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Two New Initiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Procedures by L.E. Foster and N. Elsberg

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Two New Initiatives for Provisional Remedies in International Arbitration:

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and
Article 37 of the AAA/ICDR International Dispute Resolution Procedures

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At its thirty-ninth session, which ended on July 7, 2006, the United Nations Commission on International Trade Law (“UNCITRAL”) amended Article 17 of the Model Law on International Commercial Arbitration (the “Model Law”) by extensively revising its provisions on interim measures of protection.¹ Earlier this year, in May, the American Arbitration Association’s International Commercial Dispute Resolution Center (“ICDR”) amended its International Arbitration Rules (the “ICDR Rules”) on provisional relief to include, as Article 37, “Emergency Measures of Protection.”² Both initiatives are part of a trend which recognizes that the effectiveness of international arbitration often depends on the availability of provisional measures to maintain the *status quo* or to preserve assets pending resolution by an arbitral panel.³ Both initiatives reflect state-of-the-art thinking on provisional remedies in arbitration. There are however important differences between the two, which reflect divergent approaches taken by leading practitioners and policy-makers. This note discusses and compares the new provisions of the Model Law and the ICDR Rules and explains what these new initiatives add to the arbitration practitioner’s arsenal.

¹ *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session.* U.N. GAOR, 61st Sess., No.17 U.N. Doc. A/61/17 (2006) (hereinafter “UNCITRAL Report”). A copy of amended Article 17 is attached hereto as Appendix A.

² American Arbitration Association, *International Dispute Resolution Procedures* (Including Mediation and Arbitration Rules) Amended and Effective 1 May, 2006, available at <http://www.adr.org/sp.asp?id=28144>. A copy of Article 37 is attached hereto as Appendix B.

³ For example, in 2005, New York State amended its Civil Practice Law and Rules Section 7502(c) to permit attachments and preliminary injunctions in connection with international arbitrations.

At the outset, it is important to understand that the Model Law is a legislative text proposed by UNCITRAL as a template for lawmakers to consider enacting as part of their domestic legislation. To date, legislation based on the Model Law has been adopted by over 50 nations as well as several states in the United States.⁴ The ICDR Rules, on the other hand, do not purport to be a model for domestic law, but are instead a series of rules promulgated by a major arbitral institution, which parties may adopt by contract.⁵ Article 37 of the ICDR Rules is available for use in all arbitrations conducted by the ICDR or AAA under clauses or agreements signed after May 1, 2006. Both Article 17 of the Model Law and Article 37 of the ICDR Rules, however, are contemporaneous attempts to *automatically* extend the power of *arbitrators* (rather than the courts) to order interim measures unless the parties expressly opt out and agree otherwise.⁶

Emergency Relief Prior to Appointment of the Full Arbitral Panel

Prior to their amendment, the ICDR Rules permitted an arbitral tribunal, once formed, to grant interim relief, making “whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”⁷ New Article 37 provides a

⁴ The Model Law is extremely important as it reflects a broad worldwide consensus. On a practical level however, Article 17 of the Model Law will only be relevant to arbitrations in Model Law jurisdictions, and will not apply until domestic legislation patterned on the Model Law is amended to incorporate the principles of Article 17. Jurisdictions with legislation based on the UNCITRAL Model Law can be found at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

⁵ Article 37 of the ICDR Rules did not labor under the lengthy negotiating process required for consensus by the UNCITRAL Working Group and is therefore understandably simpler and does not bear the hallmark, as the Model Law does, of negotiated compromise.

⁶ Although the Model Law contains a provision addressing Court-ordered interim measures, its purpose is only “to preserve the power of courts to issue interim measures” and not to expand the powers of the court. UNCITRAL Report at ¶139. Indeed, the UNCITRAL Report suggests that States might wish to place this section in another part of the enacting legislation rather than in Article 17 which is principally intended to deal with interim measures granted by arbitral tribunals. *Id.* at ¶143.

⁷ ICDR Article 21.

procedure, automatically available to all parties for clauses or agreements entered into after May 1, 2006, to obtain emergency interim relief prior to the appointment of a full arbitration panel.⁸

Under Article 37, a “party in need of emergency relief prior to the constitution of the tribunal” shall notify the case administrator and the other parties in writing of the nature of the relief sought and the reasons why it is required on an emergency basis.⁹ Within one business day of receipt, the case administrator will appoint a single emergency arbitrator from a special panel of emergency arbitrators “designated to rule on emergency applications.”¹⁰ A prospective emergency arbitrator is required to disclose to the administrator any circumstances likely to give rise to justifiable doubts to his or her “impartiality or independence.”¹¹ In order to keep things moving along swiftly, the parties have one business day from notification of the appointment of an emergency arbitrator to challenge the appointment. Next, the emergency arbitrator is required within two days of appointment to set a schedule to consider the application for emergency relief. The emergency arbitrator shall have the power to order or award any “necessary” interim or conservancy measure.¹² When the formal arbitral panel is constituted, the emergency arbitrator’s powers under Article 37 end. (An emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.) The tribunal may “reconsider, modify or vacate” any emergency relief granted by the emergency arbitrator.¹³

⁸ The ICDR rules previously included Optional Rules for Emergency Measures of Protection.

⁹ ICDR Article 37(2).

¹⁰ ICDR Article 37(3).

¹¹ *Id.*

¹² ICDR Article 37(5). The emergency arbitrator is also empowered with the same authority vested in a tribunal under ICDR Article 15, including the authority to rule on his or her own jurisdiction.

¹³ ICDR Article 37(6).

In contrast, Article 17 of the Model Law contains no procedure to seek interim relief prior to appointment of the panel, addressing only the powers of the arbitral tribunal itself to provide interim or conservatory measures. Rather, the Model Law leaves the availability of pre-arbitral emergency relief to local courts.¹⁴

Ex Parte Relief

Article 37 of the ICDR Rules does not allow for *ex-parte* interim relief of any kind. As noted above, a party seeking emergency relief is required to notify “all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis.” The notification to the administrator seeking emergency relief must also include “a statement certifying that all other parties have been notified” or an explanation of the steps taken in good faith to notify them.¹⁵ Furthermore, the schedule for consideration of the emergency relief application must “provide a reasonable opportunity to all parties to be heard.”¹⁶

Article 17 of the Model Law, on the other hand, provides that a party may, “*without notice* to any other party, make a request for an interim measure together with an application for a *preliminary order* directing a party not to frustrate the purpose of the interim measure requested.”¹⁷

(emphasis added). The arbitral panel may provide *ex parte* relief in the form of a preliminary order “provided it considers that prior disclosure of the request for the interim measure to the

¹⁴ ICDR Article 37 is unusual in providing for provisional remedies before the formation of an arbitral panel. The only other major arbitral institution to provide for such pre-tribunal relief is the International Chamber of Commerce (“ICC”) whose rules have provided since 1990 for a “Pre-Arbitral Referee Procedure.” The ICC procedure, unlike Article 37 of ICDR Rules, must be explicitly incorporated by the parties into their agreement. The ICC rules are available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>.

¹⁵ ICDR Article 37(2).

¹⁶ ICDR Article 37(4).

¹⁷ Model Law Article 17B(1).

party against whom it is directed risks frustrating the purpose of the measure.”¹⁸ However, immediately after the panel has made a determination with respect to the application, the panel is required to give notice to all parties and is required to give an opportunity to a party against whom a preliminary order is directed to “present its case at the earliest practicable time.”¹⁹ The preliminary order automatically expires after 20 days, unless it is adopted or modified as part of an interim measure, after the party against whom it is directed has had an opportunity to be heard.

The provision for *ex parte* interim remedies in Article 17 was the most controversial aspect of the amendments to the Model Law. Numerous concerns were expressed, including that *ex parte* proceedings were not compatible with the consensual nature of arbitration, that the tribunal would have to prematurely consider the merits of the case having only the views of one party, that court intervention would be necessary for enforcement, and that the limited grounds for review of arbitral decisions afforded insufficient protection. The compromise arrived at was that a “preliminary order shall be binding on the parties but shall not be subject to enforcement by a court.”²⁰ The Model Law expressly states that such a preliminary order does not constitute an “award.” Therefore, it is not enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the “New York Convention.” Indeed, the UNCITRAL Report openly acknowledges that the “non-enforceability of preliminary orders was central to the compromise reached.”²¹

¹⁸ Model Law Article 17B(2).

¹⁹ Model Law Article 17C(2).

²⁰ Model Law Article 17C(5).

²¹ UNCITRAL Report, U.N. Doc. A/61/17 (2006) at ¶114.

Although the UNCITRAL Report notes that “parties usually honor interim measures out of respect for the arbitrators’ authority and a desire not to antagonize them,”²² parties seeking this relief may instead (given its lack of enforceability) decide to skip an application for *ex parte* preliminary relief from the panel and apply directly to courts in jurisdictions where *ex parte* judicial remedies are available. Furthermore, it is often necessary to obtain interim relief directed against a third party not party to the arbitral proceeding. In such instances, the party seeking the relief may have no choice but to make its application to the courts.

Conditions for Granting Interim Measures and the Nature of the Relief

Article 17A of the Model Law sets forth a heavy burden for a party requesting an interim measure. A requesting party “shall satisfy” the tribunal that harm “not adequately reparable by an award of damages is likely” if the relief is not granted and that such harm substantially outweighs the harm to the party against whom the measure is directed. Further, there must be a “reasonable possibility that the requesting party will succeed on the merits of the claim.”²³ This standard was a significant amendment to the Model Law. Article 17, prior to its amendment, empowered the tribunal to order whatever interim measures it considered “necessary.” The amendment was considered appropriate to bring the Model Law into line with the existing standards in many judicial systems.²⁴

²² *Id.* at 20.

²³ With regard to the preservation of evidence, the requirements are more lax, and the panel may apply these standards “only to the extent the arbitral tribunal considers appropriate.”

²⁴ UNCITRAL Report at ¶99. This burden is similar to the standard for a obtaining a preliminary injunction under U.S. Federal law. See e.g. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108 (2d Cir. 2006): “To obtain a preliminary injunction, plaintiff must show irreparable harm absent injunctive relief, and either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in plaintiff’s favor.”

The amendment to the Model Law now specifically provides a list of functions for which interim measures are appropriate: (a) to maintain or restore the status quo; (b) to take action that would prevent, or refrain from taking action likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) preserve assets out of which an award may be satisfied; or (4) preserve evidence that may be relevant and material. Although many delegates had serious reservations about whether the arbitrators should be empowered to grant anti-suit injunctions, the UNCITRAL Report notes that the words “or prejudice to the arbitral process itself” are broad enough to cover anti-suit injunctions.²⁵

By comparison, Article 37(5) of the ICDR Rules, like Article 17 prior to amendment, gives broad discretion to the emergency arbitrator to order “any” measures “deem[ed] necessary.” Similarly, Article 21 of the ICDR Rules, authorizes relief from the full arbitral panel (once constituted), to “take whatever interim measures it seems necessary.”

An emergency arbitrator under Article 37 of the ICDR Rules is empowered, but not required, to condition the award or order of emergency relief on provision by the “party seeking relief of appropriate security.”²⁶ The Model Law likewise provides that the tribunal “may” require a party requesting an interim measure “to provide appropriate security in connection with the measure”²⁷ Reflecting the heightened burden concerning an *ex parte* preliminary order, the

²⁵ UNCITRAL Report at ¶¶ 92-95.

²⁶ ICDR Article 37(7).

²⁷ Model Law Article 17E.

tribunal “shall” require the requesting party to provide security unless it considers it inappropriate or unnecessary to do so.²⁸

Recognition and Enforcement

The Model Law expressly provides that “interim measures” are enforceable “upon application to the competent court, irrespective of the country in which it was issued,” unless otherwise provided by the arbitral tribunal.²⁹ The court may, if it considers it proper, order the requesting party to provide adequate security where the panel has not already made a determination on security, or where such provision is necessary to protect the right of third parties. Article 17 I sets forth limited circumstances under which a court may refuse to enforce an interim measure which cross-reference Article 36 of the Model Law on grounds for refusing recognition or enforcement.³⁰ A court where recognition or enforcement of an interim measure is sought may not review “the substance of an interim measure.”³¹

The ICDR Rules, which are not legislation and address only the role of arbitrators and not the courts, are understandably silent on enforcement of an emergency measure of protection as well as interim measures of protection. However, Article 37(5) provides that the emergency measure “may take the form of an interim award or of an order.” Similarly, Article 21 provides that the

²⁸ *Id.*

²⁹ Model Law Article 17H.

³⁰ In addition to the grounds set forth in Model Law Article 36, a court may refuse to enforce an interim measure if the tribunal’s decision with respect to security has not been complied with, the interim measure has been terminated or suspended by the tribunal or an appropriate court, or the measure is incompatible with the powers of the court.

³¹ Model Law Article 17I(2).

interim measures “may take the form of an interim award.” Generally, under the New York Convention, an arbitral “award” is enforceable in court.³²

Costs and Damages

Article 17G of the Model Law on costs and damages provides a safeguard to parties who may be wrongly enjoined or otherwise subject to an interim measure which is subsequently found by the tribunal not to have been warranted. A party requesting an interim measure or preliminary order “shall be liable for any costs and damages caused by the measure or the order” if the tribunal determines at a later stage that “in the circumstances, the measure or order should not have been granted.”³³ The tribunal may award such costs and damages at any point during the proceedings. By contrast, Article 17 of the ICDR Rules makes no provision for damages for a wrongful interim measure, focusing instead on the more ministerial “costs associated with applications for emergency relief” which may be apportioned by the emergency arbitrator, subject to the power of the tribunal to determine final apportionment.³⁴

Judicial Remedies

Both the Model Law and the ICDR Rules permit court-ordered interim measures. Article 17 of the Model Law contains a provision which preserves the power of courts to issue interim measures. Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request interim measures from a Court. ICDR Article 37(8) is to the

³² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

³³ Model Law Article 17G.

³⁴ ICDR Article 17(9). ICDR Article 21 similarly provides that under Interim Measures of Protection, a tribunal may, at its discretion apportion costs associated with applications for interim relief in an interim award or in any final award.

same effect, stating that a request to a judicial authority shall not be deemed incompatible with Article 37 “or with the agreement to arbitrate or a waiver of the right to arbitrate.”³⁵ The explicit provisions on the availability of judicial relief in both systems are a practical recognition that in some cases, effective interim relief may be unavailable from an arbitrator, such as where parties require measures directed at a party (or its assets) which is not a signatory to the arbitral agreement.

Conclusion

Both initiatives on interim relief in international arbitration were issued within a couple of months of each other and reflect the considered judgment of academics and practitioners in the field of international arbitration. Yet the Model Law and ICDR Rules diverge with respect to critical aspects pertaining to interim relief, including whether relief may be granted prior to the appointment of a panel, whether relief may be granted on an *ex parte* basis, the evidentiary showing to be made by the party seeking relief, conditions for provisional remedies and imposition of liability on the moving party in the event that unwarranted preliminary relief harms an adversary. The advantages and disadvantages of each remain to be seen as each initiative is put into practice.

³⁵ The same principle applies to interim measures by the constituted tribunal pursuant to ICDR Article 21.