, cf. Art. 41 N 23–28] 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).

10 The order may envisage a **positive performance** (e.g. deposition of the object of the dispute) or an **omission of certain actions** (e.g. prohibition to grant a licence or to destroy or change a facility). In certain restricted circumstances, in particular if the balance of both parties' interests justifies such measure, the tribunal may even order the provisional compliance with the main request by the Respondent, whereas claims for money may be adjudicated provisionally only in absolutely exceptional cases (PILS (Basel)-BERTI, Art. 183 N 10). In any case, the tribunal should respect the contractual balance when ordering interim measures (BESSON, Mesures provisoires, N 446–451).

V. Addressees of Interim Measures (par. 1)

11 Only a party to the arbitral proceedings may be the **addressee** of any measure taken by the tribunal. Third parties fall outside the scope of such measures because they are not parties to the agreement to arbitrate (ZULEGER, 155–156; ADEN, 326–327; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 235–236). This rule provides for a "natural" limitation to the possibility of ordering the attachment of funds deposited with third parties and similar measures (VON SEGESSER/KURTH, 74).

VI. *Ex parte* Interim Measures

12 Cases of extreme urgency and cases in which the very purpose of the requested interim measure could be jeopardised by giving advance notice of the request to the other party are the **two main situations** in which a party may wish to obtain an interim measure on an *ex parte* basis, i.e. where the affected party is not notified of the application and not given the right to defend its case at the first stage of the proceedings (VON SEGESSER/KURTH, 77–78).

13 The issue of whether an arbitral tribunal is or should be allowed to order interim measures *ex parte* is extensively **discussed and disputed** on an international level (VON SEGESSER/KURTH, 78). UNCITRAL's Working Group on Arbitration, which is currently reviewing the provision on interim measures of the UNCITRAL Model Law (Art. 17), is considering the possibility of including the tribunal's competence to act upon *ex parte* applications (UNCITRAL Report 545, 16–26, and UNCITRAL Report 547, 28–31). There is still a strong opposition against including such provision (UNCITRAL Report 547, 29; VAN HOUTTE, ArbInt 1/2004, 87–88).

14 **Swiss authors** have often favoured the arbitral tribunal's competence to issue *ex parte* interim measures. They maintain that *ex parte* applications to the tribunal and the taking of interim measures by the tribunal without hearing the affected party should be allowed in a first stage if a request for interim measures is urgent and/or if the communication of the request to the other party is likely to prejudice the effectiveness of the measure. In a second stage, to take place shortly after the *ex parte* order was issued, however, the tribunal would be under an obligation to reassess its decision, giving both parties the opportunity to plead their case (PILS (Basel)-BERTI, Art. 183 N 8; PILS (Zurich)-VISCHER, Art. 183 N 14; BLESSING, Introduction, N 863–866; BUCHER, Schiedsgerichtsbarkeit, 75; LALIVE/POUDRET/REYMOND, Art. 183 N 3; VON SEGESSER/KURTH, 78). This position corresponds to the solution provided for by most Swiss civil procedure rules. However, there seems to be no authoritative confirmation that, under Swiss law, an arbitral tribunal may actually order *ex parte* interim measures, following the described procedure.

15 Within the **UNCITRAL Working Group** on Arbitration, the Secretary-General of the ICC International Court of Arbitration has submitted an intermediary proposal which is supported by some authors and deserves profound consideration. Instead of granting arbitral tribunals the power to issue interim measures on an *ex parte* basis enforceable by state courts, the proposition is to put the tribunal in a position to issue so-called preliminary measures, if it believes that it must act upon an

inter partes application for interim measures before the other side has had a full opportunity to respond (UNCITRAL, Proposal ICC, 3–4; VAN HOUTTE, ArbInt 1/2004, 89). This approach has the advantage that the preliminary interim measures are granted in the open, the other party being notified of the request (VAN HOUTTE, ArbInt 1/2004, 89).

16 From the aforesaid, it follows that under the Swiss Rules it is **unclear** whether *ex parte* interim measures may be applied for by the parties and granted by the tribunal. On the one hand, prominent Swiss authors affirm this possibility under Art. 183 PILS. On the other hand, the discussions within UNCITRAL show that the possibility of granting such measures is certainly not envisaged by the UNCITRAL Rules on the basis of which the Swiss Rules were drafted. For the time being, a tribunal faced with the issue would best opt for the intermediary way of action proposed by the ICC in order to avoid the possible problems it may face (VAN HOUTTE, ArbInt 1/2004, 85–95). There are cases where the ICC approach was successfully applied in practice (UNCITRAL, Proposal ICC, 2).

VII. Possibility to Establish Interim Measures by Interim Award (par. 2)

17 Art. 26(2) provides that interim measures may be established by an **interim award**. It is important that the tribunal may issue an award and not only a procedural order with regard to the enforcement of interim measures (cf. Art. 26 N 18–21) and a possible action for annulment against interim measures (cf. Art. 26 N 22).

1. Enforcement of Interim Measures

18 Interim measures ordered by an arbitral tribunal are binding for the parties to the arbitration proceedings. However, such interim measures are ***leges imperfectae*** in that the arbitral tribunal has no authority to enforce the measures ordered (WIRTH, ASA Bull 1/2000, 39; MÜLLER, International Arbitration, 107). As an alternative to the formal enforcement of interim measures, some authors allow the tribunal to impose fines on the parties in case of non-compliance (LEVY, ASA Bull 1/2001, 22–23). However, if not the admissibility as such, at least the enforceability of such fines is doubtful (POUDRET/BESSON, N 540; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 238; positive: LEVY, ASA Bull 1/2001, 34–35). The Swiss Rules do not grant the tribunal an express basis to impose such fines.

19 Art. 26(2) states that interim measures may be established in an interim award. Awards, contrary to procedural orders (PILS (Basel)-PATOCCHI/JERMINI, Art. 194 N 9), are **enforceable under the NYC**. Whether an interim award in the sense of Art. 26(2) qualifies as an award in the sense of the NYC is, however, questionable and disputed among legal scholars (WIRTH, ASA Special Series No 9, 250–255; BÖCKSTIEGEL, Experiences, 432; ADEN, 635; BLESSING, Introduction, N 869–876; ZULEGER, 156; KNOEPFLER, Mesures provisoires, 328; BESSON, Mesures provisoires, N 552–609; POUDRET/BESSON, N 639–640; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 238–242). In general, the term award, as understood by the NYC, means a decision *"which finally disposes of all or at least some of the claims submitted to arbitration, either by a money award, an award for specific performance or a declaratory award"* (WIRTH, ASA Special Series No 9, 251; VAN DEN BERG, Court Decisions, 447). Interim awards ordering for interim measures will usually not finally dispose of all or some of the claims submitted to arbitration (WIRTH, ASA Special Series No 9, 251) so that, in principle, they do not qualify as an award under the NYC (cf. also Art. 30 N 10). Nevertheless, enforceability of such an interim award under the NYC may subsist (i) if the measure requested is covered by the parties' agreement to arbitrate (in order to avoid the *ultra petita*-defence pursuant to Art. V(1)(c) NYC) and (ii) if the decision cannot be changed by the arbitrators during the proceedings so that it may be regarded as binding (WIRTH, ASA Special Series No 9, 251–252; ZULEGER, 156).

20 Very recently, new activities to circumvent the problem of enforcement of interim measures have been developed. In fact, the UNCITRAL Working Group on Arbitration is at the moment **redrafting Art. 17 UNCITRAL Model Law** which deals with the power of the arbitral tribunal to order interim measures (UNCITRAL, Report 547, 3). In addition, the Working Group is elaborating the wording for a new provision which deals with the recognition and enforcement of interim measures of protection (UNCITRAL, Report 547, 5–17). It will contain an obligation on the competent state courts to recognise as binding and to enforce upon application an interim measure of protection issued by an arbitral tribunal, subject to certain well-defined grounds for refusal such as subsistence of a substantial issue as to jurisdiction of the arbitral tribunal, lack of proper notice, violation of the right to be heard (subject to the proposed competence to issue *ex parte* interim measures [cf. Art. 26 N 13]) and termination or suspension of the measure by the tribunal or a competent court (UNCITRAL, Report 547, 5–6). The inclusion of such provision in the various national arbitration laws would obviously very much facilitate the enforcement of interim measures and avoid the complex issues arising therefrom under the present situation.

21 For the time being, modern arbitration laws, avoiding the issue of enforcement, provide for an alternative solution to ensure the enforcement of (or rather the compliance with) interim measures taken by an arbitral tribunal: they allow the tribunal (and the parties) to **address the competent judicial authority** and to request it to assist in order to ensure the enforcement of the measure taken, a possibility granted e.g. by Art. 183 PILS (PILS (Basel)-BERTI, Art. 183 N 16–18; BESSON, Mesures provisoires, N 476–477, 498–521; POUDRET/BESSON, N 635–638).

2. Action for Annulment Against Interim Measures

22 Preliminary awards may be the object of an **action for annulment** pursuant to Art. 190(3) PILS (PILS (Basel)-BERTI/SCHNYDER, Art. 190 N 83–87). Yet, it is at least questionable whether interim measures in the form of an interim award pursuant to Art. 26(2) qualify as preliminary awards in the sense of Art. 190 PILS. It seems sensible to apply a similar criterion as with regard to the enforceability of interim measures: The tribunal should not be in a position to change the award during the proceedings, so that it may be regarded as binding (WIRTH, ASA Special Series No 9, 251–252; ZULEGER, 156). Only if this is the case, an action for annulment will be possible.

VIII. Provision of Security (par. 2)

23 Art. 26(2) allows the tribunal to order the provision of **appropriate security**. Under the UNCITRAL Rules, the tribunal may only require security for the costs of the interim measures ordered (SANDERS, ICCA Yearbook 1977, 197; ZULEGER, 157; less restrictive ADEN, 635; Weigand-TRITTMANN/DUVE, Art. 26 UNCITRAL N 4). Art. 26(2) omits the qualification *"for the costs of such measures"*. It thereby avoids the application of Art. 38 which sets out what the costs of arbitration may include. Although the security of Art. 26(2) still encompasses the direct costs of the interim measures ordered by the tribunal, the Swiss Rules additionally allow the tribunal to order security for possible damage that the affected party may incur because of the measure taken (VON SEGESSER/KURTH, 79; PILS (Basel)-BERTI, Art. 183 N 14; ADEN, 635). In view of Art. 26(4), pursuant to which the tribunal may apportion the costs relating to a request for interim measures in the interim award, the possibility of ordering the provision of security must furthermore encompass the competence to request advance payments for legal costs and fees (cf. Art. 41 N 23–28).

24 The provision of security is *per se* **not a condition** to the granting of interim measures. However, it is clear that the arbitral tribunal retains the right, in all circumstances, to require the provision of security as such condition (cf. also UNCITRAL, Report 545, 12).

25 The natural and usual **addressee** of an order to provide security is the party requesting the interim measures. However, as the discussions within the UNCITRAL Working Group on Arbitration show, there may be (admittedly rare) cases in which the party affected by an interim measure would be required to provide security (UNCITRAL, Report 547, 25). For example, an affected party trying to obtain the lifting of an interim measure may be required to deposit security. Art. 26(2) is wide enough to allow for such an order.

IX. Requests Addressed to Judicial Authorities (par. 3)

26 Although modern laws on arbitration usually allow the arbitral tribunal to take interim measures, they do not exclude the respective **competence of the judicial authorities**. Hence, a party intending to request provisional measures often has the choice of whether to address the arbitral tribunal or the competent judicial authority (for Switzerland, cf. KNOEPFLER, Mesures provisoires, 317–318; PILS (Zurich)-VISCHER, Art. 183 N 3).

27 The Swiss Rules reflect this situation by stating that a request for interim measures addressed by a party to a judicial authority is not incompatible with the agreement to arbitrate and does not constitute a waiver of that agreement. The Swiss Rules, therefore, make it clear that a **concurrent competence** of the tribunal and the competent judicial authorities to take interim measures subsists (ADEN, 635; SANDERS, ICCA Yearbook 1977, 197; Weigand-TRITTMANN/DUVE, Art. 26 UNCITRAL N 5; POUDRET/BESSON, N 611). This means that the parties are free to seek interim relief at any time either from the arbitral tribunal or from a competent court (VON SEGESSER/KURTH, 84; BESSON, Mesures provisoires, N 411–418; WIRTH, ASA Bull 1/2000, 44). It should be noted though that the concurrent competence provided for by Art. 26(3) does not exist where the applicable national (procedural) law provides for the exclusive competence of judicial authorities to order interim measures (SANDERS, ICCA Yearbook 1977, 197; ZULEGER, 157). This is not the case under Swiss law (Art. 183 PILS).

28 The parties may choose to **exclude the arbitral tribunal's competence to order interim measures** by agreement. Such exclusion would need to be clear and unequivocal (ICC decision of 2 April 2002,

ASA Bull 4/2003, 811; VON SEGESSER/KURTH, 85). Yet, it does not seem advisable to do so since the arbitral tribunal will often be in the best position to order appropriate interim measures.

29 On the other hand, the parties may **exclude the jurisdiction of the courts over interim measures** (VON SEGESSER/KURTH, 85; BESSON, Mesures provisoires, N 225; *contra* BERGER, Wirtschaftsschiedsgerichtsbarkeit, 245). However, we advise against such exclusion since the enforcement of interim measures ordered by an arbitral tribunal is only possible to a limited extent for the time being.

30 It is widely accepted that the principles of *lis pendens* and *res judicata* do not apply to interim measures (BESSON, Mesures provisoires, N 438–439; VON SEGESSER/KURTH, 86). The concurrent competence of the arbitral tribunal and the judicial authorities may therefore lead to **conflicting orders**. This consequence has to be accepted to some extent. However, if interim measures were already taken or declined by a competent body, a tribunal or court seized later with the same request should desist from ordering interim measures for reasons of judicial efficiency, procedural economy and in view of the requirement of sufficient protective interest of the applicant if (i) the request is identical to the earlier request, (ii) the facts and the evidence submitted are the same, (iii) the legal tests applied by the two bodies are equivalent and (iv) due process was granted in the earlier proceedings (ICC decision of 2 April 2002, ASA Bull 4/2003, 817; cf. also WIRTH, ASA Bull 1/2000, 43; POUDRET/BESSON, N 621). If an actual conflict nevertheless arises, the interim measure ordered by the tribunal should usually be given priority (BESSON, Mesures provisoires, N 440; POUDRET/BESSON, N 618; BERGER, Wirtschaftsschiedsgerichtsbarkeit, 243), unless there are valid reasons for the court's order to prevail (e.g. issues of enforcement).

31 Due to Art. 26(3), a judicial authority approached by a party may **not decline its jurisdiction** to take interim measures because of the parties' agreement to arbitrate. This is coherent with the prevailing position (WALTER, Vorsorgliche Massnahmen, 139–140; Weigand-TRITTMANN/DUVE, Art. 26 UNCITRAL N 6), which was among others taken by the European Court of Justice in its decision *Van Uden Maritime BV c. Kommanditgesellschaft in Firma Deco-Line et al.* of 17 November 1998 (Case C-391/95).

32 Art. 26(3) prevents the party affected by an interim measure ordered by a judicial authority from **challenging the arbitral tribunal's competence** later on, by arguing that the other party waived the agreement to arbitrate by approaching the judicial authority.

33 Art. 26(3) is of utmost importance since in certain cases, it will be of no avail for a party to request interim measures from the tribunal. This is particularly the case at a stage of the proceedings at which the arbitral tribunal is not even constituted. Furthermore, it may be problematic to enforce interim measures ordered by the tribunal so that it may be preferable for a party to approach the competent **judicial authority from the outset** (SANDERS, ICCA Yearbook 1977, 197).

X. Apportioning of Costs (par. 4)

34 Art. 26(4) allows the tribunal to apportion the costs relating to a request for interim measures **in the interim award or in the final award**. The possibility of apportioning the costs with the interim award is not provided for in the UNCITRAL Rules and was added by the drafters of the Swiss Rules. It is perfectly sensible to confer this option on the tribunal. The separate apportioning of the costs in the interim award seems warranted in particular if substantive amounts are involved or if the compliance with the interim measures in fact puts the dispute to an end (e.g. intellectual property or unfair competition litigation). Art. 38 sets out what the costs of arbitration may include.