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## Settlement of commercial disputes

### Interim measures of protection—Liability regime

#### Note by the Secretariat

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\*The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



## Introduction

1. At its thirty-seventh session (Vienna, 7-11 October 2002), the Working Group had agreed that the revised draft of article 17 of the Model Law on International Commercial Arbitration relating to interim measures of protection ordered by an arbitral tribunal should ensure that the requirement that the party seeking the measure give security be mandatory and that the requesting party be considered strictly liable for damages caused to the responding party by an unjustified measure (A/CN.9/523, para. 31).
2. At the thirty-ninth session of the Working Group (Vienna, 10-14 November 2003), various questions were raised concerning such liability provision:
  - One question was whether a general liability provision should apply not only to interim measures ordered on an *ex parte* basis but also to those ordered on an *inter partes* basis. In support of establishing such a general liability provision, it was stated that in either case, the measure could ultimately be found to have been unjustified to the detriment of the responding party. However, some opposition was expressed to the suggestion that a liability regime should apply generally to both *ex parte* and *inter partes* measures. It was said that the strict liability imposed in the context of *ex parte* measures was appropriate given the nature of such measures, due to the risks inherent in such procedure. However, it was said that misrepresentation or fault in relation to the *inter partes* regime could be dealt with by procedural national laws. As a general remark, it was said that the provision should be limited to establishing the basic principles of a liability regime, without dealing in any detail with substantive issues covered by national laws (A/CN.9/545, para. 60).
  - The definition of the scope of the damages intended to be covered was questioned. Diverging views were expressed as to whether a wider definition of damages (which would provide appropriate safeguards) or a more limited one (restricting the ambit of the rule to direct damages) should be retained (A/CN.9/545, para. 64).
  - Another question was whether merely requesting an *ex parte* interim measure should make the requesting party liable for damages caused, irrespective of whether the measure was found to be justified or unjustified and irrespective of whether there was any fault by the requesting party. The prevailing view, however, was that the requesting party should be liable only if the measure was ultimately found to have been unjustified. Questions were raised as to the meaning to be attributed to the word “unjustified” and whether the notion of an “unjustified” measure should be considered *per se*, or in the light of the results on the merits. It was strongly felt, in that respect, that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not (A/CN.9/545, para. 65).
3. In preparation for the continuation of its deliberations on this topic, the Working Group agreed that the matter could profit from additional information regarding the liability regimes in the context of national laws on interim measures of protection and all delegations were invited to make such information available to the Secretariat in preparation for the fortieth session of the Working Group (A/CN.9/545, para. 61).

4. Part I of this note reproduces the information received from States on that matter in the form in which such information was communicated. Part II provides a summary of texts being drafted by other international organizations in respect of this issue. Earlier drafts of these texts are reproduced in A/CN.9/WG.II/WP.108, para. 108 and A/CN.9/WG.II/WP.119, paras. 68-71.

## **I. National legislation communicated to the Secretariat by delegations**

### **A. Austria**

[Original: English]

5. According to the present legislation on arbitration (articles 577-599 of the Austrian Code of Civil Procedure), an arbitral tribunal is not empowered to issue an interim measure of protection and only courts can issue interim measures. The court has to decide whether to grant the measure upon application by the requesting party, on the basis of immediately available evidence provided simultaneously by the requesting party to support the claim. The decision to hear the party against whom the measure is directed lies within the discretion of the court. In any case, the court has to make sure that the hearing does not jeopardize the success of the interim measure.

6. Interim measures which are granted before the claim becomes due or before judicial proceedings are initiated, must be justified in the main judicial proceedings. When granting the interim measure, the court will set a time-limit for the requesting party to initiate judicial proceedings. Should the requesting party fail to initiate proceedings within this time-limit, the court *ex officio* will set aside the interim measure.

7. The liability regime under Austrian law applies generally to both *ex parte* and *inter partes* measures. According to article 394 of the Code of Execution, the requesting party is liable for all pecuniary damages caused by the measure to the party against whom it is directed, if the claim, for which the interim measure has been granted, proves to be unfounded in the subsequent main proceedings or if the requesting party fails to institute legal proceedings within due time. The Austrian provision imposes strict liability. The requesting party is liable to compensate all pecuniary damages caused by the interim measure. The pecuniary damages cover all pecuniary losses, prevented gains and the necessary costs of the party against whom the interim measure is directed to defend its case. Legal costs for representation of the party against whom the interim measure is directed must also be compensated.

### **B. Canada (Province of Quebec)**

[Original: English/French]

8. Article 755 of the Code of Civil Procedure provides that:

“Unless, for good reason, the court or the judge granting an interlocutory injunction decides otherwise, the applicant must be ordered to give security, in a prescribed amount, to pay the costs and damages which may result

therefrom. The certificate of the clerk that the security has been given must be attached to the order before it is served.

A judge may at any time increase or reduce the amount of such security [1965 (1st sess.), c. 80, s. 755; 1992, c. 57, s. 420].”

### C. Czech Republic

[Original: English]

9. The power to grant interim measure is exclusively allocated to courts. The courts have the same power to provide interim measure of protection to arbitration parties, as they have for parties to court proceedings.

10. Section 22 of Act No. 216/1994, Statute Books of the Parliament of the Czech Republic, on Arbitral Proceedings and Enforcement of Arbitral Awards (approved on 1.11.1994, entered into force as of 1.1.1995) provides that “If pending the proceedings, or before their commencement, circumstances emerge, likely to jeopardise the execution of the arbitral award, a Court of Law, acting on application of any of the parties, may order a preliminary measure (injunction).” According to this provision, which is mandatory, arbitral tribunals are not allowed to issue any interim measure at any time.

11. The legislation in the Czech Republic does not provide for cross-border enforcement of arbitrator-granted interim relief. Under the Czech law, any arbitrator-granted interim relief cannot be enforced in the Czech Republic.

### D. Finland

[Original: English]

12. Chapter 7, section 11, of the Finnish Code of Judicial Proceedings provides that, if an interim measure of protection is later found unjustified, the party who has requested the measure shall pay compensation to the other party for any damage that the measure or its enforcement has caused the latter as well as compensation for those costs that he paid in order to cancel the measure (e.g. costs for providing a security). This provision means that the party upon whose request the measure has been granted and possibly enforced has a strict liability (*sine culpa*) for any damage—both direct and indirect—the measure or its enforcement has caused the other party.

### E. France

[Original: French/English]

13. Below is an extract of the New Code of Civil Procedure on interim measures of protection granted by courts, as translated under the official legal web site of the French Government (“*legifrance. gov. fr*”).

“*Article 489* (Decree No. 81-500 of 12 May 1981, sec.18, Official Journal of 14 May 1981 amendment JORF 21, May 1981): The summary interlocutory procedure orders shall be provisionally enforceable. The judge may notwithstanding the above, subject its provisional enforcement to the

providing of an undertaking in the manner as specified under Articles 517 to 522.

Should the occasion arise, the judge may order the enforcement to be executed upon the mere production of the original.

*Article 517:* Provisional enforcement may be made subject to the providing of undertakings relating to real or personal property sufficient to cover restitutions and damages.

*Article 518:* The nature, extent and conditions of the undertakings shall be specified in the decision which prescribes that they be provided.

*Article 519* (Decree No. 76-714 of 29 July 1976, sec. 2, Official Journal of 30 July 1976): Where the undertakings shall consist in a sum of money, the same shall be deposited at the Deposits and Consignation Office; it may be deposited also at the request of one of the parties in the hands of a third party appointed for that purpose.

In the latter case, the judge, where he accedes to the request, shall state in his decision the conditions of such deposit.

Where the third party refuses to accept such a deposit, the sum shall be deposited, without any fresh decision to that effect, at the Deposits and Consignation Office.

*Article 520:* Where the value of the security may not be immediately determined, the judge shall invite the parties to appear before him with their evidence at a date which he shall specify.

It shall be determined without any right of review.

A note of the decision shall be made on the original and on the certified copies of the judgment.

*Article 521* (Decree No. 81-500 of 12 May 1981, sec.21, Official Journal of 14 May 1981 amendment JORF of 21 May 1981), (Decree No. 84-618 of 13 July 1984, sec.3 and 31, Official Journal of 18 July 1984 amendment JORF of 18 August 1984): The party ordered to pay a sum other than in view of maintenance, compensatory annuities or interim payment may avoid provisional execution by depositing, on leave granted to that effect by the judge, cash or title of sufficient value to provide a security for the amount of the award with respect to the principal claim, interest and costs.

In the event of a judgment ordering the payment of a lump sum as indemnity in cases of personal injury, the judge may also order that it be remitted to a sequester under the condition that he shall pay to the victim such installments as the judge shall specify.

*Article 522:* The judge may, at any time, authorise the substitution of the original security for one of an equal value.”

14. The principle adopted by the courts when granting interim measures of protection is as follows:

“Provisional execution of interim measures of protection is effected at the risk of the petitioner and, where the ruling is set aside, he shall be responsible for reparation of any damage caused by such execution.”

## F. Germany

[Original: English]

15. Section 1041, sub. 4 of the Arbitration Law provides that:

“If a measure ordered under subsection 1 (interim measure ordered by an arbitral tribunal) proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure or from his providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.”

16. This provision reflects the statutory provisions under German law for interim measures granted unjustly by state courts and is an expression of a general principle of law. Thus it was included in the Arbitration Act—according to general consensus—for the sake of clarification and to reiterate the idea that a party seeking interim measures of protection without sufficient cause must compensate damages arising therefrom *ipso jure*, i.e. without an express undertaking to do so.

17. Apart from this provision, there is no further specific statutory provision dealing with the consequences of unjustified interim measures.

## G. Singapore

[Original: English]

18. The International Arbitration Act, 1995, which enacts the UNCITRAL Model Law on International Commercial Arbitration with modifications, provides, in its section 12, that an arbitral tribunal has the power to make orders, or give directions to any party, for:

- Security for costs
- Preservation, interim custody or sale of any property which is the subject matter of the dispute
- Securing the amount in dispute
- Preventing dissipation of assets by a party
- An interim injunction or any other interim measure.

19. Orders and directions given by an arbitral tribunal are by leave of the High Court enforceable in the same manner as orders made by a court. The High Court has power to make similar orders for the purpose of, and in relation to, an arbitration as it has for the purpose of, or in relation to, an action or matter in court. These matters are provided for in section 12 of the International Arbitration Act.

20. With respect to liability for damages arising from interim orders, in the absence of jurisprudence to the contrary, it is assumed that the practice in relation to interim orders made in arbitration proceedings would follow the practice in relation to interim orders issued by courts in relation to cases before courts.

21. A central feature in court practice is that the applicant is almost always required to undertake to abide by any order the court may make as to damages in the event the order is shown subsequently to have been unjustly made. In fact, the plaintiff when applying for an order always offers the undertaking. On the application of the party to be affected, the court may require the applicant to back up his undertaking with security, such as in the form of a bank guarantee.

22. The court may order damages to be paid if, for example, at the end of the trial, the plaintiff fails to establish his claim. This would be the case, for instance, if the plaintiff had obtained an order securing the amount in dispute but at the end of the trial loses the case altogether. In such an instance, the view may be taken that the interim order had been wrongly applied for, and the defendant should be compensated for the consequence of such a wrongly issued order.

23. An undertaking in respect of damages is required for interim orders obtained *ex parte* as well as those obtained *inter partes*. In the case of an *ex parte* order, the plaintiff is required to make full and frank disclosures of factors which might mitigate against the granting of the order. If the plaintiff is later shown to have withheld material facts from the court when applying for the order *ex parte*, the *ex parte* order may be discharged for that reason alone whatever other merits it might have. In such a situation, too, the applicant will have to make good his undertaking to pay damages.

24. Singapore's court practice in relation to interim orders of protection follows that of England and other common law countries.

## H. Spain

[Original: Spanish]

25. The Civil Procedure Act (Act 1/2000, 7 January) expressly provides that any person who is party to arbitral proceedings abroad may appeal for interim measures of protection from a Spanish court. Under article 733 of the Act, the party may request interim measures of protection *inaudita parte (ex parte)* in cases of urgency or where the hearing may result in successful referral to arbitration of the interim measure. Security must be provided in the case of both *inter partes* and *ex parte* interim measures. Once an interim measure is adopted and security provided, execution ensues automatically.

26. *Inter partes* interim measures: Under article 745 of the Act, in the event of acquittal, or if the case is withdrawn or discontinued, "all the interim measures adopted shall be withdrawn automatically" and, on application by the defendant, any "damages that the defendant may have suffered" shall be determined.<sup>1</sup>

27. *Inaudita parte (ex parte)* interim measures: Under article 739 of the Act, the court is obliged to inform the other party of the court order in which the measure was adopted, in order to enable him to lodge objections. The deadline for objections

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<sup>1</sup> Article 745. *Withdrawal of measures upon acquittal*

In the event of discharge or acquittal, all interim measures adopted shall automatically be withdrawn and the provisions of article 742 concerning the damages that the defendant may have suffered shall be implemented. The same procedure shall be adopted in the event of withdrawal or abandonment of the case.

is 20 days following notification of the court order. The other party is provided with a copy of the document in order that it may also formulate its submission.

Under article 741 of the Act, the court may, following the hearing:

(a) Maintain the interim measure. In such case, “the costs of objection shall be borne by the objecting party”;

(b) Withdraw the interim measure. In such case, “the costs and damages resulting from the interim measure shall be borne by the petitioner”.<sup>2</sup>

## I. Switzerland

[Original: French]

28. Article 364 of the New Act on Civil Procedure, on provisional measures, security and damages, provides that:

“1. Unless the parties agree otherwise, the arbitral tribunal or the court may, on application by a party, order interim measures, for the purpose, among others, of preserving evidence.

2. Where the person targeted by the measures does not submit to them voluntarily, the arbitral tribunal or a party, by agreement with the tribunal, may apply to the court for the necessary order. The court shall apply its own law.

3. The arbitral tribunal or the court may make the required interim measures conditional on the provision of appropriate security, where such measures may cause damage to the other party.

4. The petitioner is responsible for damage caused to the other party by unjustified interim measures. If he can prove that the petition was made in good faith, the tribunal may reduce or refuse to award damages. Claims may be raised during arbitral proceedings that are pending.

5. Security shall be released once it is established that no action for damages will be brought; in case of uncertainty, the arbitral tribunal shall grant the interested party further time to take action.”

## J. United States of America

[Original: English]

29. With few exceptions, federal and state courts in the United States hold a party liable for damages suffered by another party due to a wrongfully issued interim measure of protection. Federal and state law generally require that a party requesting a preliminary injunction or temporary restraining order provide a security bond, which is then available to indemnify the affected party for all costs and pecuniary injury resulting if the measure turns out to have been wrongfully granted.

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<sup>2</sup> Article 741. *Transmission of objections to the petitioner, hearing and decision*

1. Objections shall be transmitted to the petitioner and the provisions of article 734 shall be implemented immediately.

2. The court shall, within five days after the hearing, issue a written decision on the objections. If the interim measures are withdrawn, the petitioner shall be liable for the costs and any damages.

30. Rule 65 of the Federal Rules of Civil Procedure establishes the general procedures for preliminary injunctions, permanent injunctions and temporary restraining orders under federal law, including provisions to guard against abuse of the injunction remedy. Specifically, 65(c) provides that parties requesting the imposition of a provisional remedy tender a security bond to the court:

“No restraining order or preliminary injunction shall be issued except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

31. The requirement of a security bond is strictly enforced. Courts agree that the purpose of the security bond is to guarantee the payment of costs and damages a party incurs, where it is subsequently found the party was wrongfully enjoined or restrained. In *Blumenthal v Merrill Lynch*, 910 F.2d 1049, 1055-1056 (2d Cir.1990) the United States Court of Appeals for the Second Circuit held that former employees, vindicated on a central issue in an arbitration dispute, were entitled to damages for losses proximately caused by the imposition of a preliminary injunction. The Seventh, Ninth, and Eleventh Circuits have all come to the same conclusion under similar circumstances.

32. A party has been wrongfully enjoined or restrained within the meaning of Rule 65(c) when he had the right to do what he was enjoined from doing. *Nintendo of America v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036. *See also, Blumenthal*, 910 F.2d at 1054 (“The focus of the ‘wrongfulness’ inquiry is whether, in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have been issued in the first instance.”). In some circumstances, even a party that has not entirely won on the merits and has been ordered to pay some damages may nonetheless also be awarded damages for a wrongfully issued interim order (*Id.* at 1056).

33. Rule 65(c) mandates the issuance of security bonds, and a district court may dispense with this requirement only in very limited circumstances. Failure even to consider the issue of a security bond has been found to be reversible error. The 3d Circuit in *Hoxworth v Blinder, Robinson & Co*, 903 F.2d 186,209-211 (3d Cir.1990), for example, held that a court’s failure to require plaintiffs in a civil-RICO action to post a bond constituted reversible error. The 4th Circuit, in *District 17, U.M.W.A V. A & M Trucking*, 991 F.2d 108, 110 (4th Cir.1993) and the 5th Circuit in *Philips v Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990) also came to the same conclusion.

34. Where a party lacks the resources to pay a bond and a bond requirement may discourage that party from enforcing important federal laws and rights (such as in employment discrimination claims), or might affect the party’s ability to exercise the right to judicial review, a court may dispense with the bond requirement. *Crowley v Local No. 82*, 679 F.2d 978,1000 (1st Cir. 1982). Where litigation is in the public interest and the movant lacks the resources to provide the bond, *Pharmaceutical Society v New York Dep’t of Soc. Servs.*, 50 F.3d 1168, 1174-1175 (2d. Cir. 1995), a court may also dispense with the requirement. Where there is no risk of monetary losses to the defendant, or where the movant possesses the financial resources to pay whatever damages, *Continental Oil Co. v Frontier Ref.*

*Co.*, 338 F.2d 780, 782-783 (10th Cir. 1964), courts have also dispensed with the security bond requirement.

35. The amount of the security bond is left to the court's discretion. (*Alexandria v Primerica Holdings Inc*, 811 F.Supp. 1025, 1038 (D.N.J. 1993), *See also, Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1141-1142 (7th Cir. 1994)).

## II. Work of international organizations

### A. International Law Association Principles

[Original: English]

36. At its sixty-seventh Conference in 1996, the International Law Association (ILA) adopted the "Principles of Provisional and Protective Measures in International Litigation"<sup>3</sup> (the "ILA Principles"), which were drafted with the international litigation process in mind, as opposed to interim measures granted by a court in support of an international arbitration (the Principles were reproduced verbatim in paragraph 108 of A/CN.9/WG.II/WP.108). The provision relating to liability and its related commentary provides as follows:

*Provision:*

"The court should have authority to require security or other conditions from the plaintiff for the injury to the defendant or to third parties which may result from the granting of the order. In determining whether to order security, the Court should consider the availability of the plaintiff to respond to a claim for damages for such injury."

*Comments:*

As a safeguard for the respondent, the court may need to have the authority to require security or other conditions (such as an undertaking by the applicant to indemnify the respondent if the measure proves to be unjustified) from the applicant for the potential injury to the respondent or to third parties which may result from the granting of the order, such as where the order is unjustified or too broad. If an undertaking as to damages might prove insufficient and the court considers ordering security, an additional consideration might relate to the ability of the applicant to respond to a claim for damages for such injury (A/CN.9/WG.II/WP.119, para. 58).

### B. American Law Institute/Unidroit: Draft Principles and Rules of Transnational Civil Procedure

[Original: English]

37. The Draft Principles and Rules of Transnational Civil Procedure is a joint project to set up procedural rules that a country could adopt for adjudication of

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<sup>3</sup> The International Law Association (ILA), Report of the sixty-seventh Conference held at Helsinki from 12-17 August 1996—Committee on International Civil and Commercial Litigation, Second interim report on provisional and protective measures in international litigation, published by the ILA, London 1996.

disputes arising from international transactions. The April 2003 revision of the draft Principles contains the following principles and comments relating to indemnification.

*Provision:*

“8.3 An applicant for provisional relief should be liable for full indemnification of a person against whom the relief is issued if, upon subsequent reconsideration with participation of other parties, the court determines that the relief should not have been granted. The court may require the applicant for provisional relief to post a bond or formally to assume a duty of indemnification.”

*Comments:*

“*P-8F* Principle 8.3 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction. The particulars of such indemnification should be determined by the law of the forum. An obligation to indemnify should be express, not merely by implication, and could be formalized through a bond underwritten by a third party.”

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