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Best practices of international arbitration for Asia

Defining 'best practices of international arbitration': Perspectives from Australia Part 2

Dr Clyde Croft SC

Globalisation has made international commercial arbitration more popular as a means of dispute resolution. In the Asia-Pacific region and since the early 1990s the number of arbitration requests received by the region's largest arbitral institutions has trebled.

This article looks at best practice for international arbitration and in particular how it works in Australia. Part 1 discussed the legal regime in Australia (including a current review) in the international context. It began to look at 'Interim measures of protection'. Part 2 focuses on 'Ex parte applications for interim protection measures' before reaching a conclusion about international arbitration in Australia.

Interim protection measures

Ex parte applications for interim protection measures

There is significant debate in the international arbitration community on whether arbitral tribunals ought to have jurisdiction to grant interim measures of protection on the basis of ex parte hearing, that is a hearing in the absence of all parties, particularly the parties expected to oppose the application.

The arguments in favour of a power to grant ex parte interim measures focus on the imperative of maintaining the status quo with respect to assets and other matters so that arbitration proceeding are not rendered nugatory as a result of assets being disposed of or placed outside the reach of the tribunal or court or courts enforcing a tribunal's award. It is also said that arbitral tribunals are in a position to deal with ex parte applications for interim measures more expeditiously than courts and are likely to be more familiar with a dispute, depending on the stage at which application is made.

Opponents argue that conferring powers of this nature on tribunals undermines the consensual basis of arbitration processes and may lead to real or imagined concerns in relation to natural justice and procedural fairness, because in the ex parte application one party only (or one side of the dispute only) is communicating with the tribunal 'privately'. Opponents concede that a transcript or detailed notes of ex parte proceedings can and should be supplied to opposing parties subsequently but observe that they will not necessarily convey the nuances or all things said in an ex parte proceeding. Consequently an absent party may feel concerned that comments or submissions made at the hearing could have been rebutted by explanation but have been left unchallenged, possibly 'poisoning' the minds of the tribunal. Although generalisations are risky it seems that European civil law jurisdictions have less difficulty with ex parte applications for interim measures than those from common law countries.

Some jurisdictions seem to favour granting interim measures ex parte, Swiss law being an example. It is noted that,[73]

> Swiss authors have … favoured the arbitral tribunal's competence to issue ex parte interim measures. They maintain that ex parte applications to the tribunal and the taking of interim measures by the tribunal without hearing the affected party should be allowed … if a request for interim measures is urgent and/or if the communication of the request to the other party is likely to prejudice the effectiveness of the measure. [However] … the tribunal would be under an obligation to reassess its decision (shortly after the ex parte order is issued), giving both parties the opportunity to plead their case … This position corresponds to the solution provided for by most Swiss civil procedure rules. However, there seems to be no authoritative confirmation that, under Swiss law, an arbitral tribunal may actually order ex parte interim measures, following the described procedure.

Opponents of ex parte applications to tribunals for interim relief have also argued that such a power is unnecessary because parties can already make application to courts for interim measures on an ex parte basis. For reasons already alluded to it is said that allowing such applications to be heard could adversely affect perceptions of fairness and even-handedness of tribunals, and also of equal bargaining power between parties, contrary to the fundamental, underlying, 'consensual nature' of arbitration.

Arbitration's consensual nature generally dictates that both parties must agree on the manner in which the arbitration will be conducted and where it will be held. By conducting proceedings in the absence of one party, or one side, who will not hear or be able to respond to arguments with respect to interim relief it is said that the principle is offended. Nevertheless it should be kept in mind that arbitrations are usually conducted according to arbitration rules which all parties have agreed to apply. Consequently the rules may be said to be a manifestation of the consensual basis of arbitration — a consensus which may, in turn, limit parties' rights in accordance with agreed rules.

One opponent of allowing tribunals to grant interim measures ex parte has identified 10 reasons why applications should not be entertained on this basis.[74]

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UNCITRAL developments

The UNCITRAL Working Group II (Arbitration) '… has devoted a considerable amount of time and effort to the issue of arbitral ordered interim measures and court enforcement of those measures.'[73] In 2000 some delegates made the point that it was important for parties to be able to apply to courts for interim measures before tribunals were established. Consequently the Working Group decided to address the uncertainty over whether and in what circumstances a court could order this type of measure.

As a result of growing problems and criticisms of Art 17 of the Model Law (in its original 1985 form) the Working Group began preparing a new article. One of the most controversial provisions relating to the article has been the proposal to empower arbitral tribunals to hear applications for interim measures ex parte. Swiss author Christian Oetiker noted:[76]

> Within the UNCITRAL Working Group on Arbitration, the Secretary-General of the ICC International Court of Arbitration has submitted an intermediary proposal supported by some authors and deserves profound consideration. Instead of granting arbitral tribunals the power to issue interim measures on an ex parte basis enforceable by state courts, the proposition is to put the tribunal in a position to issue so called preliminary measures if it believes that it must act upon an inter partes application for interim measures before the other side has had a full opportunity to respond. This approach has the advantage that the preliminary interim measures are granted in the open, the other party being notified of the request.

At its 38th Commission session in 2005 UNCITRAL noted the progress of the 41st session of the Working Group in 2004 and also of the 42nd session in 2005 in preparing and discussing a draft text for revision of Art 17, para 7 of the Model Law on the power of tribunals to grant interim measures of protection on an ex parte basis, the discussion of a draft provision on recognition and enforcement of interim measures of protection issued by a tribunal, and discussion of a draft article dealing with interim measures issued by state courts in support of arbitration.

UNCITRAL also noted at its 38th session that there had been a wide divergence of views expressed at the 42nd session of the Working Group in 2006 but that a *compromise* had been reached with respect to the draft of the text of Art 17 para 7, which contained a number of elements[77] with respect to preliminary orders. The first was that draft art 17 para 7 would apply unless otherwise agreed by parties; secondly that it should be made clear that preliminary orders had the nature of procedural orders and not awards and that no enforcement procedure would be provided for such orders in art 17 bis; and, thirdly that the issue of ex parte measures of protection remained contentious. The position adopted by the Working Group at the 43rd session in 2005 was that a *compromise* was reached at the 42nd session in 2006 and that ex parte interim measures of protection were not to be enforceable. The alternative position, but not one taken to be the compromise, was that if ex parte interim measures were to be enforceable the relevant provisions should be drafted as opt-in rather than opt-out provisions, so that they would only apply where parties had expressly agreed to their application. Critics of the ex parte interim measure proposals at the Working Group sessions were of the view that they were contrary to the principle of equal access by parties to arbitral tribunals and might expose such a revised Model Law to criticism.

The position reached by the Working Group in Vienna in 2005 is set out in the *Report of the Working Group* (A/CN9/589). This work was completed at the 44th session in New York in 2006 (see the *Annotated Provisional Agenda* for New York (A/CN.9/WG.11/WP.140 and the *Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session, New York, 2006 ('2006 New York Report')*).[78]

A significant issue that remained to be discussed in New York was the general style and extent of the proposed new art 17. This arose from the fact that the proposed additions are very extensive, particularly in comparison with a relatively short and concise drafting style of other articles in the Model Law. Consequently it was decided in New York that the new provisions should be located in a new Chapter IV [A]. A more substantive issue was the manner in which a proposed new art 17 might express the position that interim measures of protection granted by arbitral tribunals are not 'enforceable'.

Although this reflects the so-called, New York *compromise*, the language and style of drafting used to express the position has implications in terms of perceptions. A provision which, in language and style, emphasised the unenforceability of interim measures of protection granted by arbitral tribunals might have the effect of discouraging

A provision which, in language and style, emphasised the unenforceability of interim measures of protection granted by arbitral tribunals might have the effect of discouraging the use of measures of this type and hence negate the effect of the proposed new provisions which are, nevertheless, intended to be 'binding' on parties to arbitration.

the use of measures of this type and hence negate the effect of the proposed new provisions which are, nevertheless, intended to be 'binding' on parties to arbitration.

In a similar vein, care needed to be taken in proposed changes to avoid confusion between interim measures of protection and interim orders by arbitral tribunals so that the binding and enforceable character of the latter was not compromised. Similarly, the relationship between the power of state courts to make interim orders and the power of arbitral tribunals to grant interim measures and make interim orders generally needed to be made clear. These matters were resolved in the final draft provisions in New York by seeking to distinguish clearly between interim measures (which reflect the approach of the present provisions of Art 17) and preliminary orders, which may be obtained ex parte. Consistently with the 'compromise', draft Art 17 [C] provides in paragraph (5) that: 'A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.'

Another issue in relation to the proposed Art 17[C](5) provisions of the Model Law is the possible effect of a provision that provides for unenforceability of preliminary orders granted by tribunals on the position of a party in relation to state courts. At least in common law jurisdictions there appears to be a risk that in the absence of specific provision in the proposed art 17 dealing with the issue, a state court may take the view that a party has, or must make, an election to seek a preliminary order from the arbitrator *or* the state court. The consequence of this view would be that if a preliminary order has been obtained from the arbitral tribunal no further similar relief would be available from a state court even though the tribunal order is not enforceable, particularly as revised draft Model Law Art 17C(5) provides that it is 'binding'. A similar issue may arise in the state court's mind on the basis of a *res judicata*.

As a result of these deliberations a new Chapter IVA — Interim Measures and Preliminary Orders was adopted by UNCITRAL and subsequently the UN General Assembly in 2006.[79] The new Chapter IVA is as follows:

Section 1 — Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(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.

Article 17A. Conditions of granting interim measure

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages 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 of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2 — Preliminary orders

Article 17B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, 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.

(2) The arbitral tribunal may grant a preliminary order provided 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.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a) is the harm likely to result from the order being granted or not.

Article 17C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim

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measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3 — Provisions applicable to interim measures and preliminary orders

Article 17D. Modification, suspension, termination

(1) The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 — Recognition and enforcement of interim measures

Article 17H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17I. Grounds for refusing recognition or enforcement[80]

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5 — Court-ordered interim measures

Article 17J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

The provisions of Article 1, paragraph (2) of the Model Law are also noted:

(2) The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

UNCITRAL Arbitration Rules

At the 50th Session of the UNCITRAL Working Group II (New York, 2009) extensive discussions continued in relation to the revision of the provisions of Art 26 of the Arbitration Rules and, particularly, whether they should be revised to clarify the circumstances, conditions and procedure for granting interim measures consistently with Chap IVA of the Model Law.[81] In any event, the proposed revised Art 26 was modelled on the new provisions on interim measures of protection contained in Chap IVA of the Model Law. Proposed Art 26 of the Arbitration Rules is in the following terms:[82]

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure 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.
3. The party requesting an interim measure under paragraph 2(a), (b) and (c) or a temporary order referred to under paragraph 5 shall satisfy the arbitral tribunal that:
   (a) Harm not adequately reparable by an award of damages 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 on the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
4. With regard to a request for an interim measure under paragraph 2(d), the requirements in paragraph 3(a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the requested measure. [15].
6. The arbitral tribunal may modify, suspend or terminate an interim measure or an order referred to in paragraph 5 it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.
8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.
9. The parties requesting an interim measure or applying for an order referred to in paragraph 5 may be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
10. A request for interim measures or an application for an order referred to in paragraph 5 addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. [16].

At the 50th Session of the UNCITRAL Working Group II ... extensive discussions continued in relation to the revision of the provisions of Art 26 ... and, particularly, whether they should be revised to clarify the circumstances, conditions and procedure for granting interim measures ...

The position reached at previous sessions of the Working Group is recorded in the Secretariat Note as follows:[83]

14. Paragraphs 1 to 4 and 6 to 9 are modelled on the provisions on

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interim measures contained in chapter IV A of the Model Law. The Working Group adopted in substance those paragraphs (A/CN.9/641, paras. 46-51), save for the addition of the reference to the 'order referred to in paragraph (5)', which has been inserted for the sake of consistency with the proposed new paragraph (5).

15. The Working Group noted that chapter IV A of the Model Law deals with preliminary orders and agreed to consider a draft paragraph expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure that has been requested and that may be ordered by the arbitral tribunal (A/CN.9/641, para. 60). It is recalled that the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders (A/CN.9/641, para. 59).
16. Paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules which the Working Group agreed to retain in the Rules (A/CN.9/641, para.52). A reference to 'an application for an order referred to in paragraph 5' is proposed to be added for the sake of consistency with paragraph (5).

See also the APRAG Report on the 47th session.[84]

In an attempt to shorten Art 26, the view having previously been expressed that the version in the Secretariat Note is out of proportion to the length of other Rules, a short version was proposed, in the following terms:[85]

Article 26 — proposed short version

1. The arbitral tribunal may, at the request of a party, grant interim measures that it considers necessary for a fair and efficient resolution of the dispute. Upon application of any party or, in exceptional circumstances, on its own initiative, it may also modify, suspend or terminate the measures granted.
2. Before ruling on a request for interim measures, the arbitral tribunal may order any other party not to frustrate the requested measure. Such preliminary orders may be made before the request has been communicated to any other party, provided the communication is made at the latest together with the preliminary order and such other party is afforded immediately an opportunity to be heard. [alternatively: delete article 15(3) which in any event is in conflict with the practice of those arbitral institutions and arbitral tribunals which require the parties to make their submissions to the institution or tribunal which then passes copies to the other parties.]
3. The arbitral tribunal may require the party requesting an interim measure or a preliminary order to provide appropriate security.
4. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or preliminary order was requested or granted.
5. The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order.
6. A request for interim measures of whatever kind addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

In the course of the initial discussion in relation to the proposed short version of Art 26 it was noted that the detailed provisions of Art 26 in relation to interim measures as set out in the Secretariat Note reflected the regime adopted with respect to interim measures and preliminary orders in Chap IVA of the Model Law as adopted by UNICTRAL and the 39th session in 2006. The intention of what might be termed the long form proposed Art 26 was to give guidance to arbitral tribunals as to the sort of interim measures they could grant.[86]

The comment was made that it might have been more logical to include these provisions in the Rules rather than the Model Law but that the Law provisions arose out of a need, or perceived need, to provide a regime for interim measures. The reasons behind the Model Law revisions in this respect remain and it was said that it is still a real problem in determining when interim measures might be granted and this issue was, it was suggested, addressed in the core provisions of paras (2) and (3) of the longer form proposed Art 26, which have been deleted in the proposed short version. It was suggested that arbitral tribunals would benefit from guidance in the Rules in relation to the scope of their powers to order interim measures, hence the desirability of provisions such as proposed paras (2) and (3) of the longer form version.

There was significant support for the view that the longer version of proposed Art 26 was desirable because it provides further guidance to tribunals. The further comment was made that were the provisions of the Rules in Art 26 to differ markedly from provisions of the Model Law in Chapter IVA there is a risk that the Rules provision would be interpreted differently from Model Law provisions, on the basis that differences in drafting must indicate different intended meaning. In support of the proposed short version it was suggested that there was no need for coincidence as between the Rules and Law because it did not necessarily follow that the Model Law would be the applicable law in any particular case, and to the extent to which that is mandatory it would apply in spite of any provisions in the Rules. Consequently it was said that there was no need for paras (2) and (3) as set out in the longer form version of Art 26, noting that the provisions were deleted from the proposed short version. It was also noted that these matters would be regulated by applicable law and developed in practice.

It was further suggested that specific Rules may constrain powers conferred by the applicable law as the Rules may not include powers otherwise available under that law. In this respect it was observed again that the applicable law may not necessarily be the revised

Model Law containing the Chapter IVA provisions with respect to interim measures and preliminary orders.[87]

The comment was also made that Art 26(2) in its longer form might possibly be restrictive by reference to the applicable law. Nevertheless, it was said that it is desirable to characterise the nature of interim measures which might be granted by a tribunal in the way proposed because in the debates with respect to Model Law modification there were not thought to be any interim measures outside these categories. Consequently it was suggested that the provisions of para (2) are unlikely to be restrictive in practice and are desirable for guidance.

Supporting and contrary views were expressed in this respect. In support it was suggested that the provisions of para (2) would create certainty in relation to what might be done by an arbitral tribunal by way of an interim measure as the position may otherwise vary significantly due to variations in applicable law. Although there was substantial support for the proposed short version of Art 26 it appeared that the support was based on different grounds and, consequently, it was thought better to follow the longer form text proposed in the Secretariat Note, and to address matters arising out of the short form version.

There was no objection to Art 26(1) as proposed in the Secretariat Note,[88] and broad support for keeping the definition of interim measures as set out in Art 26(2) as broad as possible. In order to ensure that para (2) was not interpreted restrictively the view was expressed that it would be desirable to redraft the introductory provisions to read that: 'an interim measure includes any temporary measure'.

The comment was made that this list of possible interim measures was made an exclusive list in the revised Model Law revisions[89] on the basis that courts might otherwise be reluctant to enforce interim measures and would be reassured if they knew that an order of the type granted fell within the enumerated list. Nevertheless, to ensure that the paragraph was not interpreted restrictively it was suggested that 'includes' should instead read 'includes without limitation'.

More generally it was said that the provisions of para (2) as proposed are practical and useful and will give guidance, noting that the guidelines in para (2) have been distilled from a wide variety of jurisdictions. Additionally, in order to ensure the flexibility of the para (2) provisions it was suggested that a further para (e) be added which would read: '(e) any other measure that the arbitral tribunal considers necessary for a fair and efficient resolution of the dispute'. The consensus was in favour of retaining Art 26(2) as set out in the Secretariat Note with the addition of 'includes without limitation' in the first sentence after the words 'an interim measure'.

In relation to para (3) of proposed Art 26 in the longer form, it was suggested that para (3) could be removed completely on the basis that the matter could be left to the applicable law. In opposition to this it was said that the main part of para (3) is para (a) and the main thrust of that provision is circumstance of current or imminent harm. In relation to para (b) the outcome of the Working Group discussion in relation to the Model Law was, in this respect, that it was most unlikely an arbitral tribunal would want to grant relief to a party that was not likely to succeed in arbitration on the merits.

Nevertheless, it was suggested that it is useful to give guidance to tribunals.[90] In the context of the para (3) discussion reference was made again to para (2), particularly para (b). More generally in relation to para (2) it was said that the whole point of retaining that paragraph would seem to be lost if the guiding principles contained in para (3) were removed. In relation to para (2)(b) it was said that there is some ambiguity as to whether these provisions are limited in their application to the arbitration process only. It was suggested that in order to avoid this confusion it would be helpful to recast para (2)(b) as follows:

> (b) take action that would prevent, or refrain from taking action that is likely to cause:
> (i) current or imminent harm; or
> (ii) prejudice to the arbitration process itself;

As a result of ongoing discussion the consensus position reached was that para (3) of the longer form of proposed Art 26 should remain as in the Secretariat Note. Further comment was made that the key provisions of para (3)(a) resolve an issue upon which arbitral laws generally say very little until the 2006 revisions to the Model Law in Chapter IVA.

Consequently, it was said that it would be helpful to state the position as set out in para (a) because that matter is not likely to be dealt with in the applicable law. Further, it was said that removal of this clearly drafted solution at this stage might suggest that the Working Group did not think the test was appropriate which, it was suggested, is not the case.

The further comment was made that if these provisions were not retained in the Rules there is a risk that the arbitral tribunal would apply the 'irreparable harm' test rather than the 'balance of inconvenience' test now provided for in the Model Law;[91] and which may not be inconsistent with any applicable law which does not provide a test. It was said that para (3) is really an addendum to power conferred in para (1) and as a qualifier to the empowering provisions is properly included in the Rules. It was suggested that it might be appropriate to include a 'reminder' in para (3) which notes the possibility that there may be another test or tests required under the applicable law.

Para 26(4) as set out in the longer form version of Article 26 of the Secretariat Note was adopted without change.[92]

It was noted that the para (5) provisions of the longer form proposed Art 26 in the Secretariat Note which provide for temporary orders ex parte do not mirror the provisions of Arts 17B and 17C of the 2006 Model Law which make provision for preliminary orders and conditions for granting them ex parte. In the debate the comment was made that it would be desirable to harmonise the terminology of the Rules and the revised Model Law and refer to a 'temporary order' in the Rules as a 'preliminary order, consistent with the revised Model Law provisions.

The preliminary orders provisions included in the new Chap IVA of the revised Model Law have, in many jurisdictions, been regarded as controversial on the basis that the power of an arbitral tribunal to grant orders ex parte is contrary to the generally accepted position in many jurisdictions, where the view is that orders of this nature can and ought to only be granted by courts. In this vein objection was raised to proposed para (5) on the basis that ex parte preliminary orders are contrary to the consensual nature of arbitration and the proper venue for ex parte applications of this kind is a court.

It was noted that only a court order of this kind is enforceable and that even under the revised Model Law provisions a preliminary order, though binding on the parties, is not subject to court enforcement.[93] It was also noted that only a few countries had adopted the Model Law modifications contained in the new Chap IVA, because they took the view that ex parte preliminary orders were matters exclusively for courts.[94]

On this basis it was also suggested that inclusion of provisions for ex parte measures would affect the universality of the UNICTRAL Rules because some countries would not agree to a bilateral investment treaty (BIT) which adopted rules such as the proposed Art 26(5) providing for ex parte preliminary orders. It was suggested, however, that the proposed para (5) could be acceptable if redrafted to permit the granting of preliminary orders only and so long as the applicable law permitted their grant by a tribunal. However, it was also said the provision was ambiguous and could also be read as conferring power on an arbitral tribunal to grant interim ex parte orders where the applicable law did not confer the power.

There was support for these views but it was noted that in different traditions and jurisdictions provisions do exist for granting ex parte preliminary orders by tribunals. Consequently, it was suggested that para (5) might be acceptable as long as it was 'quarantined' to apply only to countries where applicable law permitted orders of this nature.

More generally, the comment was made that the present revision of the UNCITRAL Rules was called for as a result of concern over a number of defects which needed addressing. It was noted that interim ex parte measures was not a defect that had been identified. Further, it was noted that an important difference between an ex parte application for a preliminary order in a court, and a similar application in a tribunal, was that a judge hearing the ex parte application would not hear the case.

The position, it was said, is different with arbitration because the arbitrator or tribunal would also hear the main proceedings and may be prejudiced by hearing the ex parte application. Further, it was said that States are likely to be concerned at the prospect of arbitral tribunals hearing interim ex parte applications for preliminary orders under an arbitration clause adopting the UNCITRAL Arbitration Rules contained in a BIT. There was further discussion in relation to whether BITs would be 'amended retrospectively' in this respect as a result of revision of the Rules and inclusion of a provision such as para (5), but it was noted that amendments had been agreed by the Working Group in relation to the Rules' application provisions which would prevent retrospectivity.

A number of interventions were made from representatives of civil law jurisdictions indicating that arbitral tribunals are empowered to grant preliminary orders on ex parte applications in those systems. The further point was made that the provisions of para (5) are directed to 'real life' situations. It was observed that it might prove to be worthless to obtain a final award if the subject matter of the dispute has been disposed of — the example being that of the departing ship. It was also noted that the device eventually arrived at in the revised (2006) Model Law provisions, and the proposed provisions of Art 26 in longer form, was to recognise what has been happening in practice for some time. It was suggested that the practical step is that the tribunal will say to parties that it needs to hear both sides and consider the position but in the meantime would the 'offending' party not do [x]. It was suggested that the Rules' provisions should not prejudice that authority.

It was suggested that the practical step is that the tribunal will say to parties that it needs to hear both sides and consider the position but in the meantime would the 'offending' party not do [x]. It was suggested that the Rules' provisions should not prejudice that authority.

Further, it was said that reliance on state courts for orders of this nature is not the answer because there may be delays and access to courts may be

difficult. Further, it was said that it is not always true that a judge who rules on a preliminary matter will not also rule on the merits at the end of trial. Concluding these comments it was said that there was no reason why the UNCITRAL Rules should not respect traditions of countries in which the mandatory law prevents granting ex parte preliminary orders by tribunals but that this caveat should not affect the inclusion of an empowering provision applicable to jurisdictions where this was not the position. In this respect it was also suggested that one solution might be to delete para (5) entirely and leave the whole matter to be determined by the applicable law.

As a result of further discussion and consultation it was suggested that the proposed paragraph (5) of the longer form of Art 26 should be replaced with the following:

> (5) Nothing in these Rules shall have the effect of creating (where it does not exist) or of limiting (where it does exist) any right of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, an interim measure without notice to a party.

As noted previously it was suggested that the expression 'interim measure' be replaced with 'preliminary order' to be consistent with revised Model Law provisions. Further suggestions were that the better solution was to delete the proposed provisions of para (5) completely, but there was consensus in favour of proposed para (5) that was the result of discussions and consensus in September 2007.[96]

Reference was also made to the empowering provisions of Art 15 of the Rules (which in para 1 provide, inter alia, for parties to be treated with equality and be given full opportunity to present their case) as indicative of the problems in adopting the proposed para (5) of Art 26. As a result of further discussion it was agreed that the expression 'preliminary order' should be substituted for 'interim measure' in the proposed text set out above and it was agreed that there should be further clarification of the above text by adding after the words 'any power of the arbitral tribunal' the following words in place of those set out above:

ADR RECENT DEVELOPMENTS

Court-ordered mediation of civil disputes in NZ

A pilot project in which private mediators will undertake court-ordered mediation in some civil disputes has been recently launched in Auckland, New Zealand, by Courts Minister Georgina te Heuheu. 'Reducing the number of full hearings and freeing up judicial time for other matters will lead to faster resolution of disputes, which will be cheaper for the parties and the court,' Mrs te Heuheu said.

The pilot will involve the equivalent of 50 day-long mediations and it is anticipated that each mediation will take less than one day. The parties' agreement will be required.

'Mediation is currently carried out by Associate Judges', the Minister said. 'While this has resulted in a high success rate, Associate Judges are now spending large amounts of time mediating, rather than on cases that require judicial attention.'

Fifteen mediators have been appointed. The pilot will be funded by the Ministry of Justice and it will be reviewed before a decision is made to continue. ●

It's a dangerous business — Part II

Earlier in the year the *ADR Bulletin* reported on a woman who was charged with hitting and biting her mediator: see (2009) 11(2) ADR 26. During the mediation the woman threatened to kill her her ex-partner before attacking the mediator. The woman is now on a one-year good behaviour bond and has been ordered by the court to undergo anger management counselling and pay damages of $321.13 to the victim. ●

Mediation before foreclosure is working

The *ADR Bulletin* also reported earlier on the US scheme developed to use mediation to help reduce foreclosures during the current economy situation: see (2009) 11(4) ADR 87. The program gives homeowners who receive a default notice from lenders the right to seek mediation.

Nevada has had the most success in the US with 26% fewer foreclosures being reported. So far 60% of mediations have had positive outcomes. ●

Post-trial mediation to reduce appeals

The Arkansas Court of Appeals in the US, has started offering post-trial mediation. This mediation is aimed at reducing costly appeals. If both parties agree to mediation the parties have 60 days to come to an agreement, if they do not the case reverts to the normal appeals process.

Although post-trial mediation has been available in Arkansas since September 2008, the majority of lawyers and clients are still choosing the normal appeal process. It is believed this is because the waiting time for trials in Arkansas is less than that in other US jurisdictions.

Pre-appellate mediation is also found in other jurisdictions. ●

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'in either case without prior notice to a party, a temporary order that the party not frustrate the purpose of a requested preliminary order'. It was also agreed to make further changes to the text set out above, as amended, by adding the words 'which exists outside these rules' after the words 'any right' and to delete the two sets of prior brackets.

Proposed paras (6), (7), (8) and (10) of the proposed longer form Art 26 set out in the Secretariat Note were agreed to without change, notwithstanding the removal of the reference to para (5). In relation to proposed para (9) of Art 26 it was agreed that the Secretariat would prepare on the way in which civil law jurisdictions deal with liability for damages when preliminary orders are subsequently not continued and the Working Group will decide whether this whole issue can be left to the applicable law or whether para (9) needs to become a substantive provision of the Rules.

The proposed short version of Art 26 deals with the issue addressed in para (9) of the longer form in more general terms providing that the 'arbitral tribunal may rule at any time on claims for compensation that any damage wrongfully caused by the interim measure or preliminary order'. In this respect the comment was made that it might be dangerous to adopt a proposal in this form and to delete the words 'wrongfully caused'.

The comment was made that it is not clear that if 'wrongfully' is omitted there is a further objective standard to apply, and that there might be costs in preserving evidence which, if characterised as damages, may be recoverable. Consequently the longer form para (9) approach was said to be preferable. Additionally, it was said that it may be desirable to include some reference in para (9) or its equivalent which says something along the lines of 'in light of the outcome of the case' — a provision which does not have the effect of providing that awards of costs and damages depend on the outcome of cases but means, in effect, that 'in light of the outcome of the case it turns out to have been an undue measure'.[97] It was suggested that this provides a reminder that there is a substantive standard to assist determinations on this issue.

Conclusion

Australia is currently supported by internationally recognised and consistently applied international arbitration law.

The current review aims to achieve an even more comprehensive legal framework that best supports effective and efficient international arbitration by ensuring international best practice. ●

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Endnotes

73. Christian Oetiker, 'Interim Measures of Protection' in *Swiss Rules of International Arbitration: Commentary* (2005) 234; see also K Hober, 'The trailblazers v the conservative crusaders, or why arbitrators should have the power to order ex parte interim relief' in Albert Van den Berg (ed), *International Council for Commercial Arbitration — New Horizons for International Commercial Arbitration and Beyond* (Kluwer, 2005) 273.

74. Hans Van Houtte, 'Ten reasons against a proposal for ex parte interim measures of protection in arbitration' (2004) 20 *Arbitration International* 85. The reasons are: (1) The UNCITRAL Model Law is an improper vehicle. (2)Is there a need for ex parte measures? (3) Incompatibility with the consensual nature of arbitration. (4)\ Incompatibility with respect for the rights of defence. (5) Ex parte measures are difficult to enforce. (6) Ex parte decisions make prejudiced arbitrators. (7) Ex parte measures and the party-appointed arbitrator. (8) Some e*x parte* measures are irreversible. (9) Ex parte measures and bar ethics. (10) Ex parte decisions and the arbitrator's liability.

75. Donovan, above note 57, 234

76. Oetiker, above note 73, 235.

77. See A/60/17, ¶175.

78. And see the APRAG Report on this session (<www.aprag.org>).

79. See above.

80. Note to 2006 Model Law revisions: 'The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonisation sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused'.

81. See the APRAG Report on the Fiftieth Session of UNCITRAL Working Group II (<www.aprag.org>).

82. See notes prepared by UNCITRAL Secretariat A/CN.9/WG-II/WP.151 (6 August 2008), ¶14 to ¶16 (Secretariat Note).

83. Secretariat Note, ¶14 to ¶16.

84. Secretariat Note, ¶18 to ¶24 (<www.aprag.org>).

85. A/CN.9/WG.II/WP.152 (Annex).

86. As do provisions of ACICA Arbitration Rules, Art 28.2; and provisions of the ACICA Expedited Rules, Art 24.2.

87. As in Australia (and most other countries) where the 2006 Model Law revisions have not yet been adopted.

88. Secretariat Note, ¶14 to ¶16.

89. See Art 17(2) of the revised Model Law provisions (2006).

90. As do the provisions of ACICA Arbitration Rules, Art 28.3 and ACICA Expedited Arbitration Rules, Art 24.3.

91. See Art 17A(1) of the revised Model Law (2006); which is also the test applied in the provisions.

92. Secretariat Note, ¶14 to ¶16.

93. See Art 17C(5).

94. See above.

95. See the APRAG Report of the 48th session; ¶8 to ¶10 (<www.aprag.org>).

96. See the APRAG Report of the 47th session, ¶24 (<www.aprag.org>).

97. Note the provisions of the ACICA Arbitration Rules, Art 28.7 and Expedited Arbitration Rules, Art 24.7.