THE USE OF INTERIM DECLARATIONS IN INTERNATIONAL COMMERCIAL ARBITRATION: AN EXCELLENT REMEDY

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Abstract

An arbitral tribunal can make a declaratory award, simply setting forth the respective rights and obligations of the parties. Declaratory relief is efficient on many levels, and especially so where facts are undisputed or agreed or not needed to decide a legal right or obligation. The real issue is whether arbitral tribunals can and ought to issue declaratory awards at early or interim stages. This article advocates that interim declarations serve a fundamental purpose and should naturally be explored more often than the current empirical data indicates. Further, the "push" from arbitral institutions to increase efficiency, the significant increase in the number of "working groups" to address efficiency and user satisfaction in arbitration and reform of institutional rules, and the increased use of "soft law" ignore an obvious procedural tool with an inherent ability to escalate efficiency—the interim declaration. Declarations at an interim stage have potential energy to unlock key legal issues in dispute early in the proceedings, thereby reducing the need for extensive document production and expert technical evidence, and can even be a catalyst to amicable resolution or a more streamlined arbitral procedure. This article examines the contours and avenues available for parties to seek declarations in international commercial arbitration, including the possibility of obtaining emergency declaratory relief. Recent updates to the arbitral rules mean that the interim declaration in international arbitration is ready, able, and waiting to be embraced.

I. Introduction

As Professor Sutherland stated in his seminal paper published over a century ago in 1917:

> "*To ask the court merely to say whether you have certain contract rights as the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war[.]*"[1]

There is an obsession with procedural efficiency in international arbitration. This has caused the creation of a number of "*working groups,*" a myriad of procedural changes to arbitral rules and the increased promulgation of pieces of guidance or "*soft law*." Regrettably, one obvious and long-established procedural tool apt for quicker, less costly and more efficient arbitral proceedings has been inexplicably ignored: the parties' ability to obtain declaratory relief early in proceedings and prior to a tribunal's determination of monetary damages. In this article, the terms "*interim declarations*" and "*preliminary declarations*" are used interchangeably to describe a binding declaration ordered by a tribunal, which is final and not subject to revision in a final award. It is widely

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[1] Edson Sunderland, *A Modern Evolution in Remedial Rights - The Declaratory Judgement*, 16(2) MICH. L. REV. 69, 76 (1917).

understood that as a minimum standard a plea for a preliminary or interim declaration ought to meet three tests: (i) the legal rights and obligations of at least one of the parties to the arbitration are in dispute; (ii) the declaration(s) sought can resolve the dispute; and (iii) the declaration will serve a wider practical or procedural purpose.[2] This is not controversial.

Preliminary or interim declarations provide avenues to "*short-circuit*" disputes. This is because there are many disputes where parties agree on the governing legal regime (law and contractual provisions) and a set of facts, but disagree as to the legal rights and obligations arising out of those agreed or non-disputed circumstances. In such a case, the parties might well be able to unlock the dispute through an arbitral determination as to the legal consequences of the agreement (be it contractual interpretation or otherwise). The sooner the agreed legal status is adjudicated, the sooner the parties may be in a position to settle the claims—because time and money stemming from the legal consequences might be straightforward follow-on issues from the legal status (for example, in the case of liquidated damages for delay). Even if parties are unable to agree on the monetary consequences of the legal status, their follow-on adjudication of damages, including the articulation of expert evidence, will be more efficient because it is aligned to the rights and obligations decided by the tribunal in the interim declaration.[3] Naturally, there is less need for multiple and complex damages scenarios encompassing different legal arguments—the controlling legal regime has already been determined. This is the beauty of the preliminary declaration.

On the assumption that the increased use of declarations earlier in arbitral proceedings provides efficient avenues for the resolution and management of disputes (in whole or in part), there are three derivative points to clarify:

1. The arbitral tribunal's power to grant declaratory relief;
2. The ability for parties to obtain transient declaratory relief at an emergency or interim stage; and,
3. If parties are unable to obtain such relief at an interim stage, the tools available in the ordinary course of an arbitration at which parties can seek sequential proceedings for final declaratory relief leading to the efficient resolution of the dispute.

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2 Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration*, 32(3) ASA BULL. 467, 482–483 (2014) [*hereinafter* "Leimgruber"].

3 For example, in Partial Award in Case No. 15453 of 2016, conducted under the auspices of the International Chamber of Commerce (ICC) International Court of Arbitration, the Tribunal declared the following:
"214. […] That either the First or Second Respondent is the owner of:
a) The hull of the DP2 multipurpose support Vessel […] (under [Respondents' country's] flag with registration […] (and formerly designated as hull […]);
b) All items of Major Equipment delivered to and installed on the Vessel;
c) All other items of equipment which have been paid for out of the various payments made by Respondents, and have been delivered to and installed on the Vessel; and
d) Any other items of equipment affixed to the Vessel in course of construction which cannot be removed without doing damage to the Vessel or the equipment, irrespective of whether payment has been made for such items or not (this Declaration being without prejudice to any claims Claimant may have for payment for such equipment or otherwise).
215. The Arbitral Tribunal closes the proceedings in respect of the issues dealt with in this Partial Award."
Thus, allowing the substantive dispute to move to the next phase (i.e., quantum).

Whilst these points naturally fold in competing substantive legal and procedural questions,[4] the overall picture is clear that parties can seek declaratory relief. In practical terms, this means that certain discrete issues can be front-loaded, thereby increasing efficiency. As a threshold point, notions of "*burdening the state judges*" or "*misuse of publicly funded court time*" as a reason to restrict declaratory relief in international commercial arbitration fail in the context of party autonomy in private arbitration agreements. Put differently, the fact that the parties have entered into an arbitration agreement to ensure a comprehensive and final resolution of any future dispute is a sufficient basis for the arbitrators' power to award declaratory relief.

II. The Arbitral Tribunal's Power to Grant Interim Declaratory Relief

While there were historical debates in some jurisdictions as to an arbitral tribunal's power to award declaratory relief in addition to monetary damages—those questions have now largely been settled in favour of the arbitral tribunal's power to award declarations. The *Saudi Arabia* v. *Arabian American Oil Company (Aramco)* Award, dated August 23, 1958 (*ad hoc* arbitration), is a key authority on this point.[5] In this case, the parties sought and the tribunal granted only declaratory relief.[6] The tribunal was asked to interpret part of the concession agreement between the Government of the Kingdom of Saudi Arabia ["**KSA**"] and Aramco's predecessor, and declare whether Aramco could refuse to give priority to the Onassis tankers for transportation of its oil out of KSA.[7] The Award supports the notions that: (i) the parties' arbitration agreement can be a source of the tribunal's power to issue a purely declaratory award; (ii) a declaratory award can serve a useful purpose of interpreting the parties' obligations under a contract and allowing them to continue a friendly business relationship; and (iii) the non-enforceability of a declaratory award is not a bar to rendering it in the first place. This is not to say that the issue of a tribunal's power to grant declaratory relief will go unchallenged in every proceeding.

The issues surrounding the source of power from which a tribunal is able to grant declaratory relief have been well-covered by leading individuals in leading texts. In short there are two main sources of power: (i) the inherent power of the arbitral tribunal under the arbitration agreement and/or (ii) the laws governing the tribunal's powers from the seat of the arbitration and/or governing the contract.[8] In terms of the tribunal's power, the prevailing view is that arbitral tribunals enjoy the power to award declaratory relief under their inherent authority as arbitrators tasked with deciding the parties' dispute.[9] In some cases, the parties' arbitration agreement might contain an express

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4 *See* Leimgruber, *supra* note 2, at 468 ("Especially in cases where the parties, counsel, or members of the tribunal come from a civil law background, the question regularly arises whether requests for declaratory relief are subject to the same or similar restrictions as in state court proceedings, e.g. in Switzerland, Germany or Austria […].").

5 Saudi Arabia v. Arabian American Oil Company (Aramco), Award, (Aug. 23, 1958), 27 ILR 117 (1963).

6 *Id.* at 145.

7 *Id.* at 117–118.

8 *See* Michael E. Schneider, *Chapter 1: Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 43 (Michael E. Schneider & Joachim Knoll eds., 2011) [*hereinafter* "Schneider"] ("In civil law countries the rights and the remedies that flow from them, as a matter of principle, are regulated in the substantive law. For instance the sanctions for the breach of a contract, including the claim for performance of that contract, are regulated in the law governing the contract or in the contract itself. Similarly, a question such as the effect of a termination, by virtue of the declaration of a party or by decision of the court, is governed by the law of the contract. While as a matter of principle an arbitral tribunal in a civil law approach is not restricted in its powers with respect to the remedies it may apply, restrictions arise from the rules on arbitrability, rules which in their own way restrict the powers of an arbitrator.").

9 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3327–3328 (3d ed. 2021).

provision granting arbitral authority for declaratory relief or the applicable arbitral rules that might contain such a provision.[10] In any event, subject to the below discussion with respect to certain national laws, tribunals are now nearly universally seen to possess the power to grant declaratory relief in addition to monetary damages in order to fulfil the mandate they have been given by the parties, simply by virtue of the parties' free-standing agreement to arbitrate.

Some national arbitral legislations (for example, English and Singaporean) expressly provide for the power of arbitral tribunals to award declaratory relief.[11] However, sometimes there are potential wrinkles for arbitrations seated in the United States,[12] Switzerland,[13] Germany[14] and France[15] based on the domestic legislation that applies in court proceedings. These concerns appear to be overstated for two reasons:

- First, the wrinkle in domestic legislation in the U.S., Switzerland, Germany and France is the inclusion of a requirement for a cognizable legal interest in order to allow domestic courts to adjudicate declaratory relief proceedings. This requirement derives from a policy basis for keeping speculative legal disputes out of state courts and limiting the court's time to resolving those actual disputes that have arisen between the parties. However, as Michael Schneider pointed out, notions enshrined in domestic codes of civil procedure—including those of judicial economy—should not factor heavily in an arbitral tribunal's decision-making process.[16] The tribunal should be called upon to decide the issues put before it by the parties who have given the arbitral tribunal its mandate.

- Second, the premise behind this policy rationale is not shared in the context of international commercial tribunal where the parties have contracted for and are paying for an arbitral tribunal to deal with the issues they have decided to put before it. In a commercial arbitration setting, it would be unusual (and likely uncommercial) for parties to spend money and time filing arbitrations for declaratory relief simply on the basis of speculative questions of legal interpretation. In the large majority of circumstances, real

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10 The most common arbitral rules do not contain an explicit provision on the arbitral tribunal's power to grant declaratory relief. This is true for the arbitral rules used by the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC) and the United Nations Comm'n on Int'l Trade Law (UNCITRAL) Arbitration Rules 2010 [*hereinafter* "2010 UNCITRAL Rules"].

11 Arbitration Act 1996, c. 23, § 48 (Eng.) [*hereinafter* "English Arbitration Act"] ("(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies. (2) Unless otherwise agreed by the parties, the tribunal has the following powers. (3) The tribunal may make a declaration as to any matter to be determined in the proceedings."); International Arbitration Act, Cap 143A, 2002 Rev. Ed., § 12(5) (Sing.) (granting arbitrators the power to award any remedy or relief that could be ordered by a Singapore court if the dispute had been subject of civil proceedings and the power to award interest). There is a note of caution with a view that such statutory provisions should be regarded as non-mandatory, but subject to limitations or extensions by the parties (perhaps via the institutional rules forming part of the arbitration agreement).

12 *See, e.g.,* Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2010) (U.S.) ("(a) In a case of actual controversy within its jurisdiction […], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.").

13 *See, e.g.,* SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 59(2)(a) (Switz.).

14 *See, e.g.,* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 256 (Ger.).

15 *See, e.g.,* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 31 (Fr.) (requiring an *intérêt légitime* in an action for declaratory relief).

16 Schneider, *supra* note 8, at 30).

> disputes have arisen between the parties, which has led them to commence the expensive arbitral process.

Sceptics of declaratory relief have criticized or questioned the efficiency of declaratory relief as it is not directly capable of enforcement like monetary damages. This criticism is founded on theoretical implications rather than practical ones. Even if a declaration is not technically capable of enforcement—a view very much open for interpretation in certain jurisdictions like England and Wales after the *West Tankers Inc* v. *Allianz SpA* judgement[17]—it is nearly universally seen to gain both "*issue preclusion*" and "*claim preclusion*" under doctrines of *res judicata*. This means that neither the same legal issue, nor the same claim can be arbitrated or litigated again between the same parties, as long as the award has not been vacated.[18] Therefore, whether or not the parties are able to convert a declaratory arbitral award into a domestic judgement is not the only point of utility—declarations are of additional value to the parties in the event that follow-on disputes arise on related issues of interpretation or with collateral monetary implications (which were not determined in the earlier arbitration).

III. The Parties' Ability to Access Emergency or Interim Declaratory Relief?

On the basis that tribunals possess the power to grant declaratory relief, there are follow-on questions as to how quickly parties may be able to obtain such a relief and in what form. Implicit in these questions are discussions and tensions as to whether a party may obtain a grant of declaratory relief in emergency or interim situations before an arbitral tribunal pending the final award. Some parties might even *consider* interim supervisory court ordered declaratory relief or emergency arbitrator relief as an alternative to unlocking issues in dispute without awaiting the constitution of a tribunal. These questions do not have clear answers.

A. National Laws Dealing with Court Ordered Interim Measures

Some national laws dealing with the ability of the court to grant interim measures are general in nature and arguably broad enough to encompass court-ordered declaratory relief. One example of such a provision is Article 17J the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**Model Law**"], which provides as follows:

> "*A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.*"[19]

Under the Model Law, it is arguable that a court should be able to grant interim declaratory relief to parties in an arbitration if it is able to order such relief for parties to court proceedings. This

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17 *See* West Tankers Inc v. Allianz SpA [2012] EWCA Civ. 27 (Eng.); *see also* African Fertilizers and Chemicals Nig Ltd. (Nigeria) v. BD Shipsnavo GmbH & Co. Reederei Kg [2011] EWHC 2452 (Comm) (Eng.) (where African Fertilizers unsuccessfully sought to resist the application to enforce a declaratory award on the ground that the English court had no jurisdiction to make such an order because the material terms of the award were purely declaratory terms).

18 *See* Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, *in* ICC BULLETIN SPECIAL SUPPLEMENT: COMPLEX ARBITRATIONS 47 (2003).

19 UNCITRAL, Model Law on International Commercial Arbitration, art. 17J, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

type of provision would at least leave open the possibility of a party obtaining interim declaratory relief from a supervisory court prior to the constitution of the tribunal and seeking a subsequent tribunal order or award confirming the declaratory relief later in the proceedings.

Other supervisory legislations are restrictive in the powers it grants to courts (as opposed to arbitral tribunals) to issue interim relief. For example, section 44(1) of the (English) Arbitration Act 1996 ["**English Arbitration Act**"], provides as follows:

> "*Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*"[20] (emphasis added)

The English position on court's authority to order interim measures is therefore more restrictive and would not, on its face, necessarily permit the granting of interim declaratory relief.[21] However, even where legislation is arguably broad enough to encompass declaratory interim relief, there are a number of difficulties in the concept of court ordered interim declarations. The most obvious is the parties' arbitration agreement requiring an arbitral tribunal, and not the court, to decide the substantive issues of the dispute. Certain national laws make the requirement explicit. For example, Article 4 of the Swedish Arbitration Act, in its relevant part, provides as follows:

> "*A court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.*"[22]

There are already potential tensions between the provisions which squarely prohibit court interference in matters that shall be decided by an arbitral tribunal and the granting of court-ordered interim measures where the tribunal once constituted would enjoy the same scope of authority. However, these tensions are usually resolved by focusing on the interim nature of the court-ordered relief, such that the court has not affected the tribunal's ultimate decision-making ability on the merits of the dispute. Nevertheless, court-ordered interim declaratory relief might appear different. While parties recognize that some court-ordered interim measures in aid of arbitration are potentially helpful (for example, security for costs, taking or preservation of evidence, and inspection of goods or sites), typically court intervention on the substance of the dispute is the opposite of the parties' bargain. Declaratory relief, unlike the procedural aids listed above, typically strikes at the heart of the substance of the dispute. In addition to distinctions on matters of substance rather than procedure, there is also a question as to whether a court ordered interim declaration—for example, on issues of interpretation of a seminal clause—is possible. Parties again accept that there may be circumstances where a court has ordered injunctive relief

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20 English Arbitration Act, § 44(1).

21 *Id.* § 44(2) ("Those matters are—(a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—(i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of any goods the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver.").

22 Swedish Arbitration Act, art. 4 (Svensk författningssamling [SFS] 1999:116, updated as per SFS 2018:1954) (Swed.).

(and, therefore, has taken an interim view on the legal relationship and contract entered into by the parties), but a mere declaration on a particular state of affairs seems different.

B. Tribunal's Powers to Grant Interim Declaratory Relief

There are additional wrinkles when one considers a tribunal's ability to grant an interim declaration. Some arbitral rules contain broad provisions on a tribunal's power to grant interim measures. Article 25 of the London Court of International Arbitration ["**LCIA**"] Arbitration Rules 2020 ["**2020 LCIA Rules**"] is one example, which provides as follows:

> "*The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:*
>
> *[…]*
>
> *(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.*" (emphasis added)

On a broad reading, Article 25.1(iii) of the 2020 LCIA Rules could provide an avenue for a tribunal to grant such an interim declaration on the basis that the tribunal could ultimately award such relief to the parties later in the dispute. In such a way, the interim order, which might not entail the same procedural requirements for the parties or any scrutiny processes, could move a substantive decision (although interim in nature) much earlier in the case. However, as with supervisory national laws, other rules and guidelines are more restrictive in the types of interim measures which can be ordered by a tribunal and may be said to preclude interim declaratory relief. For example, Article 5 of the Chartered Institute of Arbitrators (CIArb)'s International Arbitration Practice Guideline on Applications for Interim Measures ["**CIArb Guidelines**"] provides the following:

> "*1. As a general rule, arbitrators may grant any measure that they deem necessary and appropriate in the circumstances of the case.*
>
> *2. Unless otherwise provided in the applicable national law and the applicable arbitration rules, arbitrators may grant any or all measures which fall within, but are not limited to, one of the following categories:*
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> *i) measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;*
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> *ii) measures for maintaining or restoring the status quo;*
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> *iii) measures to provide security for costs; and*
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> *iv) measures for interim payments.*"[23]

[23] Chartered Institute of Arbitrators (CIArb), International Arbitration Practice Guideline: Applications for Interim Measures (2015), art. 5, *available at* https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf [*hereinafter* "CIArb Guidelines"].

Other rules have similar limitations.[24] These more restrictive approaches to interim measures would counsel against a tribunal granting interim declaratory relief unless expressly permitted to do so under national law or the parties' arbitral agreement. However, it must be borne in mind that such specific expressions are extremely rare.

There are other well-established arguments in the context of interim measures which run against the granting of interim declaratory relief, even when a tribunal arguably has such power. These points relate to inflammatory markers as to when a tribunal should not exercise its discretion in granting interim measures. The most prominent issues appear to be as follows:

- Prohibition on "*prejudging*" the merits of the dispute: It is well settled that the tribunal cannot "*prejudge*" the merits of the case at the interim stage.[25] This is either because the tribunal might be said to have closed its mind to issues of the case prior to the final award, or based their final decision on an incomplete record, without the same safeguards of evidentiary hearings. Of course, ordering interim measures entails some pre-judgment of the case by the tribunal, at least to satisfy itself that the measure sought is *prima facie* warranted on the facts and law. However, for declarations sought in cases where the facts and law are agreed, but the legal consequences are not, it is unclear what would change in the factual or legal matrix between the granting of the interim relief and the final relief.

- Prohibition on granting relief identical to final relief: Along similar lines, the tribunal should safeguard against awarding relief at an interim stage which is tantamount to final relief. The CIArb Guidelines, for example, explain: "*Arbitrators should consider denying an application that is, in fact, a disguised application for a final award on the merits. For example, where the subject matter of the dispute between the parties relates to the storage charges of a warehouse where goods are kept and the main claim requests a transfer of such goods to a different place, an interim measure having the same effect (i.e. transfer of the goods), will be tantamount to a final relief because it will involve a decision on one of the main claims*."[26] In such situations, it is difficult to imagine an interim declaration that would not be identical to the final declaration sought.

These preclusions explained above raise the question of what situations would lend themselves to an interim declaratory measure of only a transitory nature. Further, there are other practical considerations that might run against interim declaratory relief. Typically, parties want a final determination of an issue ripe for a declaration to provide clarity regarding their legal relationship and the subsequent steps to be taken in the adjudication of their dispute. The fact that an interim order could subsequently be reversed by the tribunal may not satisfy users' desire to understand and action the various steps through which the dispute is proceeding.

C. Other Suitable Interim Alternatives?

In light of the questionable ability of tribunals to grant interim declaratory relief, parties might explore other options. One alternative which might have overlapping efficiency could be an

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24 *See, e.g.,* 2010 UNCITRAL Rules, art. 26.

25 *See, e.g.,* CIArb Guidelines, art. 2(3).

26 *See, e.g.,* CIArb Guidelines, Commentary on Article 4(1)(iii), at 13 (citing ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 183–185 (2005)).

interim measure for specific performance. Most arbitral rules and national laws provide explicitly for a tribunal's ability to grant interim measures for specific performance. For example, the "*restrictive*" English Arbitration Act allows for court orders for specific performance or "*mandatory injunctions.*"[27] Many institutional rules contain similarly explicit powers for tribunals to issue such interim injunctive relief. For example, Rule 30.1 of the Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016 ["**SIAC Rules**"] provides as follows:

> "*The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.*"[28]

When seeking mandatory injunctions for specific performance parties, therefore, do not need to contend with the threshold question of whether the court or tribunal has the authority to grant the interim measure as framed in the form of a declaration.

This could be an attractive alternative to an interim declaration depending on creative drafting of the injunction, particularly in the case of ongoing contractual relationships. An interim measure for specific performance, incorporating the legal position sought in the declaration, could just unlock the issues in dispute. For example, where the parties have a dispute as to the legal effect of particular contractual provisions, which could be resolved by a declaration as a form of final relief, a requirement that a party affirmatively act/perform or refrain from such action pending the final resolution of the issue might have a similar legal effect to a declaration itself. The injunction could also serve to mitigate some of the risks (for example, significant increase in monetary losses), if the parties were simply to stop performance and move straight to dispute.

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In contrast to interim measures, the more natural choice for parties seeking an interim declaration may be to seek a partial final award on an issue ripe for a declaration. Partial awards are not without their drawbacks, as they would typically require more fulsome procedural steps, including multiple rounds of pleadings, a hearing, a reasoned award, and compliance with institutional scrutiny processes the governing institution might have. These processes add to the complexity, time and cost of obtaining a preliminary or interim declaration as compared to interim processes.

IV. Revisions to Arbitral Rules for Providing Paths to Obtain Declaratory Relief Prior to Final Award

There has been significant emphasis in recent revisions to arbitral rules in order to provide the tribunal with additional powers to move substantive issue determinations earlier into arbitrations and save overall time and cost. While such amendments were not necessarily drafted with an aim to increase the use of preliminary declarations in proceedings, they were not typically seen to add to powers which the tribunal did not already enjoy. The most noteworthy "*summary*" provision might be contained in Article 39 of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017 ["**SCC Rules**"], which states as follows:

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27 English Arbitration Act, § 44(e).
28 SIAC Arbitration Rules 2016, r. 30.1.

"*(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.*

(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:

(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;

(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

(iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

(3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

(4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.

(5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

(6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23(2)."[29]

Article 39 of the SCC Rules is noteworthy because it provides for a hybrid approach between an interim measure and a partial final award. The tribunal is not only allowed to prescribe a less onerous procedure for final summary determination without following all steps that would otherwise be expected in the full procedure, but also to render a final determination of an issue in dispute. Commentators have noted that the summary procedure is an added "*tool in the [arbitrator's] toolbox*" and "*[it] should be tailored to the need to resolve those issues only […] certain procedural steps that otherwise would have been adopted may be either disregarded or adapted to the specific needs of the summary procedure. This could, for example, relate to the length, number and focus of the written submissions, the need (if any) of oral testimony and document production and whether a hearing will be needed and, if so, in what form.*"[30]

The ability to curtail the procedural steps necessary to obtain a partial award represents an ability for the tribunal to accelerate proceedings on certain issues. However, this power vested with the tribunal is tempered by parties' rights to due process and to fully present their case. These concerns are perhaps worth even more attention in the era of "*due process paranoia.*"[31] Empirical research on

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29 SCC Arbitration Rules 2017, art. 39.

30 JAKOB RAGNWALDH & FREDRIK ANDERSSON, A GUIDE TO THE SCC ARBITRATION RULES 124, 125 (2019).

31 *See* Lucy Ferguson Reed, *Ab(use) of due process: sword vs shield*, 33(3) ARB. INT'L 361 (2017).

challenges to summary decisions under Article 39 of the SCC Rules was not conclusive. Thus, it remains to be seen how far tribunals will take the power granted to them in this article to curtail proceedings leading up to a partial award.

A more tempered example of a modern provision on preliminary issue determination is contained in the 2020 LCIA Rules. Article 14.6 thereof gives the arbitral tribunal the explicit power to "*decid[e] the stage of the arbitration at which any issue or issues shall be determined, and in what order, in accordance with Article 22.1(vii)*" and "*exercis[e] its powers of Early Determination under Article 22.1(viii).*"[32] These provisions are in contrast to Article 14 of LCIA Arbitration Rules 2014, which was more general in the arbitrator's duty to "*adopt procedures suitable to the circumstances of the arbitration avoiding unnecessary delay and expense,*"[33] while providing the tribunal with the "*widest discretion to discharge these general duties.*"[34] Similar changes occurred in the recent revisions of the International Chamber of Commerce ["**ICC**"] Arbitration Rules 2021, and are likely to occur in the ongoing SIAC Rule revision.

This is not to say that prior to arbitral rule revisions, parties were unable to achieve the same result through bifurcation of proceedings. Parties were always able to seek bifurcated proceedings on different issues. In ICC Case 15453, the parties operating under the 1998 ICC Arbitration Rules proceeded through a multi-tiered arbitration, where the Tribunal first decided on a declaration as to the rightful owner of property in a partial final award, and subsequently decided on a number of follow-on monetary issues arising out of the decision on ownership.[35] It explicitly acknowledged the fact that its various declarations could help to clarify, if not narrow, subsequent issues in dispute which would be subject to determination later in the proceedings, and explained as follows:

> "*211. Neither we, nor, as we understand it, Respondents, are presently in a position to identify what, if any, other equipment would be covered by the Declarations referred to in the previous two paragraphs. Respondents may be entitled to a disclosure order to assist in the ascertainment of any such equipment. However, before attempting to formulate any such disclosure order, we consider that it is sensible to allow the Parties time to consider the implications of this Award, and whether such a disclosure order would advance matters, having regard, among other things, to the potential difficulties of ascertaining what equipment (other than the hull, the Major Steel Works, and the Major Equipment), has been purchased with the money advanced by Respondents. Respondents are, of course, nonetheless at liberty to make an application for such a disclosure order in the light of this Award, if so advised.*"[36] (emphasis added)

Of course, such a result was possible under previous versions of arbitral rules, as arbitral tribunals already enjoyed broad case management powers, including in respect of the order and timing of proceedings and the issues to be addressed. However, institutions have explained that the rule revision process has been undertaken to make more explicit tribunal powers in the hopes of

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32 LCIA Arbitration Rules 2020, art. 14.6.
33 LCIA Arbitration Rules 2014, art. 14.4.
34 *Id.* art. 14.5.
35 ICC Case No. 15453, Partial Award, (2) ICC DISP. RES. BULL. 113 (2016).
36 *Id.* ¶ 211.

encouraging tribunals, in circumstances which they find warranted, to exercise these broader case management powers for the purpose of efficient dispute resolution.[37]

This renewed attention to the time and cost of arbitration, and the codification of tribunal powers has increased opportunities for parties to obtain declarations at earlier stages in a case. Rather than asking for an exceptional exercise of the tribunal's case management power to bifurcate proceedings, parties can now avail themselves of codified procedural tools for "*early determination*" or other "*preliminary issue determinations,*" which better serve their interests in efficient dispute resolution. Given that parties are operating within a codified procedural system, as opposed to outside or on the edge of it, there is a strong possibility of them being more successful in obtaining relief sought earlier in the proceedings. Anecdotal evidence suggests that changes to arbitral rules, which now provide express rights and procedures for early determination of substantive issues, are shaping parties' and arbitrator's conduct in allowing structural changes to the proceedings.

V. Conclusion

Declarations at a preliminary or interim stage have benefits. An early final determination of legal rights and obligations relevant to points in dispute allows subsequent and more focused set of pleadings, witness evidence, expert evidence, and Redfern or Stern Schedules. Put shortly, unlocking key legal issues in dispute early in the proceedings has tangible dividends. As a minimum standard a plea for an interim declaration ought to happily satisfy three tests: (i) the legal rights and obligations of at least one of the parties to the arbitration are in dispute; (ii) the declaration(s) sought can resolve the dispute; and (iii) the declaration will serve a wider practical or procedural purpose. Questions of actual interest, legitimate interest, ability of the declaration to resolve the dispute, and breach of good faith or abuse of rights will continue to be obvious rebuttals to a request for an interim declaration. A tribunal's decision on a question is more likely to be answered by way of a preliminary or interim declaration if it is unlikely to involve a substantial dispute of fact. This is perhaps the most fundamental obstacle for obtaining a preliminary or interim declaration. If a tribunal forms the view that evidence (whether factual or expert) is needed to properly construe a contractual term (for example, an indemnity clause which is parasitic to an agreed breach of another contractual obligation, or a time-bar clause which is said to have been waived or amended), then a preliminary declaration may be denied on the basis that an analysis and testing of all the evidence at a final hearing is needed. Whilst a final hearing may yield a declaration (but only) in the final award, the procedural efficiencies would not have been enjoyed.

The authors advocate express clarity in the various institutional rules about the efficacy of preliminary declarations and what needs to be provided by a party to succeed in obtaining them. In so doing, the authors underline the benefits of providing clarity that include, greater focus on the seminal rights and obligations, and the essential facts and procedural efficiency. The authors also advocate and encourage empirical research on the frequency of requests for interim declarations, the type of declarations sought, and the success rate of such requests.

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[37] *See, e.g., Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020)*, LCIA, *available at* https://www.lcia.org/lcia-rules-update-2020.aspx (quoting Paula Hodges QC, it states: "The update to the LCIA Rules has enabled us to clarify a number of procedural issues, to emphasize the broad discretion for Tribunals to conduct arbitrations expeditiously and to reflect the ever-evolving nature of arbitration.").