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Settlement of commercial disputes

Preparation of uniform provisions on interim measures of protection

Note by the Secretariat

Contents

Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985, also referred to in this note as "the Model Law"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written

form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration and the text of paragraph 1 (a) (i) of a draft new article prepared by the Secretariat for addition to that Model Law (A/CN.9/WG.II/WP.113, para. 18). The Working Group was requested to continue its work on the basis of revised draft provisions to be prepared by the Secretariat.

Arbitral tribunal-ordered interim measures

6. At its thirty-fourth session (21 May-1 June 2001) the Working Group considered a draft article which contained an express power for arbitral tribunals to order interim measures of protection and a definition of the interim measures that might be ordered (para. 64, A/CN.9/487). For consideration at a future session the Secretariat was requested to prepare alternative texts which would establish the terms, conditions and circumstances in which an arbitral tribunal could or should issue interim measures of protection. The texts should be illustrative rather than exhaustive in order to avoid the risk of being read in a limiting way. It was suggested that the draft should list general categories following the approach taken in other international instruments such as the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (Brussels, 1968, and Lugano, 1988). It was also suggested that the model legislative provision contain a provision requiring that the party seeking the interim measure provide appropriate security for enforcement of the measure.

7. To assist the Secretariat in its work on interim measures issued by arbitral tribunals, a short questionnaire was prepared and sent to arbitrators and counsel in arbitral proceedings to gather information on interim measures that had been issued in arbitral proceedings.

Court-ordered interim measures

8. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group considered, in the context of the discussion of interim measures that might be issued by an arbitral tribunal, a proposal for the preparation of uniform rules for situations in which a party to an arbitration agreement turned to a court with a request to obtain an interim measure of protection (A/CN.9/468, paras. 85-87). It was pointed out that it was particularly important for parties to have effective access to such court assistance before the arbitral tribunal was constituted, but that also after the constitution of the arbitral tribunal a party might have good reason for requesting court assistance. It was added that such requests might be made to courts in the State of the place of arbitration or in another State.

9. It was observed that in a number of States there were no provisions dealing with the power of courts to issue interim measures of protection in favour of parties to arbitration agreements; the result was that in some States courts were not willing to issue such interim measures while in other States it was uncertain whether and under what circumstances such court assistance was available. It was said that, if the Working Group decided to prepare uniform provisions on that topic, the ILA Principles on Provisional and Protective Measures in International Litigation as well as the preparatory work that led to those

Principles would be useful in considering the content of the proposed uniform rules.

10. The Working Group took note of the proposal and decided to consider it at a future session.

11. At its thirty-third session (Vienna, 20 November - 1 December 2000) the Working Group considered preparatory work undertaken by the Secretariat with regard to the topic (see A/CN.9/WG.II/WP.111 paras. 2-29) and expressed its support for future work to enhance the effectiveness of arbitration in international trade. While noting that the topic concerned court procedure, an area where harmonization traditionally had been difficult to achieve, it was said that legal certainty in that area was desirable for the good functioning of international commercial arbitration. It was noted that the work on the topic would have to be founded on broad empirical information and that the Secretariat should contact Governments and arbitration organizations with a view to obtaining such information. The Secretariat was requested to prepare preliminary studies and proposals on the basis of the information received.

12. The Secretariat prepared a short questionnaire that was forwarded to Governments to ascertain information on powers of courts to order interim measures in support of arbitration and examples of measures that may have been issued.

13. Part 1 of this note summarises the information obtained from the surveys on interim measures issued by both courts and arbitral tribunals. Part 2 provides a summary of work being undertaken by other international organizations in respect of interim measures ordered by courts. Part 3 proposes ways in which some of the issues raised may be addressed, based upon the discussion in the Working Group and a revision of the draft text considered by the Working Group at its thirty-fourth session in 2001.

I. Background information regarding interim measures of protection under domestic law

A. General Remarks

14. Interim measures of protection play an essential role in many legal systems in facilitating the traditional litigation process, as well as arbitration. Courts and arbitral tribunals often receive requests from a party to arbitral proceedings for interim measures of protection. When issued by a court, such measures may be directed to one or both of the parties involved in the dispute or to third parties. When issued by an arbitral tribunal, such measures may generally not be directed to third parties. Interim measures of protection are generally temporary in nature, covering only the period up to entry of the arbitration award. Depending upon the measure, the circumstances justifying its continued existence no longer apply at the time the award is made or the interim measure is merged into the award. Referred to by different expressions (interim measures of protection, provisional orders, interim awards, conservatory measures, and preliminary injunctive relief) their aims are broadly twofold. First, they are intended to preserve the position of the parties pending resolution of their dispute, a function often referred to as “preserving the status quo”. A second aim is to ensure that the final award or judgement can be enforced by preserving, in the jurisdiction in which enforcement will be sought, assets or property which can be applied to satisfy the award or judgement. There is no evidence to suggest that the

objectives differ in the international commercial arbitration context from those sought in the context of domestic litigation.

15. In considering how some of the issues related to the ordering of interim measures by courts in support of arbitration may be addressed, the Working Group may wish to note the importance of ensuring that parties choosing to resolve their disputes through arbitration do not forfeit any rights to avail themselves of any interim relief measure that they would have had in litigation. Such an approach would help to achieve the goals of greater coherence and uniformity.

B. Classification of interim measures

16. Interim measures may be divided into different categories. Although the distinction between these different categories of measures is not always clear and specific measures can fall into more than one of the categories, the division between the different types may assist in understanding the extent to which certain domestic laws may restrict the power to issue certain types of measures, such as attachments. It is not suggested that the uniform provisions to be prepared by UNCITRAL should reflect any such classification or encourage any such restriction. Broadly speaking, interim measures are sometimes divided into two principal categories–those aimed at avoiding prejudice, loss or damage and those which are intended to facilitate later enforcement of the award.

1. Measures to avoid or minimize prejudice, loss or damage

17. These measures aim to avoid or minimize loss or damage by, for example, preserving a certain state of affairs until a dispute is resolved by the rendering of a final award and avoiding prejudice, for instance, by preserving confidentiality. They include:

(i) orders that the goods that are the subject matter of the dispute are to remain in a party's possession but be preserved, or be held by a custodian (in some legal systems referred to as sequestration);
(ii) orders that the respondent hand over property to the claimant on condition that the claimant post security for the value of the property and that the respondent may execute upon the security if the claim proves to be unfounded;
(iii) orders for inspection at an early stage where it is clear that a given situation may change before the arbitral tribunal addresses the issue relating to it. For example, if a dispute turned upon the berthing of vessels at a port, and it is known that the port is going to become a construction zone, the arbitral tribunal may make orders for inspection of the port at an early stage;
(iv) orders that one party provide to the other party certain information, such as a computer access code, that would enable, for example, certain work to be continued or completed;
(v) orders for the sale of perishable goods with the proceeds to be held by a third person;
(vi) appointment of an administrator to manage income-producing assets in dispute, the cost of which is to be borne as directed by the arbitral tribunal;
(vii) orders that performance of the contract in dispute be continued;
(viii) orders to take appropriate action to avoid the loss of a right, such as by paying the fees needed to renew a trade mark or a payment to extend a

licence of software; and

(ix) orders directing certain information to be kept confidential and measures to be taken to ensure that confidentiality.

2. Enforcement facilitation measures

18. These measures aim to facilitate later enforcement of an award and include:

(i) orders which are intended to freeze assets pending determination of the dispute, as well as orders not to move assets or the subject matter of the dispute out of a jurisdiction and orders not to dispose of assets in the jurisdiction where enforcement of the award will be sought;

(ii) orders concerning property belonging to a party to the arbitration which is under the control of a third party (e.g. to prevent a party's funds from being released by a bank);

(iii) security for the amount in dispute involving, for example, an order to pay a sum of money into a specified account, the provision of specified property, or the presentation of a guarantee by a third person such as a bank or surety; or

(iv) security for costs of arbitration which might require, for example, depositing a sum of money with the arbitral tribunal or the provision of a bond or guarantee, usually to cover the respondent's costs if the claimant is unsuccessful.

C. Power to order interim measures in support of arbitration

19. Though each State's procedural rules may differ, the process of applying for interim measures from a court may involve several steps to determine both the conditions and the extent to which a court may be empowered to order interim measures relating to an international commercial arbitration. First, the power to grant interim measures may be shared between the arbitral tribunal and domestic courts. Secondly, there is an issue of the boundaries between the arbitral tribunal's and the court's respective competences to issue a particular interim measure The question of how to resolve the issue of enforcement of the interim relief is also important (this issue is currently being considered by the Working Group - see A/CN.9/487, paras. 76-87).

20. Legal systems take different approaches to the issue of interim measures in support of arbitration and the institution that may be empowered to issue such measures. Broadly speaking, these fall into three main categories: those where the power is reserved to the court; where it is reserved to the arbitral tribunal once it has been constituted or arbitral proceedings initiated; and those where both the court and the arbitral tribunal have such powers. There are also a number of laws where the power of the court is not specifically provided in law and it is therefore uncertain whether interim measures can be ordered by the court in support of arbitration. In some of these countries, the courts have nevertheless interpreted the absence of a prohibition as allowing them to issue such measures. In some federal or non-unitary jurisdictions, the power to issue interim measures may be divided between different levels of the courts, with some interim measures in the competence of a State, province or canton and the detail of the laws differing between them.

1. Power exclusive to the courts

21. Many legal systems recognize as a general principle that courts may issue interim measures in support of arbitration proceedings. The power to issue such measures is often included explicitly in arbitration or civil procedure laws and may allow interim relief to be ordered by the courts both before and during arbitral proceedings. Some of these laws provide that only the court has the power to issue interim measures, whether before or after initiation of arbitral proceedings or constitution of the arbitral tribunal.[7] Among these laws are some that specifically preclude the arbitral tribunal from issuing interim measures, even to the extent of refusing to enforce the parties' agreement to confer the power to issue these measures on the arbitral tribunal.

2. Power exclusive to the arbitral tribunal

22. Other laws provide that the authority to issue interim relief is vested exclusively in the arbitral tribunal and the courts do not have the power to issue interim measures in support of arbitration. The court's lack of jurisdiction may be the result of provisions that oust the jurisdiction of the court where there is an arbitration agreement. The power of the arbitral tribunal arises from the interpretation of the arbitration agreement as an agreement to seek a final and binding resolution of disputes by an impartial third party and this agreement cannot co-exist with the right of either party to alter the subject matter of the dispute in such a way as to destroy or obstruct the arbitral tribunal in making a final and effective award.[8] Some courts have regarded the existence of a valid arbitration agreement as a decision by the parties to completely exclude court jurisdiction, including the jurisdiction to grant interim measures.[9] Under some laws where the power to issue interim measures is reserved for the arbitral tribunal, the court may nevertheless assist the arbitral tribunal in the interests of the parties to the arbitration. This assistance may include ensuring the effectiveness of the future arbitral procedure by ordering urgent measures for preparing the case or safeguarding the enforcement of the award.

23. The court's lack of jurisdiction may also arise because the law does not specifically address the issue of interim measures in the period before initiation of arbitral proceedings or constitution of the arbitral tribunal. Interim relief may not be available from the arbitrators because the arbitral tribunal is not yet constituted, or because arbitrators do not have authority to order the specific relief requested.

24. Given that the authority of an arbitral tribunal derives from the parties' agreement, it follows that an arbitral tribunal's powers must be determined by first examining the terms on which the parties have agreed to arbitrate. Parties may have agreed on either institutional or ad hoc arbitration under an established set of rules such as the UNCITRAL Arbitration Rules. In both cases, the arbitral tribunal's powers will be determined by an established set of rules. It may also be necessary to examine the substantive law governing the proceedings where this law either overrides the parties' agreement or supplements it.

3. Concurrent powers

25. Under a third approach, the arbitral tribunal and the courts have concurrent power to issue interim measures, with the parties deciding where to apply for interim relief, although the court will generally be the only body with the power to order interim measures before the arbitral tribunal has been constituted. In some laws where the power is concurrent the

range of measures available from the court is sometimes broader before the arbitral tribunal has been constituted than after it has been constituted. Conservatory measures, for example, may be requested before and after constitution of the arbitral tribunal, while some measures having both conservatory and executory purposes may only be issued before constitution of the arbitral tribunal.

26. A number of institutional arbitration rules recognize the power of arbitrators to issue interim measures and address the division of power between the arbitral tribunal and the court, generally providing that an application to a judicial authority after transmission of the file to the arbitral tribunal or constitution of the arbitral tribunal is not inconsistent with or deemed to be a waiver of the agreement to arbitrate.[10] A number of those rules require the applicant for the measure to promptly inform the arbitral tribunal of the application to the court.

4. Consecutive powers

27. A further approach divides the powers between the court and arbitral tribunal by reference to the constitution of the latter or the initiation of arbitral proceedings. Under these laws, the court has the power to issue interim measures before the arbitral tribunal is constituted but not after it has been constituted, on the basis that once constituted it is for the arbitral tribunal to issue interim measures if required

5. Power of courts to issue is uncertain

28. In some legal systems the power of the courts to issue interim measures in support of arbitration is not certain because it is not explicitly stated in either arbitration laws or civil procedure laws or rules. These systems require interpretation of the laws of civil procedure, with some courts deriving the power from the absence of a prohibition against issuing interim measures.

6. Limitations on powers

(a) Courts

29. The courts in a number of countries have tried to establish the limits of the powers of the courts in issuing interim measures. A number of precedents are slowly building up, defining the situations in which the court may legitimately intervene to support the work of the arbitral tribunal without usurping its authority. The conclusions reached, however, vary from country to country, making it difficult to predict the extent to which a national court may be prepared to intervene. As noted above, courts often draw a distinction between the time before and the time after the arbitral tribunal has been constituted or the arbitration initiated.[11]

30. Other limitations on the power of the court to issue interim measures relate to the existence of certain specified circumstances. These might include limiting the power of the court to issue interim measures to those circumstances where the rights of a third party are involved; an *ex parte* application is involved; or the court's powers will be more effective than those of an arbitrator.

31. A further limitation on which there appears to be a consensus is where the relief requested goes to the heart of the substantive dispute. Some legislation provides, and courts

in some countries have held, that the court has the power to issue interim measures, but that in doing so its power does not extend to a discussion of, or preliminary decision on, the substantive dispute. Where the party requesting the interim measure is in effect seeking to obtain a ruling on the merits of the dispute, courts will deny the request. According to some reports, even where arbitrators have broad authority, they use it reluctantly so as not to appear to be deciding on the merits or in favour of one party. Courts seem similarly reluctant to use their coercive powers to avoid making a decision that may turn out to be premature–that is, before the facts and the law of the case have been fully presented to the arbitral tribunal. Courts will generally avoid prejudicing the essence of the case by issuing, for example, a measure that effectively interprets the contract. Some courts, in refusing to exercise their interim relief powers, focus on the parties' expressed intent to submit their dispute to the confidential, neutral arbitration forum.

(b) Arbitral tribunals

32. A number of limitations operate in respect of the arbitral tribunal's power to order interim measures. The first is the point at which the power of the arbitral tribunal arises (whether by reference to the constitution of the arbitral tribunal or transmission of the file to the arbitral tribunal or to some other time as defined in the law or applicable arbitration rules). This power may arise some time after the dispute commences and after the interim measure may be required.

33. A second limitation is that an arbitral tribunal has no enforcement power of its own and enforcement of a measure ordered by an arbitral tribunal must be sought in the courts. A third limitation is that an arbitrator or arbitral tribunal has no power to bind any person not a party to the arbitration and thus cannot issue a measure directed to any third person.

D. The applicant for interim measures

34. Where the court has exclusive authority, there are two distinct approaches to the question of who may apply to the court for interim measures in support of arbitration. Some laws require the arbitral tribunal or arbitrator to make the request to the court (a party to the proceedings is specifically prohibited), but generally it is a party to the arbitration who will be the applicant. A request to an arbitral tribunal to issue an interim measure would be made by a party to the proceedings.

35. Many laws provide for *ex parte* applications for interim measures, provided that the applicant gives security for damages in case it is later determined that the order should not have been issued. To obtain *ex parte* relief, the applicant is most often required to show requisite urgency–that is, that irreparable harm will result if the applicant is required to seek the requested relief under customary procedures requiring many days' notice. In exceptional cases, some laws allow the requirement of security to be waived. Where the interim relief is sought before the arbitral tribunal is constituted, some laws require that the arbitral proceedings be commenced within a fixed period, which may vary from a number of days to a number of months.

36. Where the application for interim relief is denied, a number of laws permit the applicant to appeal either with or without leave of court. Other laws simply deny the right to appeal.

E. Types of interim measures that may be ordered

1. Courts

37. Different legal systems have characterized interim measures of protection in different ways and using different classifications. While the terminology "provisional and conservatory measures" is often used, the distinction between the two is not always clear and there is no universally accepted classification of interim relief. This distinction may, however, be important because some laws allow courts to order one type of measure but not the other, or distinguish between the two in terms of what orders may be made before and after constitution of the arbitral tribunal (see, for example, para. 25 above). In addition, countries adopt different approaches to the scope and variety of interim measures available from a court in support of arbitration and may draw a distinction between measures that may be ordered in support of domestic and foreign arbitration (see, for example, para. 45 below, footnote 17).

38. The types of measures that may be ordered by courts vary. Orders against an entity's property that direct an authority to seize or take control of the property, and orders compelling a party to do or refrain from doing a specified act, appear to be the type of measures most commonly issued. In some discussions, however, the general notion of interim measures is intended to include any procedural measures or measures concerned with the management of the arbitral process that may be issued.

39. Some arbitration laws enumerate the types of specific measures available, while in others they are described by reference to a general formulation, such as measures which are "conservatory or preventive and concretely adequate to secure the effectiveness of the threatened right." In some of the examples where the measures are not enumerated in the arbitration law, interim measures in the arbitral context are afforded the same treatment as in other court-supervised adversary matters as provided in civil procedure laws and rules of court.

40. Despite differences in terminology, standard types of measures widely available from courts in support of arbitration typically include:

(a) Orders to protect the property in dispute or protect certain rights of a non-monetary nature, typically addressed to the parties to the dispute (referred to as "attachment" in certain jurisdictions);
(b) Orders to prevent a party from removing assets or money kept by that party or placed with a third party (referred to as "injunctions" in certain jurisdictions);
(c) Preservation, custody or sale of perishable goods;
(d) Orders requiring a party to conserve goods in it its possession (referred to as "sequestration" in certain jurisdictions);
(e) Property inspection orders;
(f) Appointment of a receiver to hold property that should not be in either party's possession until the dispute is resolved;
(g) Orders requiring a party to post security for the costs of the other party should the action prove to be unsuccessful.

2. Arbitral tribunals

41. In line with article 17 of the UNCITRAL Model Law on International Commercial Arbitration, many national laws limit the types of interim measures that may be ordered by an arbitral tribunal by requiring that any such measure be "in respect of the subject matter of the dispute". In that respect, it may be recalled that article 17 of the Model Law was drafted against the background of article 26 of the UNCITRAL Arbitration Rules, which refer to the arbitral tribunal taking, at the request of either party, any interim measures "it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or ordering the sale of perishable goods". The reference in those texts to "the subject-matter of the dispute" and the illustration provided in the UNCITRAL Arbitration Rules regarding the sale of perishable goods is generally not understood as restricting the power of the arbitral tribunal to order any type of interim measure it deems appropriate. However, such references to "the subject-matter of the dispute" and to "conservation of goods forming the subject-matter of the dispute" have suggested to at least one commentator that the measures contemplated related to the preservation or sale of goods rather than preventing the transfer of assets to another jurisdiction. By comparison, the language used in the ICC Rules which allows an arbitral tribunal to "order any interim or conservatory measure it deems appropriate" is seen as possibly providing a broader discretion. The AAA Rules also may be broader by allowing the arbitral tribunal to "take whatever interim measures he or she deems necessary" and not making any reference to the subject matter of the dispute. The revision of the text of article 17 of the Model Law may provide the occasion to clear any misunderstanding, either through redrafting of the provision or by way of appropriate explanations in the guide to enactment.

F. Elements to be satisfied for issuance of interim measures

42. Many laws establish a number of prerequisites for the issuance of interim measures by courts in support of arbitration, the most common of which are:

(a) That appropriate security be posted by the applicant for damages that may arise from the order issued;

(b) That there is an urgent need for the measure applied for;

(c) That the applicant for the measure demonstrate that a significant degree of harm will result if the interim measure is not ordered, generally called "irreparable" or "substantial" harm[12]; and

(d) In most jurisdictions, that there is a likelihood of the applicant succeeding on the merits of the underlying case.

43. The prerequisites for the issue of interim measures by the arbitral tribunal depends on the applicable law and the rules governing the arbitration proceedings. The preconditions for the granting of interim measures are generally set out in the applicable law although there is no uniformity in this area and the laws and rules do not provide any detail on the prerequisites even though interim measures of protection have potentially far-reaching consequences. In many of the international rules, an arbitral tribunal is given a broad discretion to determine if a requested interim measure is appropriate[13] or necessary.[14] Typical preconditions include that the issue sought to be addressed in the interim measure requires urgent redress, that there is a risk to the subject matter in the

dispute, that there would be irreparable harm or serious or actual damage if the measure requested is not granted, that no other remedy is available and that security is provided.[15]

G. Interim measures from courts in support of foreign arbitration

44. In an international dispute where the interim relief is sought in a country other than the country where the arbitration takes place, the question of jurisdiction arises: do the national courts have jurisdiction to grant interim relief in support of foreign arbitration and on what grounds? As a general principle, a form of relief that is directed towards specified property, or a third party holding it, is more likely to be territorially restricted than an injunction against the party personally. The injunction against the party will apply irrespective of where the property is situated.

45. Countries have adopted different approaches to the issue of measures in support of foreign arbitration. The laws of some countries allow recourse to the court not only in cases where the arbitration takes place in the country of the court, but also in cases where the arbitration takes place outside the country. Those laws generally refer to the need to be able to enforce the measure within the jurisdiction of the court issuing the measure, such as requiring the presence of assets in its territory (whether of a resident or non-resident)[16] or they may require the presence of the respondent to the application for interim measures.[17] In some countries, for example, the law requires that the court have jurisdiction over the respondent before an interim measure can be ordered or enforced.

46. Other examples of conditions required by some national laws for the granting of interim measures in support of foreign arbitration include: that the foreign arbitral award would be enforceable in that jurisdiction of the court issuing the measure;[18] that full disclosure of the existence of the arbitration agreement has been made;[19] that the request for the interim measure has been made by the arbitral tribunal; or that the conditions of the legislation of the country in which the measure is sought are met.[20] There are also laws that provide that interim measures to be enforced outside the country may be ordered only if there is a chance that they will be enforced in the foreign jurisdiction.

47. In many countries, however, the law does not provide that this type of assistance may be granted by local courts. In some laws, an application to the courts for protective measures may only be granted where an application has already been made to that court for a decision on the merits, clearly not possible where there is an arbitration agreement in existence. In other laws, the court may order protective measures in cases where the arbitration takes place within the jurisdiction of the court, but not abroad. [21].

48. In a further category of countries, the position is not clear either because the relevant legislation does not address the issue or because there have been no reports of cases in which such an order has been sought.[22]

II. International work on provisional measures

49. The questions concerning the availability, effectiveness and enforcement of interim measures on an international level have been the subject of work by a number of different international organizations, some of which are currently drafting texts which include provisions on interim measures.

A. International Law Association Principles

50. At its 67th Conference in 1996, the International Law Association (ILA) adopted the "Principles of Provisional and Protective Measures in International Litigation"[23] (the “ILA Principles”), which were prepared by a group of experts under the aegis of the ILA (the Principles were reproduced verbatim in paragraph 108 of A/CN.9/WG.II/WP.108).

51. The ILA Principles seek to establish rules of general application for the assistance of law reformers both at the national and international level on the exercise by courts of independent jurisdiction for granting provisional and protective measures with the objective of securing assets out of which an ultimate judgement may be satisfied.[24] The Principles were drafted bearing in mind “a paradigm case of measures to freeze the assets of the defendant held in the form of sums on deposit in a bank account with a third party bank”.[25] The ILA recommended these Principles for possible use by UNCITRAL and the Hague Conference on Private International Law and in national statutory reforms.[26] It must be noted however that these Principles were drafted with the international litigation process in mind, as opposed to interim measures granted by a court in support of an international arbitration. Nevertheless, a number of the issues addressed are relevant to any consideration of interim measures issued by courts in support of arbitration. The Principles are summarised below.

1. Scope (Principles 1-2)

52. The Principles adopt a twofold classification of the purposes performed by provisional measures in civil and commercial litigation: (a) to maintain the status quo pending determination of the issues at trial; or (b) to secure assets out of which an ultimate judgment may be satisfied. The distinction is one that is commonly made in national legal systems and reflects the need for different types of relief (the classification of interim measures into different categories was discussed at para. 63, A/CN.9/WG.II/WP.108 and paras. 16-18 above). As noted above, the Principles focus upon measures in category (b) simply because those measures represent measures commonly available and thus capable of comparative analysis.

2. Availability of provisional and protective measures (Principle 3)

53. When used in the context of arbitration, the Principles would seem to imply that it is desirable that interim measures be available to foreigners and citizens alike and in respect of arbitrations held in both the country of the court issuing the measure and in a foreign country. (As noted in the discussion of the survey results above, practice varies with respect to the availability of interim measures in support of foreign arbitration.)

3. Discretionary nature of the award of interim measures (Principle 4)

54. The granting of relief would generally be discretionary rather than mandatory and subject to certain specified considerations. Those might include, for example, prima facie consideration of the merits of the applicant's case and the relative consequences to the parties if the measure is either granted or refused.

55. Case law in a number of countries shows that courts are not prepared to issue interim relief in support of arbitration in any situation that would involve a preliminary discussion of the merits of the case. The willingness of the court to grant the interim measure usually depends to a great extent on the urgency of the measure and the potential damage to the applicant should the measure be refused. If it is clear that the applicant is not merely trying to frustrate the arbitral proceedings it would seem that there is a greater chance that the measure will be ordered and the court will avoid having to look at the substantive issues.

4. Hiding of assets (Principle 5)

56. The Principles recognize that the respondent should not be able to hide its assets by putting them into, for example, a corporation or a trust, while still retaining either de facto or beneficially the ownership of the assets. While stating the general principle, the ILA Committee noted that this problem was a complex one and required further research and elaboration.

5. Due process and protection for the respondent (Principles 6-8)

57. While it might not always be possible to give the respondent prior notice that an order for interim measures is being sought, particularly where the element of surprise is important, as a general rule the respondent is entitled to be informed promptly of the measure ordered. The Principles stress that the respondent should be given the opportunity to be heard within a reasonable time and to object to the provisional and protective measure.

58. As another safeguard for the respondent, the court may need to have the authority to require security or other conditions (such as an undertaking by the applicant to indemnify the respondent if the measure proves to be unjustified) from the applicant for the potential injury to the respondent or to third parties which may result from the granting of the order, such as where the order is unjustified or too broad. If an undertaking as to damages might prove insufficient and the court considers ordering security, an additional consideration might relate to the ability of the applicant to respond to a claim for damages for such injury. The type of measure requested is a common determinant of the conditions that may attach to an interim measure.[27]

6. Access to information concerning the respondent's assets (Principle 9)

59. In some countries little relief is available to an applicant in the area of access to information concerning the respondent's assets and the applicant may have no legal right, for example, to be informed by a third party as to the assets held at the bank by the respondent. Other legal systems make more expansive provision for ancillary disclosure. As the ILA Principles note, there are important competing policies underlying these two different positions; for example, the need for disclosure particularly in fraud cases to enable

an applicant to trace and recover assets effectively, as against the importance of maintaining bank secrecy and the right to privacy as to personal financial affairs.

7. Jurisdiction (Principles 10-12, 16, 17)

60. A limitation on the granting of interim measures of relief in support of foreign proceedings may be the requirement that courts of the forum in which the measure is sought have jurisdiction over the substantive dispute. In some countries, for example, some interim measures of protection cannot be ordered unless the substantive proceedings are taking place, or would take place, in a court of that jurisdiction or in an arbitral tribunal within that jurisdiction. In other cases, the provision for the granting of interim relief in support of foreign court proceedings is limited to the group of countries party to particular conventions (e.g., the 1968 Brussels Convention). In yet other cases, that provision will apply to foreign court proceedings anywhere in the world without the law specifying any basis on which the court of the country in which relief is sought could assess jurisdiction in relation to the substantive issues in the claim. In such jurisdictions, the courts have indicated that the relief should not be limited to exceptional cases,[28] provided that it is not granted as a matter of routine or without very careful consideration. Such considerations might include, for example, whether the interim relief might hamper or obstruct the management of the case by the court seized of the substantive proceedings; or give rise to a risk of conflicting, overlapping or inconsistent orders in other courts; and whether the primary court was requested to give such relief and declined to do so.

61. The ILA Principles propose that jurisdiction could be derived from the mere presence of assets, subject to conditions. These include that the presence of assets (or, in fact, the granting of an interim measure of protection in relation to those assets) should not be used as a basis for founding more general substantive jurisdiction. This condition reflects the common position in a number of different countries; the applicant would have an obligation to file a substantive action, within a reasonable time, either in the forum or abroad and there should be a reasonable possibility that any judgement rendered abroad would be recognized in the forum which granted the interim relief.

62. Where the court is properly exercising jurisdiction over the substance of the matter, the wide scope of orders that may be made over the respondent personally is a feature of the law of many countries. The court's power would cover issuing provisional and protective orders addressed to a respondent personally to freeze the respondent's assets, irrespective of their location and regardless of whether the respondent is or was physically present within the jurisdiction.

63. Where, however, the court is not exercising jurisdiction over the substance of the matter, and is exercising jurisdiction purely in relation to the grant of provisional and protective measures, there is a need for caution. The court's jurisdiction may need to be restricted to assets located within the jurisdiction, in particular to ensure that third parties are protected from the conflicts of jurisdiction which might otherwise arise. Subject to international law, national rules (including rules of the conflict of laws) will determine the location of assets.

8. Duration of the validity of the interim measure (Principle 13)

64. The provisional and protective measure should be valid for a specified limited time. This principle is connected with the respondent's right to be heard. It may also be important

where the measure sought may be controversial, such as an *ex parte* measure, or where it has the potential to be particularly onerous on the respondent if prolonged. In the case of *ex parte* measures, the requirement that the applicant return to the court for a renewal of the measure will allow the respondent to be heard at that time. The court can then consider renewal in the light of developments in the arbitral tribunal where the substantive action is being heard.

9. Duty to inform (Principle 15)

65. The applicant for provisional and protective measures should be required to promptly inform the arbitral tribunal of orders that have been made at the applicant's request. It is also important that the applicant be required to inform the court requested to make an interim order of the current status of arbitration proceedings on the merits and proceedings for provisional and protective measures in other jurisdictions (the duty to inform is discussed in the context of enforcement of interim measures in A/CN.9/WG.II/WP.110 at para. 64).

10. Cross-border recognition and international judicial assistance (Principles 18-20)

66. While not seeking to impose an obligation to recognize orders made in other States, encouraging cooperation in the making of local complementary orders may lead to tangible results, both in recognition and judicial assistance. At the request of a party, a court may take into account orders granted in other jurisdictions. Further, it may be appropriate for courts to co-operate where necessary in order to achieve the efficacy of orders issued by other courts, and to consider the appropriate local remedy.

67. The fact that an order is provisional in nature, rather than final and conclusive, should not by itself be an obstacle to cooperation or even recognition or enforcement (enforcement of interim measures is addressed in A/CN.9/WG.II/WP.110 paras. 52-80; A/CN.9/WG.II/WP.113, paras. 17-18; A/CN.9/487, paras. 64-87).

B. American Law Institute/Unidroit: Draft Fundamental Principles and Rules of Transnational Civil Procedure

68. This is a joint project to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions. The draft Principles are intended to be interpretative guides to the draft Rules and could be adopted as principles of interpretation. They could also be adopted as guidelines in interpreting existing national codes of procedure. Correlatively, the draft Rules can be considered as an exemplification of the Principles. The November 2001 revision of the draft Fundamental Principles contains the following principles relating to provisional measures:

> "3.3 Jurisdiction may be exercised on the basis of sequestration of property located within the forum state, but only if no other reasonably convenient forum is available.
>
> "3.4 Provisional measures may be provided with respect to property in the forum state, even if the courts of another state have jurisdiction over the controversy.

"4.3 A person should not be required to provide security for costs, or for liability for provisional measures, solely because that person is not domiciled in the forum state. In any event, security for costs should not restrict access to justice.

"26.1 Procedures should be available for prompt, speedy, effective, and efficient execution of a provisional remedy, a judgment for money, including costs, or a judgment for an injunction, awarded in a proceeding under these Principles.

"27.1 A final judgment or provisional remedy in a proceeding under these Principles, and its eligibility for effective enforcement, should be accorded the same recognition, in the forum and other States, as other judgments or provisional remedies of the forum.

"28.1 The courts of a State that has recognized these Principles should provide support to the courts of any other State that is conducting litigation under these Principles, including the grant of protective or provisional relief, or assisting in the identification, preservation, or production of directly relevant evidence."

69. The November 2001 version of the draft Rules contains the following provisions (with commentary) on interim measures:

"17.1 In accordance with forum law and subject to applicable international conventions, the court may issue an injunction to restrain or require conduct of any person who is subject to the court's authority where necessary to preserve the status quo or to prevent irreparable injury pending the litigation. The extent of such a remedy shall be governed by the principle of proportionality.

17.1.1 A court may issue such an injunction, before the opposing party has opportunity to respond, only upon proof showing urgent necessity and a preponderance of considerations of fairness in support of such relief. The party or persons to whom the injunction is directed shall have opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.

17.1.2 The court may, after hearing those interested, issue, dissolve, renew, or modify an injunction.

17.1.3 The applicant is liable for full indemnification of the person against whom an injunction is entered if it turns out that the injunction was wrongly granted.

17.1.4 The court may require the applicant for relief to post a bond or to assume a duty of indemnification of the person against whom an injunction is entered.

"17.2 An injunction may restrain a person over whom the court has jurisdiction from transferring property or assets, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant.

"17.3 When the property or assets are located abroad, recognition and enforcement of an injunction under the previous subsection is governed by the law of the country

where the property or assets are located, and by means of an injunction by the competent court of that country.

"34.2 An order of a court of first instance granting or denying an injunction sought under Rule 17 is subject to immediate review. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise."

70. The following is the Commentary on the Rules:

"C-17.1 The term "injunction" refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Rule 17.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. Availability of other provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law.

"C-17.2 Rule 17.1.1 authorizes the court to issue an injunction without notice to the person against whom it is directed where doing so is justified by urgent necessity. "Urgent necessity," required as a basis for an *ex parte* injunction, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of "balance of equities." Considerations of fairness include the strength of the merits of the applicant's claim, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an *ex parte* injunction. In common-law procedure such an order is usually referred to as a "temporary restraining order."

"The question for the court, in considering an application for an *ex parte* injunction, is whether the applicant has made a reasonable and specific demonstration that such an order is required to prevent an irreparable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until the opposing party has opportunity to be heard. The burden is on the party requesting an *ex parte* injunction to justify its issuance. However, opportunity for the opposing party or person to whom the injunction is addressed to be heard should be afforded at the earliest practicable time.

"C-17.3 Rules of procedure or ethics generally require that a party requesting an *ex parte* injunction make full disclosure to the court of all aspects of the situation, including those favorable to the opposing party. Failure to make such disclosure is ground to vacate an injunction and may be a basis of liability for damages against the requesting party.

"C-17.4 As indicated in Rule 17.1.2, if the court had declined to issue an injunction *ex parte*, it may nevertheless issue an injunction upon a hearing. If the court previously issued an injunction *ex parte*, it may renew or modify its order in light of the matters developed at the hearing. The burden is on the plaintiff to show that the injunction is justified.

"C-17.5 Rule 17.1.4 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction.

The particulars of such indemnification should be determined by reference to the general law of the forum.

"C-17.6 Rule 17.2 permits the court to restrain transferring property located outside the forum State and to require disclosure of the party's assets. In the law of the United Kingdom this is referred to as a Mareva injunction. The Brussels Convention requires recognition of such an injunction by signatories to that Convention because an injunction is a judgment. This subsection also authorizes an injunction requiring disclosure of the identity and location of persons to facilitate enforcement of an eventual judgment.

"C-17.7 Rule 34.2 provides for the review of an order granting or denying a preliminary injunction, according to the procedure of the forum. Review by a second-instance arbitral tribunal is regulated in different ways in various systems so that only a general principle providing for an immediate review is stated here. The guarantee of a review is particularly necessary when the injunction has been issued *ex parte*. However, it should also be recognized that such a review may entail a loss of time or procedural abuse.

"C-17.8 Rule 17.3 deals with a preliminary injunction that concerns property or assets located in another country. In transnational litigation property or assets may need to be "blocked" or "disclosed" in a country different from the one of the court having jurisdiction of the case. A further problem concerns the enforcement of such an injunction. Whether the injunction should be recognized depends on the rules and principles of the law of the country where the property or assets are located.

"C-34.3 Rule 34.2 permits *pendente lite* interlocutory appellate review of orders granting or denying an injunction. See Rule 17. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise. The court may determine that an injunction should expire or be terminated if circumstances warranted**.**"

C. Hague Conference on Private International Law: draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

71. The interim text prepared by the Permanent Bureau and the Co-reporters on the basis of the discussion in Commission II of the first part of the Diplomatic Conference (6 – 20 June 2001) contains a number of alternative provisions addressing provisional and protective measures, although it has not yet been resolved whether these measures should be included within the scope of the Convention.[29]

Article 13 Provisional and protective measures

[Alternative A

1. A court seised[30] and having jurisdiction under Articles […] to determine the merits of the case has jurisdiction to order provisional and protective[31] measures.

2. A court of a Contracting State [may] [has jurisdiction to],[32] even where it does not have jurisdiction to determine the merits of a claim, order a provisional and protective measure in respect of property in that State or the enforcement of which is limited to the territory of that State, to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party in a Contracting State which has jurisdiction to determine that claim under Articles […][33]

3. Nothing in this Convention shall prevent a court in a Contracting State from ordering a provisional and protective measure for the purpose of protecting on an interim basis a claim on the merits which is pending or to *[sic]* brought by the requesting party in another State.[34]

4. In paragraph 3[35] a reference to a provisional and protective measure means

a) a measure to maintain the status quo pending determination of the issues at trial; or

b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or

c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

[Alternative B[36]

A court which is or is about to be seised of a claim and which has jurisdiction under Articles [3 to 15] to determine the merits thereof may order provisional and protective measures, intended to preserve the subject-matter of the claim.]

[*Article 23A Recognition and enforcement of provisional and protective measures*[37]

[Alternative A

1. A decision ordering a provisional and protective measure, which has been taken by a court seised[38] with the claim on the merits, shall be recognised and enforced in Contracting States in accordance with Articles [25, 27-34].
2. In this article a reference to a provisional or protective measure means –

a) a measure to maintain the status quo pending determination of the issues at trial; or
b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or
c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

[Alternative B

Orders for provisional and protective measures issued in accordance with Article 13[39] shall be recognised and enforced in the other Contracting States in accordance with Articles [25, 27-34].]]

III. Possible provisions

72. The material discussed above suggests that, with respect to interim measures in support of arbitration issued by both courts and arbitral tribunals, there are a number of issues that the Working Group may wish to address.

73. Those issues are: whether there is the power to order interim measures and if so, the scope and extent of that power; the relationship between the court and the arbitral tribunal once the arbitral tribunal has been constituted and their respective powers to issue interim measures (including before the arbitral tribunal is constituted); the pre-conditions for issue of such measures; and the conditions that may attach to the interim measures issued; the type and scope of measures that may be issued; and whether the measures can be enforced in a foreign jurisdiction. In respect of court ordered measures there is an additional issue of whether the power to order interim measures extends to both domestic and foreign arbitration.

A. Arbitral-tribunal ordered interim measures

74. At its thirty-fourth session in 2001, the Working Group discussed the question of interim measures of protection issued by an arbitral tribunal on the basis of draft provisions prepared by the Secretariat. The considerations of the Working Group are reflected in paras. 65-76 of A/CN.9/487. The revised draft provisions presented below have been prepared on the basis of the considerations in the Working Group elaborating on article 17 of the UNCITRAL Model Law on International Commercial Arbitration.

Draft article 17

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary [in respect of the subject-matter of the dispute].

(2) The party requesting the interim measure should furnish proof that:

(a) there is an urgent need for the measure applied for;
(b) a significant degree of harm will result if the interim measure is not ordered; and
(c) there is a likelihood of the applicant for the measure succeeding on the merits of the underlying case.

(3) The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(4) An interim measure or protection is any temporary measure [, whether it is established in the form of an arbitral award or in another form,] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. For the purposes of this article reference to an interim measure includes:[40]

Variant 1

(a) a measure to maintain the status quo pending determination of the questions at issue;

(b) a measure providing a preliminary means of securing assets out of which an award may be satisfied; or

(c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.[41]

Variant 2

(a) a measure to avoid or minimize prejudice, loss or damage; or

(b) a measure to facilitate later enforcement of an award.

(5) The arbitral tribunal may, where it is necessary to ensure that an interim measure is effective, grant a measure [for a period not exceeding […] days] [without notice to the party against whom the measure is directed] [before the party against whom the measure is directed has had an opportunity to respond] only where:

(a) it is necessary to ensure that the measure is effective;

(b) the applicant for the measure provides appropriate security in connection with the measure;

(c) the applicant for the measure can demonstrate the urgent necessity of the measure; and

(d) [the measure would be supported by a preponderance of considerations of fairness[42]].

[(6) The party to whom the measure under paragraph (5) is directed shall be given notice of the measure and an opportunity to be heard at the earliest practicable time.]

(7) A measure granted under paragraph (5) may be extended or modified after the party to whom it is directed has been given notice and an opportunity to respond.

[(8) An interim measure of protection may be modified or terminated [on the request of a party] if the circumstances referred to in paragraph (2) have changed after the issuance of the measure.]

[(9) The party who requested the issuance of an interim measure of protection shall, from the time of the request onwards, inform the court promptly of any substantial change of circumstances referred to in paragraph (2).]

B. Court-ordered interim measures

75. As noted above, there is some uncertainty as to the power of courts to issue interim measures in cases where there is a valid arbitration agreement. While article 9 of the UNCITRAL Model Law provides that is not incompatible with an arbitration agreement for a party to request interim measures of protection and for a court to grant it, the Model Law does not positively resolve the question of whether the court has the power to issue interim measures. In some jurisdictions, therefore, adoption of article 9 may not be sufficient to establish that the court has express power to issue interim measures in support of arbitration.

76. The Working Group may wish to consider whether a provision clarifying that issue of the court's power should be formulated. If such a provision were to be considered, the Working Group may also wish to consider three related questions (which the Working Group discussed at its thirty-fourth session (New York, 21 May-1 June 2001) (see A/CN.9/487, paras. 64-68) in the context of arbitral tribunal ordered interim measures):

(a) the scope of the power and whether it should be limited in any way such as by reference to the "subject matter of the dispute" or some other formulation (as included in article 17 of the UNCITRAL Model Law) and whether such measures may be ordered *ex parte*;

(b) pre-conditions for the issue of interim measures and whether they should be included in the provision, such as requirements that: appropriate security be provided by a party (see article 17 of the UNCITRAL Model Law); it be demonstrated that the measure is required urgently; or it be demonstrated that a significant degree of harm will result if the measure is not ordered (common examples of these conditions are set forth in para. 37 above); and

(c) the types of measures that the court may order in support of arbitration, and whether they should be specifically enumerated in the provision in order to provide assistance to courts and achieve a degree of consistency and clarity or whether they should be included by reference to broader categories of measures. These references could be included in the provision as purely illustrative (and not exhaustive) of the types of measures the court may issue or they could be discussed in an explanatory guide to the provisions.

77. In view of the Working Group's discussion in respect of the arbitral tribunal-ordered interim measures of protection, and the degree of similarity of the issues discussed in respect of court-ordered measures, the Working Group may wish to consider whether provisions along the lines of those presented above in respect of arbitral tribunal ordered measures may be appropriate for application to court-ordered measures, with appropriate reference to the court and taking into account the following suggested changes.

78. In article 17, paragraph (1) of the draft provision, the references to agreement by the parties could be deleted as it would be inappropriate to an application for court-ordered interim measures. The provision would be intended to apply to requests for the issue of interim measures in support of both domestic and foreign arbitral proceedings.

79. Provisions relating to the types of measures and the conditions for their issuance already exist in national laws (at least in respect of parties to litigation). In line with the discussion referred to above in respect of arbitral tribunal-ordered interim measures, the Working Group may wish to consider whether to establish a set of harmonized provisions

on the types of measures and the conditions that will be applicable to their issue by courts in support of arbitral proceedings or whether, alternatively, to apply the existing provisions with respect to litigation to interim measures in support of arbitration. A harmonized provision establishing the types of measures that can be issued might refer to general categories of measures along the lines as presented above in article 17, paragraph (4) of the draft provision. An alternative approach reflecting the provisions existing with respect to litigation might be:

> **(4) 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 court.[43]**

80. At its last session, the Working Group discussed the possibility of an arbitral tribunal ordering interim measures on an *ex parte* basis, noting with some concern the different positions with respect to enforcement between *ex parte* measures ordered by a court and by an arbitral tribunal (see A/CN.9/487, para. 70). As noted in para. 30 above, many jurisdictions allow courts to issue interim measures in support of arbitration on an *ex parte* basis on certain conditions. These include provision of security for damages and demonstration of the requisite urgency.

81. The Working Group may wish to consider whether the question of the court's power to issue interim measures on an *ex parte* basis should be addressed in uniform provisions and if so, whether the conditions discussed in respect of their issue by arbitral tribunals should serve as a model. If a provision along the lines of that discussed in paragraph 79 above were to be adopted, the question of the *ex parte* issue of interim measures would follow the position with respect to litigation. To promote the adoption of a more uniform position, the Working Group may wish to consider a provision along the lines of that presented above as article 17, paragraphs (5) and (6) of the draft provision.

C. Relationship between courts and arbitral tribunals

82. As discussed above, a number of different approaches are evident in respect to the power to issue interim measures and how this is divided between the court and the arbitral tribunal. To ensure effective availability of interim measures to parties who have agreed to arbitrate, it is desirable that they have access to both the arbitral tribunal and to the court. As noted above in paragraph 75, that goal is only partially achieved by article 9 of the Model Law that an application to the courts for interim measures is neither inconsistent with, nor constitutes a waiver of, an agreement to arbitrate. The Working Group may wish to consider whether this issue requires further consideration.

D. Enforcement of interim measures

83. At its thirty-fourth session in 2001, the Working Group discussed the question of enforcement of interim measures of protection issued by an arbitral tribunal under article 17 on the basis of draft provisions prepared by the Secretariat. The considerations of the Working Group are reflected in paras. 76-87 of A/CN.9/487, although for lack of time, the Working Group did not complete its consideration of the enforcement provision. The revised draft provisions presented below have been prepared on the basis of those parts of the provision considered in the Working Group.

Enforcement of interim measures of protection

(1) Upon an application by an interested party, made with the approval of the arbitral tribunal, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if: *

(a) The party against whom the measure is invoked furnishes proof that:

(i) *[Variant 1]* **The arbitration agreement referred to in article 7 is not valid** *[Variant 2]* **The arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the arbitral tribunal in accordance with article 16 of this Law];**

(ii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iii) The party against whom the interim measure is invoked was unable to present its case with respect to the interim measure [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal.

(b) The court finds that:

(i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

(ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

(2) Upon application by an interested party, made with the approval of the arbitral tribunal, the competent court may, in its discretion, refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if the party against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application.

(3) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.

(4) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.

(5) Paragraph (1)(a)(iii) does not apply
[Variant 1] **to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.**
[Variant 2] **to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.**
[Variant 3] **if the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17(2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the measure is invoked.**

*** The conditions set forth in this article are intended to limit the number of circumstances in which the court must refuse to enforce interim measures. 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 must be refused.**

84. The Working Group may also wish to consider the question of enforcement of interim measures issued by a court in support of arbitration, particularly as the issue arises solely in respect of enforcement of measures issued by a court in a foreign jurisdiction. There is currently no multilateral international regime dealing with the enforcement of court orders, although the Hague Conference on Private International Law, as discussed above, is currently working on a convention that may extend to provisional measures. In the absence of such a regime (and given the difficulty of achieving agreement on a multilateral regime that would extend to provisional measures), the Working Group may wish to consider alternative approaches. These may include, for example, a regime of coordination and cooperation between courts, inspired by article 26 of the UNCITRAL Model Law on Cross-Border Insolvency and by ILA Principles 18-20. As noted at para. 61 above, in the absence of an obligation to recognize orders made in other States or to cooperate with courts and arbitral tribunals in other jurisdictions, encouraging cooperation in the making of local complementary orders may lead to tangible results, both in recognition and judicial assistance. This may be applicable particularly in cases where the enforcement of an interim measure is sought in a number of jurisdictions, such as the freezing of assets. It could cover the sharing of information between courts, coordinating among jurisdictions the effect given to foreign interim measures and coordinating and cooperating on the issue of appropriate local remedies.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.
[2] Ibid., paras. 340-343.
[3] Ibid., paras. 344-350.
[4] Ibid., paras. 371-373.
[5] Ibid., paras. 374 and 375.
[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.
[7] The phrase "constitution of the arbitral tribunal" has several different possible meanings, including the moment the arbitrators are chosen by the parties; the date of appointment of the tribunal; the date the tribunal has its first meeting, either with or without parties or their representatives present.
[8] *E-Systems, Inc. v. Islamic Republic of Iran* 2 Iran-U.S. Cl. Trib. Rep. 51, 57 (1983).
[9] Where the UNCITRAL Model Law on International Commercial Arbitration has been adopted, however, it is clear that a request to a court for interim relief is not incompatible with the existence of a valid arbitration agreement: art. 9.
[10] UNCITRAL Arbitration Rules article 26; ICC Rules, article 23(2); AAA Commercial Arbitration Rules, Rule 36; LCIA Rules article 25.
[11] One national law provides that the power to issue interim measures is limited to the period after the award has been made and filed with the court, the purpose being to ensure that the award can be enforced.
[12] The concept of irreparable harm generally contemplates that the harm that would result would be such that remedies at law–that is, damages–could not be adequate compensation.
[13] ICC Rules, Article 23(1); LCIA Rules, Article 25.1(a).
[14] UNCITRAL Rules, Article 26(1); AAA Rules, Article 23(1).
[15] The UNCITRAL Rules provide: the "tribunal shall be entitled to require security for the costs of such measures."(art. 26(2); under the LCIA Rules the arbitral tribunal may order a party to provide "security for legal or other costs" and "upon such terms as the Arbitral Tribunal considers appropriate". Some national laws that expressly empower arbitral tribunals to issue interim measures also include express power to require appropriate security either by payment of a specific amount (in Guatemala, 10% of the amount being claimed) or the provision of a bond, guarantee or other security.
[16] Under some laws certain measures can only be granted where the assets in respect of which the order is sought belong to non-resident debtors.
[17] E.g. in one country legislation provides that the powers conferred on the court with regard to interim relief are exercisable even if the seat of the arbitration is outside the country or no seat has been designated or determined. Nevertheless, the court may still refuse to grant interim relief if in the opinion of the court the fact that the seat of the arbitration is outside the country makes it inappropriate to do so. Because the law has only recently been enacted it is not entirely clear how the courts will exercise this discretion. It seems likely that, if the courts at the place where the arbitration has its seat are themselves competent to order interim measures, then the home court may regard the seat-of-arbitration courts as the natural forum for the grant of such measures and will itself decline to grant relief.
[18] Austria, s387(2) Exekutionsordnung.
[19] Canada, *Ruhrkohle Handel Inter GmbH et al and Fednav Ltd. et al*, unreported judgement of the Federal Court of Canada, Trial Division T-212-91 supports the view that an arrest may be maintained in a foreign arbitration matter provided full disclosure of the arbitration agreement is made and that court proceedings are subsequently stayed.
[20] German courts do not differentiate between foreign and national arbitral proceedings as long as the Civil Procedure Code provides for a State court's jurisdiction to grant interim relief. In Greece, as long as the conditions of the Greek Code of Civil Procedure with regard to interim relief are satisfied, the Greek court will grant interim relief in support of a foreign arbitration.
[21] Courts in India have interpreted the 1996 Arbitration and Conciliation Act to mean that a court may only order interim relief in support of a domestic arbitration. In China it would seem that it

is not possible to apply for interim relief if the seat of arbitration is not in China.

[22]E.g. In the USA there is no provision in State statutes or the Federal Arbitration Act allowing interim remedies by the courts when the parties have agreed to arbitration, except in the case of maritime arbitration: 9 USC §8. However US courts have often derived their authority to provide interim relief from State law. See: *David L. Threlkeld & Co. v. Metallgesellchaft Ltd*, 923 F.2d 245, 253 No. 2 (2d Cir.1991) *Borden Inc. v. Meiji Milk Products Co. Ltd.*, 919 F. 2d 822 (2d Cir. 1990).

[23] The International Law Association (ILA), Report of the sixty-seventh Conference held at Helsinki from 12-17 August 1996-Committee on International Civil and Commercial Litigation, Second interim report on provisional and protective measures in international litigation, published by the ILA, London 1996.

[24] The principle of independence of the jurisdiction to grant provisional and protective measures is in line with Article 24 of the 1968 Brussels Convention (and Lugano Convention) on Jurisdiction and Enforcement of Judgements.

[25] The ILA Report, page 186.

[26] The ILA Report, page 201.

[27] E.g. in Sweden, section 6, chapter 15 of the Procedural Code provides security is essential for the granting of an interim measure. The security can be in the form of a personal letter or guarantee or a pledge, or a bank guarantee. The applicant can be exonerated from this demand only by showing extraordinary grounds for the claim: Execution Code ch 2, s 25.

[28] E.g. *Credit Suisse Fides Trust v. Cuoghi* [1998] Queen's Bench Division 818 (UK).

[29]Article 1.2(k) provides that the Convention does not apply to:

(k) Alternative A
[provisional and protective measures other than interim payment orders;]
Alternative B
[provisional or protective measures [other than those mentioned in Articles 13 and 23A];]

[30] It has been suggested that it would be sufficient if a court is seised after a provisional and protective measure is made. This would require the addition of the words 'or about to be seised' or similar.

[31] The description 'provisional and protective' is intended to be cumulative, that is to say, the measures must meet with both criteria.

[32] A form of words has also been suggested that would make it clear that Contracting States are obliged to provide this jurisdiction, although it was also stressed that this would not interfere with the discretion of the courts of such States either to make or to refuse to make such orders.

[33]It was noted that some States, especially those in the Commonwealth other than the United Kingdom, did not provide for jurisdiction to make provisional and protective orders unless the court was seised of jurisdiction to determine the merits of the case. This could operate to the detriment of foreign plaintiffs who sought to 'freeze' assets within the jurisdiction in aid of litigation pending elsewhere. The provision is intended to provide such States with jurisdiction to make such orders based on the existence of property in the forum and limited to the territory of the forum. There was no consensus on this provision.

[34] This provision is intended to overcome any restrictions imposed on the exercise of jurisdiction by the courts of Contracting States by the list of prohibited jurisdictions (at present found in Article 18). The provision would also allow the exercise of jurisdiction to make provisional and protective orders under national law without the restrictions imposed by the list of prohibited jurisdictions. It is proposed to remove the reference to Article 13 in Article 17 in order to allow the exercise of such jurisdiction under national law. Some delegations took the view that this paragraph was the only provision on provisional and protective measures that should be included in the Convention.

[35] It has been proposed that this definition should apply also to paragraphs 1 and 2.

[36] This proposal is linked with the second alternative in Article 1(2)(k) which in itself contains the options either to exclude provisional or protective measures entirely from the scope of the Convention or to permit a limited jurisdiction to make such orders. Alternative B provides for such a limited jurisdiction, if so desired.

[37] The two alternatives which do not appear to differ much in substance, provide for the

recognition and enforcement of provisional and protective orders made by a court that is seised (or about to be seised) of the substantive dispute. Such a provision is opposed naturally by those delegations that favour exclusion of such measures from the scope of the Convention. But several delegations that favoured the inclusion of a provision relating to such measures in the jurisdictional or procedural part of the Convention, opposed making provision for the recognition and enforcement of provisional and protective orders. Note also that there may be a need to address: the extent to which similar relief is known in the State of the court addressed; and, procedures to safeguard the interests of third parties or of the defendant (e.g. an undertaking to pay damages).

[38] It was suggested that it would be sufficient if a court is seised after a provisional and protective measure is made as long as it is already seised by the time of recognition and enforcement of the provisional and protective measure is sought abroad.

[39] This refers back to the proposal made as Alternative B in Article 13, above. The order must have been made by a court that is seised or about to be seised of a claim and that has jurisdiction to determine the merits thereof.

[40] This provision could be accompanied by an explanation providing more detail on the measures that might fit within these broad categories, along the lines set forth in paras. 12 and 13 or a more general formulation along the lines of para. 35 above.

[41] Article 23A Alternative A, Hague Conference on Private International Law: draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, interim text, June 2001

[42] ALI/Unidroit Rules of Transnational Civil Procedure, April 2001, Rule 17.1.1.

[43] see section 47, Commercial Arbitration Act, Queensland, Australia.