



United Nations
General Assembly

A/CN.9/WG.II/WP.129

Distr.: Limited
3 February 2004*

Original: English

**United Nations Commission
on International Trade Law**
Fortieth session
New York, 23-27 February 2004

Settlement of commercial disputes

Interim measures of protection

Proposal by the International Chamber of Commerce

Note by the Secretariat

On 2 February 2004, the Secretariat received a proposal from the Secretary-General of the International Court of Arbitration of the International Chamber of Commerce ("the ICC") on revised draft articles 17 and 17 bis of the UNCITRAL Model Law on International Commercial Arbitration relating respectively to interim measures of protection ordered by arbitral tribunals and recognition and enforcement of interim measures of protection. The draft articles on which those comments are based are reproduced in documents A/CN.9/WG.II/WP.123, A/CN.9/WG.II/WP.125 and A/CN.9/545. The text of the proposal, including proposed revisions to articles 17 and 17 bis, is annexed to this note in the form in which it was received by the Secretariat.

* The late submission of the document is a reflection of the date at which the proposal was communicated to the Secretariat.

V.04-50671 (E)



Annex

Comments and proposal from the Secretary-General of the International Court of Arbitration of the ICC

As you know, the ICC International Court of Arbitration very much appreciates the opportunity to participate as an Observer in the discussions of Working Group II (Arbitration) regarding possible modifications to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration. We understand that the Model Law is designed to reflect a worldwide consensus on the principles and important issues of international arbitration practice that is acceptable to States of all regions. In this regard, we hope that our experience in having administered over 13 000 arbitrations throughout the world over the past eighty years may be useful to delegates as they consider whether or not to modify Article 17 and, if so, how.

The ICC Rules of Arbitration expressly allow parties to seek interim measures from both arbitral tribunals and State courts. In our cases, we have seen arbitral tribunals grant interim measures of protection, among other things, requiring production of documents, ordering a party to post a bank guarantee, enjoining a party from transferring shares and enjoining a party from calling a bank guarantee.

Of parties that sought interim measures from arbitral tribunals in ICC arbitrations, none did so on an *ex parte* basis (*i.e.*, without giving notice to the other side). We did, however, have a case in early 2000, where a party applied to an arbitral tribunal for interim measures on an *inter partes* basis (*i.e.*, giving notice to the other side) and the arbitral tribunal granted the interim measure without first hearing from the opposing party. This, however, was apparently done in error, and the arbitral tribunal retracted its order upon the protest of the opposing party and apologized for acting prematurely.

We also had a case in 2001 where a party applied to an arbitral tribunal for an interim measure on an *inter partes* basis and the arbitral tribunal asked the opposing party not to take any steps concerning the assets at issue pending the arbitral tribunal's decision. The opposing party voluntarily complied with the arbitral tribunal's request. After receiving submissions from the opposing party, the arbitral tribunal granted the application for interim measures.

In light of our experience, we believe that the practice with respect to interim measures – particularly with regards to the way those applications are handled by arbitral tribunals – is still evolving. Indeed, we can identify no worldwide consensus with respect to the standards and practices concerning the granting of interim measures by arbitral tribunals. Accordingly, we believe that caution should be exercised when considering changes to Article 17, particularly if those changes would expand the existing power of arbitral tribunals to grant interim measures. With this in mind, we have the following comments on the current drafts of Article 17 and Article 17bis.

We believe that certain of the proposed modifications may well aid parties and arbitrators in the practice with respect to interim measures. Specifically, we believe that the articulation of standards for the issuance of interim measures (see draft Article 17, paragraph 3) will help parties in formulating their applications and help arbitral tribunals in evaluating the applications they receive. Similarly, we believe that setting forth standards governing the enforceability of interim measures (see draft Article 17bis, paragraphs 1 and 2) could aid State courts in evaluating the effect of such measures.

Other proposed changes, however, raise concerns for us. Specifically, those proposed modifications that would: (1) permit arbitral tribunals to issue interim measures on an *ex parte* basis (see draft Article 17, paragraph 7); and (2) allow such measures to be enforced by State courts – also, in certain circumstances, on an *ex parte* basis (see draft Article 17bis, paragraph 6).

Inclusion of such provisions in the Model Law would make the Model Law materially different from the arbitration laws in major centers of international arbitration (*e.g.*, Paris, Switzerland, London and New York). Such provisions would also conflict with many well-established arbitration rules – including the UNCITRAL Arbitration Rules. This could undermine the Model Law's serving as an international standard reflecting a worldwide consensus, thereby making it less useful to countries seeking to harmonize their arbitration law with that of other jurisdictions.

Based on our experience, we have no reason to believe that parties either expect or want their arbitral tribunals to have *ex parte* powers. Were the Model Law amended to provide for them (and the amended Model Law enacted by State legislatures), knowledgeable parties might shy away from places of arbitration in Model Law countries and unwary parties might be caught by surprise. We believe that the Model Law will best serve to further the growth of international arbitration if its provisions are kept consistent with parties' reasonable expectations and common intentions.

This is especially so as the prospect of an arbitral tribunal issuing interim measures on an *ex parte* basis raises due process issues. The party that is excluded from an *ex parte* proceeding may never know all of what was communicated to the arbitral tribunal – particularly if communications were oral – and may have reasonable concerns that the arbitral tribunal has, by virtue of deciding the *ex parte* application, prejudged substantive issues in the case. In this way, an arbitral tribunal's granting of *ex parte* interim measures could undermine parties' confidence in the arbitral process and make arbitration a less attractive means of resolving disputes. Moreover, in those Model Law countries where the local judiciary is cautious about the development of arbitration, the provision of such powers may serve only further to undermine the development of arbitration.

In light of these concerns, we would suggest eliminating those provisions of the current draft of Article 17 and Article 17bis that grant arbitral tribunals the power to issue interim measures on an *ex parte* basis and make such measures enforceable by State courts. In their place, delegates might consider including

provisions that would address the situation where an arbitral tribunal receives an *inter partes* application for interim measures upon which it believes it must act before the other side has had a full opportunity to respond. As mentioned above, we have had two cases where this situation has arisen. Permitting arbitral tribunals to grant preliminary measures freezing the *status quo* – based on applications that are communicated to all parties and granted with notice to all parties – could aid arbitral tribunals that receive emergency applications requiring decision before the opposing party can present its views. As the opposing party has yet to be heard, we would recommend that such preliminary measures not be enforceable by State courts pursuant to Article 17bis or other similar legislation. Rather, a party that violated such a measure could be subject to a claim for damages in the pending arbitration. Once both sides had been given an opportunity to be heard, the arbitral tribunal could issue an interim measure that would be enforceable in State courts pursuant to Article 17bis or similar legislation.

The following revised texts of Article 17 and Article 17bis reflect our suggestions. In so doing, we note that we are not suggesting that our proposed texts be incorporated into the Model Law itself. Rather, we believe that, in light of the evolving practice and absence of worldwide consensus in this area, any alternative formulation of Article 17 (including Article 17bis) that might ultimately be adopted would be best included in an appendix to the Model Law.

Lastly, we wish to note that the Chairman of the ICC International Court of Arbitration, Dr Robert Briner, has participated in the preparation of this letter and approved its contents.

Suggested changes to article 17, paragraph 7

(a) Unless otherwise agreed by the parties, the arbitral tribunal may ~~[in exceptional circumstances,]~~ grant an interim measure of protection, without notice ~~to~~giving the party [against whom the measure is directed] [affected by the measure] an opportunity [to oppose the measure] [to be heard], when:

- (i) There is an urgent need for the measure;
- (ii) The circumstances set out in paragraph (3) are met; and
- (iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted;

(b) The requesting party shall:

- (i) Be liable for any costs and damages caused by the measure to the party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]; and

(ii) Provide security in such form as the arbitral tribunal considers appropriate [, for any costs and damages referred to under subparagraph (i),] [as a condition to granting a measure under this paragraph];

(iii) Give notice of the application for the measure to the party ~~[against whom it is directed]~~ [affected by the measure] at the time such application is made.

(c) [For the avoidance of doubt,] the arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to [subparagraph (b)], above;]

(d) [The party [against whom the interim measure of protection is directed] ~~[affected by the measure granted]~~ under this paragraph shall be given notice ~~of the measure and an opportunity to oppose the measure and to~~ be heard by the arbitral tribunal ~~[as soon as it is no longer necessary to proceed on an ex-parte basis in order to ensure that the measure is effective]~~ [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];]

(e) [Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by the measure] has been given notice ~~and an opportunity~~ [to oppose the measure] [and be heard;]

(f) [A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;]

Suggested changes to article 17bis paragraphs 1 and 6

(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article ~~17, shall~~¹⁷ shall with the exception of an interim measure of protection issued under article 17(7), be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application [in writing] to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.

Paragraph (6) of article 17bis should be deleted in its entirety.