



Guideline 2 to the UNCITRAL Model Law and Rules: Guidelines for Arbitrators on how to approach an application for interim measures of protection

1. Introduction, the different versions of the Model Law and the UNCITRAL and ICC Rules

1.1 Article 17 of the original UNCITRAL Model Law stated:

“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. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

1.2 Equally, the old Article 26 read:

“At the request of either party, the arbitral tribunal may take 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 the sale of perishable goods.

Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.”

1.3 This has been expanded by the new Article 17 and Article 26 of the UNCITRAL Rules. The relevant part of Article 17 reads:

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

(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.

1.4 Article 26 of the UNCITRAL Rules is identical to Article 17 of the 2006 version of the Model Law except for the absence of any reference to the agreement of the parties in subparagraph (1). Assuming that the parties have not reached a contrary agreement, the arbitrator's powers are extensive, covering all forms of property, including vessels and even shares.

1.5 Article 28(1) of the ICC rules (2012 version) operates in a very similar way to the 2006 version of the UNCITRAL Model Law:

"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate. "

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 and measures for the protection or conservation of property". 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.

1.6 The revision of Article 17 in the 2006 changes to the Model Law introduced a preliminary order procedure which allows for an ex parte application in the case of the emergency. Article 17B describes a preliminary order as one 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.

1.7 The 2012 version of the ICC rules introduced an “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.

1.8 It should be remembered that interim measures of protection ordered by the arbitral tribunal may be unenforceable against third parties, and may be buttressed by insufficient sanctions even as against a party. In such circumstances a concerned party would do better to make an application to a competent court under Article 17J in the seat of arbitration or the location of the asset or individuals in question.

2. Dealing with an application

2.1 The burden of proving the need for a direction rests upon the applicant, but the standard may vary depending on the consequences such a direction may have upon the other party to the proceedings. Such directions should only be issued if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial common sense.

2.2 The usual Article 18 duties of arbitrators apply to the giving of directions under Article 17. Accordingly, arbitrators should give both parties a fair opportunity to put their cases as to whether it would be appropriate for the direction to be issued.

2.3 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. However, the tribunal is likely to take a similar approach.

2.4 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.

2.5 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.

2.6 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.

2.7 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.

2.8 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.

2.9 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.

3. Matters to consider when deciding whether to give directions in relation to the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert, or a party

3.1 A distinction needs to be drawn between directions relating to the inspection and photographing of property, and an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party. An application for the detention of the property can potentially cause the other party a greater degree of harm than an application for the inspection or photography of the property.

3.2 By granting a direction for the preservation, custody or detention of property the arbitrators should take particular care to ensure that an injustice is not caused. Although a direction is reversible, the arbitrators should be aware that in some circumstances such a direction could compel the party affected to abandon the arbitration. The preservation or detention of property may have seriously adverse consequences for a party that needs to sell or use the property concerned. The arbitrator may prefer to order inspection, observation, samples or experiments instead. The tribunal may decline to make an order in view of the hardship likely to be caused and the lack of alternatives.

4. Matters to consider regarding an application for directions relating to the inspection and photographing of property

4.1 Arbitrators should only order the inspection and photography of the property if they are satisfied that it is relevant and necessary to the case and the results are likely to provide significant evidence relating to a substantial point in issue in the case.

4.2. Arbitrators should not allow an applicant to use this process to delay or increase the costs of the arbitral proceedings or impose an unreasonable burden on the other party. This is particularly relevant where there are limited sums at stake or where the cost of complying with the order may be significant.

5. Matters to consider regarding an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party

5.1. There should usually be clear evidence that the party against whom the direction is sought is likely, unless restrained by the direction, to dispose of or otherwise deal with the property in dispute in such a manner as to deprive the applicant of the ability to present the case properly or the benefit of any award obtained. Arbitrators should be persuaded that the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief.

5.2. Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the direction causes the arbitration to be abandoned. In this respect, the likely financial hardship to be caused to both parties will have to be considered.

5.3. Arbitrators could consider whether a cross-undertaking to pay damages, from the party seeking the direction, is appropriate to protect the interest of the other party.

5.4. No direction should normally be made for delivery of a party's tools of trade or stock-in-trade, so as to prevent him carrying on his lawful business.

6. Matters to consider when deciding whether to give directions ordering that samples taken from any observation be made of, or experiment conducted upon, the property

6.1 Since a direction ordering that samples be taken, or observations be made of, or experiments be conducted upon the property is not likely in most cases to cause the other party a great degree of harm, the arbitrators need only to consider the same principles that are applicable to an application for directions relating to the inspection and photographing of property. These two principles have been set out above.

6.2 Nevertheless, the tribunal should be aware of the time that sampling and experiments can take, the possibility that damage may be caused, and the consequent risks to the parties' general interests of making orders of this type.

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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