

ICC Case 12361 Interim Award

Date: September 2003

Place of arbitration: Hong Kong, China

The claimant, a Japanese company, supplied equipment to the respondent, a telephone operator in an Asian state (X). Under the supply contract, the respondent was required to pay 15 per cent of the price in advance and the remaining 85 per cent in subsequent instalments according to an agreed schedule. The respondent also agreed to provide a chattel mortgage in favour of the claimant for the total value of the equipment. During the performance of the contract, the respondent's parent company provided two guarantees covering payment of a portion of all outstanding sums due to the claimant. While the 15 per cent advance was paid in accordance with the contract, the payment schedule for the remaining 85 per cent was renegotiated over a period of seven years. The first two instalments were paid, but the respondent then failed to pay subsequent instalments, alleging cash-flow problems. The claimant refused to accept this explanation, asserting that the respondent was involved in another project, on which it was spending its funds. After making several unsuccessful demands for payment and the execution of the chattel mortgage, the claimant requested the respondent to pay the total outstanding amount due. Faced with the respondent's continuing resistance, the claimant served notice of termination of the contract, to which the respondent reacted by seeking an injunction from a state court preventing termination, arguing that it was entitled to withhold payment owing to breaches of contract by the claimant. Thereupon, the claimant applied for three interim measures: (i) payment by the respondent of all or part of the amount claimed in the arbitration pending the final determination of the dispute; (ii) an order preventing the respondent from selling or encumbering equipment supplied by the claimant pending the final determination of the claimant's entitlement to a chattel mortgage; and (iii) an order requiring the respondent to pay its share of the advance on costs.

La demanderesse, une société japonaise, fournit du matériel au défendeur, un opérateur de télécommunications dans un État asiatique (X). Le contrat obligeait le défendeur à payer 15 % du prix à l'avance et le reliquat (85 %) à tempérament selon un échéancier convenu.

Le défendeur s'engagea aussi à constituer une hypothèque mobilière en faveur de la demanderesse correspondant à la valeur totale du matériel. Au cours de l'exécution du contrat, la société mère du groupe auquel appartenait le défendeur, fournit deux garanties pour couvrir le paiement d'une partie de toutes les sommes restant dues à la demanderesse. Le paiement de l'avance de 15 % fut effectué conformément au contrat. En revanche, l'échéancier pour le reliquat fut renégocié sur une période de sept ans. Les deux premières échéances furent honorées, mais le défendeur s'abstint de payer les échéances suivantes, arguant du fait qu'il avait des problèmes de trésorerie. La demanderesse n'accepta pas cette explication et prétendait que le défendeur participait à un autre projet, auquel il consacrait ses fonds. Après plusieurs demandes infructueuses de paiement et de la réalisation de l'hypothèque mobilière, la demanderesse somma le défendeur de payer la totalité du montant restant dû. Face au refus persistant du défendeur, le défendeur lui annonça la résiliation du contrat. En réponse, le défendeur se tourna vers le juge étatique pour faire interdire la résiliation du contrat, arguant du fait qu'il était en droit de retenir le paiement parce que la demanderesse avait manqué à ses obligations contractuelles. Sur ce, la demanderesse sollicita trois mesures provisoires : (i) le paiement par le défendeur de la totalité ou d'une partie du montant en cause dans la procédure arbitrale en attendant l'issue du litige ; (ii) l'interdiction au défendeur de vendre ou de grever le matériel fourni par la demanderesse en attendant une décision définitive sur le droit de la demanderesse à une hypothèque mobilière ; et (iii) la sommation du défendeur de payer sa part de la provision pour frais.

El demandante, una sociedad japonesa, suministró equipos al demandado, un operador de telefonía en un estado asiático (X). Con arreglo al contrato de suministro, al demandado se le exigió que pagara el 15% del precio por adelantado y el 85% restante en tramos subsiguientes según un calendario acordado. El demandado también aceptó suministrar una hipoteca mobiliaria en favor del demandante por el importe total del equipo. Durante la ejecución del contrato, la empresa matriz del demandado constituyó dos garantías que cubrían el pago de una parte de las sumas adeudadas al demandante. Se abonó el anticipo del 15% conforme a lo estipulado en el contrato, y se renegócié el calendario de pagos por el 85% restante repartiéndolo en un periodo de 7 años. Los dos primeros tramos se pagaron,

pero a continuación el demando no procedió al pago de los tramos posteriores alegando tener problemas de liquidez. El demandante se negó a aceptar esta explicación afirmando que el demandado estaba participando en otro proyecto en el que estaba utilizando sus fondos. Después de hacer varias peticiones de pago en vano y de la ejecución de la hipoteca mobiliaria, el demandante solicitó al demandado que le pagara el importe total aún pendiente. Ante la continua oposición del demandado, el demandante notificó la resolución del contrato, a lo que el demandado respondió iniciando una acción de cesación en un tribunal estatal para impedir dicha resolución con la alegación de que se le había concedido el derecho de retener el pago en virtud del incumplimiento de contrato por parte del demandante. Acto seguido, el demandante solicitó tres medidas provisionales: (i) el pago, por parte del demandado, de toda o de una parte del importe solicitado en el arbitraje en espera de la resolución final de la controversia; (ii) una orden que impida al demandado vender o gravar los equipos suministrados por el demandante en espera de la resolución final del derecho del demandante a una hipoteca mobiliaria; y (iii) una orden solicitando al demandado que pague su parte de la provisión para gastos.

1. Preliminary considerations

36. Under Article 23(1) of the ICC Rules, the arbitral tribunal has broad authority to grant such interim or conservatory relief as it may consider "appropriate". Article 23(1) provides, in pertinent part, as follows:

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.

37. In considering what measures may be "appropriate", the arbitral tribunal is not constrained in this case by any contrary agreement of the parties. While [Respondent], as noted above, has raised objections to the arbitral tribunal's jurisdiction, which have yet to be decided, it has not been contended that, pending the determination of those objections, the arbitral tribunal is without authority to act under Article 23(1). The tribunal does not, in any event, consider that it is precluded from awarding interim relief by virtue of any objections to its jurisdiction, although those objections are among the many elements of which the tribunal may legitimately take account in

determining how to exercise its discretion under Article 23(1).

38. Nor has it been suggested by either party that the tribunal's authority is limited, in any way, by any rule of national law. In this regard, the law applicable to the present proceedings at the place of the arbitration, Hong Kong (see Hong Kong Arbitration Ordinance, Chapter 341 of the Laws of Hong Kong, Schedule 5 incorporating the UNCITRAL Model Law (Article 17) . . .), merely provides, consistent with Article 23(1) of the ICC Rules, that an arbitral tribunal may:
- order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.
39. The law does not prescribe any standards that must mandatorily be satisfied in order for a measure to be considered "necessary".
40. In the circumstances, it seems clear that the tribunal's discretion to decide upon the appropriateness of interim relief is not fettered by any mandatory legal requirements and, indeed, that the arbitral tribunal is not bound to apply any standards of national law at all in deciding upon the Claimant's application . . . In arguing respectively for or against the application, the parties have themselves therefore both relied primarily on the standards that have been applied by ICC arbitral tribunals in this regard. The tribunal has no difficulty in endorsing such an approach, which appears consistent with the practice of most ICC tribunals in the past.¹⁸
41. The tribunal has, thus, given careful consideration to the available ICC arbitral jurisprudence, as well as the various commentaries on ICC arbitral practice, to which the parties have referred. From that jurisprudence, the following general principles appear to have emerged:
42. First, the granting of interim relief constitutes an exceptional measure. While interim relief has been granted in an increasing number of ICC cases in recent years, the number of such cases is still small in relation to the number of ICC cases as a whole. ICC arbitrators will therefore not be inclined to award any such relief in the absence of a persuasive showing that, without such relief being granted, a party's rights may be adversely and substantially affected during the arbitration. Moreover, in considering the possible harm to

¹⁸ See, e.g., the excerpts from ICC arbitral awards published in the *ICC International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), pp. 37 et seq.

the applying party's rights, the tribunal is also required to take into consideration the impact of the possible relief on the rights of the other party, given that decisions as to interim relief are generally required to be made, as in the present case, before the tribunal has had an opportunity to consider the merits of the dispute, and the tribunal will not ordinarily wish to pre-judge those merits at an early stage of the arbitration. Thus, in exercising the discretion that they enjoy under Article 23(1) of the ICC Rules, arbitrators must endeavour to balance the relative harm to each party that may or may not flow from the granting or denial of the measures requested.

43. Second, interim measures are generally intended to be protective of the status quo. As one commentator has observed, such measures are generally designed to "prevent or minimize any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result".¹⁹ It is therefore not generally the purpose of such measures to improve, as opposed simply to protecting, the position of one of the parties relative to the other as at the time of the application.

44. Third,²⁰ in considering whether to order such measures, ICC arbitrators have most frequently required a showing of the need for such measures as a matter of "urgency" or in order to prevent "irreparable" or otherwise substantial harm to the applying party.²⁰

45. Both of the parties appear, from their written and oral submissions, generally to accept these principles. The tribunal has, thus, considered the application with regard to its urgency and the possible harm to the Claimant that might occur without the relief being requested. As already noted, the Respondent denies the existence of any urgency or possibility of irreparable harm if the measures requested are not granted. While the Claimant argues, to the contrary, that the relief requested is both urgently needed and required to prevent the possibility of irreparable harm, it nevertheless also advocates a "more flexible" approach by the tribunal, which, the Claimant contends, has a wide discretion to order any interim measures it deems "appropriate" . . . It is therefore the Claimant's position that, irrespective of urgency or the possibility of irreparable harm, interim relief may be "appropriate" where there is no "sustainable

defence" to a party's claims . . . The Claimant has, thus, endeavoured to show that there is no such defence in the present case and that the relief requested by it is warranted for that reason alone.

46. The tribunal concurs with the Claimant that it has "wide discretion" in applying Article 23(1) of the ICC Rules and that the standards elaborated by other ICC arbitral tribunals are in no way binding upon it. Nevertheless, the tribunal considers that the available decisions of other ICC tribunals, to which both parties have referred, set forth prudent standards that comport with this tribunal's conception of the purpose of interim relief in international arbitration. This tribunal also does not consider that it is in any position at this stage of the proceedings, without having heard all of the arguments and evidence of both parties, to make any relevant determination concerning the "sustainability" of any defences that the Respondent may have to any of the Claimant's claims. In the circumstances, the tribunal has been guided by considerations relating principally to the nature and extent of the possible harm to the Claimant if the interim relief requested by it is or is not granted. In this regard, the tribunal has also given consideration to any possible, related hardships on the Respondent.
47. Each of the Claimant's individual requests is now considered in turn.

2. Application regarding monetary claims

48. As indicated above, the Claimant first seeks an interim award ordering the Respondent to pay to the Claimant (or alternatively into an escrow account) the whole, or a proportion, of the sums claimed by the Claimant on an interim basis, pending the final determination of the dispute by the tribunal . . .
49. This relief is sought, broadly speaking, on the basis of the Claimant's contentions that (i) the Respondent has no sustainable defence to the claim and (ii) the Respondent's financial position is deteriorating. With respect to the latter contention, the Claimant asserts, in particular, that the Respondent has been using its available resources to fund the development of a new mobile network through a subsidiary, the effect of which will be to "ring-fence" its assets against the Claimant.

19 Yesilirmak, «Interim and Conservatory Measures in ICC Arbitral Practice», *ICC International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), p. 31.

20 See, e.g., for a discussion of these requirements: "Extracts from ICC Awards Referring to Interim and Conservatory Measures", *ICC International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), p. 37, more specifically, ICC Case No. 8894 Interim Award (1997), p. 94, ICC Case No. 8786 Interim Award (1996), p. 81, and ICC Case No. 8113 Partial Award (1995), p. 65. See also ICC Case No. 4156, J.D.I. 937 (1984), ICC Case No. 4402 Partial Award (1983), ICCA YB vol. IX (1984), pp. 138-141, ICC Case No. 3540 Partial Award (1980), ICCA YB vol. VII (1982), pp. 124-133 and ICC Case No. 2090 Partial Award (1976), ICCA YB vol. VI (1981), pp. 131-132. See also Bond, "The Nature of Conservatory and Provisional Measures", *Conservatory and Provisional Measures in International Arbitration*, (ICC Publications 1993), pp. 18-19; Yesilirmak, "Interim and Conservatory Measures in ICC Arbitral Practice", *ICC International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), p. 34; and Lew, "Commentary on Interim and Conservatory Measures in ICC Arbitration Cases", *ICC International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), p. 23.

50. The specific contentions of the parties in relation to this request are now summarized, followed by the tribunal's analysis.

a. Claimant's position

51. The Claimant firstly submits, as just stated, that interim relief should be granted since the Respondent has no sustainable defence to the claims that have been asserted. In this regard, the Claimant claims to have demonstrated not only that it has a prima facie case on the merits, but also that its claims are, in substance, unanswerable ...

52. In this regard, the Claimant has emphasized that the Project was virtually complete by the end of 1999 and that, as at that time, the Respondent had not suggested that it had any reason to withhold payment of any of the sums due for the work performed. The Claimant has also produced an expert opinion from [a professor] in support of its contention that the Respondent has no valid basis, under [state X] law, for withholding payment of the amounts claimed.

53. With respect to the Respondent's allegedly "deteriorating" financial position, the Claimant has relied heavily on various financial statements ...

54. According to the Claimant, those documents show that there has been a steady decline in the performance of [Respondent]'s fixed line business since the last quarter of 2001 and that significant losses have been reported in [Respondent]'s most recent financial statements. Further, notwithstanding short-term improvements in [Respondent]'s share price, the Claimant argues that [Respondent]'s poor financial outlook has been mirrored in the trading of its shares at a substantial discount to the net asset value of the business, an indication that investors consider the business to be worth much more on break-up than on a trading basis. The Claimant further argues that [Respondent] is likely to suffer major losses for years to come ...

55. Apart from the deterioration in [Respondent]'s trading performance, the Claimant asserts that, in connection with the creation of its new mobile phone business through [its subsidiary], the Respondent's assets are being dissipated.

56. Thus, the Claimant argues that the Respondent has been using revenues from its

fixed-line network, which was built and financed by the Claimant, to fund the development of its subsidiary's mobile network. More specifically, the Claimant asserts that over ... of [Respondent]'s fixed line revenues have been diverted to the mobile subsidiary and that this is an ongoing process ...

57. In addition, the Claimant has expressed concern about the Provisional Authority. More generally, the Claimant argues that, as assets are transferred to [Respondent's subsidiary], the Respondent will lose control over them, notwithstanding its equity interest in [its subsidiary], as those assets are at the same time being used as security to raise funds from [company S] and external lenders for the development of the mobile business, for which the funding needs are enormous. In this regard, the Claimant has noted that [Respondent] is planning to issue ... in convertible bonds and ... in preference shares to fund the mobile network and pay creditors of [its subsidiary], primarily [company S] ... Further, the Claimant has contended that, over the last year, the Respondent has elected to pay off bank debt in preference to its liabilities to the Claimant, ...

58. It is, thus, the Claimant's fear that the funding of [Respondent]'s mobile business and associated liabilities is seriously prejudicing the Respondent's ability to pay the Claimant the amounts owed to it and, at the same time, reducing the assets that may be available to the Respondent to satisfy any award against it. Both at the hearing and in its written submissions, the Claimant raised a number of additional specific arguments in support of this proposition and further contended that the Respondent's actions constitute fraud as a matter of [state X] law ...

59. The Claimant has further argued, with respect to the guarantees provided by [company S], that the latter has, thus far, refused to honour those guarantees or consent to be joined to this arbitration. The Claimant expressed concern regarding the possible need to enforce the guarantees in the [state X] courts ...

b. Respondent's position

60. Apart from its objection to the arbitral tribunal's jurisdiction, the Respondent vigorously objects to the relief requested by the Claimant.
61. It argues, first of all, that the Claimant's claims have no merit and that there is therefore no basis for the tribunal to award interim relief, before the Respondent's defences have been heard, on the ground that the Respondent has no "sustainable" defence.
62. The Respondent further argues, in any event, that its financial position is not as bleak as portrayed by the Claimant. In this connection, the Respondent has emphasized that it is a large, publicly-traded company backed by a substantial [state X] conglomerate, [company S]. Not only is the Respondent not in imminent danger of financial collapse, according to the Respondent, but the relevant financial indicators show that its financial health ranges from strong, at best, to slightly below industry average, at worst ...
63. The Respondent has relied, like the Claimant, on the [financial] report. But the conclusions that it wishes the tribunal to draw from that document are quite different. The Respondent notes, in this connection, that [the financial report] describes the Respondent as the "second largest fixed line operator in [state X] with a 12% market share in the local telephony market" ... and that the Respondent's fixed line operations are free operating cash flow positive and expected to remain so, thus enabling the Respondent to meet its debt amortization schedule ...
64. The Respondent also argues that the Claimant already has substantial security for its claims, including the guarantees of [company S], whose consolidated revenue for the year ended December 31, 2002 was ... and benefits from a seller's lien, as a matter of [state X] law, on the equipment sold to the Respondent ...
65. The Respondent also denies that it is dissipating any assets or attempting to elude its contractual obligations towards the Claimant. It argues that its decision to incorporate a subsidiary to operate the mobile business had nothing to do with the present dispute, and that over 80% of the mobile subsidiary's current funding comes, in

any event, from sources other than the Respondent. All assets being transferred by the Respondent to [its subsidiary], moreover, are, according to the Respondent, being transferred for value, i.e., for equity in [the subsidiary], which is owned 100% by the Respondent. Unlike the Claimant, the Respondent therefore argues that its investments in [the subsidiary] are intended to strengthen the financial position of the Respondent, rather than the reverse ...

c. The arbitral tribunal's decision

66. As already stated, the tribunal does not consider that it is presently in a position to give any consideration to the Claimant's argument that the Respondent has no sustainable defence to the Claimant's claims. The tribunal notes, in this connection, that the Respondent has asserted defences to the claims, as set out in the Terms of Reference, relating both to the tribunal's jurisdiction and the merits. The validity of those defences is therefore a matter that the tribunal will be required to resolve during the course of this arbitration, and the tribunal considers it premature to express any view on that subject prior to having heard all of the parties' related arguments and evidence.
67. For the purpose of the present application, therefore, the tribunal considers that it need only be concerned with the question of whether the relief requested is appropriate in order to prevent irreparable or otherwise substantial harm to the Claimant prior to the tribunal's final award. After careful consideration of all of the parties' submissions and the evidence before it, the tribunal declines to order the relief requested.
68. In so deciding, the tribunal has been guided by the following considerations:
69. First of all, it is not disputed that the Respondent is a substantial, publicly-traded company that is today the second largest provider of fixed line telephone services in [state X] ... The Respondent's largest shareholder, [company S], is, in turn, one of the largest companies in [state X], with interests in a variety of industrial and commercial sectors ranging from real estate to air transportation, telecommunications, petrochemicals and financial services, among others ...

70. Although there has been a great deal of discussion between the parties as to the Respondent's present financial health and future prospects, as well as the implications of the creation by the Respondent of a subsidiary to launch a mobile phone business, there has been no suggestion that the Respondent is on the brink of insolvency or that its majority shareholder has any intention of allowing the Respondent to withdraw from the fixed line telephone business or otherwise to fail. Rather, the Claimant's case, as discussed above, is founded on the propositions that (i) the Respondent's financial condition is deteriorating and (ii) assets are being "dissipated" by being transferred to the Respondent's new mobile subsidiary. However, as already indicated, those contentions are vigorously contested by the Respondent, and the tribunal has not been persuaded by the evidence presented, much of which is either uncertain or speculative, that the Respondent is either in imminent danger of financial collapse or that its shareholders are in the process of implementing a scheme to strip the Respondent of its assets.

71. Second, insofar as there is any risk of deterioration in the financial position of the Respondent during the period of this arbitration, this is a risk that the Claimant accepted when it agreed in 1999 to allow the Respondent to pay the amounts being claimed in this arbitration over a seven-year period stretching through 2007, without any greater guarantees or security being in place than those that the Claimant presently enjoys, as discussed further below. The Claimant therefore was prepared to assume the normal risks associated with the Respondent's financial health over the period concerned. The tribunal does not consider that it is the purpose of interim relief to provide a party with more security than it contracted for, in the absence of any evidence that the other party is engaged in a scheme to empty itself of its assets to avoid payment of its obligations. There has not been a sufficient showing, as already indicated, that the Respondent or its shareholders are engaged in any such scheme.

72. Third, as noted above, the Claimant holds two irrevocable and unconditional guarantees issued by [company S] for the payment of 57% of all sums due to the Claimant under the Supply Contract (which [company S] ...

confirmed in writing remained valid in respect of amounts payable under the Contract) ... Those guarantees cover much more than all of the sums that would have been payable to the Claimant as of the present time under the Contract had it not been terminated by the Claimant. There has been no indication that those guarantees are not valid or enforceable in accordance with their terms. Security is therefore already in place in respect of a substantial portion of the Respondent's alleged indebtedness.

73. In the circumstances, the tribunal does not consider that the Claimant has discharged its burden of establishing that it will suffer irreparable or otherwise substantial harm sufficient to justify the relief requested.

3. Application regarding chattel mortgage claim

74. The Claimant further seeks an interim award restraining the Respondent from selling or encumbering the equipment delivered by the Claimant pursuant to the Supply Contract pending the tribunal's consideration of its claim for the specific performance by the Respondent of its obligation to execute a chattel mortgage in accordance with Clause 87.1 of the Supply Contract.

75. During the ... hearing, the Claimant altered its application in order to request the following orders and directions: ...

1. That, pending the tribunal's determination of [Respondent]'s jurisdictional objection, [Respondent] shall not dispose of, sell or create encumbrances over the equipment;

2. That, on the making of its determination in respect of [Respondent]'s jurisdictional objection, the tribunal may make such directions as to the continuation, variation or discharge of the present Order as it deems appropriate;

3. Without prejudice to the tribunal's determination of the merits or of [Respondent]'s jurisdictional objection, this Order shall be deemed to create a right of possession in the Equipment on the part of [Claimant], such that [Respondent] shall be deemed (during the pendency of this Order) to hold possession of the Equipment on behalf of [Claimant] by way of security for [Claimant]'s monetary claims referred to above; and

4. That [Claimant] shall be at liberty to notify the terms of this Order to the relevant [state X] Government agencies ... and any current or future creditors of [Respondent].

a. Claimant's position

76. As noted, the Claimant's application is founded on the Respondent's failure to provide the Claimant with a chattel mortgage in respect of all equipment supplied under the Supply Contract. According to the Claimant, this leaves the Respondent in full control of such equipment and, unless the Respondent is enjoined from doing so, the Claimant fears that the Respondent may transfer, dispose of, or otherwise encumber such equipment during the arbitration proceedings.

77. The Claimant's fears arise out of the substantial funding needs of the Respondent associated with the development of its mobile business. The Claimant's specific concern is that to obtain funding the Respondent may accept to transfer, dispose of, or otherwise encumber its fixed line assets, by way of collateral. In this regard, the Claimant has noted that the Respondent is in the process of raising funding of over \$100 million for its mobile business. The Claimant also notes that the Respondent's financial statements refer to financing being subject to "chattel mortgages on specific assets financed" and submits that there is uncertainty as to whether or not the equipment that has been delivered by the Claimant has in fact already been made the subject of encumbrances.

b. Respondent's position

78. The Respondent's principal response to the Claimant's application for an injunction is that the Claimant has failed to demonstrate that, in the absence of such relief, it would suffer irreparable harm or that there is any related urgency. The Respondent argues that the Claimant has chosen to wait until after it terminated the Contract before attempting to enforce and execute the chattel mortgage, but now claims that it will suffer substantial harm if interim relief is not granted.

79. The Respondent further contends that, pursuant to, *inter alia*, the [state X] Civil Code, the Claimant enjoys a supplier's lien on the equipment that it has sold to [Respondent] in the event of insolvency. In this regard, the Respondent has argued that, if [Respondent] becomes insolvent, [Claimant] would have a claim in the insolvency proceedings, up to the value of the amount unpaid, which would be equivalent to the ranking of a chattel mortgage.

80. The Respondent has nevertheless orally undertaken at the hearing not to dispose of, or create encumbrances over, the relevant equipment until after the tribunal's consideration of the Claimant's application. It has further indicated at the hearing that the equipment delivered by [Claimant] is unencumbered and that the Respondent has no intention to encumber, sell or dispose of that equipment.

c. The arbitral tribunal's decision

81. It is, as already stated, one of the principal purposes of interim measures in ICC arbitration to protect the status quo pending the final resolution of the arbitration. In furtherance of this objective, ICC arbitral tribunals have accepted to issue directions intended to preserve or secure the assets that are the subject matter of the dispute and to prevent the dispute's aggravation so that the tribunal's final award will not be prejudiced by actions of the parties.²¹

82. In the present case, as noted above, the Claimant is seeking an award requiring specific performance of Article 87.1 of the Supply Contract, under which the Respondent "agrees to provide chattel mortgage on 100% of the equipment sold under this Contract". Although the Respondent disputes the Claimant's right to a chattel mortgage, the Claimant has a reasonable interest in seeking to prevent the disposal or encumbrance of the equipment in question, pending a final determination of its claim by the arbitral tribunal; for if any such equipment were disposed of or encumbered, an award ordering the execution of a chattel mortgage in relation to the same equipment would inevitably be deprived of its significance.

21 See, e.g., for a discussion of these requirements: "Extracts from ICC Awards Referring to Interim and Conservatory Measures", ICC *International Court of Arbitration Bulletin*, vol. 11, no. 1 (Spring 2000), p. 37, more specifically, ICC Case No. 8879 Interim Award (1998), p. 84, ICC Case No. 9593 Interim Order [*sic*] (1998), p. 105, ICC Case No. 9154 Final Award (1998), p. 98, ICC Case No. 7692 Interim Award (1995), p. 62, ICC Case No. 7895 Final Award (1994), p. 64, ICC Case No. 7544 Interim Award (1996), p. 56, and ICC Case No. 8670 Interim Award (1996), p. 77. See also ICC Case No. 6503 Interim Award (1990), J.D.I. (1995) 1022; and ICC Case No. 3896 Partial Award (1982), J.D.I. (1982), p. 914. See also Bond, "The Nature of Conservatory and Provisional Measures", *Conservatory and Provisional Measures in International Arbitration* (ICC Publications, 1993), p. 15; and Collins, *Provisional and Protective Measures in International Litigation*, Extract from *Recueil des cours*, vol. 234, (Martinus Nijhoff, 1992), pp. 214-215.

b. Respondent's position

92. The Respondent's answer ... is that it has refused to pay its share of the advance because it has not agreed to ICC arbitration of the present dispute and is, thus, contesting the tribunal's jurisdiction. Further, the fact that [Respondent] has agreed to the tribunal determining its own jurisdiction is not an acceptance to pay the ICC advance on costs ... In these circumstances, the Respondent argues that the Claimant's request should be denied. The Respondent further contends that, in any event, the Claimant has failed to establish either the urgency of its application or that it will suffer any irreparable harm, given that the Claimant will be entitled to a final award of costs, including payment by the Respondent of its share of those costs, if the tribunal so decides at the conclusion of the arbitration.

c. The arbitral tribunal's decision

93. After careful consideration of the parties' submissions and the relevant ICC arbitral jurisprudence and authorities, the tribunal declines to order the relief requested by the Claimant.

94. The tribunal appreciates that, in a number of relatively recent cases, ICC tribunals have accepted, on an interim basis, to order the payment by a party of its share of the advance on costs. The tribunal does not consider, however, that it would be appropriate to do so where, as here, the issue of the tribunal's jurisdiction still remains to be decided and, in addition, the Claimant has not, by virtue of the Respondent's failure to pay, been prevented from prosecuting the arbitration or established that it will suffer any irreparable harm.

95. The Claimant's request for relief is, as already noted, founded on a claimed breach by the Respondent of the parties' arbitration agreement. This tribunal has not yet determined, however, whether the present arbitration has validly been commenced in accordance with any such arbitration agreement. The tribunal therefore does not consider that it would be appropriate to award relief at this stage of the arbitration on the assumption that such an agreement exists.

96. Such relief is not, in any event, necessary in order to prevent irreparable harm or prejudice to the possible rights of the Claimant. As the Respondent has noted, the tribunal is required under the ICC Rules (Article 31(3)) to decide in its final award upon the costs of the arbitration and the manner in which they should be borne. The tribunal will therefore have the possibility of awarding the Claimant damages for any losses that it may have suffered due to the breach by the Respondent of any obligations that it may owe to the Claimant in respect of the advance on costs.

97. In any event, the tribunal will be in a better position at the conclusion of the arbitration to consider, in the light of all of the circumstances of possible relevance, the nature, extent and consequences of the Respondent's breach of any obligation that it may have to pay its share of the advance on costs. Indeed, insofar as Article 30(3) gives rise to an obligation, as certain ICC arbitrators and authorities have concluded, it nevertheless is, at best, a conditional one, given that it is subject to being adjusted by the tribunal in its final award in whole or in part. Moreover, the amount of the advance is subject to being adjusted by the ICC during the course of the arbitration or apportioned in unequal shares between the parties in the event that counterclaims are raised.²²

98. In these circumstances, it is the tribunal's view that issues relating to a party's non-payment of its share of the advance are best left to the final award, unless the party requesting earlier relief is able to demonstrate that it will be severely hampered in its ability to conduct the arbitration or suffer other severe hardship or possible irreparable loss as a consequence of such non-payment. There has been no such showing in the present case.

²² An award requiring payment of the advance by a party may also give rise to difficulties of enforcement. See, e.g., M. Secomb, "Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems", *ICC International Court of Arbitration Bulletin*, vol. 14, no. 1 (Spring 2003), p. 59.

83. In contrast to the Claimant's interest in securing the equipment's preservation pending the arbitration proceedings, the Respondent has failed to establish, or even argue, that it would suffer any significant hardship if it were ordered to refrain, during the continuation of these arbitration proceedings, from disposing of or encumbering any of the equipment in question. To the contrary, the Respondent has given a voluntary undertaking to refrain from doing so pending the issuance of this interim award and has affirmatively stated during the ... hearing that it has no intention of disposing of or encumbering any such assets ...
84. In the circumstances, the tribunal is persuaded that it is appropriate to grant the Claimant interim relief. Although the Claimant has not demonstrated that there is an imminent threat of any relevant assets being alienated or encumbered, the impact of such an occurrence on the Claimant's claims pending the arbitration would be sufficiently prejudicial to warrant the tribunal dealing with this application as a matter of urgency.
85. The tribunal therefore accepts, by this interim award, to order and direct the Respondent not to dispose of, sell or create encumbrances over the equipment supplied to it by the Claimant under the Supply Contract and the Contract, pending the determination of the Respondent's jurisdictional objection by this tribunal and, in the event that the tribunal determines that it has jurisdiction, for as long thereafter during the pendency of this arbitration as the tribunal may subsequently direct.
86. The tribunal is not inclined, however, to issue any of the other directions requested by the Claimant in order to create a lien enforceable against third parties under [state X] law. Such directions would go beyond the mere preservation of the status quo by requiring the perfection of a security interest, the Claimant's right to which is contested in this arbitration by the Respondent. The tribunal trusts and expects, moreover, that the Respondent will comply with its directions during the pendency of this arbitration. Given, in addition, that there has been no showing that the Respondent is in imminent danger of insolvency, the tribunal does not consider that a lien of the kind requested is vital for the protection of the Claimant's interests during the arbitration.

4. Payment of the ICC advance on costs

87. The Claimant, lastly, has supplemented its application with a request, as first set out in its reply of ... 2003, that the Respondent be ordered either to pay to the ICC its share of the ICC advance on costs (presently fixed by the ICC at ... of which the Respondent was requested by the ICC to pay half) or otherwise "to secure the said sums on the same or similar terms and conditions as those on which the Claimant has requested the principal sums which it is claiming ... to be secured" ...
88. This claim arises due to the Respondent's refusal to pay any part of the ICC advance on costs for this arbitration. Thus, in addition to paying its own share of the advance, the Claimant has been required to provide the ICC with a bank guarantee for the remainder.
- a. Claimant's position
89. The Claimant contends that the parties have a reciprocal obligation under Article 30(3) of the ICC Rules to pay the advance on costs in equal shares. By failing to do so, the Respondent has breached not only the ICC Rules, according to the Claimant, but the parties' arbitration agreement as well insofar as the ICC Rules have been incorporated into the parties' arbitration agreement ...
90. The Claimant relies upon a number of ICC arbitral awards and other authorities in support of the proposition that it has a right of recourse, including for specific performance or damages, against the Respondent in such circumstances.
91. The Claimant further contends that, by refusing to pay its share of the ICC advance on costs, the Respondent is in breach of the arbitration agreement and of the ICC Rules. The Claimant submits that the Respondent's breach will cause material prejudice to it, in that it is now required to deposit a much larger sum with the ICC than would have been required had the Respondent complied with the directions of the ICC Court. This will inevitably add to the financial burden already imposed on the Claimant. The Claimant therefore requests the arbitral tribunal to order the Respondent to pay its share of the advance on costs to the ICC or into an escrow account, and to reimburse the Claimant for any additional costs incurred by it pending such payment by the Respondent.