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Settlement of commercial disputes

Interim measures of protection

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.

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Introduction

1. At its fortieth session (New York, 23-27 February 2004), the Working Group considered a newly revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") regarding the power of an arbitral tribunal to grant interim measures of protection (see A/CN.9/547, paras. 68-116).[1]

2. At that session, the Working Group discussed as well a newly revised draft of the provision on recognition and enforcement of interim measures of protection (for insertion as a new article of the Model Law, tentatively numbered 17 bis) (see A/CN.9/547, paras. 12-67).[2]

3. This note contains two revised provisions based on the discussions and decisions made by the Working Group at its fortieth session, one relating to article 17 of the Model Law regarding the power of an arbitral tribunal to grant interim measures of protection (Part I), the other relating to recognition and enforcement of interim measures of protection (Part II).

I. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

A. Text of draft article 17

4. To facilitate the resumption of discussions, the following text sets out a newly revised version of article 17 of the Model Law based on the discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116), (hereinafter referred to as "draft article 17"):

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
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> "(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
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> "(a) Maintain or restore the status quo pending determination of the dispute;
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> "(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];
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> "(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
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> "(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

"(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

"(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

"(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

"(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

"(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

"(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the tribunal's own initiative, upon prior notice to the parties.

"(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

"(7) (a) [Unless otherwise agreed by the parties,] where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure, the requesting party may file its application without notice to that party and request a preliminary order [directing that party to preserve the status quo until the tribunal has heard from that party and ruled on the application].

"(b) The provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

"(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

"(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application [,unless the arbitral tribunal determines [pursuant to

paragraph 7 (i)[1]] that such notification should be deferred until court enforcement or expiry of the preliminary order].

"(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.

"(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]. Such confirmation, extension or modification shall take place only after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

"(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order.

"(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c)."

B. Matters for further consideration

5. At its fortieth session, the Working Group agreed that the following matters of substance might need further consideration.

Subparagraph (b) of paragraph (2)—Anti-suit injunctions

6. At its fortieth session, the Working Group heard diverging views on the question of whether paragraph (2) of article 17 could be interpreted as encompassing the power of an arbitral tribunal to order an anti-suit injunction (A/CN.9/547, paras. 75-83). After discussion, the Working Group agreed to amend

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[1] Proposed subparagraph relating to deferral of notification for the purpose of allowing court enforcement:

"[(i) If notification by the arbitral tribunal risks prejudicing court enforcement of the preliminary order, the arbitral tribunal may defer notification to the party against whom the preliminary order is directed of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The duration of such deferral shall be indicated in the order and shall not exceed the maximum duration of the preliminary order. At the expiration of the period fixed for the deferral of notification, the arbitral tribunal shall give immediate notice to the party concerned of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.]"

subparagraph (b) of paragraph (2) to clarify that anti-suit injunctions were included in the definition of interim measures of protection (see below, paragraph 12). Nevertheless, noting that the implications of the proposed amendment have not been fully considered, the Working Group agreed to further discuss that proposal at a future session (A/CN.9/547, para. 83).

Subparagraph (a) of paragraph (3)— interplay with paragraph (2)

7. The Working Group might wish to further consider whether or not the general requirements set forth in paragraph (3) adequately apply to all types of interim measures listed under paragraph (2). It is recalled that, at the fortieth session of the Working Group, it was stated, for example, that it would not be appropriate to require in all circumstances that a party applying for an interim measure to preserve evidence under paragraph (2) (d) should necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered, or to require that requesting party to otherwise meet the very high threshold established in paragraph (3) (A/CN.9/547, para. 91).

Paragraph (7)—Ex parte interim measures

8. At the fortieth session of the Working Group, there remained strongly opposing opinions on the question of including a provision granting the arbitral tribunal the power to issue ex parte interim measures (A/CN.9/547, paras. 109-112), and this matter is further discussed below under paragraphs 27 to 45.

C. Notes on draft article 17

Paragraph (1)

9. Paragraph (1) has been adopted without modification from the previous draft as contained in document A/CN.9/547, para. 68 (A/CN.9/547, para. 69).[3]

Paragraph (2)[4]

Chapeau—"whether in the form of an award or in another form"

10. It is recalled that, after discussing the form in which an interim measure might be issued by an arbitral tribunal, the Working Group reiterated its decision not to modify the chapeau of paragraph (2) (A/CN.9/547, paras. 70-72). On that matter, the Working Group agreed that any explanatory material to be prepared at a later stage, possibly in the form of a guide to enactment of draft article 17, should make it clear that the wording adopted regarding the form in which an interim measure might be issued should not be misinterpreted as taking a stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (A/CN.9/547, para. 72).[5]

Subparagraph (a)

11. Subparagraph (a) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.

Subparagraph (b)—Anti-suit injunction

12. The draft of subparagraph (b) reflects the decision of the Working Group that, for the sake of clarity, the power to issue anti-suit injunctions should expressly be conferred upon arbitral tribunals and that, for that purpose, the words "or to prejudice the arbitral process itself" should be added at the end of subparagraph (b). However, for the reasons mentioned under paragraph 6 above, that proposal has been inserted in square brackets, for further consideration by the Working Group at a future session (A/CN.9/547, para. 83).

Subparagraph (c)—[preliminary]; [securing]—[preserving]

13. The word "preliminary" has been deleted on the basis that it was confusing and added nothing to the meaning of the provision (A/CN.9/547, para. 73; for earlier discussion on that matter, see A/CN.9/545, para. 26) and the word "preserving" has been retained rather than "securing" because the latter term could be interpreted as a particular method for protecting assets (A/CN.9/547, para. 74).[6]

Subparagraph (d)

14. Subparagraph (d) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.

Paragraph (3)[7]

Subparagraph (a)—"Irreparable harm"

15. The draft subparagraph (a) follows the proposal made by the Working Group to replace the words "irreparable harm" by the words: "harm not adequately reparable by an award of damages" (A/CN.9/547, para. 89). It was stated that that proposal addressed the concerns that irreparable harm might present too high a threshold and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure (A/CN.9/547, paras. 84-89).[8]

Subparagraph (a)—interplay with paragraph (2)

16. At the fortieth session of the Working Group, a view was expressed that the reference to "harm" in subparagraph (a) of paragraph (3) might lend itself to confusion with the words "current or imminent harm" in subparagraph (b) of paragraph (2), thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of subparagraph (b) of paragraph (2) (A/CN.9/547, para. 90). It is however submitted that the broad definition of interim measures under paragraph (2) does not conflict with the need for the party requesting the interim measure to show evidence of "harm not adequately reparable by an award of damages" (see A/CN.9/WG.II/WP.123, para. 15).[9]

Subparagraph (b)

17. Subparagraph (b) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.[10]

Paragraph (4)[11]

18. The draft paragraph (4) takes account of the proposal made by the Working Group at its fortieth session to amend paragraph (4) in such a manner that the provision of security should not be considered as a condition precedent to the granting of an interim measure (A/CN.9/547, para. 92), and interpreted as a free-standing provision allowing the tribunal to order security at any time during the procedure, or as limiting the ordering of security only at the time that the application was brought (A/CN.9/547, para. 94).

"in connection with"

19. The Working Group clarified its understanding that, in draft paragraph (4), as adopted, the term "in connection with" should be interpreted in a narrow manner to ensure that the fate of the interim measure was linked to the provision of security (A/CN.9/547, para. 94).

"or"

20. As a matter of drafting, it was stated that the use of the word "or" was more appropriate than the word "and" to indicate that the arbitral tribunal could require either the requesting party or any other party to provide appropriate security (A/CN.9/547, para. 95).

Paragraph (5)[12]

Obligation to inform

21. The draft paragraph (5) reflects the decision of the Working Group that the obligation to inform be expressed in a more neutral way and avoided any inference being drawn that the paragraph excluded the obligation under article 24 (3) of the Model Law (A/CN.9/547, paras. 97-98).[13]

Sanction for non-compliance

22. It is recalled that the Working Group agreed that the express inclusion of a sanction under paragraph (5) in case of non-compliance with the obligation to disclose any material change in the circumstances or paragraph (6) was not necessary, as in any case the usual sanction for non-compliance with that obligation was either the suspension or termination of the measure, or the award of damages (A/CN.9/547, paras. 99-100).[14]

Paragraph (6)[15]

"it has granted"

23. The words "it has granted" have been retained without square brackets, to reflect that the arbitral tribunal may only modify or terminate the interim measure issued by that arbitral tribunal (A/CN.9/547, paras. 102-104).

Paragraph (6 bis)

24. It is recalled that, in order to assist deliberations on paragraph (6 bis), the Secretariat had prepared a note (A/CN.9/WG.II/WP.127) containing information

received from States on the liability regimes that applied under their national laws in respect of interim measures of protection. It was observed that, of the legislation contained therein, the national laws did not distinguish between inter partes and ex parte measures in relation to the liability regimes that applied. It was suggested that, for that reason, the square brackets around that paragraph should be deleted and the Working Group should consider possible improvements to the text (A/CN.9/547, para. 105).[16]

25. Draft paragraph (6 bis) contains the proposal which was adopted by the Working Group at its fortieth session (A/CN.9/547, paras. 106-108) and reflects the agreement of the Working Group that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not.

26. It was also agreed that any explanatory material accompanying paragraph (6 bis) should clarify that the reference to "proceedings" therein referred to the arbitral proceedings and not to the proceedings relating to the interim measure (A/CN.9/547, para. 108).

Paragraph (7)

Ex parte measures

27. At its thirty-ninth session, the Working Group proceeded with a detailed review of paragraph (7), and agreed that discussions as to whether, as a matter of general policy, a provision on interim measures granted ex parte should be retained in draft article 17 should be held at its next session (A/CN.9/547, para. 110). The draft paragraph (7) reflecting the discussions of the Working Group at its thirty-ninth session is reproduced in documents A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128 ("the Secretariat draft").

28. At the fortieth session of the Working Group, a number of alternative proposals were made in respect of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128). These proposals are reflected in the report of the fortieth session of the Working Group (A/CN.9/547, paras. 114 and 115).

29. At the thirty-seventh session of the Commission (New York, 14–25 June 2004), the view was reiterated that the issue of ex parte interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law, and the hope was expressed that consensus could be reached on that issue by the Working Group at its forthcoming session, based on a revised draft to be prepared by the Secretariat.

30. Taking into account the various proposals made at the fortieth session of the Working Group, a revised draft of paragraph (7) has been prepared by the Secretariat with a view to finding a consensus ("the revised draft").

Subparagraph (a) of the revised draft

31. Subparagraph (a) of the revised draft defines ex parte interim measures. The main modifications of the revised draft are as follows:

"[Unless otherwise agreed by the parties]"

32. The wording in square brackets "[Unless otherwise agreed by the parties]" reflects the principle that ex parte interim measures should be available by default, an approach which is consistent with that taken in the Model Law. The opt-in approach, which was discussed by the Working Group at its thirty-ninth session and resulted in the inclusion in the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128) of the bracketed words "[if expressly agreed by the parties]", would be unusual for a legislative instrument and has not been included in the revised draft. That matter nevertheless remains an open issue that is to be further considered by the Working Group (A/CN.9/545, para. 52).

"Preliminary order"

33. The term "preliminary order" is used, instead of "interim measure", to describe an interim measure made on an ex parte basis. This term emphasizes the temporary and extraordinary nature of the order.

34. The Working Group will need to decide whether or not "preliminary order" should be defined and, if so, whether it should be limited to a measure that is both strictly limited in its duration (see below paragraph 39) and exclusively aimed at preserving the status quo until the tribunal has heard from the other party and ruled on the application as provided for in square brackets in subparagraph (a) of the revised draft (see below paragraph 36).

"in exceptional circumstances"—"Urgent need for the measure"

35. The revised draft does not include a reference to "exceptional circumstances" and "urgency". The Working Group may wish to further discuss whether these are conditions specific for the granting of an ex parte interim measure.

Subparagraph (b) of the revised draft

"Conditions under paragraph (3)"

36. Instead of retaining a reference to the application of the conditions set out under paragraph (3), which was considered ambiguous and which could be misinterpreted as excluding the application of paragraphs (5) and (6) to ex parte interim measures, subparagraph (b) of the revised draft includes a wider reference to the application of article 17, by providing that: "the provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph" (see also, A/CN.9/545, para. 56). The Working Group may wish to further confirm which of the general provisions applicable to interim measures also apply to preliminary orders. Depending on the definition of "preliminary order" under paragraph 7 (a), the reference to paragraph (2) in paragraph 7 (b) would only need to be retained if the Working Group decided that the definition of a preliminary order and an interim measure should be the same. If a preliminary order is defined under paragraph 7 (a) as a subset category of interim measures, the reference to paragraph (2) would be deleted. It is submitted that paragraph (4) would not apply to a preliminary order, as the requirement for the provision of security in the context of a preliminary order is set forth under paragraph 7 (g).

Subparagraph (c) of the revised draft

37. Subparagraph (c) has been inserted in order to provide some additional certainty regarding the power of the arbitral tribunal to grant a preliminary order. The Working Group may wish to decide whether or not such a provision is needed.

Subparagraph (d) of the revised draft

38. Subparagraph (d) of the revised draft deals with the issue of notice to the other party of both the ex parte application and the preliminary order, if any. It partly mirrors subparagraph (e) of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128), with the following differences:

- The revised draft refers to notice of the application and all other communications, and not only to notice of the measure;
- While providing some flexibility for the arbitral tribunal in respect of when the responding party should be heard, the proposal clarifies the point of time at which notice should be given;
- The second part of subparagraph (d) of the revised draft in square brackets deals with the sensitive issue of enforcement of ex parte interim measures, and seeks to address the view that giving notice immediately after the interim measure is ordered may not satisfy the requirement of surprise needed to give efficacy to ex parte measures, including time to seek enforcement in court (A/CN.9/545, para. 78). Subparagraph (d) refers to subparagraph (i), which is included as a footnote to the text. Subparagraph (i) relates to deferral of notification for the purpose of court enforcement. The Working Group has not yet discussed in detail the question whether or not to include a provision allowing court enforcement of an ex parte interim measure. The Working Group may need to consider the proposed paragraph (i) in tandem with its discussion on whether or not a regime for court enforcement of an ex parte interim measure should be included in the Model Law.

Subparagraph (e) of the revised draft

39. Subparagraph (e) of the revised draft deals with the issue of the responding party's opportunity to present its case, and the corresponding time period. In that respect, it is recalled that, at the thirty-ninth session of the Working Group, some reservations were expressed as to the inclusion of a time period of forty-eight hours or any other specific time period, which might prove too rigid and inadequate, depending on the circumstances. It was also pointed out that introducing wording to allow the arbitral tribunal to consider another time and date as was appropriate in the circumstances might provide flexibility but might also make it illogical to maintain a reference to a fixed period of time within that same provision. A widely shared view, however, was that the inclusion of a specific time period served the purpose of underscoring that the opportunity to be heard was urgent and also of putting the arbitral tribunal on notice that it should be ready to reconvene to allow an opportunity for the responding party to be heard (A/CN.9/545, para. 79).

40. It is recalled that, at its thirty-ninth session, the Working Group agreed that the words "opportunity to be heard" should be replaced by "opportunity to present its

case", in order to encompass both a hearing of the responding party and a written submission from that party (A/CN.9/545, para. 80).

41. The drafting of subparagraph (e) will need to be revisited after the Working Group has examined the question whether enforcement of an ex parte interim measure should be permitted.

Subparagraph (f) of the revised draft

42. The revised draft, which mirrors subparagraph (f) of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128), reflects the decision of the Working Group to simplify this subparagraph (A/CN.9/545, paras. 83 and 84).

Subparagraph (g) of the revised draft

43. The drafting of subparagraph (g) reflects the decision of the Working Group that, as a matter of consistency, it should be aligned with the wording used in draft paragraph (4) relating to the provision of security in the context of inter partes interim measures, except for the word "may" which could be replaced by the word "shall" (A/CN.9/545, para. 69), and that subparagraph (g) be a mandatory condition for the granting of an ex parte interim measure (A/CN.9/545, para. 70).

44. The revised draft takes account of the decision of the Working Group that the granting of security should not be a condition precedent for the granting of an interim measure (A/CN.9/547, paras. 92-94, see also above, paragraph 18).

Subparagraph (h) of the revised draft

45. Subparagraph (h) of the revised draft paragraph takes account of the proposals made by the Working Group at its thirty-ninth session (A/CN.9/545, paras. 91 and 92).

II. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)

A. Text of draft article 17 bis

46. To facilitate the resumption of discussions, the following text sets out a newly revised version of the provision on the recognition and enforcement of interim measures of protection, based on the discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 12-67), (hereinafter referred to as "draft article 17 bis"):

> "(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral

tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.*

"(2) The court may refuse to recognize or enforce an interim measure of protection, only:

"(a) At the request of the party against whom it is invoked, if the court is satisfied that:

"(i) [There is a substantial question relating to any grounds for refusal] [Such refusal is warranted on the grounds] set forth in article 36, paragraphs (1) (a) (i), (iii) or (iv); or

"(ii) Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

[(iii) The requirement to provide appropriate security in connection with the interim measure issued by the arbitral tribunal has not been complied with;] or

"(iv) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which, [or under the law of which, that interim measure was granted] [the arbitration takes place]; or

"(b) if the court finds that:

"(i) The interim measure is incompatible with the powers conferred upon the court by the law, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

"(ii) Any of the grounds set forth in article 36, paragraphs (1) (b) (i) or (ii) apply to the recognition and enforcement of the interim measure.

"(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection. The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure.

"(4) The party who is seeking or has obtained recognition or enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or modification of that interim measure.

"(5) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security, unless the arbitral tribunal has already made a determination with respect to security, or where such an order is necessary to protect the rights of third parties.

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* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

"(6) [An interim measure issued by an arbitral tribunal under standards substantially equivalent to those set forth in paragraph (7) of article 17 shall not be denied enforcement pursuant to paragraph 2 (a) (ii) of this article because of the measure's ex parte status, provided that any court action to enforce such measure must be issued within twenty (20) days after the date on which the arbitral tribunal issued the measure.]"

B. Matters for further consideration

47. At its fortieth session, the Working Group agreed to give further consideration to the following matters of substance relating to draft article 17 bis.

Relationship between draft article 17 bis and articles 34-36 of the Model Law

Subparagraph (a) of paragraph (2) and burden of proof under articles 34 and 36 of the Model Law

48. The draft paragraph (2) reflects the decision of the Working Group that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable law (A/CN.9/524, paras. 35-36, 42, 58 and 60). The current text, which omits any reference to the burden of proof, appears to be inconsistent with the approach taken in articles 34 and 36 of the Model Law. If so, this might lead to different interpretations such as imposing a burden of proof on the party asking for enforcement or implying that it was for the arbitral tribunal to verify these requirements *ex officio*. If the Working Group agrees that this different wording is justified given the different objectives of draft article 17 bis as compared to articles 34 and 36 of the Model Law, the Working Group should seek to elaborate the reasons for this difference in drafting to avoid uncertainty in interpretation.

Paragraph (2) of article 17 bis and use of the term "awards" under articles 34, 35 (2) and 36 (1)

49. It is recalled that, in paragraph (2), the Working Group had maintained reference to article 36 (1) of the Model Law and that that article spoke in terms of awards. Given that the Working Group had taken the decision not to define the form in which an interim measure should be made (see above, paragraph 10), the Working Group may wish to further consider whether it is necessary to clarify that the term "award" under article 36 (1) should be interpreted as covering all types of interim measures, with no implied restriction that the grounds in article 36 (1) applied only to those interim measures issued in the form of an award (A/CN.9/547, para. 43). The Working Group may wish to consider whether it is appropriate to proceed with the same clarification in relation to articles 34 and 35 (2) of the Model Law (see also below, paragraphs 50 and 51).

Effect of subparagraph (a) (iv) of paragraph (2) and article 34

50. For the sake of uniform interpretation of the interplay between draft article 17 bis and article 34 of the Model Law, the Working Group may wish to clarify the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Model Law (A/CN.9/547, para. 26). It is recalled that that question was raised at the fortieth session of the Working Group in the

context of a discussion on whether the effect of subparagraph (iv) would be to allow the court to set aside an interim measure issued by the arbitral tribunal. In response, it was recalled that, at its thirty-ninth session, the Working Group had decided to delete the general reference to the requirements of article 17 from paragraph (1), precisely to avoid creating an additional and hidden ground for the refusal to recognize and enforce an interim measure (A/CN.9/545, paras. 101-102). The Working Group agreed that subparagraph (iv) should not be misinterpreted as creating a ground for the court to set aside the interim measure issued by the arbitral tribunal. It was recalled that the general purpose of article 17 bis was to establish rules for the recognition and enforcement of interim measures, but not to parallel article 34 of the Model Law with provisions on setting aside such interim measures.

Article 35 (2)

51. Article 35 (2) of the Model Law provides that "the party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement … or a duly certified copy thereof". As well, the article provides that if "the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language." At its thirty-eighth session, the Working Group generally agreed that "unnecessary deviation from the text of articles 35 and 36 should be avoided" (A/CN.9/524, para. 57). On that basis, the Working Group may wish to consider whether language along the lines of article 35 (2) should be included in the current text.

Provision of security and 1954 Hague Convention on Civil Procedure

Paragraph (5)

52. The Working Group may wish to further consider the issue of security, which includes security for costs ordered by courts, in the light of the Hague Conventions on Civil Procedure of 1905 and 1954, which prohibit security for costs being required from nationals of signatory States. Article 17 of the 1954 Hague Convention on Civil Procedure provides as follows:

> "No bond, nor deposit, under any denomination whatsoever, may be imposed on the ground, whether of their foreign character or of absence of domicile or residence in the country, upon nationals of one of the contracting States, having their domicile within one of such States, who are plaintiffs or intervene in the tribunals of another of such States.
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> "The same rule applies to payments, which may be required of plaintiffs or interveners to guarantee judicial costs.
>
> "Conventions by which contracting States may have stipulated on behalf of their nationals exemption from security for costs and damages in proceedings or from payment of judicial costs irrespective of domicile, shall continue to apply."

Paragraph (6)

53. Given the potential adverse impact of an ex parte measure against the affected party, the Working Group agreed that empowering an arbitral tribunal to issue such

an order would only be acceptable if strict conditions were imposed to ensure that the power was not subject to abuse (A/CN.9/547, para. 62; for earlier discussion on that matter, see A/CN.9/523, para. 17). Bearing that concern in mind, a proposed draft for paragraph (6) was made and, as decided by the Working Group, placed in square brackets for further consideration, after the review of draft article 17 had been completed (A/CN.9/547, paras. 62-67).

C. Notes on draft article 17 bis

Paragraph (1)[17]

54. The draft paragraph (1) reflects the decision of the Working Group (A/CN.9/547, paras. 13 and 17) to delete the bracketed text "in writing" (for earlier discussion on that matter, see A/CN.9/545, para. 96), and the reference to the words "that satisfies the requirements of article 17".[18]

55. It is recalled that the Working Group had found the substance of the footnote to paragraph 1 to be generally acceptable (A/CN.9/547, para. 13).

Paragraph (2)

Chapeau—"[and][or]"—"only"

56. For the sake of consistency with article 36 of the Model Law, and also to better reflect the options available to the court, the word "or", instead of "and", has been retained; in addition, the word "only" has been placed at the end of the chapeau. The Working Group may wish to confirm whether it agrees with these modifications.

Subparagraph (a)(i)—Reference to article 36 of the Model Law

57. As agreed by the Working Group, subparagraph (a) (i) contains a straightforward reference to article 36, instead of replicating the contents of article 36 (A/CN.9/547, paras. 18-19).[19]

"such refusal"

58. The word "such", which appeared in the previous draft (as contained in document A/CN.9/547, para. 12) before the word "refusal", has been deleted to indicate more clearly that the reference to refusal was to the refusal to recognize or enforce an interim measure, and does not refer to the refusal to recognize or enforce a final award under article 36 (A/CN.9/547, para. 19).

"[there is a substantial question]—[such refusal is warranted on the grounds]"

59. The Working Group may wish to further consider whether the words "there is a substantial question" should be replaced by the words "Such refusal is warranted on the grounds" for the sake of consistency with the language used elsewhere in draft paragraph 17 bis or whether they should be maintained as these words indicate the importance of the principle that courts should not pre-empt a determination by the arbitral tribunal as to its competence in the first instance (A/CN.9/547, para. 20).

Subparagraph (a) (ii)

60. As the Working Group agreed to retain Variant 2, without modification (A/CN.9/547, para. 22), subparagraphs (ii) and (iii) have been merged (A/CN.9/547, para. 24).

Subparagraph (a) (iii)

61. The Working Group may wish to consider whether subparagraph (a) (iii), which is a new subparagraph, addresses the concern of the Working Group that, if an order for security made by the arbitral tribunal had not been complied with, such non-compliance should be a ground for the court to refuse enforcement of the interim measure (A/CN.9/547, paras. 21, 45-48).

Subparagraph (a) (iv)[20]—"or by order of a competent court"

62. It is recalled that, after considering whether the reference to a situation where an interim measure had been set aside "by a competent court" was necessary, the Working Group agreed that courts of a State that has enacted the Model Law shall be allowed to refuse recognition and enforcement of an interim measure set aside by a court in another country (A/CN.9/547, paras. 28-33). The draft reflects:

- The decision of the Working Group to retain the revised wording proposed during the fortieth session of the Working Group for continuation of the discussion at a later stage (A/CN.9/547, para. 33); the word "country" in the phrase "by the court of the country in which," has been replaced by the word "State" for the sake of consistency with the language used in the Model Law; and
- The observation that the words "or under the law of which, that interim measure was granted" might need to be replaced by a reference to the country of the seat of the arbitral tribunal (A/CN.9/547, para. 33).

Subparagraph (b) (i)[21]

63. It is recalled that the Working Group found the substance of subparagraph (b) (i) to be generally acceptable (A/CN.9/547, para. 36). As a matter of drafting, the word "requested" appearing after the opening words "the interim measure" and before the words "is incompatible" in the previous draft contained in document A/CN.9/547, paragraph 12 has been deleted, and the Working Group may wish to confirm whether it agrees with that deletion.

64. As a matter of drafting, the reference to "by its law" has been replaced by a reference to "the law" (A/CN.9/547, para. 44).

Subparagraph (b) (ii)[22]

65. The draft subparagraph (b) (ii) reflects the decision of the Working Group to retain Variant 2 of the previous draft (as contained in document A/CN.9/547, para. 12), without modification, subject to further consideration of the wording used in relation to references to article 36 (1) (a) and (b) of the Model Law in paragraphs (2) (a) and (b) after the Working Group had completed its review of article 17 bis (A/CN.9/547, para. 41, and also paras. 37-42).

Paragraph (3)[23]

66. The first sentence of paragraph (3) has been adopted by the Working Group without modification from the previous draft as contained in document A/CN.9/547, paragraph 12 (A/CN.9/547, para. 49).

67. The second sentence of this paragraph reflects the suggestion that Variant C of paragraph (5) of the previous draft as contained in document A/CN.9/547, paragraph 12, which expressed the important principle that the court, where enforcement of the interim measure was sought, should not review the substance of the interim measure, should be included in paragraph (3) (A/CN.9/547, paras. 50 and 60).

Paragraph (4)[24]

68. For the sake of consistency with the language used in articles 17 and 17 bis, the word "amendment" has been replaced by the word "modification" (A/CN.9/547, paras. 53 and 101; for earlier discussion on these words, see A/CN.9/545, para. 35) and the words "recognition or" have been added before the word "enforcement" (A/CN.9/547, para. 53).

Paragraph (5)[25]

69. It is recalled that, of the four variants proposed in the previous draft as contained in document A/CN.9/547, paragraph 12, which reflected the differing views expressed by the Working Group at its thirty-eighth session on that question, the Working Group expressed its preference for the retention of Variant A and the first bracketed text namely, "unless the tribunal had already made an order with respect to security for costs" (A/CN.9/547, para. 55).

"determination"

70. To clarify that the possibility of a court undertaking a review of a tribunal's decision to grant or not grant security was entirely excluded, the words "an order", which were contained in Variant A have been replaced by the words "a determination" (A/CN.9/547, para. 56).

"security for costs"

71. The Working Group agreed that the term "security for costs" was considered as too narrow and it has therefore been replaced by a reference to "appropriate security" as provided in paragraph (4) of draft article 17 (A/CN.9/547, para. 58).

"the other party"

72. In accordance with the decision of the Working Group, the words "the other party" have been replaced by the words "the requesting party", in order to clarify that, in most conceivable cases, the party ordered to provide security would be the party requesting the interim measure (A/CN.9/547, para. 59).

"or where such an order is necessary to protect the rights of third parties"

73. The words "or where such an order is necessary to protect the rights of third parties" have been added at the end of paragraph (5) in accordance with the decision

of the Working Group that Variant D of the previous draft as contained in document A/CN.9/547, paragraph 12, which dealt with an important issue of third party protection, could be built into Variant A (A/CN.9/547, para. 61).

Notes

[1] A/CN.9/545, paras. 19-92; A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 51-94; A/CN.9/487, paras. 64-75; A/CN.9/468, paras. 80-84.
[2] A/CN.9/545, paras. 93-112; A/CN.9/524, paras. 16-75; A/CN.9/523, paras. 78-80; A/CN.9/487, paras. 76-87; A/CN.9/485, paras. 78-103; A/CN.9/468, paras. 60-79.
[3] A/CN.9/545, para. 20; A/CN.9/523, para. 34; A/CN.9/508, paras. 52-54.
[4] A/CN.9/545, paras. 21-27; A/CN.9/523, paras. 35-38; A/CN.9/508, paras. 64-76.
[5] A/CN.9/523, para. 36; A/CN.9/508, paras. 65-68.
[6] A/CN.9/545, para. 26.
[7] A/CN.9/545, paras. 28-32; A/CN.9/523, paras. 39-44; A/CN.9/508, paras. 55-58.
[8] A/CN.9/545, para. 29 and A/CN.9/508, para. 56.
[9] A/CN.9/523, para. 42.
[10] A/CN.9/545, paras. 31 and 32.
[11] A/CN.9/545, paras. 33-34; A/CN.9/523, paras. 45-48; A/CN.9/508, paras. 59-63.
[12] A/CN.9/545, paras. 44-48; A/CN.9/523, para. 49.
[13] A/CN.9/454, para. 45.
[14] A/CN.9/523, para. 49.
[15] A/CN.9/454, paras. 35-43; A/CN.9/523, paras. 50-52
[16] A/CN.9/545, paras. 48, 60-61, 64-66.
[17] A/CN.9/545, paras. 95-102; A/CN.9/524, paras. 24-29, 32-33, 64-66; A/CN.9/487, paras. 77-82; A/CN.9/485, paras. 80-83.
[18] A/CN.9/545, para. 102 and also paras. 107-110.
[19] A/CN.9/545, paras. 105-106; A/CN.9/524, para. 57; A/CN.9/468, paras. 72-74.
[20] A/CN.9/524, para. 47.
[21] A/CN.9/524, para. 48-49.
[22] A/CN.9/545, paras. 103-111; A/CN.9/524, paras. 35-39, 42-52; A/CN.9/487, paras. 83-86; A/CN.9/485, paras. 84-89, 95-101.
[23] A/CN.9/524, paras. 40 and 56.
[24] A/CN.9/524, paras. 67-71.
[25] A/CN.9/524, paras. 72-75.