

For participants only  
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**United Nations Commission  
on International Trade Law**  
Working Group II (Arbitration)  
Fortieth session  
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## **Draft report of the Working Group on Arbitration on the work of its Fortieth session**

### **Addendum**

#### **IV. Newly revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection**

(Continued)

##### **Paragraph (6 bis)**

1. The Working Group recalled that, in order to assist deliberations on subparagraph (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 subparagraph should be deleted and the Working Group should consider possible improvements to the text therein.

2. It was suggested that the words providing that liability for costs and damages arose "from the date the measure has been granted and for as long as it is in effect" was inappropriate as costs and damages could arise even before and after these times. It was also suggested that the present conditions set out in paragraph (6 bis) might be confusing and the requirement that made liability dependent on the final disposition of the claims on the merits may be inappropriate. In this respect, the Working Group was reminded that, at its thirty-ninth session, it was strongly felt



that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not (A/CN.9/545, para. 68). For these reasons, a first proposal was made to replace the first sentence of paragraph (6 bis) by the words "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". Support was expressed for that proposal.

3. A concern was expressed that paragraph (6 bis) appeared to provide that the power of the tribunal to order damages was triggered if the tribunal found that the interim measure should not have been ordered, which might not provide a broad enough discretion, for example, to allow an arbitral tribunal to exercise that power where it found that the measure had been made on incorrect facts. To achieve that broader discretion, a second alternative proposal was made to replace the entire text of paragraph (6 bis) by the following: "The requesting party shall be liable for such costs and damages that is caused by the interim measure of protection to the party against whom it is directed, as may be awarded by the arbitral tribunal, at such time in the course of the proceedings and to such extent as it considers appropriate having regard to all the relevant circumstances." It was stated that, if that formulation were accepted, the second sentence of paragraph (6 bis) could be deleted. That proposal received little support. Preference was expressed for the first proposal, which was said to address the concerns expressed and to provide more guidance than the second proposal.

4. With respect to the last sentence of paragraph (6 bis) it was suggested that the term "immediate" should be deleted as it could be misinterpreted as suggesting that the damages would be awarded simultaneously with the interim measure. It was suggested that the sentence be replaced by words in the following words: "The arbitral tribunal may order an award of costs and damages at any point during the proceedings following the termination of the interim measure." It was suggested that the words "following the termination of the interim measure" were unduly narrow given that they restricted the award of damages to the time after the termination of the interim measure. It was agreed that the words "following the termination of the interim measure" should be deleted. It was also agreed that any explanatory material accompanying paragraph (6 bis) should clarify that the reference to "proceedings" therein referred to the arbitral proceedings and not to the proceedings relating to the interim measure. Subject to these modifications, the proposed text was adopted in substance by the Working Group.

#### **Paragraph (7)**

##### *Ex parte measures*

5. The Working Group recalled that, at previous sessions, the question whether to include a provision allowing for interim measures to be ordered *ex parte* by an arbitral tribunal had been extensively discussed and that opposing views had been expressed as to whether this matter should be included in draft article 17. The Working Group also recalled that the Commission, at its thirty-sixth session, noted the suggestion that the issue of *ex parte* interim measures, which the Commission agreed remained a point of controversy, should not delay progress on the finalization of draft article 17 (A/58/17, para. 203).

6. At its thirty-ninth session, the Working Group proceeded with a detailed review of paragraph (7), and agreed that discussions as to whether, as a matter of general policy, a provision on interim measures granted *ex parte* should be retained in draft article 17, should be held at its next session (A/CN.9/545, para. 50).

7. Comments made during the current session indicated that there remained strongly opposing opinions on the question of including a provision granting the arbitral tribunal the power to grant *ex parte* measures. On the one hand, it was said that there was no worldwide consensus with respect to the standards and practices concerning the granting of *ex parte* interim measures by arbitral tribunals and that inclusion of such a provision in the absence of such consensus could undermine the role of the Model Law as an international standard reflecting worldwide consensus.

8. On the other hand, it was said that the role of UNCITRAL went beyond merely harmonizing existing laws and that it had regularly taken the lead in developing new and modern rules, looking at their potential economic impact and evaluating the best practice. Support was expressed for the idea that, notwithstanding the absence of consensus, the Working Group could take account of the existing body of opinion in favour of *ex parte* measures and produce a self-contained text for use by those jurisdictions that wished to adopt legislation on that matter.

9. The view was expressed that the current draft of paragraph (7), which had strengthened and increased the safeguards against misuse of *ex parte* measures might be acceptable to the Working Group.

10. A number of alternative proposals were made to the present draft paragraph (7). One proposal, as contained and explained in the proposal by the International Chamber of Commerce (A/CN.9/WG.II/WP.129), read as follows:

“(a) Unless otherwise agreed by the parties, the arbitral tribunal grant an interim measure of protection, without 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 an opportunity to [oppose the measure and to] be heard by the arbitral tribunal [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 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 17 bis, paragraphs 1 and 6*

“(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article 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 17 bis should be deleted in its entirety.”

11. An additional proposal for the replacement of paragraph (7) read as follows:

“In cases where the prior disclosure of the requested measure to the party having to perform it risks prejudicing its implementation, the requesting party may file its application without communicating it to any other party. Upon receipt of such an application, the arbitral tribunal shall communicate it to the other parties inviting their response. The arbitral tribunal may accompany this communication with a provisional [order preventing the frustration of the requested measures]/[for preserving the status quo] until it has heard the other parties and has ruled on the application [provided that such provisional order shall remain in force no longer than X days].”

12. Due to the absence of sufficient time, the Working Group did not discuss those proposals in detail. The Working Group took note of the proposals and decided that the discussion would be continued at its next session on the basis of the documentation prepared for the current session and of the additional proposal.

**A/CN.9/WG.II/XL/CRP.1/Add.6**

*To be added at the end of paragraph 6:*

“It was also pointed out that *ex parte* interim measures were not dealt with extensively in national laws, general principles of law and international commercial practice. It was pointed out that it might be counter-productive for an UNCITRAL instrument to attempt to regulate an issue for which little recognition existed.

*In paragraph 8, after the words “best practice” insert the following:*

“It was stated that the Working Group had an opportunity to address the emerging reality that *ex parte* orders were being requested and a failure to include such rules would not diminish their importance. The view was expressed that while the need to regulate *ex parte* measures might be questioned, attention should be given to avoid introducing into the Model Law provisions that could inhibit the possible future development of practice relying on such measures.

*To be added at the end of paragraph 8:*

“It was also pointed out that a number of international arbitral institutions had adopted emergency rules for arbitrators to accommodate the increasing demand for such orders, for example, in the field of sport arbitration.

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*To be added at the end of paragraph 12*

“, as well as any further proposal that might be communicated to the Secretariat for the preparation of the next session of the Working Group. It was pointed out that, in addition to discussing the contents of a provision on *ex parte* measures, the Working Group would need to focus its attention on the placement of such a provision. Suggestions for such placement included a footnote to article 17, either in the form of an opt-in or opt-out provision for consideration by national legislators.