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Settlement of commercial disputes

Interim measures of protection

Note by the Secretariat

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Introduction

1. At its fortieth session (New York, 23-27 February 2004), the Working Group discussed draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") relating to the power of an arbitral tribunal to order interim measures of protection, based on a draft contained in A/CN.9/WG.II/WP.128 and considered various proposals for a revision of that article. A revised version of draft article 17, taking account of the discussions and decisions of the Working Group at its fortieth session, is contained in A/CN.9/WG.II/WP.131, paragraph 4. At its forty-first session, the Working Group took note of a text proposed by one delegation as a possible alternative to draft article 17 (A/CN.9/569, para. 22).[1]

2. At its forty-first (Vienna, 13-17 September 2004) and forty-second (New York, 10-14 January 2005) sessions, the Working Group discussed the text of paragraph (7) of draft article 17 relating to preliminary orders, based on drafts prepared by the Secretariat (as reproduced in documents A/CN.9/WG.II/WP.131, para. 4 and A/CN.9/WG.II/WP.134, respectively). The Working Group recalled that paragraph (7) had been the subject of earlier discussions in the Working Group.[2] It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session (A/59/17, para. 58). At its thirty-eighth session (Vienna, 4-15 July 2005), the Commission noted that, notwithstanding the wide divergence of views, the Working Group agreed, at its forty-second session, to include a compromise text of the revised draft of paragraph (7) in draft article 17. The Commission expressed doubts as to the value of the proposed compromise text, particularly in light of the fact that it did not provide for enforcement of preliminary orders. Concerns were also expressed that the inclusion of such a provision was contrary to the principle of equal access of the parties to the arbitral tribunal and could expose the revised text of the Model Law to criticism (A/60/17, para. 175). In respect of the structure of draft article 17, it was proposed that the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176).

3. At its forty-second session (New York, 10-14 January 2005), the Working Group considered a draft provision on recognition and enforcement of interim measures of protection (tentatively numbered article 17 bis), as reproduced in document A/CN.9/WG.II/WP.131, paragraph 46.[3] The Working Group also exchanged views on a possible draft provision expressing the power of State courts to order interim measures of protection in support of arbitration (tentatively numbered article 17 ter), on the basis of variants reproduced in A/CN.9/WG.II/WP.125, paragraph 42.[4]

4. To facilitate the resumption of discussions, this note sets out newly revised versions of draft articles 17, 17 bis and 17 ter of the Model Law, contained in parts I, II and III of this note, respectively. Part IV contains proposals from the Secretariat on the issue of the form in which the current and the revised provisions could be presented in the Model Law, with possible variants to be considered by the Working Group, as requested by the Working Group at its forty-second session (A/CN.9/573, para. 99).

Part 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

5. The following text sets out a newly revised version of draft article 17 of the Model Law (herein referred to as "draft article 17"). Paragraphs (1) to (6 bis) of draft article 17 are based on discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116). Paragraph (7) of draft article 17 is based on discussions and decisions made by the Working Group at its forty-second session (A/CN.9/573, paras. 11-69):

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

"(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:

"(a) Maintain or restore the status quo pending determination of the dispute;

"(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];

"(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

"(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 arbitral 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, 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 not to frustrate the purpose of the interim measure requested.

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

"(c) The arbitral tribunal may grant a preliminary order provided it considers that there is a reasonable concern that the purpose of the requested interim measure will be frustrated where prior disclosure of the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

"(d) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to the party against whom the preliminary order is requested of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

"(e) At the same time, the arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. The arbitral tribunal shall decide as promptly as required under 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. However, the arbitral tribunal may issue an interim measure of protection adopting or modifying the preliminary order, 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 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 has been requested has presented its case, 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."

B. Notes on draft article 17

Paragraph (1)

6. At the fortieth session of the Working Group, the text of paragraph (1) as contained in document A/CN.9/547, paragraph 68 was adopted (A/CN.9/547, para. 69).[5]

7. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add at the end of paragraph 1 the words "or modify them", so that the paragraph would read:

> "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection or modify them."

That proposal was not discussed by the Working Group.

Paragraph (2)[6]

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

8. 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). 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 used to describe 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).[7]

Subparagraph (a)

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

Subparagraph (b)—Anti-suit injunction

10. Subparagraph (b) reflects the decision of the Working Group that, in the interests 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). Noting that the implications of the proposed amendment had not been fully considered, the Working Group agreed to insert that proposal 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]

11. The word "preliminary" has been deleted for the reason that it was considered to be 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 term "preserving" has been retained instead of the term "securing" because it was considered that the latter term could be interpreted narrowly as indicating a particular method for protecting assets (A/CN.9/547, para. 74).[8]

Subparagraph (d)

12. Subparagraph (d) is reproduced without modification from the draft contained in document A/CN.9/547, paragraph 68.

Paragraph (3)[9]

Subparagraph (a)—interplay with paragraph (2)

13. 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).

14. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add as opening words to paragraph 3 the words "Except with respect to the measure referred to in subparagraph (d) of paragraph (2)," so that the chapeau of paragraph 3 would read:

> "Except with respect to the measure referred to in subparagraph (d) of paragraph (2), the party requesting the interim measure of protection shall satisfy the arbitral tribunal that:"

That proposal was not discussed by the Working Group.

Subparagraph (a)—interplay with paragraph (2) (b)

15. 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 sub-paragraph (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).[10]

Subparagraph (a)—"Irreparable harm"

16. Subparagraph (a) follows the proposal made by the Working Group to replace the words "irreparable harm" with 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).[11] At its fortieth session, the Working Group expressed concerns that that provision could be interpreted in a very restrictive manner, potentially excluding from the field of interim measures any loss that might be cured by an award of damages. The Working Group also noted that, in current practice, it was not uncommon for an arbitral tribunal to issue an interim measure merely in circumstances where it would be comparatively complicated to compensate the harm with an award of damages. The Working Group might wish to further consider whether the word "adequately" addresses those concerns or whether to clarify, in any explanatory material accompanying paragraph (3), that the paragraph should be interpreted in a flexible manner, keeping in mind balancing the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.

Subparagraph (b)

17. Subparagraph (b) is reproduced without modification from the draft contained in document A/CN.9/547, paragraph 68.[12]

Paragraph (4)[13]

18. Paragraph (4) takes account of the proposal made by the Working Group at its fortieth session 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), but rather 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 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)[14]

21. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add as opening words to paragraph 5 the words "If so ordered by the arbitral tribunal,", so that paragraph 5 would read:

> "If so ordered by the arbitral tribunal, 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."

That proposal was not discussed by the Working Group.

Obligation to inform

22. Paragraph (5) reflects the decision of the Working Group that the obligation to inform be expressed in a more neutral way to avoid 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).[15]

Sanction for non-compliance

23. At its fortieth session, 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 of paragraph (6) was not necessary, as in any case the usual sanction for non-compliance with that obligation was either suspension or termination of the measure, or the award of damages (A/CN.9/547, paras. 99-100).[16]

Paragraph (6)[17]

"it has granted"

24. 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).

25. At the forty-first session of the Working Group (A/CN.9/569, para. 22), an alternative proposal was made, and not discussed, to delete paragraph 6.

Paragraph (6 bis)

26. 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).[18]

27. 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.

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

29. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to replace the words "the interim measure should not have been granted" at the end of the first sentence of paragraph 6 bis by the words, "the interim measure was unjustified", so that paragraph 6 bis would read:

> "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 was unjustified. The arbitral tribunal may order an award of costs and damages at any point during the proceedings."

Paragraph 7

30. At its forty-first (Vienna, 13-17 September 2004), and forty-second (New York, 10-14 January 2005) sessions, the Working Group undertook a detailed review of the text of paragraph (7) of draft article 17 regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis. In draft article 17, the notion of interim relief being granted on an ex parte basis is generally reflected by the term "preliminary order(s)".

31. Notwithstanding the wide divergence of views, the Working Group agreed to include the revised draft of paragraph (7) in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added (A/CN.9/573, para. 27).

32. The Working Group might wish to note that, at the thirty-eighth session of the Commission, a proposal was made that, in respect of the structure of draft article 17, the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that would not wish to adopt provisions relating to preliminary orders (A/60/17, para. 76). As well, it was said that if paragraph (7) were to be included in draft article 17, it should be drafted in the form of an opting-in provision, applying only where the parties had expressly agreed to its application (A/60/17, para. 175).

33. As well, the Working Group might wish to consider whether interim measures ordered ex parte by an arbitral tribunal would still present any practical value to practitioners if the revised text of the Model Law made them unenforceable. In that respect, the Working Group might wish to recall that it was observed, at the thirty-sixth session of the Working Group that, in certain countries where the court system would experience difficulties in reacting expeditiously to a request for a preliminary order, it would be essential to establish the enforceable character of such an interim measure when ordered by an arbitral tribunal (A/CN.9/508, paragraph 79).

Subparagraph (a)

Opt-out option

34. In order to reflect the decision made by the Working Group concerning the retention of the opt-out option for the parties, the words "unless otherwise agreed by the parties" have been retained and the words "if expressly agreed by the parties" deleted (A/CN.9 573, paragraph 28). In light of the comments made by the Commission at its thirty-eighth session (see paragraph 32 above), the Working Group might wish to give further consideration to that issue.

"take no action"

35. The revised draft reflects the decision of the Working Group to substitute the words "take no action" with the word "not" in order to clarify that a preliminary order might be aimed not only at preventing a party from taking an action but also at requiring a party to take an action such as, for instance, to protect goods from deterioration or some other threat (A/CN.9 573, paragraph 29).

Subparagraph (b)

36. As agreed by the Working Group, the words "relating to interim measures also" have been included after the word "article" on the basis that those words clarified that the intention of subparagraph (b) was to make the obligations set out in paragraphs (3), (4), (5), (6) and (6 bis) applicable to preliminary orders (A/CN.9/573, paragraph 31).

Subparagraph (c)

Power of the arbitral tribunal to grant preliminary orders

37. The revised draft reflects the decision of the Working Group that, in order to expressly empower the arbitral tribunal to grant preliminary orders, the word "only" appearing before the word "grant" be deleted, and the word "if" be replaced by the word "provided" (A/CN.9/573, paragraph 32).

"reasonable basis for concern"

38. The Working Group agreed to simplify the existing language by deleting the words "basis for" (A/CN.9/573, paras. 33 and 34).

Definition of the risk

39. It was suggested that the risk defined under subparagraph (c) that the measure be frustrated before all the parties could be heard did not include the risk that the preliminary order be disclosed to the party against whom it was made, and it was therefore proposed to amend subparagraph (c) to better reflect that risk. Accordingly, it was suggested that the words "before all parties can be heard" should be deleted. In that connection, it was said that the formulation contained in a previous draft of paragraph 7 (a), reproduced in A/CN.9/WG.II/WP.131, paragraph 4 and A/CN.9/569, paragraph 12, stating that "where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure", was preferable. The revised draft takes that suggestion into account (A/CN.9/573, para. 35).

Subparagraph (d)

Communication of information

40. A concern was expressed that giving notice of oral communications to the party against whom the preliminary order was directed might not be easily discharged. In order to clarify that the arbitral tribunal was obliged to disclose not only the existence of the oral communications but also to indicate their contents, the words "including indicating the content of any oral communication" have been added after the words "all other communications" (A/CN.9/573, para. 37).

"A determination in respect of a preliminary order"

41. The revised draft takes account of the suggestion to add the words "in respect of an application for" after the words "a determination" for the sake of providing consistency with paragraph 7 (a), which referred to "an application for a preliminary order" (A/CN.9/573, para. 38).

"the party against whom the preliminary order is directed"

42. The Working Group agreed that it might be more appropriate to refer to "the party against whom the preliminary order is requested" or "is sought", rather than to "the party against whom the preliminary order is directed", as a determination might be for or against the granting of a preliminary order (A/CN.9/573, para. 39).

Notice

43. The revised draft makes it clear that, as decided by the Working Group, the arbitral tribunal, in receipt of the request for a preliminary order, was under an obligation to give notice of the documents and information to the other party (A/CN.9/573, para. 40).

["unless the arbitral tribunal…whichever occurs earlier"]

44. The Working Group agreed to delete the bracketed text appearing at the end of subparagraph (d) to reflect its earlier decision (see above, paragraph 31) that no judicial enforcement regime should be provided for in the Model Law for preliminary orders.

Subparagraph (e)

Time limitation

45. Subparagraph (e) reflects the decision of the Working Group not to include any time limitation expressed in hours or days. It was further agreed by the Working Group that a commentary or explanatory note that might be prepared at a later stage in respect of article 17 could refer to two days as an illustration to indicate the intention of the provision (A/CN.9/573, paras. 43-50) .

Notice

46. In order to clarify when the notice should be given, the Working Group agreed to add, as the opening words of subparagraph (e), the words "at the same time" (A/CN.9/573, para. 51).

Subparagraph (f)

47. With a view to preventing any confusion as to the purpose of subparagraph (f), a proposal was made to clarify that, as a matter of principle, a preliminary order should not have a life span beyond twenty days, but that certain relief granted under the preliminary order might be included in an inter partes interim measure of protection. The revised draft therefore reflects the decision of the Working Group to reverse the order of the two sentences of paragraph (f) (A/CN.9/573, para. 58). The Working Group also agreed to replace the words "confirming, extending" by the word "adopting", on the basis that that term better expressed the fact that the preliminary order had to be converted into an inter partes interim measure (A/CN.9/573, paras. 57-58).

Subparagraph (g)

"appropriate security"

48. The revised draft reflects the decision of the Working Group to retain the text of subparagraph (g), with the deletion of the term "appropriate".

Subparagraph (h)

Cross references to subparagraphs (c) and (e) and footnote

49. The cross-references to subparagraphs (c) and (e) have been deleted for the reason that these references were no longer necessary (A/CN.9/573, para. 65). As well, as agreed by the Working Group, the footnote has been deleted for the reason that it was unnecessary and that the reference to "less onerous conditions" was considered to provide an awkward standard to apply in respect of an obligation to disclose (A/CN.9/573, para. 68).

"is directed"

50. A proposal was made and agreed to replace the words "is directed" appearing after the words "the preliminary order is" by the words "has been requested" to clarify that the obligation of disclosure of the requesting party applied from the moment that the request for a preliminary order was lodged by the requesting party, and not from the moment the arbitral tribunal made a determination thereon (A/CN.9/573, para. 67).

Part 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

51. The following text sets out a newly revised version of article 17 bis of the Model Law (hereinafter referred to as "draft article 17 bis") based on the discussions and decisions of the Working Group at its forty-second session (A/CN.9/573, paras. 70-89):

"(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) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

"(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

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

"(b) if the court finds that:

"(i) the interim measure is incompatible with the powers conferred upon the court, 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

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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.

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 of the State where recognition or enforcement is sought may, if it considers it proper, request the requesting party to provide appropriate security, if the arbitral tribunal has not already made a determination with respect to security, or where such a decision is necessary to protect the rights of third parties.

"[(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 enforceable.]"

B. Notes on draft article 17 bis

Paragraph 1[19]

52. The Working Group adopted paragraph 1 without change (A/CN.9/573, para. 71).

Paragraph 2[20]

Subparagraph (a)(i) (subparagraph (a)(i) and (ii) of the previous draft contained in A/CN.9/WG.II/WP.131)

53. The draft reflects the decision of the Working Group to retain the language "such refusal is warranted on the grounds" and to combine subparagraphs (a)(i) and (ii) of the previous draft (A/CN.9/573, para. 74).

Subparagraph (a)(ii) (subparagraph (a)(iii) of the previous draft contained in A/CN.9/WG.II/WP.131)

54. The words "the requirement to provide appropriate security" have been replaced by the words "the arbitral tribunal's decision with respect to the provision of security" in order to better reflect that the arbitral tribunal has a discretion not to require any security or that the security might have been ordered and its provision deferred (A/CN.9/573, para. 76).

Subparagraph (a)(iii) (subparagraph (a)(iv) of the previous draft contained in A/CN.9/WG.II/WP.131)

[or under the law of which, that interim measure was granted] [the arbitration takes place]

55. To achieve consistency between draft article 17 bis (2) (a)(iii) and article 36 (1) (a)(v) of the Model Law, the two bracketed texts of the previous draft have been be retained, but their order reversed (A/CN.9/573, para. 79).

Subparagraph (b)(i)

56. The words "by the law" are omitted from subparagraph (b)(i), since the Working Group agreed that they could be misinterpreted to mean that a court could operate on a law other than that from which it drew its powers (A/CN.9/573, para. 82).

Subparagraph (b)(ii)

57. The Working Group adopted the substance of subparagraph (b)(ii) without change (A/CN.9/573, para. 83).

Paragraph (3)[21]

58. It is recalled that the Working Group took note of various proposals relating to paragraph (3), which were to be further discussed in the context of draft article 17 ter. Due to lack of time, the Working Group did not reconsider them. The Working Group might wish to further discuss those proposals, which are reflected in A/CN.9/573, para. 84.

Paragraph (4)[22]

59. The Working Group adopted the substance of paragraph (4) without change (A/CN.9/573, para. 85).

Paragraph (5)[23]

60. Paragraph 5, as revised, seeks to clarify the intention that the court might order a requesting party to provide security if the court is of the opinion that it is appropriate and the tribunal had not already made such an order or such an order was necessary to protect the rights of third parties (A/CN.9/573, para. 86). As agreed, the reference to "order", which appeared twice in paragraph (5) of the previous draft, has been replaced by the verb "require" or by the substantive term "decision" to avoid limiting the effect of the provision to procedural decisions. (A/CN.9/573, para. 86)

Paragraph (6)[24]

Preliminary orders and enforcement

61. Consistent with its earlier decision that a preliminary order would not be judicially enforceable, the Working Group agreed to delete paragraph (6). (A/CN.9/573, para. 87).

62. The Working Group then proceeded to consider whether or not draft article 17 bis should include an express statement that it did not apply to preliminary orders. After discussion, the Working Group agreed that the Secretariat should prepare a draft paragraph for inclusion in article 17 bis, based upon the principle that preliminary orders were not enforceable by State courts, and ensuring that any proposed formulation would not undercut the binding nature of preliminary orders (A/CN.9/573, paras. 87-89).

Part III
Draft provision on court-ordered interim measures in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter[25]

A. Text of draft article 17 ter

63. The following text sets out a newly revised version of article 17 ter of the Model Law (hereinafter referred to as "draft article 17 ter") based on the discussions and decisions of the Working Group at its forty-second session (A/CN.9/573, paras. 90-95):

> "The court shall have the same power of issuing interim measures of protection for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

B. Notes on draft article 17 ter

64. It is recalled that, after discussion, the Working Group adopted Variant 1 of draft article 17 ter as it appeared in A/CN.9/WG.II/WP.125, paragraph 42 (A/CN.9/573, para. 95).

Part IV
Possible options on the issue of the form in which the current and revised provisions could be presented in the Model Law

65. At its forty-second session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/573, para. 99).

66. The Working Group might wish to consider two different issues in relation to the form in which the current and the revised provisions could be presented. The first one relates to the structuring of the provisions, the second one to the placement of those provisions in the Model Law.

A. Structuring of the revised provisions

(1) Placement of definition

67. Article 17, paragraph (2), contains a definition of interim measures of protection. One approach could be to include that definition under article 2 of the Model Law, which relates to the definitions and rules of interpretation of the Model

Law. That approach would simplify the drafting of article 17. However, the Working Group might wish to further consider whether the definition of "interim measures" currently contained in article 17, paragraph (2), which applies in respect of interim measures granted by arbitral tribunals, should be redrafted so as to apply also to interim measures granted by State courts under article 9 and article 17 ter of the Model Law.

(2) Preliminary orders

68. At its thirty-eighth session, the Commission heard a proposal that the issue of preliminary orders should be dealt with in a separate article to facilitate the adoption of draft article 17 by States that would not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176). If that proposal were to be accepted by the Working Group, then the following options for the presentation of that new article might be considered by the Working Group:

- The article on preliminary orders might be included following article 17, and articles 17 bis and 17 ter would then be renumbered accordingly; or
- Due to the wide divergence of views expressed in the discussions on that matter, the Working Group might wish to consider whether the article should appear as a footnote along the lines adopted, for example, in article X as appended to article 4 of the UNCITRAL Model Law on International Commercial Conciliation.

B. Placement of the revised provisions in the Model Law

69. Concerning the placement of the revised provisions in the text of the Model Law, various options might be considered, as follows.

(1) Placement of the revised provisions under chapter IV or IV bis of the Model Law

70. A first option would be to replace the current article 17 by the revised provisions on interim measures of protection and include articles 17, 17 bis and 17 ter in the current chapter IV of the Model Law. That option presents the advantage of simplicity. However, it should be noted that, whilst chapter IV deals with the jurisdiction of arbitral tribunal, articles 17 bis and 17 ter relate to State court intervention and, for that reason, might be better placed in a new chapter.

71. If a new chapter entitled "Interim Measures of Protection" (possibly numbered chapter IV bis) and containing articles 17 to 17 ter were created, that chapter could include an indication of the date at which that chapter was adopted by the Commission. A similar approach was taken in respect of article 5 bis of the Model Law on Electronic Commerce. Inclusion of the date at which the chapter was adopted by the Commission would give an indication to enacting States of the reason why the drafting style of the revised provisions differs from the remaining provisions of the Model Law. If the Working Group agreed to include a new chapter, the current chapter IV would only contain article 16 and the question of whether or not to renumber both the chapters and the articles of the Model Law might need to be considered.

(2) Placement of the revised provisions as ancillary text to the Model Law

72. Another option would be to include the revised provisions on interim measures as a footnote to the current article 17 or in an annex to the Model Law. Explanatory material should then clarify that the revised provisions should be read as replacing the current provision on interim measures. One advantage of that option would be to avoid any restructuring of the Model Law. That annex might also be used to insert additional revisions that might be made to the Model Law. However, the Working Group may wish to consider whether such a presentation would not create the false impression that there are two classes of provisions, namely those contained in the annex being of secondary importance compared to those contained in the text of the Model Law itself.

(3) Presentation of the revised provisions as a separate set of model legislative provisions on interim measures of protection in international commercial arbitration

73. Another option would be to present the revised provisions on interim measures of protection as a discrete set of provisions, formally distinct from the Model Law, and dealing with a specific procedural aspect of arbitration. Indication could be made that those provisions are intended to build upon the current article 17 of the Model Law. Such an approach would offer an advantage to enacting States that deal with interim measures of protection in legislation separate from that dealing with international arbitration.

C. Explanatory material

74. The Working Group expressed the wish that explanatory material be prepared in relation to the revised provisions. The Working Group might wish to consider various options for the presentation of the explanatory material. The explanatory material could be drafted along the lines of the current explanatory note, which accompanies the Model Law, and replace paragraph 26 of the current explanatory note. Another option would be to provide more detailed information on interim measures of protection to enacting States and to prepare a legislative guide on the revised provisions. The Working Group might wish to further consider whether it would be appropriate to also prepare a legislative guide for the remaining provisions of the Model Law.

Notes

[1] For earlier discussions on draft article 17, see 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. 64-87; A/CN.9/485, paras. 78-106; A/CN.9/468, paras. 60-87.

[2] For earlier discussions on paragraph 7 of draft article 17, see A/CN.9/569, paras. 12-72; A/CN.9/547, paras. 109-116; A/CN.9/545, paras. 49-92 ; A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 77-79; A/CN.9/487, paras. 69-76; A/CN.9/485, paras. 89-94; A/CN.9/468, para. 70.

[3] For earlier discussions on draft article 17 bis, see 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.

[4] For earlier discussions on draft article 17 ter, see A/CN.9/524, paras. 76-78; A/CN.9/523, para. 77; A/CN.9/WG.II/WP.125, para. 44; A/CN.9/WG.II/WP.119, paras. 19-33, 37-40, 44-48 and 75-82.

[5] A/CN.9/569, para. 22; A/CN.9/545, para. 20; A/CN.9/523, para. 34; A/CN.9/508, paras. 52-54.

[6] A/CN.9/545, paras. 21-27; A/CN.9/523, paras. 35-38; A/CN.9/508, paras. 64-76.

[7] A/CN.9/523, para. 36; A/CN.9/508, paras. 65-68.

[8] A/CN.9/545, para. 26.

[9] A/CN.9/569, para. 22; A/CN.9/545, paras. 28-32; A/CN.9/523, paras. 39-44; A/CN.9/508, paras. 55-58.

[10] A/CN.9/523, para. 42.

[11] A/CN.9/545, para. 29 and A/CN.9/508, para. 56.

[12] A/CN.9/545, paras. 31 and 32.

[13] A/CN.9/545, paras. 33-34; A/CN.9/523, paras. 45-48; A/CN.9/508, paras. 59-63.

[14] A/CN.9/545, paras. 44-48; A/CN.9/523, para. 49.

[15] A/CN.9/454, para. 45.

[16] A/CN.9/523, para. 49.

[17] A/CN.9/454, paras. 35-43; A/CN.9/523, paras. 50-52.

[18] A/CN.9/545, paras. 48, 60-61, 64-66, A/CN.9/524, paras. 32-34.

[19] A/CN.9/545, paras. 95-102; A/CN.9/524, paras. 32-34, 64-66.

[20] A/CN.9/545, paras. 103-110; A/CN.9/524, paras. 35-39, 42-52, 57-63.

[21] A/CN.9/524, paras. 40-41, 55-56.

[22] A/CN.9/524, paras. 67-71.

[23] A/CN.9/524, paras. 72-75.

[24] A/CN.9/545, para. 111.

[25] A/CN.9/573, paras. 90-95; A/CN.9/524, paras. 76-78; A/CN.9/523, para. 77.