Specificity of international arbitration: its increasing role in case law illustrated by Geneva Court practice on applications for stays imposed on arbitral awards

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Specificity of International Arbitration

Its Increasing Role in Case Law Illustrated by Geneva Court Practice on Applications for Stays Imposed on Arbitral Awards

I. Introductory Comments

1. Legal Environment: General Recognition of the Specific Needs of International Arbitration and Chapter 11 of the Swiss Private International Law Bill

“Arbitration, between sovereign states as well as ‘private’ persons, is a long-standing Swiss tradition and for many years our country has been host to arbitrations of all kinds, the subject of which often bears no or little relation to Switzerland and its residents [...]”. This policy of hospitality [...] requires that arbitrations held in this country are provided not only with a quiet atmosphere and appropriate facilities, but also with a legal framework meeting the present needs of international arbitration”.

This quotation is an excerpt from the explanatory report published by the Swiss Federal Government on February 1, 1983 together with a new bill on private international law. This bill codifies Swiss conflicts law and includes a chapter — Chapter 11 — on international arbitration. In other words, by referring to the “present needs of international arbitration” and drafting proposed rules to meet these needs, Switzerland was showing that it had become aware of the specificity of international arbitration and was eager to do something about it.

In recent years Swiss arbitration circles have increasingly realized that the present status of the law needed some adjustments in order to meet the requirements of international arbitration. A strong consciousness developed that international arbitra-

2 The bill was presented by the Federal Government on the basis of a draft prepared by an expert commission. It is now being reviewed by parliamentary commissions and will later be submitted to parliament for final enactment. On the bill, see Lalive, Problèmes spécifiques de l'arbitrage international, Revue de l'arbitrage, 1980, pp. 341 ss.
3 On the specificity of international arbitration, see among many others David, L'arbitrage dans le commerce international, Paris 1982, pp. 98 ss.
4 Jolidon, Les motifs de recours en nullité selon le Concordat suisse sur l'arbitrage, in: Berner Festgabe zum Schweizerischen Juristentag 1979, Bern and Stuttgart 1979, pp. 311 to 312; L'arbitrage international privé et la Suisse, Colloque des 2 et 3 avril 1976, Geneva 1977, pp. 1,
tion was different and required different rules and substantial efforts were expended on remedying the present situation. The most spectacular result of these efforts is Chapter II of the Private International Law Bill. Chapter II contains a set of rules on international arbitration which are designed to better serve the purposes of the international business community and are in line with current trends as they may be found in recent treaties and laws of foreign jurisdictions. Summarily, the bill will facilitate international arbitration in Switzerland in the following main ways:

(a) it will supersede the Intercantonal Arbitration Convention, also called Concordat, or cantonal codes of procedure and provide uniform rules;
(b) the parties' and the arbitrators' freedom in matters of procedure will be significantly broadened;
(c) the bill will restrict the grounds upon which an award may be challenged in court;
(d) in the event that neither party is a Swiss domiciliary or resident, or does business in Switzerland, the parties will be entitled to waive their right to challenge the arbitral tribunal's decisions after the tribunal's formation.

Undoubtedly Chapter II is the foremost expression of the strong trend which evolved recently and advocates the specific nature of international arbitration. However, it is not the only one. Another achievement is the courts' rising sensitivity to those characteristics peculiar to international arbitration, with the result that — although not entirely unknown before — specificity of international arbitration forcefully entered the cantonal courtroom in 1983 for the first time. It did so by way


Chapter II will apply to any arbitration when the place of the arbitration is in Switzerland and at least one of the parties to the arbitration agreement, at the time it was entered into, was not a Swiss domiciliary or resident (art. 169 II). On this definition of "international", see Lalive, supra note 2, pp. 347–348 and Poudret, L'application du Concordat de 1969 à l'arbitrage international en Suisse, in: Les Etrangers en Suisse, Recueil publié par la Faculté de droit de Lausanne, 1982, pp. 251 ss.

They will not be bound by any mandatory rules, except for the compliance with due process (art. 173).

An arbitral award may be challenged only upon the grounds that it is arbitrary (which is similar to the concept of excess of power) or violates due process and for lack of a valid arbitration agreement (art. 177). The bill further limits the remedies against an award by providing that a challenge shall be brought before a cantonal court from the decision of which no appeal can be taken (art. 177 [3]).

Art. 178 (1). As drafted by the expert commission, the bill would have allowed the parties to agree upon a waiver even before a dispute arises. However, the Federal Department of Justice — unfortunately — has narrowed such waivers to those entered into only after formation of the arbitral tribunal.

We are not aware of any other cantonal decisions treating international arbitration differently than domestic arbitration. Of course, there are instances where factual characteristics of international arbitration are referred to (see, e.g., Blätter für Zürcherische Rechtsprechung, vol. 77 [1978], nr 107, p. 240).
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of three Geneva cases dealing with stays imposed on the execution of arbitral awards pending court proceedings. However, the implications of these decisions reach far beyond the mere procedural technicality of staying awards.

Admittedly, earlier Swiss case law is not totally unfamiliar with the specific characteristics of international arbitration. For example in several cases, the Swiss Supreme Court has emphasized the contractual element in international arbitration, whereas it has traditionally considered domestic arbitration as procedural in nature. Furthermore, the Supreme Court uses slightly modified standards when enforcing foreign awards as opposed to when enforcing domestic awards. However, in an obiter dictum of a 1981 opinion, the Supreme Court clearly stated that the Intercantonal Arbitration Convention did not provide for differential treatment. The new Geneva approach shows that there is nevertheless room left for such differential treatment, which further enhances its significance.

These are the legal surroundings in which our specific issue must be seen.

2. Specific Issue: Stays on Execution of Awards and Some Statistics

Let us assume that, in an arbitration held in Geneva, the respondent disputes the validity of the arbitration clause. The arbitrators decide to dispose of this defense before proceeding on the merits and render an interlocutory award by which they assume jurisdiction. Dissatisfied with this award, the respondent challenges it in court and applies for a stay of the award while the court proceedings are pending. Will the arbitration process go on or will it remain frozen until the court decides on the arbitrators' jurisdiction?

The same question arises if an interim award deals, not with jurisdiction, but with part of the merits of the controversy, e.g., it holds that one party has breached

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10 E.g., 93 I 49/54; 84 I 39/47; see also for a detailed analysis and other citations: Klein, A propos de la jurisprudence du Tribunal fédéral suisse en matière d'arbitrage commercial international, in: Stabilité et dynamisme du droit dans la jurisprudence du Tribunal fédéral suisse, Recueil offert au Tribunal fédéral suisse à l'occasion de son centenaire par les Facultés de droit suisses, Bâle 1975, pp. 487 ss, who reaches the conclusion that the Supreme Court has cautiously started to develop a uniform Swiss law of international arbitration (p. 501).

11 In connection with the parties' right to a fair and impartial trial, the Supreme Court held that standing tribunals of Swiss business and trade associations failed to meet the required standards, for fairness and impartiality and that their awards were thus unenforceable (see e.g., 80 I 336/341). As opposed thereto, it held that awards emanating from arbitral tribunals sitting in a foreign country, especially an eastern country, in accordance with the rules of the local chamber of commerce were not per se unenforceable (93 I 265/272–278; 93 I 49/58–60; 84 I 39/46–49). Moreover, it accepts to enforce a foreign award without reasons, whereas a domestic award without reasons may not be enforceable (101 I 521/530).


13 On the basis of art. 36 (a) Intercantonal Arbitration Convention (hereafter: IAC).
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the contract\textsuperscript{14}. A somewhat different, though closely linked, problem occurs when a party brings an action for vacation of a \textit{final award}\textsuperscript{15} and requests the court to stay enforcement of that award during the pendency of this action.

This issue of stays imposed on arbitral awards has not received much scholarly attention so far\textsuperscript{16}. However, as stated earlier, it gave rise to significant court decisions very recently. The \textit{Geneva Court of Justice} thoroughly reviewed and clarified its position with respect to \textit{final awards}. It drew a clear distinction between international and domestic arbitration and, for the first time in its history, it took the specificity of international arbitration into consideration. Moreover, the \textit{Federal Supreme Court} addressed the problem of a stay on an \textit{interim award} for the first time in 1983 and strongly emphasized the arbitrators’ freedom to fashion the arbitration proceedings.

In the following developments, we will briefly examine the legal provision applicable to stays of awards (II. 1.), then analyze pertinent case law, its history and evolution (II. 2.). From there we will attempt to infer appropriate guidelines (II. 3.) and, finally, we will try to appreciate the significance of the evolution so described in light of the specificity of international arbitration (III.).

Before going further some statistical data may be of interest. During the last four years, i.e., from 1980 to 1983\textsuperscript{17}, the \textit{Geneva Court of Justice} disposed of nine actions involving international arbitrations\textsuperscript{18}. The Court granted relief in only one case and even this was a far cry from full relief, as the Court only vacated a fraction of the award\textsuperscript{19}. In all other cases the requested relief was denied and the award upheld\textsuperscript{20}.

\textsuperscript{14} Parties are entitled to challenge an interim award, provided it finally disposes of parts of the merits (\textit{Geneva Court of Justice in re BICC Limited v. Compagnie Industrielle des Télécommunications CIT-Alcatel}, September 23, 1983, unreported).

\textsuperscript{15} Upon the grounds for vacation of art. 36 IAC.


\textsuperscript{17} Precisely, until the end of October 1983.

\textsuperscript{18} 6 actions for vacation of the award, out of which 4 were brought against a final award, 1 against an interim award on the merits and 1 against an interim award on jurisdiction. 2 actions to reopen the award because of newly discovered evidence and because it was induced by criminal acts (art. 41 IAC), which is a most restricted remedy very rarely used. 1 action for a declaratory judgment that no valid arbitration agreement had been made. These figures do not encompass decisions on staying the award.

\textsuperscript{19} Out of a total amount awarded of approximately sfrs 12'000'000,—, sfrs 2'000'000.— were struck.

\textsuperscript{20} Subject to the qualification that in the case of the action for declaratory judgment, no award had been rendered yet. Note that similar statistics for the canton of Vaud show that out of 19 decisions reported within a period of time of 10 years, 2 challenges succeeded in full and 1 in part. All others were denied (\textit{Poudret/Reymond/Würzburger, L'application du Concordat intercantonal sur l'arbitrage par le Tribunal cantonal vaudois}, in: \textit{Journal des Tribunaux}, part III, 1981, p. 68). For the situation in Zurich, see \textit{Nobel, Privates Schiedsgerichtswesen und staatlicher Richter im "Wettbewerb"}, in: Festschrift für Meier-Hayoz, Bern 1982, pp. 268–269.
II. Status of the Law

1. Statutory Provision: Art. 38 IAC

Any commercial arbitration between private parties, whether domestic or international, which takes place in Geneva is subject to the Intercantonal Arbitration Convention also called Concordat ("IAC"). Part of the provisions of the IAC can be waived by the parties, in particular by their referring to institutional arbitration rules. Other IAC provisions are mandatory. Among the mandatory provisions one finds art. 38, which reads as follows:

The action [i.e., for vacation of an arbitral award] shall not have the effect of suspending the award. However the judicial authority provided in Article 3 may grant it such effect if one of the parties so requests.

Such language calls for three comments. First, the basic rule is that challenging an award, whether interlocutory or final, will not stay execution. Second, if one party applies for a stay, the court may grant it, but is under no obligation to do so. Third, art. 38 does not specify what requirements must be met for the court to grant a stay. Thus, this provision implies that the court is vested with broad discretion.

2. Case Law: Three Step Evolution

The IAC entered into force in Geneva on January 12, 1971. Since that date, case law experienced an evolution which can be seen as being composed of three steps.

a) First Step: Palma S.A. or Likelihood of Success Test

The Court of Justice set the guidelines for the application of art. 38 IAC in 1974. By a final award, an arbitral tribunal sitting in Geneva had ordered Palma S.A., a Swiss corporation, to pay damages for non-performance of a sales contract to Motoimport, a Polish state enterprise. Palma challenged the award in court and applied for a stay of execution on the award pending the outcome of the challenge. In support of its application, Palma put forward two main arguments. Were it to pay and the award...
would later be vacated, then it would encounter great difficulties having to sue for reimbursement in Poland. Further, by complying with the award, it would unnecessarily jeopardize its financial position if the award were subsequently set aside.

But the Court did not give way to these arguments and refused to stay the award. It reached that conclusion by construing art. 38 and relying upon its rationale. According to the Court, the language of art. 38 required the court to deny a stay, unless exceptional circumstances were shown. By submitting to arbitration, the parties had sought a fast settlement of their dispute in a friendly environment. The rationale of art. 38 was thus to serve the purpose of obtaining a quick resolution of the dispute and, as a consequence, to avoid anything which would delay the arbitration process.

The Court further supported its holding by drawing an analogy with a similar rule of cantonal procedure applicable to stays of judgments pending a certain type of appeal. Pursuant to this rule, the Court must deny any stay, unless specific circumstances surrounding the case mandate a different solution. The Court has wide discretion in weighing such circumstances and it may make the stay conditional upon the moving or the opposing party’s providing a bond or other security.

Due to the requirements of specific circumstances, stays are exceptions and, therefore, the Court held that it should exercise its discretion with great restraint and weigh the circumstances very attentively. In the Court’s view, this necessity for restraint was further enhanced, because the IAC did not allow the filing of a bond or other security and because the parties had agreed upon resolving their disputes by referring to private justice.

Now what specific circumstances warrant a stay? In the Court’s opinion, it could be any circumstances which demonstrate that the applicant is likely to succeed on the merits of its challenge, and not, or to a much lesser extent, circumstances affecting the parties themselves, i.e., the harm they may suffer from a stay or lack of stay. Hence, the Court decided to grant a stay whenever a prima facie review of the merits showed that the applicant was likely or certain to prevail in the action for vacation.

On the same date, the Court of Justice handed down another decision, which relied on Palma and restated the same guidelines.

26 Palma, supra note 25, pp. 6–7.
28 I.e., (a) the Court may grant a stay subject to the applicant’s putting up a guarantee or other security securing its performance should the award be upheld or (b) the Court may deny the stay provided the opponent posts security for its reimbursing any amounts collected should the award be set aside.
29 Palma, supra note 25, p. 8.
30 Bucher-Guyer S.A. v. Meiki Co. Ltd., February 1, 1971, unreported. Note that, when applying the Palma guidelines to the facts in Bucher-Guyer, the Court held surprisingly that a stay lay because the action was not prima facie ill-founded, which was apparently a more lenient standard than the one used in Palma. One should also mention an earlier case, La République Populaire du Bangladesh et al. v. La Société des Grands Travaux de Marseille, Mai 4, 1973, unreported, which without referring to the test later used in Palma, stayed an interim award directing that Bangladesh be added as a party to the arbitration process. The Court ordered the stay because
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Thereafter, the Court followed its Palma practice for quite a period of time. For instance, it reaffirmed it in a 1980 opinion Montaggi Tubolari Montubi S.A. v. Spie Batignolles S.A. et al.\(^\text{31}\). Unlike the Palma case, this decision involved an interim award. Several corporations of different countries, all partners in a joint venture for the construction of a pipeline, had started an arbitration in Geneva against another partner, an Italian corporation by the name of Montubi. They claimed damages for violation of the joint venture agreement. Montubi disputed the arbitral tribunal's jurisdiction and asserted that the agreement had been terminated prior to its alleged violation. The arbitrators disposed of these defenses by an interlocutory award holding that (a) they had proper jurisdiction and (b) as a principle, Montubi was liable to pay damages, provided the claimants would prove the amount of actual damages incurred. Montubi took this decision to court and moved for a stay of the arbitration proceedings while the court procedure was pending. It argued that the substantial expenses involved in continuing the arbitration would be wasted if it later turned out that the arbitrators had no jurisdiction over the matter.

Applying the prima facie test set out in Palma, the Court regarded the chances of success here as too slim and, despite the cost argument, denied the stay\(^\text{32}\).

b) Second Step: El Nasr or Irreparable Harm Test

Anglo French Steel Corporation S.A., a French based company, had initiated an arbitration against El Nasr, an Egyptian entity\(^\text{33}\). El Nasr asserted that it was not bound by the arbitration clause in issue and raised the defense of lack of jurisdiction. The arbitrators made an interlocutory award in which they stated that they had proper jurisdiction. El Nasr filed an action in court and moved for a stay. On that occasion, the Court of Justice thoroughly reexamined its practice. It started by reiterating that stays were to remain exceptions. This being so, it acknowledged that refusing to stay execution may cause severe harm to the party aggrieved, and that this harm factor should be taken into consideration when ruling on an application for a stay\(^\text{34}\). A stay must be granted, if in its absence a party would suffer irreparable

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\(^{32}\) Regardless of the circumstances at stake, the Court has always accepted to stay execution of an award when the respondent had not opposed the stay. E.g., Procycle S.A. v. Colvert S.A., April 10, 1979, unreported, or Promotion Hôtelière et Immobilière S.A. v. Pro Anzère S.A., March 17, 1981, et al., unreported.


\(^{34}\) The Court in particular cited to von Salis, Probleme des Suspensiveffektes von Rechtsmitteln im Zivilprozess- und Schuldverfahrens- und Konkursrecht, Zurich 1980, pp. 26 ff, who unlike the majority of authors suggests that the harm factor be added as a criterion to the chances of success. See in particular p. 40 for the interplay of both criteria.
injury. However, this harm factor cannot be considered on its own. It must be linked to the applicant's possible chances of success in the action for vacation. If there are limited perspectives for success, potential harm is also much less of a threat.

The Court then went on buttressing its position by referring to federal case law on stays in other areas. For instance, the Supreme Court has been staying the payment of taxes during the pendency of an appeal, only in situations where the appellant would have encountered major financial difficulties. In another context dealing with arbitration, the Supreme Court has repeatedly stated that the drawbacks arising from longer and costlier proceedings would not amount to irreparable harm.

Eventually, the Court focused on the characteristics of arbitration. In the Court's opinion, these were mainly speed and freedom of the arbitrator in shaping the arbitration process. The Court did not differentiate between characteristics of international and domestic arbitration.

Bearing all this in mind, the Court denied staying the effects of the El Nasr interim award. Indeed, it found that (a) there were no serious chances of success and (b) refusing a stay would not bring about irreparable harm. The only harm which could possibly result from the immediate continuation of the arbitral proceedings consisted of cost and procedural inconvenience. Such harm was not irreparable. It could easily be compensated for when awarding cost in the arbitration should the arbitrators' jurisdiction prove ill-founded.

El Nasr, of course, was not satisfied with such a result. It tried its luck with the Federal Supreme Court, but again unsuccessfully.

Never before had the Supreme Court scrutinized the application of art. 38 IAC. Like the cantonal court, the federal judges insisted on speed being an essential part of the arbitration process, which puts the parties under an obligation to refrain from disturbing the regular course of an arbitration, except in cases of "absolute necessity."

Then the Supreme Court went over to its main point: staying the interim award does not by itself stay the arbitration proceedings. It is not within the court's power to direct that an arbitration be stayed. Such a decision rests with the arbitrators alone and is not subject to court review.

The reasons underlying that conclusion were as follows. The award assuming jurisdiction is a mere declaratory decision. As such, it cannot be enforced by means of debt collection and execution procedures and does not directly jeopardize the parties' rights nor give rise to severe harm, because any pecuniary damage may be

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35 E.g. 107 La 269/272.
36 E.g. 105 Ib 431/434.
37 Or, in the Court's own words, "il n'y a donc aucune raison majeure qui commande impérieusement l'octroi de l'effet suspensif". El Nasr, supra note 33, p. 7.
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adequately compensated for when apportioning payment of costs and expenses in the final award. Moreover, pursuant to the IAC, the arbitrators may rule on their jurisdiction, either in an interim or in a final award. When they choose the second alternative, they conduct the proceedings on the merits without their jurisdiction being previously established. If they favor the first alternative and render an interlocutory award, they must equally be in a position to continue the proceedings, even if the interim award is being challenged in court. If a stay is granted in court, the situation should be no different. Undoubtedly, the effects of the interim award are suspended. But this does not deprive the arbitrators from proceeding further on the merits, unless they deem it inappropriate under the circumstances and issue an order staying the proceedings.

In later cases, the Geneva Court of Justice applied the two-pronged test developed for an interim award in the El Nasr matter also to final awards. In a January 1983 opinion, for example, it restated that a stay may be granted only if otherwise irreparable injury would ensue, with specific mention that this standard must be looked at while considering likelihood of success as well. On such basis, the Court refused to grant a stay. On the same grounds, it also held against a stay of final award, in another matter involving this time a domestic arbitration.

c) Third Step: Chetrol or the Specificity of International Arbitration

So far, the restrictive El Nasr test had been applied consistently to interim as well as to final awards, and in domestic as well as in international arbitrations. In particular, no difference was made between the latter two types. Although the El Nasr test seemed well-settled, a later case somewhat modified its implementation.

In an arbitration involving Sonatrach, as a claimant, and its Moroccan counterpart, Société Chérifienne des Pétroles ("Chetrol"), as a respondent, the arbitrators making their final determination had awarded damages to Sonatrach. Chetrol challenged part of the award and applied for a stay. Summarily, it supported its application with three arguments. First, Morocco was a party to the New York Convention, whereas

40 Art. 8 IAC.
41 In short excerpts, the Supreme Court expresses these considerations in the following terms: "Dès lors, rien ne s'oppose en principe, sous réserve de l'opportunité, à ce qu'ils [les arbitres] instruisent sur le fond de la cause malgré un recours contre la décision par laquelle ils se sont reconnus compétents. Il n'en trait pas autrement si l'effet suspensif était accordé au recours [...]. Aussi la décision sur la suspension de la procédure arbitrale, relevant de considérations tirées de l'économie de la procédure, donc de l'opportunité, appartient-elle aux arbitres." (Emphasis added.) El Nasr, supra note 38, pp. 500–501.
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Algeria was not. In absence of a stay, the Algerian party may enforce the award in Morocco or elsewhere. However, should the award be set aside and a new arbitral decision be rendered thereafter, then the Moroccan party would be unable to reclaim monies already paid out, because Algeria would not be bound to recognize the new award. Second, in a 1977 opinion, the Supreme Court stated that a stay should be allowed unless there were no chances of success at all. Third, granting a stay would not do Sonatrach any harm.

Sonatrach replied by referring to the Court’s practice and alleging that Chetrol’s sole intent was to delay the regular outcome of the arbitration process.

The Court’s decision in this case came as a surprise. It decided for Chetrol, i.e., it stayed execution on the award. How did this come about?

The Court did not abandon the twofold test set in El Nasr, but it relaxed its application in international situations. This result was prompted by the Court’s pondering the specific characteristics of international as opposed to domestic arbitration. It emphasized that the general prohibition of stays set forth in art. 38 IAC was better suited to domestic than international arbitrations. In international matters, said the Court, speed was not a primary goal. Parties to international transactions did not choose arbitration for a rapid settlement of dispute. They chose the arbitration forum because for political as much as for legal reasons court litigation was seen as inadequate. Or in the Court’s language:

"The general rule provided in Article 38 IAC seems better suited for arbitrations between Swiss domiciliaries than for international arbitrations. On the international level, the purpose of arbitration is not so much to ‘rapidly obtain an award rendered in an atmosphere of complete trust’, but rather to have arbitrators resolve a dispute which for political and legal reasons is difficult to submit to the courts;"46

and further:

"With respect to international arbitration, one cannot but note that its advantage is certainly not speed, but rather, as was already stressed, the opportunity it provides for settling disputes which can hardly be seen as being resolved in a different way."47

Thus, to effect a speedy settlement of dispute was not a prime concern in international arbitration. Especially when considering that the risk of irreparable injury occurring is higher in international than in internal matters: if the party which challenges the award must comply with it and then succeeds in its challenge, it will often be unlikely to recover the amount paid out.

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Like under the El Nasr rule, this harm standard is to be examined together with any possible chances of success, which lead the Court to the following conclusions:
(a) if the applicant will clearly lose on the merits, any potential injury is to be ruled out and the stay must be denied;
(b) if the applicant is likely or certain to win on the merits, then the stay must be granted, even though no irreparable damage is foreseen;
(c) if the Court cannot simply rule out that the applicant may succeed, and denying the stay would cause irreparable injury, then the stay must be granted. It is no more required that success appears likely or certain.

The Court expressly indicated that these less stringent standards would only prevail in international matters. Further, it distinguished El Nasr pointing out that El Nasr dealt with an interlocutory award whereas Chetrol involved a final award. Lastly, the Court mentioned that it would not allow any stays in actions which were brought for stalling purposes only.

On the date of the Chetrol decision, the Court handed down two other judgments, both involving final awards in international arbitrations. They were both consistent with the Chetrol opinion and holding.

3. Inferred Guidelines

Where do we stand now? On the basis of the foregoing case law analysis, what can be said about the fate of future applications for stay? Any answer to this question must consider final and interim awards separately.

a) Interim Awards: El Nasr Standards

Did Chetrol overrule El Nasr with respect to interim awards? No. First, for the obvious reason that the Court of Justice expressly distinguished El Nasr in its Chetrol opinion. Second, because logically the issue at stake here is different.

It is different because it comes into play while the arbitration is still ongoing. The Supreme Court’s statement in El Nasr is clear: stay or not, the arbitration proceedings may continue. In this and earlier cases, the Geneva Court of Justice had erroneously implied that imposing a stay on the interim award would freeze the arbitration.


Cf., e.g., Bangladesh, supra note 30, or Montubi, supra note 31.
Interestingly, in related situations, the Court of Justice had not overlooked the difference between staying the award and staying the proceedings. In one action, it stressed that art. 38 IAC only provided for the court to stay the enforceability of the award, but did not permit the court to put a hold on the arbitration proceedings, because staying the arbitral proceedings was a prerogative which fell within the scope of the arbitrators’ powers exclusively.\(^\text{50}\)

In another case, the Geneva Court had made an even more restrictive statement. It was faced with the question whether it could stay an interim award on parts of the merits which was declaratory in nature.\(^\text{51}\) Without comment, it held that it was “not possible to request” that a declaratory judgment be suspended.\(^\text{52}\)

Obviously this last statement is excessive and the Supreme Court’s solution is the correct one in view of the following two factors. First, the effect of imposing a stay on an award is that the award cannot become final.\(^\text{53}\) Second, an arbitrator has the choice between rendering an interim award on some issues or later disposing of all issues in the final award. As a consequence, if he chooses an interim award, he need not wait for the award to become final before continuing the proceedings.\(^\text{54}\) Of course, there may be cases in which a stay may be appropriate, but this decision will then lie in the arbitrator’s discretion.

Once the rule is accepted that staying an interim award does not block the arbitration proceedings, the practical significance of applying for a stay shrinks substantially. Nevertheless, even if a stay were applied for, it would be refused. Both the Geneva and the Supreme Courts held that, in any event, denying a stay may only cause pecuniary damage and that such damage was not irreparable.

b) Final Awards: Chetrol Standards and Requirement for Security?

One may reasonably venture to state that the test developed in the Chetrol case will govern the outcome of future applications for stays. This results not only from the general evolution of case law in this area, but also from the very wording of the Chetrol opinion. Indeed, the Court indicated that it would apply the newly developed standards to international arbitration:

\(^{50}\) La République Arabe d’Egypte v. Westland Helicopters Ltd. et al., November 26, 1982, unreported, in particular p. 54.

\(^{51}\) Eurosystem Hospitalier en faillite v. S.A. Servicios Profesionales Construccion, May 23, 1980, unreported. This case involved a request for the court to open the interim award on the ground of newly discovered evidence and fraudulent acts (art. 41 IAC). At the time this request was filed the arbitration was still pending.

\(^{52}\) Eurosystem Hospitalier; supra note 51, p. 20.

\(^{53}\) I.e., it is not vested with “formelle Rechtskraft” or “force de chose jugée”. See von Salis, supra note 34, pp. 90 and 92.

\(^{54}\) Note that this would apparently be different in judicial proceedings (Guldener, Schweizerisches Zivilprozessrecht, 3d ed., Zurich 1979, p. 486; contra: von Salis, supra note 34, p. 98).
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"Lastly, we should restate that it is in matters of international arbitration more particularly that, for the reasons set forth above, the Court will from now on be less restrictive in granting stays in actions against an award on the merits." [55]

Some practitioners may of course disapprove the outcome of the Chetrol case, because it is likely to somewhat delay enforcement of the award. The Court did not overlook this objection. It refuted it by adding that clearly dilatory applications would be denied [56].

In this context, the question arises whether the court could condition its decision about staying the award upon one party's providing security shielding from any possible irreparable harm [57]. In comparable non-arbitration matters, civil procedure rules vest the court with the power to make an order for security [58]. Art. 38 IAC, however, is silent on this issue which has not been the subject of court scrutiny so far [59].

It is submitted that the court's decision on a stay could be made conditional upon security. Indeed, on the one hand, art. 38 IAC leaves the conditions upon which a stay may be denied or granted to the court's discretion. On the other hand, pursuant to art. 45 IAC, cantonal rules govern the procedure before the cantonal court. On the basis of that provision, the cantonal court in the exercise of its discretion could refer to the rule of cantonal procedure on security when determining the conditions under which a stay may be decided [60].

In any event, whether or not imposing a stay on a final award makes a significant difference in terms of timing of the enforcement abroad is an open question. It is true that art. V (1) (c) of the New York Convention provides that enforcement may be

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[56] On this problem of abusive actions, see for instance Lalive, ICC Report, supra note 4, p. 45.
[57] Apparently affirmative: Lalive, in: Dutuit/Knoepfler/Lalive/Mercier, supra note 16, p. 21 note 40. The security could work in two ways: the court could either grant the stay subject to the applicant's security for the payment of the amount awarded by the arbitrators or it could under certain circumstances refrain from ordering the stay, but conditionally upon the opponent's securing reimbursement of any monies which may later turn out to have been unduly collected. This latter alternative would allow immediate enforcement without risk of irreparable injury occurring. Although less forceful, the former possibility would mitigate the effects of the present practice and possibly act as a deterrent.
[58] E.g., art. 354 Geneva Code of Civil Procedure (both alternatives set forth in footnote 57); art. 70 Federal Act of Judicial Organization (first alternative only); §§ 286 and 255 Zurich Code of Civil Procedure (first alternative only) applicable in matters of arbitration as well.
[59] It is true that in an obiter dictum repeated in several earlier cases the Court of Justice inferred from that silence that no security may be ordered. However, when doing this, it was not addressing the very issue at stake, but rather defining the test first developed in Palma (Bucheguyer, supra note 30; Palma, supra note 25; Montubi, supra note 31).
[60] This, in any event, applies to granting a stay subject to security. Does it equally apply to denying a stay subject to security? On the face of art. 38 IAC, the court's discretion could be said to relate to the conditions under which a stay may be granted only. However, taking a less literal perspective one could reply that this is merely a matter of wording and that, by deciding when to grant a stay, the court at the same time necessarily decides when to deny it. Thus, its discretion would encompass denials as well as grants.
denied if the award has not yet become binding or has been suspended. However, even when it has not been suspended, art. VI of the Convention allows the court in which enforcement is sought to adjourn the enforcement proceedings pending disposition of an action for vacation. Consequently, whether or not a stay is imposed will probably be of little practical relevance. Therefore, Chetrol’s true importance must be seen in the Court’s expressly acknowledging the specific nature of international arbitration.

III. Conclusion and Outlook

If El Nasr is significant for its practical impact, Chetrol is even more so for its potential implications.

Delays are a major problem in arbitration everywhere. This is particularly true with respect to delays occurring while the arbitration is pending. El Nasr reduces the risk of such delays substantially. Parties “intent on dragging their feet” have now lost a good opportunity for doing so...

While preventing the arbitration proceedings from being paralyzed until a court decision is issued, El Nasr also restates and implements the basic rule of the arbitrators’ freedom to shape the arbitration process as they see fit.

It is not by chance that the Court in the Chetrol case made a first statement on the specificity of international arbitration in connection with a strictly procedural problem, which may be less sensitive than certain matters of substance. Nevertheless, the statement was very general and could well apply to other issues in the future.

This increasing role of specificity in case law is prompted by the general tendency in arbitration which provided the impetus for Chapter 11 of the Swiss Private International Law Bill. When this chapter comes into force, its success will depend to a significant extent on the courts’ implementation. If the courts are prepared to construe the new rules, not just by analogy with domestic arbitration, but in keeping with the specific characteristics of international arbitration, then the new statute will fully achieve its purpose. Although some may view it as just the starting point of a longer evolution, the Chetrol practice shows that the Swiss courts are willing to take into account the specific needs of present-day international arbitration.

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62 So for instance, Lahive, supra note 2, p. 361.

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