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Settlement of commercial disputes

Interim measures of protection

Note by the Secretariat

1. At its forty-first session (Vienna, 13-17 September 2004), the Working Group discussed the text of paragraph (7) of draft article 17, based on a draft prepared by the Secretariat, as reproduced in document A/CN.9/WG.II/WP.131 and on a proposal made by one delegation, as reproduced in the report of the Working Group on the work of its forty-first session (A/CN.9/569, para. 22). It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), had 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. The Commission, however, noted that the Working Group had not spent much time discussing that issue at its recent sessions and expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session (A/59/17, para. 58).

2. The Working Group recalled that the issue of including ex parte interim measures had been the subject of earlier discussions in the Working Group (see A/CN.9/468, para. 70; A/CN.9/485, paras. 89-94; A/CN.9/487, paras. 69-76; A/CN.9/508, paras. 77-79; A/CN.9/523, paras. 15-76; A/CN.9/545, paras. 49-92 and A/CN.9/547, paras. 109-116; A/CN.9/569, paras. 12-72).

3. To facilitate the resumption of discussions, this note sets out a newly revised version of paragraph (7) of draft article 17 of the UNCITRAL Model Law ("the revised draft"), taking account of discussions and decisions made at the forty-first session of the Working Group.

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Revised draft of paragraph (7) of 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

"(7) (a) [Unless otherwise agreed by the parties,][If expressly agreed by the parties,] a party may file, without notice to the other party, a request for an interim measure of protection together with an application for a preliminary order directing the other party to take no action to frustrate the purpose of the interim measure requested.

"(b) The provisions of paragraphs (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 only grant a preliminary order if it considers that there is a reasonable basis for concern that the purpose of the requested interim measure will be frustrated before all parties can be heard.

"(d) Immediately after the arbitral tribunal has made a determination in respect of a preliminary order, the party against whom the preliminary order is directed shall be given notice of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications between any party and the arbitral tribunal in relation thereto [, unless the arbitral tribunal determines that such notification should be deferred until either the court decides whether to enforce the preliminary order or the order expires, whichever occurs earlier].

"(e) The arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case

Variant A: no later than forty-eight hours after notice is given, or a longer period of time if so requested by that party [in light of the circumstances].

Variant B: at the earliest practicable time after notice is given [in light of the circumstances].

"(f) The arbitral tribunal may issue an interim measure of protection confirming, extending or modifying the preliminary order, or terminate the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case. In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal.

"(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

"(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 disclose to the arbitral tribunal all circumstances that

the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c).*"

Options

4. At its forty-first session, the Working Group agreed that various options might need to be considered before finalizing a set of model statutory provisions aimed at providing a limited recognition of ex parte measures. In particular, it is recalled that the following options were considered as possible approaches in respect of paragraph (7) (A/CN.9/569, paras. 18-21 and para. 70):

- opting-in or opting-out by the parties:
    - If the opting-in solution is adopted by the Working Group, the words "[If expressly agreed by the parties,]" should then be retained in the text. In addition, in order to preserve the freedom of the parties to enter into agreements containing other legal rules governing ex parte interim measures, the following words could be added for that option under subparagraph (b): "Subject to the provisions of paragraphs (3), (5), (6) and (6 bis) of this article, the parties are free to agree on a procedure to allow the arbitral tribunal to grant a preliminary order. Failing such agreement, the provisions of paragraph (7) of this article shall apply.".
    - If the Working Group adopts the opting-out solution, the words "[Unless otherwise agreed by the parties,]" should then be retained in the text.
- opting-in or opting-out by the enacting State:
    - An opt-in approach could be reflected by including paragraph (7) as a footnote to the revised article 17 with the following sentence to introduce paragraph (7) (inspired by article 4 of the UNCITRAL Model Law on International Commercial Conciliation):

      "The following text is suggested for States that might wish to adopt a provision on preliminary orders:"
    - An opt-out approach could be reflected by retaining paragraph (7) within the main body of the revised article 17, but including a footnote (modelled on the approach taken in article 35(2) of the Model Law) along the lines that:

      "Paragraph 7 is intended to define the procedure applicable to preliminary orders. It would not be contrary to the harmonization to be achieved by the Model Law if a State decided not to include this paragraph.".

5. If the Working Group decides to adopt an opt-in or opt-out option for national legislators then explanations might need to be provided as to whether, in the absence

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* The conditions set forth in this subparagraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

of any specific provision regarding ex parte interim measures, the text should be interpreted as permitting or not permitting arbitral tribunals to issue such measures.

Subparagraph (a)

6. The revised draft reflects the decision made by the Working Group at its forty-first session to clarify the distinction between interim measures and preliminary orders, and to further restrict the functions served by a preliminary order (A/CN.9/569, paras. 30 and 31).

Subparagraph (b)

References to paragraphs (3), (5), (6) and (6 bis)

7. The revised draft reflects the decision of the Working Group to maintain the reference to paragraphs (3), (5), (6) and (6 bis) in subparagraph (b) (A/CN.9/569, para. 34).

Subparagraph (c)

8. The revised draft of subparagraph (c) reflects the following decisions of the Working Group (A/CN.9/569, paras. 39-43):

- To draft that provision in an affirmative rather than negative way;
- To emphasize the exceptional nature of preliminary orders and to ensure that subparagraph (c) complements rather than duplicates subparagraph (a). Whilst subparagraph (a) deals with the procedure to be followed by a party when applying for a preliminary order, subparagraph (c) deals with that issue from the perspective of the arbitral tribunal's powers and provides guidance as to the considerations to be taken into account by an arbitral tribunal when granting such an order;
- To ensure that the draft provision concerns itself with the risk of frustration of the measure and with the appropriateness of the measure.

Subparagraph (d)

Notice

9. In line with the approach taken in other articles of the Model Law (as for instance under article 24(2)), the revised draft of subparagraph (d) leaves open the question of who shall give notice (A/CN.9/569, para. 44). In addition, as agreed by the Working Group, the term ", the request for an interim measure" has been added to put beyond doubt that subparagraph (d) requires that notice of the application for a preliminary order be given (A/CN.9/569, para. 45).

Deferral of notification and court enforcement

10. It is recalled that the Working Group failed to reach consensus as to whether the issue of court enforcement of preliminary orders should be dealt with in the revised draft of article 17. It was decided that the bracketed text at the end of subparagraph (d) should remain in square brackets for continuation of the discussion at a future session (A/CN.9/569, para. 51).

Subparagraph (e)

11. As agreed by the Working Group, in order to clarify that the arbitral tribunal has an obligation to give the responding party an opportunity to present its case, the opening words of the subparagraph have been redrafted in the active voice (A/CN.9/569, para. 53).

12. The Working Group expressed concern that, whatever approach is taken with respect to the requirement that the responding party be given an opportunity to present its case, the approach should avoid the risk that the provision could be misinterpreted as creating an obligation for the responding party to react within forty-eight hours (A/CN.9/569, paras. 54 and 55). Variants A and B proposed in the revised draft of paragraph (7) reflect the discussions of the Working Group on the appropriateness of defining a time limit for the responding party to present its case.

13. Variant A provides for a forty-eight-hour period during which the responding party should present its case. This limitation was regarded by some delegations in the Working Group as a fundamental safeguard. The purpose of this Variant is to expressly provide a longer period for the responding party to present its case and to allow that party to request such longer period rather than leave that matter entirely to the judgement of the arbitral tribunal based on the circumstances (A/CN.9/569, para. 57).

14. Variant B does not include any time limitation or refers to the possibility that the responding party might request a longer period in which to present its case.

15. The Working Group may wish to consider merging Variants A and B so that the provision would read as follows: “at the earliest practicable time, but no later than forty-eight hours, after notice is given, or a longer period of time if so requested by that party [in light of the circumstances].”.

Subparagraph (f)

16. As agreed by the Working Group, the new draft of paragraph (7) includes a reference to the notion of a preliminary order being modified by the arbitral tribunal (A/CN.9/569, para. 62).

17. The revised draft reflects the decision of the Working Group that subparagraph (f) should unambiguously clarify that a preliminary order has a limited life span of twenty days and strengthens the principle that an arbitral tribunal could not extend the ex parte phase of the proceedings beyond the twenty-day limit. To that end, the sentence “In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal” has been added (A/CN.9/569, paras. 63 and 64).

Subparagraph (g)

18. The revised draft of subparagraph (g) reflects the decision of the Working Group to grant to the arbitral tribunal more flexibility on the question of the provision of security by the requesting party. The following words have been added at the end of subparagraph (g): “unless the arbitral tribunal considers it inappropriate or unnecessary to do so”. (A/CN.9/569, para. 65).

Subparagraph (h)

19. As decided by the Working Group, a footnote, inspired from the approach taken under article 35 (2) of the Model Law, has been added to subparagraph (h) to take account of the fact that, under many national laws, the obligation for a party to present arguments against its position is unknown and contrary to general principles of procedural law. The Working Group might wish to further consider that proposal (A/CN.9/569, para. 68), taking account of the decision which will be made by the Working Group on whether paragraph (7) in its entirety, should appear as an opt-in or opt-out provision for the national legislators (see above, paragraph 4).