



## Arbitration Newsletter Switzerland

# Amendment of Art. 17 ("Interim Measures and Preliminary Orders") of the Uncitral Model Law on International Commercial Arbitration

On its forty-fourth session held in New York on January 23-27, 2006, the Working Group II finalized its work on the amendment of the Uncitral Rules as to interim measures. It agreed to a new Chapter IV *bis* which proposes now under the heading "Interim measures and preliminary orders" eleven new articles (Art. 17 *bis* - Art. 17 *undecies*). This amendment will still have to be formally approved by the UN Commission (scheduled for June of this year). The above amendments are the result of long discussions within the Working Group II (e.g. report of the Working Group II on its forty-third session on October 3-7, 2005, A/CN. 9/589, N 49-55).

Most of the relevant arbitration rules convey to an arbitral tribunal the authority to issue interim measures (e.g. Art. 23 ICC, Art. 26 Swiss Rules, Art. 25 LCIA). In this respect the proposed amendments to Art. 17 do not add new elements but do simply clarify the frame-work within which interim measures can be issued by the arbitral tribunal. The controversial issue in Working Group II was, however, whether an arbitral tribunal should be entitled to grant preliminary orders on *ex parte* basis. In Switzerland it seems to be established that an arbitral tribunal has authority to do so, though no precedents are available. But there are also valuable arguments at hand against granting an arbitral tribunal such authority (Van Houtte, Ten Reasons against a Proposal for *ex parte* Interim Measures of Protection in Arbitration, *Arbitration International*, 2004, pp. 85 *et seq.*). The wording for preliminary orders on *ex parte* basis as agreed now by the Working Group II is the result of a compromise which seems to have been proposed by the Swiss delegate Prof. Gerhard Walter with the support of ASA. The wording can be found under

[www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html)

and is also attached to this posting as PDF file. The finalized version to be submitted to the Commission, together with the arguments exchanged in the last session of the Working Group II, shall be made available on the website of UNCITRAL in the first half of March 2006.

These new provisions in Chapter IV *bis* (Interim Measures and Preliminary Orders) of the Uncitral Rules can be briefly summarized as follows:

Art. 17 (1) repeats first what has already been stated in the Art. 17 as presently in force, namely that the arbitral tribunal "may, at the request of a party, grant interim measures." A new Section 2 of this article then defines interim measures as follows

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

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

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Art. 17 *bis* defines the conditions under which interim measures can be granted and requires for interim



measures under Art. 17 (2)(a), (b) and (c) the generally accepted standards, namely harm not adequately reparable by an award of damages whereby 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 a reasonable possibility that the requesting party will succeed on the merits of the claim.

In so far interim measures are ordered just to preserve evidence that may be relevant and material to the resolution of the dispute in the sense of Art. 17 (2)(d) the above two prerequisites shall be applied only to the extent the arbitral tribunal deems appropriate.

Art. 17 *ter* and *quater* are the most relevant provisions of the proposed amendments since they describe the grounds based on which an arbitral tribunal may grant preliminary orders without notice to any other party. It can do so if it considers that "prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure." In doing so, the conditions as defined above in Art. 17 *bis* have to be met and the harm to be assessed under Art. 17 *bis* (1)(a) "is the harm likely to result from the order's being granted or not." According to Art. 17 *quater* such preliminary order has to be notified immediately to all parties and the party against whom a preliminary order has been directed shall have the opportunity to presents its case "at the earliest practicable time." In any case, a preliminary order expires after 20 days from the date on which it was issued by the arbitral tribunal. Finally, such preliminary order is binding on the parties, but "shall not be subject to enforcement by the court and does not constitute an award."

Section 3, covering Art. 17 *quinquies-octies* establishes joint provisions, applicable to interim measures and preliminary orders. Such measures and orders may be modified, suspended or terminated upon request of a party, or in exceptional circumstances, on the initiative of the arbitral tribunal. A party requesting such measures /orders can be required to provide appropriate security and shall be liable for any costs and damages caused by the measure or the order. The party requesting is also under the duty to promptly disclose any material change in the circumstances on the basis of which the measure/order was requested or granted.

Section 4, Art. 17 *novies-decies*, covers the terms under which interim measures are recognised and enforced. Interim measures (but not preliminary orders, cf. Art. 17 *quater* [5]) are enforced upon application by the competent court, irrespective of the country in which the interim measures were issued. Grounds for refusing recognition or enforcement of interim measures are listed in Art. 17 *decies*, which make reference, amongst other, to certain provisions of Art. 36 of the existing Uncitral Rules.

Whilst it will still take time until the terms of the amended Uncitral Rules as to interim measures and preliminary orders are formally implemented, such amendment may already as per today serve as guideline to arbitral tribunals dealing with this issue.

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