

Guideline 1 to the UNCITRAL Model Law and Rules: Guidelines for arbitrators on how to approach an application for provisional or interim relief

1. Introduction

1.1 When the UNCITRAL Model Law was updated in 2006, one of the key reasons was to take into account the increasing prevalence of interim orders being made by arbitrators. At least as regards interim measures, the new Article 17 of the Model Law and Article 26 of the UNCITRAL Rules are identical. However, the new Model Law provisions on preliminary orders (ex parte orders in cases of emergencies) have not been reproduced. This probably makes no difference in practice since the UNCITRAL Model Law approach is widely accepted in other countries or at least there appears to be no prohibition of it. On interim measures, the Model Law has become more detailed than the 1985 version. However, the substance has not altered in any significant way.

1.2 The new Article 17(1) (as with the old Article 17) of the Model Law and Article 26(1) of the Rules lay down the general rule that unless the parties otherwise agree, the tribunal can grant interim measures at the request of one of them. For non-Model Law countries where the parties have to agree to the application of interim measures, such as England, agreement to arbitrate under the UNCITRAL Rules (as with the ICC and LCIA rules) without any modification will constitute the necessary consent to give the arbitrator all the powers in Article 26 described below.

1.3 Article 21 of the ICDR Rules of the American Arbitration Association gives the arbitrator a broad discretion to take whatever interim measures it deems necessary, including injunctive relief. These measures can take the form of an interim award or just a decision. The tribunal can require security for costs for these types of measures and apportion costs associated with applications in either an interim or final award.

2. Interim Measures

2.1 Interim measures are defined by Article 17(2) of the Model Law and Article 26(2) of the Rules as any temporary measure which prior to the issuance of the final award the tribunal orders 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.

Applications for provisional relief are essentially of two types:

1. for monetary compensation; and
2. for any other type of provisional relief.

Included within 2 are orders freezing one party's assets.

2.2 Article 17A of the Model Law and Article 26(3) of the Rules require for an order under (a) to (c) that

- 1) harm is likely to result that cannot be adequately reparable by a damages award if no order is made and that this outweighs the harm likely to result to the respondent if the order is granted; and
- 2) there is a reasonable possibility that the applicant will succeed on the merits of the relevant claim.

For applications under (d), the tribunal is given a discretion as to whether to apply these factors by Article 17A(2) and Article 26(4) respectively.

3. Preliminary Orders

3.1 Article 17B introduces the idea of preliminary orders which are requested alongside interim measures essentially directing the respondent not to frustrate the purpose of the interim measure. Under Article 17B(2), the arbitrator can grant one of these orders if prior disclosure of the request to the respondent risks frustrating the purpose of the measure.

The requirement to balance the harm caused to each side by granting or not granting the order applies here as well.

3.2 The 2012 version of the ICC rules introduces a similar “Emergency Arbitrator” procedure where the arbitration agreement was entered into after 1st January 2012 and the parties have not excluded it or agreed to another pre-arbitral procedure of a similar type. This allows a party needing an interim measure to apply to the ICC Secretariat for the appointment of an emergency arbitrator. His or her orders will not bind the arbitral tribunal although the parties agree to be bound by such orders.

4. Preliminary Orders and Interim Measures

4.1 Once an order has been made, the tribunal must, under Article 17C give notice to all parties of the request for the interim measure, the application for the preliminary order and any communication between any party and the tribunal on the subject. The arbitrator must then hear any application to modify or set aside the order at the earliest practicable time. A preliminary order expires after twenty days although the arbitrator can issue an interim measure adopting or modifying the order once the respondent has had an opportunity to apply to have it lifted. Preliminary orders bind the parties but cannot be enforced through the courts.

4.2 The arbitrator can modify, suspend or terminate an interim measure or preliminary order typically on an application from a party although it can do so on its own initiative having given notice to all sides: Article 17D of the Model Law and Article 26(5) of the Rules.

4.3 The arbitrator can insist on appropriate security being granted by the application for interim measures and must do so with respect to a preliminary order unless he or she considers it inappropriate or unnecessary: Article 17E of the Model Law and Article 26(6) of the Rules.

4.4 Under Article 17F, an applicant for a preliminary order must disclose to the tribunal all relevant circumstances and report any changes to it until the respondent has had an opportunity to present its case. More generally, the tribunal may require any party to give prompt disclosure of any material change in the circumstances which formed the basis for the request or granting of any interim measure or preliminary order.

4.5 If the arbitrator subsequently decides that the measure or preliminary order should not have been granted, he or she may award any costs or damages caused and do so at any point in the proceedings: Article 17G.

4.6 An important feature of the new Article 17H is the way in which courts will be required to enforce an interim measure regardless of whether it was issued by an arbitrator sitting in that jurisdiction. This does not apply to preliminary orders.

5. Interim or Provisional Relief – guidelines on applying the Model Law and Rules generally

5.1 A provisional or interim order does not finally determine the rights of either party. Arbitrators are only empowered to order on a provisional basis any relief which they would have power to grant in a final award. Such orders are appropriate where one of the parties to the reference requires immediate assistance or where the circumstances of the case demand that the arbitrators take action in order to protect or preserve the interests of one of the parties or the subject matter of the proceedings. An order by way of provisional relief can be amended subsequently should the arbitrators deem it necessary.

5.2 In international arbitrations, where recourse to a court may be required to enforce such an order, the applicant party may seek the relief in the form of a partial award rather than a provisional order although this is not an alternative for a preliminary order: Article 17C(5) of the Model Law and Article 26(8) of the UNCITRAL Rules. The advantage of a partial award is that it may be enforceable under the local law, the law of a foreign country or the New York Convention. A partial award granting such relief will only be appropriate where there is certainty that the claimant (including a counter-claimant) applicant will recover an equivalent sum of money, or that the property concerned will have to be dealt with in a particular way.

5.3 It is for the arbitrators to decide, for any particular application, in the light of such representations as the parties may make, whether to grant the relief at all. If it is to be granted they must decide whether this should be done by way of a reasoned or unreasoned order or a reasoned award. If the relief sought will be a final determination of the party's rights on any issue, thereby disposing of that issue completely, the arbitrators must issue an award in accordance with Article 34 of the Model Law.

5.4. The arbitrators must ascertain whether they have been given the power by the parties to make an order for provisional relief. Both UNCITRAL Model and Rules assume that they have unless the parties have otherwise indicated.

5.5 Such applications should only be granted if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial commonsense.

5.6 By granting provisional relief an injustice could be caused to the other party. Accordingly arbitrators should exercise their discretion with due care and diligence. Although an order made on a provisional basis will, in theory, be reversible and be the subject of compensation at a later stage, arbitrators should keep in mind that by the time a final award is made may have insufficient assets to honour the part of the award reversing the original order and, further, that a provisional order could compel a party affected by it to abandon the arbitration, thereby resulting in injustice.

5.7 The usual Article 18 of the Model Law duties of arbitrators apply to applications for provisional relief. Accordingly, arbitrators should give both parties a fair opportunity to put their cases on whether the matter is suitable for provisional relief and whether the actual relief sought is appropriate.

6. Matters to consider when deciding whether to make an order granting provisional monetary compensation

6.1 When deciding to order a respondent to make an interim payment (or other form of provisional monetary compensation) arbitrators should bear in mind (a) that the purpose of Article 17(2)(a) of the Model Law and Article 26(2)(b) of the Rules is to mitigate the hardship or prejudice which may be occasioned during the interval between the commencement of the arbitration and its ultimate conclusion but (b) that an interim payment order will not be truly "provisional" if the party who obtained the order is subsequently unsuccessful in the arbitration and is then unable to repay the sum covered by the interim order or cannot be forced to do so in enforcement proceedings.

6.2 Arbitrators should therefore consider the following:

(a) Is there sufficient hardship or prejudice to justify making an order for provisional monetary compensation?

(b) If so, how can the rights of the respondent best be protected?

6.3 In some cases it may be possible to preserve the rights of the respondent by requiring the applicant to furnish a bank or other third party guarantee securing that the provisional amount is repaid if it, or part of it, ultimately proves not to be payable.

6.4 In all cases, and particularly where no security is ordered, arbitrators should be satisfied, before making an order for provisional monetary compensation, that if the matter goes to a final award, the claimant or counter-claimant concerned will at least probably obtain damages against the respondent or some other relevant monetary relief: Article 17A(1)(b) of the Model Law and Article 26(3)(b) of the UNCITRAL Rules. They should also be satisfied that an order for provisional monetary compensation is for no more than the minimum sum that the claimant or counter-claimant applicant is likely to recover in the arbitration. The arbitrators may have to weigh the strength of the applicant's case alongside the likely hardship to each party of making or not making the order. The tribunal should be careful not to make orders against parties who may have valid objections to his jurisdiction unless persuaded that they are clearly not valid.

7 Matters to consider when deciding whether to make an order granting any other type of provisional relief

7.1 Arbitrators should be certain that the circumstances of the case and the grounds supporting the granting of provisional relief outweigh the grounds favouring denial of the relief: Article 17A(1)(a) Model Law and Article 26(3)(b) UNCITRAL Rules.

7.2 Arbitrators should always consider whether the provisional relief is unnecessary on the basis that damages at the end of the case will be a sufficient remedy if the applicant is found to be in the right and whether an undertaking to pay damages, from the party seeking the provisional relief to compensate for any damage done in the event of it proving unjustified (usually referred to as a "cross-undertaking"), is adequate to balance out the prejudicial effects on the respondent of any proposed order.

7.3 Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the order causes the arbitration to be abandoned: Article 17(2)(b) of the Model Law and Article 26(2)(b) of the Rules. In this respect the financial hardship endured by both parties will have to be considered.

8 The effect of an order on the proceedings

8.1 An interim order under the section is subject to the tribunal's final adjudication. The tribunal's final award, on the merits or as to costs, must take into account any such order. The arbitrator must proceed to decide all the points in the case, only adjusting the final award(s) to take into account the effect of the earlier orders where appropriate. A provisional conclusion by the arbitral tribunal does not bind it.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

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