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**United Nations Commission
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Draft report of the Working Group on Arbitration on the work of its fortieth session

Addendum

IV. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

General remarks

1. Having completed a review of draft article 17 bis, the Working Group turned its attention to the newly revised draft of article 17 of the Model Law regarding the power of an arbitral tribunal to grant interim measures of protection contained in A/CN.9/WG.II/WP.128 in the following terms:

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

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

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

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;

“(c) Provide a [preliminary] means of [securing] [preserving] assets out of which a subsequent award may be satisfied; or

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- “(d) Preserve evidence that may be relevant and material to the resolution of the dispute.
- “(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:
- “(a) [Irreparable harm] is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- “(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- “(4) The arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.
- “(5) The requesting party shall inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.
- “(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection [it has granted], at any time, upon application of any party or, in exceptional circumstances, on the tribunal’s own initiative, upon prior notice to the parties.
- “[(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [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]. The arbitral tribunal may order an immediate award of damages.]
- “(7) “(a) [Unless otherwise agreed by the parties] [If expressly agreed by the parties], the arbitral tribunal may [in exceptional circumstances,] grant an interim measure of protection, without notice to the party against whom the measure is directed, [when] [if the requesting party shows that]:
- “(i) There is an urgent need for the measure;
- “(ii) [The conditions set out in paragraph (3) are met]; and
- “(iii) The requesting party [shows] [satisfies the arbitral tribunal] 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 be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [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]. The arbitral tribunal may order an immediate award of damages;

“(c) The arbitral tribunal shall require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection;

“(d) *Variant 1:* The arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to subparagraph (b) [and (c)] above, [at any time during the arbitration proceedings];

Variant 2: A party may, at any time during the arbitration proceedings, bring a claim under subparagraph (b);

“(e) *Variant A:* The party against whom the interim measure of protection is directed shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal at the earliest possible time and in any event no later than [forty-eight] hours after that notice, or on such other date and time as is appropriate in the circumstances;

Variant B: Any party affected by the interim measure of protection granted under this paragraph shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal within [forty-eight] hours of the notice, or on such other date and time as is appropriate in the circumstances.

“(f) Any interim measure of protection ordered under this paragraph shall expire after twenty days from the date on which the arbitral tribunal orders the measure, unless that measure has been confirmed, extended or modified by the arbitral tribunal [, upon application by the requesting party and] after the party against whom the measure is directed has been given notice and an opportunity to present its case. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party;

“(g) A party requesting an interim measure of protection under this paragraph shall [inform the arbitral tribunal of] [place before the arbitral tribunal information relating to] 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] [whether the arbitral tribunal should grant the measure].”

Paragraph (1)

2. The Working Group found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

Chapeau “whether in the form of an award or in another form”

3. It was suggested that the phrase “whether in the form of an award or in another form” should be deleted. It was stated that, in many legal systems, an interim measure would never take the form of an award and was most likely to be issued in the form of a procedural order. It was also stated that the reference to an award as the only expressed example of the form such a measure could take could create the

false impression that an award was the most legitimate form for an interim measure. It was said that the inclusion of the term “award” in the definition of interim measure would be inappropriate to those jurisdictions whose legislation defined an award as a decision of the arbitral tribunal on the substance of the dispute. In addition, it was suggested that the deletion of the phrase from subparagraph (2)(b) would not take away from the effectiveness of the provision. A proposal was made to delete the phrase and replace it with more neutral words, such as “irrespective of the name and form of that measure”.

4. A contrary view was that the phrase should be maintained to acknowledge the fact that in some legal systems, in order to be recognized and enforced, an interim measure was required to be issued in the form of an award. As well, it was said that the phrase had been understood as being broad enough to encompass any interim measure, regardless of the title given to it. In support of retention of the phrase, it was said that the wording used to refer to the form of interim measures originated from the UNCITRAL Arbitration Rules, that the language was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued.

5. The Working Group recalled that these words had been the subject of discussion at its thirty-fifth session in 2002 (see A/CN.9/508, paras. 65-68) and thirty-sixth session in 2003 (see A/CN.9/523, para. 36) and that they had generally been accepted. After discussion, the Working Group decided not to modify the chapeau of paragraph (2). In the context of that discussion, it was suggested that any explanatory material to be prepared at a later stage, possibly in the form of a guide to enactment of draft article 17, should make it clear that the wording adopted regarding the form in which an interim measure might be issued should not be misinterpreted as taking a stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention.

Subparagraph (c)

[preliminary]

6. The Working Group agreed to delete the word “preliminary” on the basis that it was confusing and added nothing to the meaning of the provision.

[securing] [preserving]

7. The Working Group expressed its preference for the retention of the word “preserving” rather than “securing” because the latter term could be interpreted as a particular method for protecting assets. It was agreed to delete the word “securing” from the text and retain the word “preserving”.

Anti-suit injunctions

8. A question was raised whether paragraph (2) of article 17, as presently drafted, could be interpreted as encompassing a power on an arbitral tribunal to order an anti-suit injunction (i.e., an interim measure by which an arbitral tribunal would order a party not to initiate court proceedings or separate arbitral proceedings). In view of the fact that article 17(2) contained a generic exhaustive list of provisional measures (see A/CN.9/545, para. 21), it was suggested that the Working Group

should clarify whether it was its intention that this list should encompass the ordering of such an anti-suit injunction.

9. As a matter of general policy, reservations were expressed against article 17 directly or indirectly allowing the use of anti-suit injunctions. It was said that these types of injunctions were rather uncommon in international legal practice, unknown or not familiar to many legal systems, and, under some national laws, would be regarded as contradicting the fundamental constitutional right of a party to apply for court action. It was also stated that there might be a danger in proposing a specific provision to cover anti-suit injunctions and in descending into too much detail in this provision. Notwithstanding the express aim of the Working Group to promote harmonization in international arbitration law, there was a risk inherent in endorsing a juridical practice that was not yet settled. It was said that inclusion of such a provision might jeopardize the chances of it being implemented, or indeed jeopardize the overall acceptability of the Model Law, particularly in those countries that did not recognise anti-suit injunctions. From a different perspective, it was pointed out that, while the issue of anti-suit injunctions might be of growing importance in the practice of international arbitration, it deserved careful study, including possible consideration for the preparation of a discrete set of rules by UNCITRAL, but that it should not be dealt with in an indirect and incomplete manner in the context of a provision dealing with interim measures of protection, which might not do justice to the issue and lead to the mistaken conclusion that anti-suit injunctions were merely a subset of interim measures as defined in draft article 17.

10. In favour of dealing with anti-suit injunctions under draft article 17, it was stated that these injunctions were becoming more common and served an important purpose in international trade. It was suggested that the fact that such injunctions were not yet familiar to some legal systems spoke in favour of covering such injunctions in the Model Law, with a view to promoting the modernization and harmonization of legal practices. It was stated that, notwithstanding that, in a number of countries, the law did not recognize these injunctions, there was evidence that arbitral tribunals sitting in such countries were increasingly considering such injunctions. It was also stated that anti-suit injunctions were designed to protect the arbitral process and that it was legitimate for arbitral tribunals to seek to protect their own process. It was pointed out that the issuance of an anti-suit injunction was not to be understood as preventing a party from making an application to the court of the seat of the arbitration seeking a decision as to whether there was a valid arbitration agreement. It was also pointed out that, to the extent there existed concerns about the overall acceptability of anti-suit injunctions, other provisions of the Model Law might offer adequate safeguards, for example in the nature of grounds for refusal of recognition and enforcement, notably through the reference to the law governing the powers conferred upon the court in draft article 17 bis (2)(b)(i), or the reference to public policy in draft article 17 bis (2)(b)(ii).

11. It was stated that, at previous sessions, the Working Group had expressed a degree of preference for not disallowing anti-suit injunctions in draft article 17. It was suggested that, even if no express words were included in paragraph (2)(b) regarding the power to issue anti-suit injunctions, there would nevertheless be implicit support for the existence of such a power, particularly where the

UNCITRAL Arbitration Rules applied. It was said that paragraph (2)(a) of draft article 17 was flexible and open-ended and was probably broad enough to encompass anti-suit injunctions. It was said that that interpretation had been strengthened by the fact that the requirement that the interim measure be connected to the subject matter of the dispute (as contained in the original version of article 17 of the Model Law) had been deleted from draft article 17 at a previous session. It was noted that the requirement that interim measures should be linked to the subject matter of the dispute also appeared in article 26 of the UNCITRAL Arbitration Rules and had been understood in some jurisdictions as limiting the availability of anti-suit injunctions. However, some delegations recalled that the linking of interim measures to the "subject matter of the dispute" had nevertheless permitted the ordering of anti-suit injunctions by arbitral tribunals under the UNCITRAL Arbitration Rules.

12. For the sake of clarity, it was suggested that paragraph (2) should expressly confer a power on arbitral tribunals to issue anti-suit injunctions. A number of proposals were made regarding the manner in which anti-suit injunctions should be expressly covered in draft article 17. One proposal was to insert a provision expressly allowing an arbitral tribunal to issue such an injunction, together with an explanatory note stating that that provision would only apply to the extent that such injunctions were permissible under the procedural laws of the country concerned. However, it was said that a drawback of that proposal was that, for countries that did not adopt the express provision, paragraph (2) could be understood as forbidding the issuance of anti-suit injunctions.

13. Another proposal was to address the issue of anti-suit injunctions by adding to paragraph (2)(b) of draft article 17, words along the lines of "or would seriously aggravate the dispute between the parties". It was stated that that formulation was recognized in certain jurisdictions and had been used in a number of international arbitrations including arbitrations undertaken pursuant to the UNCITRAL Arbitration Rules.

14. Yet another proposal was that the words "or prejudice the arbitral process itself" could be added to the end of paragraph (2)(b) of article 17. It was stated that that proposal would clarify and put beyond doubt the understanding expressed by a number of delegations that the phrase "take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm", in paragraph (2)(b), already covered anti-suit injunctions.

15. The view was expressed that the debate on the question of coverage of anti-suit injunctions had proceeded largely on the basis that such injunctions would prevent a party from bringing an action before a court. However, in some cases, these injunctions had been used to prevent a party from bringing an action before another arbitral tribunal. It was suggested that the draft text should encompass both situations.

16. After discussion, the Working Group agreed to amend subparagraph (2)(b) as follows: "Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process itself". However, noting that the Working Group had not fully considered the implications of the proposed wording, it was agreed that this proposal should be retained in square brackets for further consideration at a future session.