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Settlement of commercial disputes

Interim measures of protection

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1-3	2
I. Proposal on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law	4	2
II. Notes on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law	5-15	6
Annex. Table of concordance		9



Introduction

1. At its forty-second session (New York, 10-14 January 2005), the Working Group requested the Secretariat to consider the issue of the form in which the legislative provisions on interim measures and preliminary orders could be presented in the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) and present possible variants for consideration by the Working Group at a future session (A/CN.9/573, para. 99).
2. At its forty-third session (Vienna, 3-7 October 2005), the Working Group agreed that the legislative provisions on interim measures and preliminary orders be placed in a new chapter, numbered chapter IV bis of the Model Law, and requested the Secretariat to prepare a new draft of the provisions, taking account of the suggestion to restructure the provisions by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106).
3. To facilitate the resumption of discussions, this note contains a proposal on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law.

I. Proposal on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law

4. The following text sets out a proposal as to the presentation of the draft legislative provisions on interim measures and preliminary orders, recognition and enforcement of interim measures and court-ordered interim measures. Modifications to the earlier draft contained in the annex to the report of the Working Group on the work of its forty-third session (annex to A/CN.9/589) have been underlined in the text below. As well, a comparative table outlining the concordance of the numbering between articles of the earlier draft and articles of the text below has been annexed to this note.

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure 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 prejudice to 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.

Article 17 bis—Conditions for granting interim measures

- (1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) 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 of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders

- (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
- (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.^[1]
- (3) The conditions defined under article 17 bis apply to any preliminary order [1], provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order's being granted or not.

Article 17 quater—Specific regime for preliminary orders

- (1) 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 all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order [] 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 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.

(5) A preliminary order [] shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security by the arbitral tribunal

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the [] measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the [] order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the [] order, and such obligation shall continue until the party against whom the [] order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to

the party against whom it is directed if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 - Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement of interim measures

- (1) An interim measure 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 article 17 novies.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order 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.

Article 17 decies—Grounds for refusing recognition or enforcement of interim measures*

- (1) Recognition or enforcement of an interim measure may be refused 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

* The conditions set forth in article **novies** are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. 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.

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.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country 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.[]

II. Notes on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law

Structure of the provisions

5. As agreed by the Working Group, the provisions on interim measures, preliminary orders, recognition and enforcement of interim measures and court-ordered interim measures are placed in a new chapter, numbered chapter IV bis (A/CN.9/589, para. 105). As suggested by the Working Group, those provisions have been restructured by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106). In order to better clarify the proposed structure of the revised text, section headings have been included. This structure has the advantage of providing a logical presentation of the provisions, and avoids creating an article on interim measures that is of inordinate length as compared to other articles in the Model Law.

Article 17 bis, paragraph (1)(b)

6. The Working Group might wish to note that the words “of the claim” have been added after the word “merits” in order to clarify that the merits to be considered might relate to the main claim and not to the interim measure requested. Clarifying that what is being considered is the main claim of the dispute may limit unnecessary arguments as to whether there exists a reasonable possibility of success in respect of the granting of the interim measure (or the preliminary order under article 17 ter (3)). However, the reasonable possibility of success on the merits of the claim will be assessed differently in view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings, ranging from

the early stage where the preliminary order is being applied for until the time when the issuance of the interim measure is discussed inter partes.

Article 17 ter, paragraph (1)

7. The word “file” has been deleted from article 17 ter, paragraph 1, and replaced by the word “make”. The Working Group might wish to consider whether this word provides a more neutral requirement in relation to application for preliminary orders.

Article 17 ter, paragraph (2)—Article 17 quater, paragraph (5)

8. The words “such preliminary order does not constitute an award” have been removed from article 17 ter, paragraph (2) and relocated under article 17 quater, paragraph (5). The Working Group might wish to consider whether these words are more appropriately located within article 17 quater, paragraph (5) given that paragraph (5) deals with the nature and effect of a preliminary order.

Article 17 ter, paragraph (3)

9. Article 17 ter, paragraph (3) provides that the provisions of article 17 bis (relating to interim measures) also apply to preliminary orders. The Working Group might wish to consider whether the proposed revised draft of that paragraph clarifies how article 17 bis is to be applied in the context of preliminary orders, namely that the harm to be assessed by the arbitral tribunal in that context is the harm resulting if the preliminary order is not granted, and not the harm resulting if the interim measure is not granted.

Article 17 septies, paragraph (2)

10. The word “any” appearing before “party” has been replaced by the word “the” for the sake of consistency with paragraph (1) of the same article.

Article 17 decies

11. A footnote has been added to the title of article 17 decies (formerly that footnote appeared under article 17 bis (1) as contained in the annex to the report of the Working Group on the work of its forty-third session (annex to A/CN.9/589)). The content of the footnote applies to the grounds for refusing recognition and enforcement and therefore relates to the content of article 17 decies.

Article 17 undecies

Placement

12. In enacting article 17 undecies, States might wish to consider the placement of that provision since article 17 undecies, which deals with court-ordered interim measures might not easily fit in a chapter that is intended to deal mostly with interim measures granted by arbitral tribunals.

13. Among the options to be considered, one possibility would be to place article 17 undecies following provisions enacting article 9 of the Model Law, which deals with interim measures granted by courts. However, given that article 9 is contained within chapter 2 of the Model Law, which relates to the definition and

form of arbitration agreement, that option might not be considered appropriate. The Working Group might wish to consider whether a footnote to article 17 undecies should draw the attention of States to the issue of placing article 17 undecies in the most appropriate part of their enacting legislation. Such footnote could read as follows:

“In enacting article 17 undecies, States might wish to consider grouping this provision with other provisions in the enacting legislation relating to certain functions of arbitration assistance and supervision performed by courts or other authority.”

Reference to article 1, paragraph 2 of the Model Law

14. At its forty-third session, the Working Group noted that, given the intention that the provision on court-ordered interim measure should apply irrespective of the country where the arbitration takes place, that provision should be added to the list of articles contained under article 1, paragraph (2). That article provides that, in respect of the listed articles, the Model Law, as enacted in a given State, would apply even if the place of the arbitration were not in the territory of that State (A/CN.9/589, paras. 101-103). It is also suggested that a reference to articles 17 novies and 17 decies (which deal with recognition and enforcement of interim measures and the grounds for refusal thereof) be included within the list of excepted articles so that article 1, paragraph (2) of the Model Law would read as follows:

“The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.”

15. Including all excepted articles within article 1, paragraph (2), which establishes the territorial scope of application of the Model Law, appears to provide a simpler and more user-friendly approach than including such an exception within each of the revised articles. Taking that approach into account, the words “This article shall apply notwithstanding the provisions of article 1, paragraph 2”, which appeared at the end of article 17 ter of the earlier draft (contained in the annex to A/CN.9/589) have been deleted.

Annex

Table of concordance

<i>Provisions on interim measures and preliminary orders as contained in the annex to the report of the Working Group on the work of its forty-third session (A/CN.9/589)</i>	<i>Newly revised provision on interim measures and preliminary orders as contained in this note</i>
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Article 17 (1)	Article 17 (1)
Article 17 (2)	Article 17 (2)
Article 17 (3)	Article 17 bis (1)
Article 17 (4)	Article 17 bis (2)
Article 17 (5)	Article 17 sexies (1)
Article 17 (6)	Article 17 septies (1)
Article 17(7)	Article 17 quinquies
Article 17 (8)	Article 17 octies
Article 17 (9) (a)	Article 17 ter (1)
Article 17 (9) (b)	Article 17 ter (3)
Article 17 (9) (c)	Article 17 ter (2)
Last sentence of subparagraph (c)	Article 17 quater (5)
Article 17 (9) (d)	Article 17 quater (1)
Article 17 (9) (e)	Article 17 quater (2)
Article 17 (9) (f)	Article 17 quater (3)
Article 17 (9) (g)	Article 17 quater (4)
Article 17 (9) (h)	Article 17 sexies (2)
Article 17 (9) (i)	Article 17 septies (2)
Article 17 (9) (j)	Article 17 quater (5)
Article 17 bis (1)	Article 17 novies (1)
Footnote to article 17 bis (1)	Footnote to title of article 17 decies
Article 17 bis (2)	Article 17 decies (1)
Article 17 bis (3)	Article 17 decies (2)
Article 17 bis (4)	Article 17 novies (2)
Article 17 bis (5)	Article 17 novies (3)
Article 17 ter	Article 17 undecies
Last sentence of article 17 ter	Article 1 (2)