THE SEARCH FOR RELIEF IN PROVISIONAL MEASURES

Nicky Balani•

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Abstract

The absence of an express power of arbitral tribunals to grant interim measures raises a question if this is precluded under Thai arbitration law. The practice of Thai arbitral institutes to include such a power for the issuance of interim measures may be explained by an inherent authority of arbitral tribunals. The article questions this proposition of an inherent power of arbitral tribunals to order interim measures where the applicable curial law is Thai law. The argument made is that neither the arbitration law nor developments to arbitration rules show traces of an implied power of the tribunal. The residual position of an exclusive competence of Thai courts for interim measures of protection potentially undermines the fairness and efficiency expected from arbitration proceedings. In such circumstances, an amendment to the arbitration law to expressly confirm the power of arbitral tribunals to order interim measures and the recognition and enforcement thereof provides an important safeguard against frustrating the arbitral process.

Keywords: provisional measures, Thai arbitration law, power of arbitral tribunals in Thai-seated arbitrations, enforcement of provisional measures.

I. Introduction

Provisional measures under Thai arbitration law has been a regular discussion point since the Thai Arbitration Act BE 2545 (2002) ("TAA") was passed. Section 16 of the TAA is silent on the power for an arbitral tribunal to grant interim relief. This has led to the debate whether the effect of Section 16 precludes an arbitral tribunal from granting provisional measures.[1] This uncertainty has called for clarity, but the proposed amendments to the TAA have since not involved reform on provisional measures.[2]

• International law consultant.

[1] See e.g. Luke R. Nottage and Sakda Thanitcul, "The Past, Present and Future of International Investment Arbitration in Thailand" (28 April 2016, Legal Studies Research Paper No. 16/31, Sydney Law School), 17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770889> ("However, the Model Law regime emphasises respect for autonomy of the arbitration process, and commentators argue that even though the 2002 Act does not expressly permit arbitrators to issue interim measures, it does not preclude this power if parties have agreed on it (directly or through relevant arbitration rules)").

[2] Instead, the first amendment in 2019 to the TAA eased the process for foreign arbitrators and representatives to participate in arbitration proceedings in Thailand: Arbitration Act (No. 2) BE 2562 (2019). Following this an arbitration bill debated was for a judicial review of arbitral awards in cases involving a state agency: see, Section 3 of the Draft Arbitration Act, <https://www.parliament.go.th/ewtadmin/ewt/parliament_parcy/download/section77/section77_arbitration.pdf>; House of Representatives Agenda for 9 February 2022 <https://edoc.parliament.go.th/Meeting/MeetingViewer.aspx?id=812>.

In the past, national arbitration legislation historically limited the power of arbitral tribunals in granting interim measures.[3] Modern arbitration jurisdictions have since confirmed the authority of arbitral tribunals to grant interim relief, so long as this is not contrary to the parties' agreement.[4] The practice of courts in developed arbitration jurisdictions has also been to defer to the arbitral tribunal as appropriate, such as for measures to have effect only until such time that the tribunal is able to review the court-ordered measures.[5]

Thailand alongside China and Italy were earlier considered as not empowering tribunals to order interim relief.[6] Aside from Thailand, this position may no longer be accepted:[7] Xing Xiusong and Wang Heng state, "[t]his might be a misunderstanding of the arbitration law and practice in China; arbitral tribunals sitting in China have been consistently issuing orders for measures that are equivalent to 'interim measures', though they might not have been described as such."[8] In Italy, the reformed Article 818 of the Civil Procedure Code in 2022 now permits parties to agree for the arbitral tribunal issue interim measures under the arbitration clause, arbitration agreement or by agreement to arbitration rules containing such a power.[9]

In Thailand, the absence of an express prohibition has led to the enquiry whether the powers for interim relief by a tribunal is impliedly permissive. Such a proposition arises out of the practice of leading Thai arbitration institutions, the Thai Arbitration Institute ("TAI") and Thailand Arbitration Center ("THAC"), that provide in their respective arbitration rules the power of the tribunal to order interim measures.[10] Notably, arbitration rules have the benefit of being "carefully drafted by experienced practitioners, and that has often been widely applied and interpreted by arbitral tribunals and courts and commented by practitioners and academics."[11] The careful drafting and institutional affiliation of the TAI and THAC to

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[3] Gary B Born, International Commercial Arbitration (3rd edn, Kluwer Law International 2021) 2606, 2610.

[4] ibid, 2612, 2614.

[5] ibid, 2736 – 2738.

[6] ibid, 2619: ("Although historic limitations on arbitrators' power have been removed in almost all states [...]. That remains the case, for example, in Italy, China, and Thailand, where local legislation still provides that the granting of provisional measures is reserved exclusively to local courts, which are authorized to issue provisional relief in aid of arbitration"); Emi Rowse and Dutsadee Dutsadeepanich, "Thailand", 9 <https://www.ibanet.org/MediaHandler?id=AF819767-C572-4B20-97AD-448D3CE1EFFD>.

[7] Born (n 3) 2619.

[8] Xing Xiusong and Wang Heng, "Interim Measures in Arbitration Proceedings in China" (Global Arbitration Review, 27 May 2022) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/interim-measures-in-arbitration-proceedings-in-china>.

[9] See, Osborne Clarke, "Italy Enters New Era of Arbitration 'Friendliness'" (27 April 2023) <https://www.osborneclarke.com/insights/italy-enters-new-era-arbitration-friendliness>; Cecilia Buresti and Edoardo Mazzoli, "A Modernization of Italian Arbitration Law" (Norton Rose Fulbright International Arbitration Report) 35-36, 35 <https://www.nortonrosefulbright.com/en/knowledge/publications/f3baa1b1/a-modernization-of-italian-arbitration-law>.

[10] See e.g. Thai Arbitration Institute Arbitration Rules 2017 Article 39 ("TAI Rules"); Thailand Arbitration Center Arbitration Rules 2015 Article 66(5) ("THAC Rules").

the Office of the Judiciary and Ministry of Justice respectively makes scrutiny of this apparent inconsistency all the more relevant.[12]

Against this backdrop, the article examines the divergence between the arbitration rules of Thai institutions and Thai law on provisional measures. The argument made is that the TAI and THAC arbitration rules which empower tribunals for provisional measures exacerbate the silence under Section 16 of the TAA. The article examines if in such circumstances an implied power reconciles this apparent inconsistency without however finding the presence of an inherent authority.[13] The consequence of powers reserved exclusively for the Thai courts on interim measures in support of arbitration proceedings potentially affects the efficiency and integrity of arbitral proceedings. This argument is made in four parts: The first part provides an overview of the framework for provisional measures in arbitration proceedings under Thai law showing a consistent pattern of reserving powers for interim relief only to the courts (Section II). The second part reviews whether there exists an inherent power of the arbitral tribunal to order interim relief without finding a trace of such authority (Section III). The third part examines the implications on the efficiency, effectiveness and integrity of the arbitration proceedings (Section IV). The fourth part recommends an amendment to the TAA to clarify powers of the arbitral tribunal for interim measures and its enforcement (Section V).

II. Framework for Provisional Measures

The availability of provisional measures is necessary to "preserve a factual or legal situation so as to safeguard rights" for which recognition is sought from the tribunal.[14] This is to maintain the status quo or prevent serious harm or prejudice in the pendency of the dispute being decided.[15] The purpose is to ensure fairness, efficiency and effectiveness in the resolution of the dispute.[16] Examples of provisional measures that may be ordered include; freezing orders which prevent the dissipation of assets which are the subject matter of the dispute or relevant to the satisfaction of the award; orders to preserve property

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11 UNCITRAL Notes on Organizing Arbitral Proceedings 2016 para. 7.

12 See, Thai Arbitration Institute ("TAI"), "TAI Overview" <https://tai.coj.go.th/en/content/page/index/id/56>; Ministry of Justice Thailand Organization Structure <https://www.moj.go.th/view/7782>.

13 See generally, Ciarb, "Applications for Interim Measures" (International Arbitration Practice Guideline 2016) 4 <https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf> ("If there are no express provisions allowing the arbitrators to grant interim measures and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the lex arbitri, arbitrators may conclude that they have an implied power to do so.").

14 Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line, Case No. C-391/95, [1998] ECR 1-7091, 7133 (ECJ).

15 UNCITRAL Model Law 1985 with 2006 Amendments Article 17; Mihaela Apostol and Kabir Duggal, 'Provisional Measures' (Jus Mundi, 21 September 2022) <https://jusmundi.com/en/document/publication/en-provisional-measures>; See also, Born (n 3) 2651-2653.

16 Ortho Pharmaceutical Corporation v. Amgen 882 F.2d 806 (3d Cir. 1989); Born (n 3) 2604, 2644, 2737: (These provisional measures rest on a simple premise: in order for a dispute resolution process to function in a fair and effective manner, it is essential that an adjudicative body possesses broad power to safeguard the parties' rights and its own remedial authority during the pendency of the dispute resolution proceedings.").

and evidence, confidentiality orders and security for costs.[17] V.V. Veeder explains: "[a]n order for interim measures is essentially temporary in nature; it is not an award which is always final; but an interim order can be at least as, or even more important than, an award. In the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration procedure—completely and finally."[18]

This power to order interim measures by a tribunal is determined in accordance with the curial or procedural law; which in most cases will be the law of the arbitral seat.[19] The curial law also defines the circumstances under which interim relief may be granted.[20] As appropriate, the tribunal gives effect to the arbitral rules and the local law where interim measures may be executed or enforced (lex loci executionis) under a sui generis system of rules.[21]

The inability to obtain timely interim measures where required carries the risk of prejudice or irreparable harm for the applicant. This may materialize in the dissipation of assets, destruction of evidence, loss of market value, disclosure of confidential information or misuse of intellectual property.[22] Some examples of this are where the court declines jurisdiction as a foreign court, or the result of delays in having to approach a national court by first engaging local counsel.[23] This may bring into play strategic choices potentially undermining the positions taken by a party in the arbitration, and may also exert pressure in settlement negotiations.

By contrast to awards, there is no harmonized framework for the recognition and enforcement of provisional measures.[24] As such, a party may decide on a seat of arbitration based on the efficiency by which tribunal-ordered measures can be enforced.[25] The 2021 International Arbitration Survey found the ability to enforce decisions of emergency arbitrators or interim measures ordered by an arbitral tribunal make that a more attractive arbitral seat.[26]

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17 See, Philip Norman and Leanie van de Merwe, 'Interim Relief, Including Emergency Arbitrators in Construction Arbitration' (Global Arbitration Review, 19 October 2021) <https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/interim-relief-including-emergency-arbitrators-in-construction-arbitration>; Born (n 3) 2729.

18 V.V. Veeder, Provisional and Conservatory Measures. Enforcing Arbitration Awards under the New York Convention: Experience and Prospects. (1999, United Nations Publication) 21.

19 Gary B Born, International Arbitration: Law and Practice (2nd edn, Kluwer Law International 2016) 211.

20 Ciarb (n 13) 2; Born (n 3) 2639.

21 Ciarb (n 13) 5.

22 Born (n 3) 2604.

23 See e.g., Channel Tunnel Group v Balfour Beatty Construction [1993] AC 334; Report of the Secretary General, Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement (20-31 March 2000, UN Doc.A/CN.9/WG.II/WP.108) 24 at para. 104.

24 Ronald A Brand, 'Provisional Measures in Aid of Arbitration' (2023) 61 Columbia Journal of Transnational Law 133, 136.

25 ibid, 166 – 167.

Internationally, there has been a progressive relaxation of limitations on interim relief granted by arbitral tribunals.[27] For example, the French Code of Civil Procedure in 2011 expressly provided for tribunals to grant interim and conservatory measures under Article 1468.[28] This power for interim relief by tribunals has also been recognized in jurisdictions that follow – as with Thailand – the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").[29] This includes Germany, Canada, Japan, India, Singapore, New Zealand and Australia.[30]

In parallel, courts have upheld the presumption, absent contrary agreement, that parties have agreed to permit the tribunal to order provisional measures.[31] This is based on an appreciation that parties in agreeing to arbitrate disputes intend that the tribunal should have remedial powers over the adjudicative process rather than rendering it a hollow exercise.[32] This supports principles of party autonomy, arbitral exclusivity and judicial non-interference in the arbitral process where courts have concurrent jurisdiction for interim measures.

A. Context to provisional measures

1. Court-annexed arbitration

The arbitration framework in Thailand includes the regulation of court-annexed and out-of-court arbitration. Taking court-annexed arbitration first, this is regulated under Sections 210 to 220 of the Thai Civil Procedure Code ("CPC"). Section 216 leaves broad powers on the conduct of the arbitration to the tribunal. This power is limited to "[w]here the arbitrators are of opinion that proceedings can only be carried out by a Court is necessary (such as in [...] ordering the production of a document), they may file with the Court an application by motion asking it to carry out such proceedings [...]." This restricts powers of the tribunal to seeking assistance from the court where this requires specific action from a party or third party as in orders for interim measures. The extent of the supervisory role of the court is further apparent in the confirmation required of awards rendered by the tribunal under Section 218 CPC.

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26 "2021 International Arbitration Survey: Adapting arbitration to a changing world" (Queen Mary University, School of International Arbitration, White & Case LLP) 8 <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey>.

27 Born (n 3) 2612 ("Consistent with the foregoing analysis, over the past several decades, virtually all developed jurisdictions have rejected historic prohibitions against the authority of arbitral tribunals to grant provisional measures.").

28 Constance Malleville, "Interim Measures in French Seated Arbitrations – Do They Measure Up?" (Clyde & Co Market Insight, 16 June 2022) <https://www.clydeco.com/en/insights/2022/06/interim-measures-in-french-seated-arbitrations-do>.

29 Born (n 3) 2618. 1985 United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law") listed jurisdictions <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

30 ibid.

31 ibid, 2612, 2614, 2616, 2642, 2677. See also, Charles Construction Company v. Derderian 586 N.E.2d 992 (Mass. 1992).

32 ibid, 2618, 2635.

2. Arbitration Act 1987

Alongside court-annexed arbitration, the Arbitration Act BE 2530 (1987) (the "1987 Act") regulated out-of-court arbitration prior to the TAA coming into effect. The relevant provision under Section 18 of the 1987 Act reads, "[w]here resort to the power of the court is required in regard to [...] the application of provisional measures for the protection of interests of the party during arbitration proceedings [...] an arbitrator may file a petition requesting a competent court to conduct the said proceedings."[33] Similar to provisions for court-annexed arbitration, the power to request provisional measures only from a court was left to the arbitral tribunal.

3. Arbitration Act 2002

The TAA which currently applies to Thai arbitration proceedings is based on the Model Law and mirrors for the most part its provisions.[34] As Sorawit Limparangsri and Prachya Yuprasert observe on the difference with the Model Law, the TAA "contains some minor deviations based on the experience of arbitration in Thailand."[35] One of these differences is on provisional measures which does not follow Article 17 of the Model Law. Article 17 states: "[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute."

The Model Law also contains guidance on enforcement before this was included in the 2006 amendments ("2006 Model Law Revisions").[36] The Explanatory Note states, "[i]t may be noted that [Article 17] does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard."[37]

Section 16 of the TAA in contrast to the Model Law provides, "[a] party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures [...]." This provision is viewed as "not empower[ing] arbitrators to order interim measures or other forms of preliminary relief. The law only provides that parties may apply to the court for any required provisional

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[33] Arbitration Act BE 2530 (1987) <https://www.newyorkconvention.org/11165/web/files/document/2/1/21416.pdf>.

[34] See, UNCITRAL, Model Law Status of Adoption (n 30); Kornkieat Chunhakasikarn and John Frangos, "Thailand" in Gerhard Wegen, Stephan Wilske and Gleiss Lutz (eds), Getting the Deal Through - Arbitration 2017 (Law Business Research 2017) 353 - 360, 353. ("Thailand's arbitration law is the Arbitration Act BE 2545 (the Arbitration Act), which closely follows the UNCITRAL Model Law."). See also, Nottage and Thanitcul (n 1) 16.

[35] Sorawit Limparangsri and Prachya Yuprasert, "Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective" (2003) 190.

[36] See, 2006 Model Law Revisions Article 17H.

[37] UNCITRAL Model Law on International Commercial Arbitration 1985 (UN, A/40/17) 20 para. 26.

measures before or during arbitral proceedings."[38] The drafters, including the TAI, had before them the choice of opting for provisional measures on the basis of the Model Law which includes the presumption of the authority conferred on arbitral tribunals to order interim measures.[39] Instead the decision was made to follow the 1987 Act in part by maintaining that the court is competent to order provisional measures, but added standing to a party to make such an application.

Thawatchai Suvanpanich noted that "the legislators at that time were of the opinion that the Model Law was too modern for Thais who were involved in the practice of arbitration."[40] This reason however appears difficult to accept in light of the wider dispositive powers of the tribunal in deciding the outcome of the dispute. Moreover, there is little reason to doubt the parties had not intended to centralize the dispute resolution process in a single neutral forum.[41]

In terms of procedure, Section 16 of the TAA provides a party with the right to approach the competent court before or during the arbitral proceedings. The court will determine its jurisdiction and exercise discretion in accordance with the court's authority to issue provisional measures under the CPC. Measures the court may prescribe are enumerated in Section 254 of the CPC[42] along with the availability of ex parte applications. Additionally, the court may order security for costs under Section 253 of the CPC.

In support of Section 16, Section 45(5) of the TAA allows a party to appeal an interim relief order by a court.[43] The appeal under Section 45(5) of the TAA is made directly to the Supreme Court or Supreme Administrative Court.[44]

B. Thai arbitral institutes

The two main Thai arbitration institutions (out of seven) are the TAI and THAC.[45] Both institutions provide tribunals with powers for interim measures, but differ substantially on the scope of that authority.

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[38] Alastair Henderson, "Thailand" (IBA Arbitration Guide, February 2012) 8. See also, Saowanee Asawaroj, "National Report for Thailand (2013)" in Jan Paulsson and Lise Bosman (eds), ICCA International Handbook on Commercial Arbitration Kluwer Law International (Kluwer Law International 2013) 8.

[39] See, Biwater Gauff (Tanzania) v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order 3, 29 September 2006 [135]; Born (n 3) 2613. TAI as drafters of the TAA: Warathorn Wongsawangsiri, Jedsarit Sahussarungsi and Chadamarn Rattanajarungpond, "Thailand" in James Carter (ed), International Arbitration Review (10th edn, The Law Reviews 2019) 459, 461.

[40] Thawatchai Suvanpanich "Thailand" in Michael Pryles. (ed) Dispute Resolution in Asia (2nd edn, Kluwer Law International 2002) 369.

[41] Born (n 3) 2734, 2740.

[42] Section 16 TAA.

[43] Section 45(5) TAA. See also, Supreme Court Case 3263 of 2554 (2011).

[44] Section 45 TAA.

[45] See, THAC Arbitration Report 2018, 9. See also, Wongsawangsiri, Sahussarungsi and Rattanajarungpond (n 39).

The TAI set up in 1990 is now a part of the Office of the Judiciary.[46] Article 39 of the 2017 TAI Arbitration Rules ("TAI Rules") state, "[t]he Arbitral Tribunal may, at the request of a party, grant interim measures of protection for the party as it deems appropriate." This is similar to Rule 30.1 of the SIAC Arbitration Rules 2016 ("SIAC Rules") which state the tribunal may "issue an order or an Award granting an injunction or any other interim relief it deems appropriate."[47] Both provisions are broad in scope and leave the type of measure to the arbitral tribunal's determination.

Reliance on the authority of arbitral tribunals to order interim relief under Article 39 of the TAI Rules for Thai-seated arbitrations is unknown. The lack of information publicly available on applications made under Article 39 coupled with the absence of a decision of the Supreme Court where the exercise of this power has been impugned leaves unclear its impact in practice, at least in connection with Thai arbitration proceedings. As Noppramart Thammateeradaycho notes, "[t]o our knowledge, arbitrators have never granted an order or provisional award for interim measures in Thailand, regardless of the institutional rules being used in the arbitration (emphasis added)."[48]

Also of note is the second paragraph of Article 39 of the TAI Rules which does not exclude the concurrent jurisdiction of the court.[49] This paragraph states, "[t]he request pursuant to paragraph one shall not affect the right of the party to request the court to grant interim measures. Such request shall not be deemed to be incompatible with the arbitral proceedings under these Rules."

By comparison, this power to issue interim measures under the TAI Rules is broader than the narrow power of tribunals under the THAC Arbitration Rules 2015 ("THAC Rules"). Pursuant to Article 66(5), the arbitral tribunal may "[i]ssue an order for any party to provide security for legal or other costs as the Arbitral Tribunal finds appropriate." This is subject to the qualification "in so far as it does not conflict with the law applicable to the conduct of the proceedings". Article 66(5) is similar to the SIAC Rules in Rule 27(j): "[u]nless otherwise agreed by the parties [...] the Tribunal shall have the power to: [...] order any party to provide security for legal or other costs in any manner the Tribunal thinks fit [...]." This provision on security for costs may be found under a broader power for interim measures in other arbitration rules, such as Article 39 of the TAI Rules.[50]

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[46] TAI (n 12).

[47] Arbitration Rules of the Singapore International Arbitration Centre (6th edn, 1 August 2016) <https://siac.org.sg/siac-rules-2016>.

[48] Noppramart Thammateeradaycho, "Emergency Interim Measures in Thai Arbitration" (Lexology, 4 December 2019) <https://www.lexology.com/library/detail.aspx?g=ee3ebd9f-c545-48f4-9778-cf7b3f833f38>.

[49] See also, TAI's explanation of provisional measures: <https://tai.coj.go.th/th/content/article/detail/id/8397/iid/249096>.

[50] See e.g., Tennant Energy LLC v. Government of Canada, PCA Case No. 2018-54, Procedural Order 4, 27 February 2020 [166].

Article 60(2) of the THAC Rules additionally provide for a tribunal to issue an order to secure documents, objects or property concerning the case for an expert to examine.[51] Such an order unlike security for costs does not contain a reference to conflicts of law, but may be implied. Where the tribunal refers to the TAA in Thai-seated arbitrations, Section 32(2) allows the tribunal to direct a party to give the expert information or to produce or provide access to documents, materials or places for inspection. The difference is in the scope of the power, which under the THAC Rules also permit an order to secure those objects or property.

As a comparator, another Thai arbitral institute is the Thai Commercial Arbitration Office. Article 29 of the Thai Commercial Arbitration Rules state, "[t]he Arbitration Tribunal may, as it considers fit, issue any instruction or order, while the arbitration proceedings are in progress and such instruction or order must be complied with by the parties to the dispute."[52] It is unclear if this provision includes orders for interim measures, which may by implication depend on the authority under the curial law.

Taking the practice of the three arbitral institutes together, neither of the arbitration rules expressly exclude provisional measures. This is relevant as these rules are not delocalized and therefore the frequency of a default seat in Thailand often invokes consideration of Section 16 of the TAA.[53] However, in terms of scope, only the TAI Rules specifically contain a broad power of the tribunal in ordering interim measures.

III. Inherent Power of the Arbitral Tribunal

The broad power for provisional measures included in the TAI Rules provided fresh emphasis to the debate on powers of the tribunal for interim relief under the TAA. The question is whether the power for provisional measures pursuant to the TAI and THAC Rules are compatible with Section 16 of the TAA as an inherent power of the tribunal.

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[51] See on the power to secure evidence as an interim measure: Secretary General Report, International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UNCITRAL, A/CN.9/264, 3-21 1985) 25 ("Article 9 deals with the compatibility of the great variety of possible measures by courts available in different legal systems, including not only steps by the parties to conserve the subject-matter or to secure evidence but also other measures, possibly required from a third party, and their enforcement."). See also, Delphi Petroleum Inc. v. Derin Shipping & Training Ltd [1994] 73 FTR 241; Born (n 3) 2682 – 2683; Apostol and Duggal (n 15). Note, the TAI Rules also includes a narrower power of the arbitral tribunal for the production of documents and evidence in Article 34.

[52] Thai Commercial Arbitration Rules 2000 (Thai Commercial Arbitration Office) <https://www.thaichamber.org/public/themes/frontend/assets/pdfjs/web/viewer.html?file=/public/upload/file/document/0310231678413362.pdf>.

[53] Article 31 TAI Rules and Article 49 THAC Rules. See also, Gary B Born, International Arbitration: Law and Practice (2nd edn, Kluwer Law International 2016) 27 ("Equally important, many institutional rules contain provisions that make the arbitral process more effective").

This inherent power of the arbitral tribunal has been found to arise out of the arbitration agreement in other jurisdictions, unless parties have not expressly excluded this.[54] This comes from the presumption of its inclusion under the arbitration agreement which enable the tribunal to carry out its mandate in the conduct of the arbitration in a fair and effective manner.[55]

The Federal Arbitration Act in the United States is similar to the TAA in the absence of an express power for tribunals to order provisional measures.[56] Courts in the United States have nevertheless recognized this authority, absent anything contrary in the arbitration agreement.[57] This is either on the basis that the interim measures order disposes of a separate independent claim for preliminary relief or that it is necessary in relation to the final award.[58]

A. Structure of the TAA

In the absence of judicial opinion having confirmed or deferred to the arbitral tribunal on provisional measures, the question is if an inherent power is consistent with the TAA. To this end, provisions of the TAA do not support an inherent power of the tribunal for interim measures. Firstly, the application of Section 16 is not displaced by a contrary agreement of the parties. Section 6 of the TAA provides, "[...] where the provisions of this Act empower the parties to determine any issue, the parties may authorize a third party or institution to make that determination on their behalves." Section 6 is not triggered in relation to provisional measures as Section 16 of the TAA does not permit the parties to agree otherwise. This is in direct contrast to the Model Law on which the TAA is based that includes the presumption the parties intended to confer the power to order interim measures on the arbitral tribunal, only displaced by an agreement to the contrary.[59] Accordingly, the parties will be unable to rely on the arbitration rules or arbitration agreement as a basis from which the tribunal derives its power for the issuance of provisional measures.

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[54] Born (n 3) 2612, 2614, 2616, 2642, 2677.

[55] Born (n 3) 2605, 2617, 2644.

[56] Federal Arbitration Act 1925; See, Born (n 19) 211.

[57] See, e.g., Benihana v. Benihana of Tokyo 784 F.3d 887, 902 (2d Cir. 2015); Charles Construction Co. v. Derderian, 412 Mass. 14, 17 (Mass. 1992) ("We agree in general that, in the absence of an agreement or statute to the contrary, an arbitrator has inherent authority to order a party to provide security while the arbitration is continuing.").

[58] See, e.g., Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986) ("Because the award in the instant case finally and conclusively disposed of a separate and independent claim and was subject to neither abatement nor set-off [...].")

[59] Born (n 3) 2613.

Secondly, there is no legal basis for seeking the recognition and enforcement of provisional measures granted by a tribunal.[60] In relation to a tribunal's interim measures decision or order, it is uncertain on what grounds the court may entertain such an application as different to an award.[61] Whereas, Thai courts will enforce an award if it is binding on the parties, and made in a foreign country to the extent Thailand is bound by its international obligations.[62] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") to which Thailand is a party does not define an award. However, awards that decide some or all matters in a final and binding manner would fall within the scope of arbitral awards under the New York Convention.[63] Although Section 5 of the TAA does not define an award; under Section 41 partial or interim awards may be enforced if this is binding on the parties.[64] As awards on interim measures may be subject to variation, suspension or termination, this may be held as contrary to the requirement that the award is binding on the parties.[65]

Thirdly, Section 45(5) of the TAA is categorical in that appeals may only be considered for provisional measures ordered pursuant to Section 16. As Section 16 is limited to interim relief by a Thai court, no appeal grounds are available under the TAA for tribunal-ordered provisional measures; even where a first instance court has decided (and denied the admissibility of an application).

Fourthly, it may be argued the TAA permits a tribunal to order the disclosure or production of evidence for expert examination.[66] Gary Born suggests, "[p]roperly understood, interim relief of this sort often involves little more than a tribunal's general authority to ascertain the facts of the case and oversee the procedural conduct of the arbitration, including disclosure and taking of evidence."[67] As such, the authority under Section 32(2) of the TAA is better characterized as a direction of the tribunal; where in other circumstances, this power for interim measures fall within the competence of the court under Section 33.

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60 Sorawit Limparangsri, Samuel Seow and Paul Tan, "Arbitration in Thailand 2015; the Thai Arbitration Institute", International Arbitration Asia (25 May 2015) <http://www.internationalarbitrationasia.com/arbitration-in-thailand-the-thai-arbitration-institute-2015/> ("In the absence of any provisions relating to the power of tribunals to issues such preliminary orders, section 16 of the Arbitration Act has been interpreted to imply that only preliminary orders issued by the courts would be legally enforceable.").

61 Article 17(2) 2006 Model Law Revisions state, "[a]n interim measure is any temporary measure, whether in the form of an award or in another form [...]."

62 TAA Sections 41, 43(6).

63 "UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (UNCITRAL, 2016 edn) ("Courts have found that only those decisions made by arbitrators that determine all or some aspects of the dispute, including jurisdiction, in a final and binding manner, can be considered 'arbitral awards' within the meaning of the New York Convention.") [21].

64 See reply to question 26 in Michael Ramirez, Noppramart Thammateeradaycho and Anyamani Yimsaard, "Thailand", The Guide to Challenging and Enforcing Arbitration Awards - Third Edition (2023) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/thailand#:~:text=A%20partial%20or%20interim%20award,order%20of%20the%20arbitral%20tribunal.>.

65 See e.g., Article 26(5) UNCITRAL Arbitration Rules 2021.

66 UNCITRAL (n 51); Limparangsri, Seow and Tan (n 60).

67 Born (n 3) 2683.

By reviewing Sections 16, 33 and 45(5) that make up the provisions for interim measures of the TAA, this is indicative of the reserved powers of the court without also evincing an inherent power of the arbitral tribunal. This conclusion is also affirmed by the absence of enforcement of tribunal-ordered measures under the TAA.

B. Arbitration rules

As the TAI Rules brought into sharp focus the powers for interim measures, the question this presents is why before the amended rules in 2017 such a power of the tribunal was not recognized.[68] The earlier 2003 version of the TAI arbitration rules, available after the TAA came into force, would be expected to include interim measures if such a power is implied under Section 16 of the TAA. If an inherent power of the tribunal provided the basis upon which provisional measures were included in the subsequent edition of the rules, then it would have been expected that other local institutions recognize and adopt a similar amendment.

The THAC Rules in comparison do not include a broad power of the tribunal to issue provisional measures. Aside from the power for disclosures to experts, the limited authority on security for costs may be deemed as falling within the general competence of the tribunal to deal with the recovery of costs of the arbitration.[69] If this is correct, then the compatibility of the THAC Rules with the TAA is not dependent on an inherent power of the tribunal for provisional measures.

The divergence between the TAI and THAC Rules on provisional measures cannot be reconciled by an inherent power of the tribunal for interim measures. Rather, the stark difference in the scope of the power on provisional measures points more to the lack of an inherent power premised on the presumption that these rules seek consistency with the TAA.

IV. Efficiency Costs

The absence of an express or implied power has led in practice to avoidance in seeking provisional measures from an arbitral tribunal for arbitrations seated in Thailand. Arbitral tribunals are similarly deterred from granting interim relief where the applicable curial law does not expressly permit this.[70] The UNCITRAL Secretariat noted:

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[68] TAI Arbitration Rules 2003 <https://tai.coj.go.th/th/content/category/detail/id/2196/cid/8226/iid/129360>.

[69] Section 46 TAA. See generally, "Thai Court Approach to Legal Costs in Arbitration" (Watson Farley & Williams, 7 February 2022) <https://www.wfw.com/articles/thai-court-approach-to-legal-costs-in-arbitration/>. For a discussion on disclosures and access for experts under Article 60(2) of the THAC Rules, see Sections II.B and III.A.

[70] James E Castello and Rami Chahine, "Enforcement of Interim Measures" (Global Arbitration Review, 17 May 2023) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-of-interim-measures>; Born (n 3) 2610.

To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making assets inaccessible to the claimant. Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure; this causes unnecessary cost and delay (e.g. because of the need to translate documents into the language of the court and the need to present evidence and arguments to the judge).[71]

This deterrence is not avoided by reference to arbitration rules or the arbitration agreement wherein parties have not excluded this power; Section 16 of the TAA does not allow for parties to agree otherwise on interim measures. In such circumstances, the more predictable approach has been to seek provisional measures from a Thai court directly.[72]

It follows that the parties in accepting jurisdiction of the local Thai court allow for ex parte applications. An example of this is from the case of Kumagai Gumi against the Rapid Transit Authority, where an ex parte application was successful in opening up the Bangkok Expressway in the public interest.[73] As this case illustrates, while the court hears ex parte applications, the outcome was in "significantly diminishing the investors' negotiating power to reach agreement with the authorities over the toll price."[74]

By comparison such as to the procedure under the arbitration rules of the TAI and THAC, these rules make clear of the reasonable and equal opportunity for parties to present their case in the conduct of the arbitration.[75] The tribunal may find it is not capable of deciding interim measures on an ex parte basis, otherwise only under exceptional circumstances. This is consistent with other arbitral rules that deny ex parte applications or deprive measures issued ex parte of enforcement, such as under the 2006 Model Law Revisions under Article 17C(5).[76]

Taking this further, if a tribunal granted interim measures, even though not as an ex parte application, the respondent is likely to challenge the tribunal's order as an excess of power incompatible with Section 16 of the TAA. Absent a challenge, if a party does not voluntarily comply, the applicant still faces an enforcement vacuum. As Alastair Henderson observed, "[t]here is no clear formal law on tribunal orders

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71 Report of the Secretary General (n 23) 24 at para. 104.

72 See, Thammateeradaycho (n 48).

73 Nottage and Thanitcul (n 1) 17.

74 ibid.

75 Article 28 TAI Rules and Article 38 THAC Rules.

76 See e.g., Rule 47(2)(b) and (c) of the ICSID Arbitration Rules 2022; Born (n 3) 2695 – 2696.

for interim measures that would be enforced by the Thai court [...]."[77] Accordingly, "Thai courts, therefore, will apply differing approaches to accept or dismiss a partial or interim order of the arbitral tribunal."[78] The court's approach remains to be seen, whether in such circumstances the interim measures order will instead be treated as a request to assist in an order of the court on the same terms.[79] This also leaves the possibility that the court may reach a different decision to the arbitral tribunal on the same request for relief. Whereas, in relation to interim measures as an award, there is similarly no certainty as to the court's approach to enforcement.[80] Importantly, these enforcement hurdles will be common to decisions arising out of domestic and international arbitrations without a distinction contained in the TAA.[81]

In order to bypass enforcement challenges, orders for interim payment as an example may be decided under expedited arbitration procedures.[82] This procedure produces a binding award, rather than temporary measures. It raises the potential for conflicts, as in relation to the procedure or number of arbitrators agreed. To this end, the Thai Supreme Court decided such a case and enforced the expedited arbitration award even though the parties agreed to a three-member tribunal in the arbitration agreement.[83] The award rendered by the sole arbitrator was enforced by the Court on the basis that the SIAC Rules under Rule 5.3 expressly provides that provisions for expedited procedures override any term in the arbitration agreement to the contrary.[84] If in a similar situation the TAI or THAC expedited arbitration procedures were invoked, it is unclear if the court will enforce the award without a similar rule under 5.3 of the SIAC Rules.[85]

Moreover, the concurrent jurisdiction of the court, particularly as recognized under Article 39 of the TAI Rules, adds complexity. Article 39 does not exclude the right of a party to request a court for provisional measures. This situation may prove difficult if for instance a respondent to an application in the arbitration applies to a court on security for costs; while at the same time an applicant's request for provisional measures is pending before an arbitral tribunal. There is no certainty how a Thai court will deal with the application in such circumstances.

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77 Henderson (n 38) 8.

78 Ramirez, Thammateeradaycho and Yimsaard (n 64).

79 ibid. See e.g., Swiss courts enforce a provisional measures order of the tribunal by issuing a ruling mirroring the tribunal's order. P Bärtsch and D Schramm, Arbitration Law of Switzerland: Practice & Procedure 66 (Juris 2014).

80 Asawaroj (n 38) 8 ("In general, in Thailand an award is a final award, except in certain circumstances, e.g., an interim award by the arbitral tribunal on its jurisdiction [...]."). See above under Section III.A.

81 ibid, 1 ("Although the Act [...] it also goes beyond the Model Law in certain aspects. For example, it covers both domestic and international arbitration, whereas the Model Law concerns only international commercial arbitration. Since both kinds of arbitration in Thailand are governed by the same provisions of law, arbitrators, lawyers, courts and parties are not faced with the difficulties of distinguishing between domestic and international arbitration when applying the Act.").

82 Born (n 3) 2684.

83 "The Supreme Court of Thailand Issues Judgement Endorsing the Use of SIAC Expedited Procedure" (Allen & Overy, 15 September 2022) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-supreme-court-of-thailand-issues-judgement-endorsing-the-use-of-siac-expedited-procedure>.

84 ibid.

85 SIAC Arbitration Rules 2016.

Further, the TAI Rules do not specify the circumstances before an application may be made before a judicial authority. For instance, the SIAC Rules state, "[a] request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules (emphasis added)." The LCIA Arbitration Rules 2020 ("LCIA Rules") in Article 25.3 provide, "[a] party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: [...] (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award (emphasis added)."[86] In absence of a specific standard under the TAI Rules for an application to the court, this may result in dilatory tactics by a party in the manner in which interim measures are applied for.

The TAI Rules also do not specify the secretariat be informed of an interim relief application to the court. This is in contrast to the LCIA Rules which state, "[a]fter the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties." The ICC Rules similarly provide, "[a]ny such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof." This approach of promptly informing the secretariat and thereby the tribunal offsets the risk, among others, for requests of similar relief in separate forums.

The corollary is whether the Thai court will defer to a tribunal on requests for provisional measures. Without an available decision as such of the Thai court coupled with the authority in Section 16 of the TAA, it is unclear if a Thai court will defer to a tribunal on an application for interim measures. An example of such deference may be found where the court-ordered measures remain in effect until such time for the tribunal to review the relief granted.[87] This is where courts recognize by accepting jurisdiction over measures which can be properly granted by an arbitral tribunal, the court may be acting in cross-purposes with the arbitration agreement.[88]

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[86] Arbitration Rules of the London Court of International Arbitration (effective 1 October 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>.

[87] Merrill Lynch v. Salvano 999 F.2d 211, 215 (7th Cir. 1993); PLD Telekom Inc. v. Commerzbank (2000) (QB) (unreported); Rodenstock v. New York Optical International 2018 WL 4445108 (S.D. Fla.).

[88] Born (n 3) 2616 ("The trend towards recognition of greater powers on the part of arbitrators to order provisional measures [...] an increasing recognition by national courts that interlocutory judicial involvement in the arbitral process can be counterproductive and an acknowledgement that (in many cases) it is desirable to have the same tribunal resolve both the merits of a dispute and any requests for provisional relief.")

By application to the local Thai court in the absence of powers of the tribunal, a party is also deprived of the option in being able to enforce the tribunal-ordered measures across jurisdictions. Born suggests that "[a]s a practical matter, however the courts of the arbitral seat may not be in a position to grant effective provisional relief. [...] That is because security measures often have only territorial effect and, even when they purport to apply extraterritorially, enforcement may be difficult or impossible."[89] Therefore, the jurisdictional limits of orders of local courts could frustrate the purpose of the measures and increase costs having to repeat applications for the same relief.[90]

Arbitral efficiency aside, other issues may prejudice a party's position in the arbitration proceedings. This may arise where the court expresses an opinion on the merits of the underlying claims. Henderson cites one case relating to an application for emergency relief where the substantive issues in dispute were ventilated during the hearing.[91] This goes against the court's jurisdiction in relation to interim relief which does not include consideration of the substantive issues in dispute left for the tribunal.

Security for costs is another measure for which Thai courts have jurisdiction pursuant to Section 16 of the TAA.[92] By contrast, most modern arbitration legislation provides for arbitral tribunals to consider applications for security for costs, rather than national courts.[93] The court in conducting the balancing exercise between a meritorious claim and recoverability of costs is left without the benefit of the full case record. As such, in Article 25.4 of the LCIA Rules it states, "[b]y agreeing to arbitration under the Arbitration Agreement, the parties shall be taken to have agreed not to apply to any state court or other legal authority for any order for security for Legal Costs or Arbitration Costs."

The integrity of the arbitral process could also be at issue if a party has appointed foreign representatives. Foreign representatives are eligible for a work permit in connection with arbitration proceedings in Thailand where "the law applicable to the dispute considered by the arbitrators is not Thai law."[94] There is no clarity if the applicable Thai law also covers the procedural law which is relevant to an application for interim measures. Accordingly, foreign representatives making interim relief submissions will be wary of the conditions attached to the work permit. Otherwise, this may result in a challenge of the award. Alternatively, local counsel may be engaged for the provisional measures application adding to the overall legal costs.

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89 Born (n 19) 225.

90 ibid, 2748.

91 Alastair Henderson, "Commercial Arbitration in Thailand" (2009) 5 Asian International Arbitration Journal 46, 61.

92 Section 253 CPC.

93 See e.g.., English Arbitration Act 1996 Sections 38(3) and 44; Frontier International Shipping Corp. v. Ship Tavros et al. (1999) 179 FTR 98 (TD); BGH – I ZB 4/19, 19 September 2019 (German Bundesgerichtshof).

94 Foreign Workers Administration Office, Notification of the Ministry of Labor Regarding the Prescription of the Prohibited Occupations for Foreigners (1 April 2020) <https://www.doe.go.th/prd/download/download_by_pool_file/62790>.

The time limitation under Section 16 of the TAA in relation to court-ordered measures contain a thirty-day period from the date of the court's order or as prescribed by when arbitration proceedings must be commenced. Article 9 of the Model Law on the court's assistance for interim measures does not contain a similar time period. However, there may be circumstances where the arbitral proceedings may not commence within a thirty-day window, such as when the parties continue settlement negotiations or a challenge is made seeking an anti-arbitration injunction. In such circumstances, a renewal period must be applied for with the attended costs and risk of not being granted the same or similar relief.

More broadly, the parties will be removing the cloak of confidentiality and neutrality sought in the agreement to arbitrate by having to seek interim measures from a local court.[95] Approaching Thai courts also comes with the unfamiliarity of language and procedure for foreign parties alongside engaging local counsel for this purpose; whereas foreign counsel may be engaged for the arbitration proceedings.

The silence of Section 16 comes with its costs. These costs are attributed to the territorial limits of a court's orders and engagement with local court procedures. There is also the potential risk of prejudice to a party being denied an equal opportunity in being heard, having the parties' interests being considered without appreciation of the full case record, or from passing observations made on the merits of the case.

V. Amendment of the TAA

By expressly permitting arbitral tribunals to grant provisional measures capable of being enforced by local courts, this will remove the deterrence and allow tribunals to conduct the arbitration more efficiently and effectively. As a preliminary matter, such an amendment requires consideration of the arguments that have thus far been raised supporting the current position of the law. The first is the argument against ouster of the court in directing a party or third party for specific action. Henderson suggests: "[f]or much of the mid and late 20th century, Thai courts were ambivalent (to say the least) in their attitudes and approach to arbitration. There was a patchy record of judicial support and a tendency for some judges to see arbitration as an undesirable encroachment on the sovereign authority of the courts."[96]

The resistance in the past against ouster of the court no longer accords with current practice. With the Thai arbitral institutes particularly the TAI of the Office of the Judiciary having included interim relief within the powers of the tribunal; this clearly points to a different attitude than one that is concerned with ouster of the court. The amendment to the TAA in 2019 further illustrates a more a favorable disposition

[95] Asawaroj (n 38) 8 ("Facts concerning arbitration must be revealed in court proceedings, e.g., in actions for the setting aside of arbitral awards or for the enforcement of arbitral awards.")

[96] Henderson (n 91) 60.

in developing Thailand as a more attractive seat for international arbitration; thereby more amenable to adopting standards in line with modern arbitration jurisdictions that defer to tribunals for interim measures as appropriate.[97]

The second argument made is that a party inevitably has to rely on the authority of the court's coercive measures. While correct, seeking enforcement from a court is not required as a party may voluntarily comply with the tribunal's order. The tribunal may also make known the risk of an adverse inference which may encourage compliance, or otherwise the party will be advised on the consequences, such as for costs.[98]

Accordingly, the legal basis upon which an amendment to Section 16 of the TAA may be premised is Article II(1) of the New York Convention.[99] In principle, this requires Contracting States to recognize the agreement to arbitrate. This includes those matters to which parties have agreed, such as arbitration rules empowering arbitral tribunals to grant interim relief. Where parties have not excluded the authority of tribunals to decide on interim measures, this power should be upheld by national courts.

Moreover, the Model Law upon which the TAA is based including the 2006 revisions in particular provide guidance on the direction of a possible amendment to Section 16 of the TAA.[100] This includes the express authority of an arbitral tribunal to order provisional measures as well as its enforcement (or refusal).[101] Other questions will also be relevant to the discussions for an amendment; such as recognition of emergency arbitrator decsions, implications of form taken of the interim measures granted and enforcement of interim measures granted by foreign-seated tribunals.

VI. Conclusion

The silence of the TAA with respect to the power of arbitral tribunals to order interim measures does not preclude, but also does not support an inherent authority of the tribunals to grant interim measures. The divergence between the arbitration rules of Thai arbitral institutes and the TAA on powers for interim relief cannot be explained under the current framework on the basis of an implied power of tribunals. This consequently has led parties to seek predictability over efficiency by approaching the competent Thai court instead for interim measures of protection.

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97 Arbitration Act (No. 2) BE 2562 (2019).

98 Born (n 3) 2628 – 2629.

99 ibid, 2610.

100 See above, UNCITRAL (n 29).

101 See, Article 17 of the Model Law and Articles 17H and 17I of the 2006 Model Law Revisions.

By depriving the arbitral tribunal with powers to issue interim relief, this is not reflective of a modern arbitration jurisdiction. Modern arbitration jurisdictions not only permit, but defer to the tribunal for requests on provisional measures. In applying to a court for interim relief, this involves additional procedural and substantive hurdles which may potentially risk prejudice to a party or exacerbate the dispute. In order to avoid such challenges, an amendment to the TAA expressly recognizing the power of arbitral tribunals for provisional measures and the enforcement thereof aligns with reasonable expectations of parties in agreeing to arbitrate disputes.