This Article is from World Arbitration & Mediation Review (WAMR), Vol:6, No:1.
© JurisNet, LLC 2012 www.arbitrationlaw.com

GENERALIZING ABOUT THE VIRTUES OF SPECIFICITY: THE SURPRISING EVOLUTION OF THE LONGEST ARTICLE IN THE UNCITRAL MODEL LAW

James E. Castello∗

"Amid the pressure of great events, a general principle gives no help."
G. W. F. Hegel, *The Philosophy of History*[1]

I. INTRODUCTION

In regulating international arbitration, general principles are often preferable to detailed prescriptions. But this is not always so. And, it may be least so in regulating those junctures in an arbitration when arbitrators must take swift, concrete action – and when one of the parties may question their right to do so. UNCITRAL's Arbitration Working Group reached precisely this conclusion in 2006 when it revised Article 17 of the Model Law on International Commercial Arbitration (the Model Law). For the previous 20 years, Article 17 had authorized tribunals to issue interim measures of protection in very general terms. Delegates decided in 2006 to replace that general language with a far more detailed regime of rules and conditions for issuing such measures.

The story of how this came about is circuitous, since delegates set out in 2000 to do something quite different and more limited: to add a mechanism to the Model Law for court enforcement of arbitral interim measures. Few delegates would have predicted that, six years after taking up that task, they would also have established comprehensive requirements for arbitrators' own issuance of interim measures and have authorized, as well, the

∗ The author wishes to thank Jernej Sekolec, former Secretary of UNCITRAL, for his review of, and helpful comments on, a prior draft of this article. Any remaining errors are of course the author's.

[1] GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 6 (J. Sibree, trans., Dover 1956).

issuance of interim measures in support of arbitration by national courts. The text that ultimately accomplished all of these things now comprises the longest and most detailed article of the Model Law, broken up into eleven sub-parts.[2]

This outcome was all the more remarkable since, as further explained below, the Model Law is a particularly unlikely vehicle for establishing this kind of internal arbitral procedure.[3] But therein lies the final surprise of this story: after delegates spent years debating and redrafting a revised Article 17 of the Model Law, they then rather quickly agreed to incorporate most of its provisions governing the issuance of interim measures into the revised UNCITRAL Arbitration Rules (the Rules). Indeed, to the extent that amendment of the Model Law was intended to guide arbitrators' handling of interim measure requests, this is now more likely to be achieved through revised Article 26 of the 2010 Rules.

It is fitting to recount this evolution of the new regime for arbitral interim measures in an essay honoring José María Abascal. After all, it was Jose Maria who served as the Working Group's resilient chairman as it inched its way toward revision of the Model Law. And, I believe José María understood far earlier than most delegates that the Model Law's original treatment of interim measures – while appealingly broad and flexible – probably gave less guidance than was desirable.

Of course, such a conclusion runs counter to the common wisdom about drafting model legislation. The Model Law often works well by incorporating general principles that tribunals can apply to particular facts. Many examples could be cited: "The parties shall be treated with equality" (Article 18); "[T]he arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers necessary" (Article 19); or "Failing such agreement [by the parties], the place of

---

[2] UNCITRAL Model Law on International Commercial Arbitration, arts. 17, 17A to 17J (2006).

[3] According to one commentator, "no national arbitration statute – other than the 2006 revision to the Model Law – provides meaningful standards governing an arbitral tribunal decision whether to grant provisional measures." GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1977 (2009).

arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties" (Article 20).

Initially, that same approach was deemed appropriate to establish arbitrators' authority to issue interim measures. The drafters of the 1985 Model Law rejected a narrow description of this power (which would only have authorized arbitrators to order conservation of goods – the interim measure deemed most likely to be sought) because such a "scope was too limited."[4] Accordingly, delegates in 1985 adopted "a more general formula"[5] in what became Article 17 of the Model Law, allowing arbitrators "to 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." Yet, when the Working Group reexamined this phrasing nearly 20 years later (under Jose Maria's leadership), it concluded that the provision should be much more specific as to the types of interim measures that could be granted and the circumstances that justified granting them.

It took the Working Group several sessions to reach that conclusion. In the process, the revised Article 17 – and the drafting process itself – grew longer. Soon, those of us who were Working Group delegates heard criticism from outside observers that we had lost our way. We were said to have fallen prey to the "Anglo-American drafting style" – a scourge that was blamed (wrongly, in fact) for prolonging textual debates and fostering disagreements.

Notwithstanding these notes of gloom that occasionally intruded into our sessions, the Working Group doggedly pursued its task for more than five years. Throughout that process, we found solace in the determination of our chairman. If Jose Maria ever doubted a favorable outcome, he never betrayed his anxiety. Was his confidence in the end rewarded?

---

[4] U.N. Comm'n on Int'l Trade L. [UNCITRAL], *Report of the Working Group on International Contract Practices on the work of its sixth session*, ¶ 71, U.N. Doc. A/CN.9/245 (Aug. 29– Sept. 9). *See also* HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 531-32 (1989).

[5] *Id.*

When the Model Law revisions were completed in 2006, such an appraisal would have been premature; we were too close to the experience to hazard a dispassionate view. But, six years later, seventeen jurisdictions have enacted arbitration statutes based on the 2006 Model Law,[6] so, perhaps now one may attempt an assessment of what was achieved and why. This essay seeks to do this from two vantage points. First, it examines why the revisions on interim measures acquired a scope far beyond what the Commission originally contemplated. One major cause was that delegates determined – for several reasons – that the regime governing interim measures would be more effective if set forth in detailed rather than general terms. Second, this essay offers an initial view on whether this more detailed approach may produce its desired benefits. The comments on that subject acknowledge that we are still at an early stage of the new regime, with no real record from which to gauge its effect.

II. HOW PROPOSALS FOR COURT ENFORCEMENT OF ARBITRAL INTERIM MEASURES LED TO MUCH MORE EXTENSIVE REGULATION OF ARBITRATORS' ISSUANCE OF SUCH MEASURES

The idea for partly revising the Model Law grew out of U.N. celebrations marking the 40th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Those 1998 festivities went beyond mere celebration to examine what might still be done to strengthen international arbitration: "various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible."[7]

---

[6] *See*, *e.g.*, *Costa Rica: Passage of Model Law Marks Milestone*, GLOBAL ARB. REV., GLOBAL BRIEFING, June 17, 2011, *available at* www.globalarbitrationreview.com/journal/article/29551/; *see also* UNCITRAL's list of nations that have enacted laws based on the 2006 UNCITRAL Model Law, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[7] UNCITRAL, *Report of UNCITRAL on the work of its thirty-second session*, ¶ 334, U.N. Doc. A/54/17 (May 17 – June 4, 1999).

José María Abascal was among the distinguished commentators on that occasion, but his assigned topic was not the one that would soon occupy him as chair of Working Group II. Instead, it fell to Sergei Lebedev of the Russian Federation and V.V. Veeder of the United Kingdom to highlight possible improvements relating to interim measures. Mr. Lebedev spoke of the need for a uniform authorization of court-ordered interim measures in aid of arbitration – particularly, of arbitration seated in a foreign country.[8] Mr. Veeder focused on the "absence of any international legal order for enforcing abroad an arbitration tribunal's provisional and conservatory measures" which he said "strikes at the heart of an effective system of justice in transnational trade." As he explained,

> [i]n the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration – completely and finally. An enforceable interim measure can maintain the status quo until the award is made and it can also secure assets out of which an award may be satisfied where a recalcitrant debtor is deliberately dissipating assets to render itself eventually judgment proof.[9]

Mr. Veeder further remarked that "this problem … could not be resolved under articles 9 and 17 of the UNCITRAL Model Law."[10] This appeared to refer to political realities rather than legal impediments. As the *travaux préparatoires* for the original Model Law disclosed, a proposal to authorize court enforcement of arbitral interim measures had been rejected during the initial drafting of Article 17 on the ground that it "dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many states."[11] Mr. Veeder therefore concluded that "the preferred solution lies

---

[8] U.N., ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, at 23-24, U.N. Sales No. E.99.V.2 (1999).

[9] *Id. at* 21.

[10] *Id.*

[11] UNCITRAL, *Report of the Working Group on International Contract Practices on the work of its sixth session*, ¶ 72, U.N. Doc. A/CN.9/245 (Aug. 29 – Sept. 9, 1983).

in a supplementary convention to the New York Convention" that would deal with "enforcement by State courts of an arbitral tribunal's interim measures of protection."[12]

Not all speakers at the commemorative conference shared that view as to preferred means: it was endorsed by Werner Melis of Austria[13] but challenged by Gavan Griffith of Australia, who favored an annex to the Model Law instead of a new convention to enhance interim measures:

> [T]he advantage of a model law over a convention is that additional optional articles are as capable of being carried into domestic law by those States who already have applied the Model Law as those who have yet to pick it up. Hence, the mechanism of [the] Model Law usefully avoids the chaos of successive treaty regimes, as, for example, is the case with the competing terms of the Hague, the Hague Visby, and the Hamburg Rules.[14]

However, the fact that speakers disagreed on the best instrument for authorizing court enforcement of interim measures was not the most striking feature of the 1998 discussion. Rather, what stood out was that speakers confined their proposed improvements to aspects of interim measures that were not yet regulated under the Model Law. Thus, no one suggested that the Model Law's existing language – broadly authorizing tribunals to issue interim measures – was inadequate. The questions preoccupying conference speakers were whether *courts* were authorized either to order such measures in aid of arbitration or to enforce measures ordered by tribunals.

The 1998 conference presentations were eventually distilled into 13 topics for possible future work by UNCITRAL.[15] The Commission subsequently chose four of these – including the

---

[12] UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 21 (1999).

[13] *Id.* at 44-45.

[14] *Id.* at 46-47.

[15] UNCITRAL, Secretariat, *Possible future work in the area of international commercial arbitration*, U.N. Doc. A/CN.9/460.

power of courts to enforce arbitral interim measures – for priority consideration, and this further work was assigned to a new Working Group.[16]

To lay the groundwork, a background report was prepared in early 2000, canvassing, *inter alia*, existing national laws on court enforcement of arbitral interim measures and the justifications for more uniform legislation on this topic. This exposition largely followed the prior arguments by Mr. Veeder.[17] Unexpectedly, however, the report included a final section, suggesting for the first time that,

> in connection with the discussion on the enforcement of interim measures of protection, the Working Group may also wish to give consideration to the desirability of preparing a harmonized text on the scope of interim measures of protection that an arbitral tribunal may issue and the procedural rules for their issuance.[18]

The report left unresolved what form a "harmonized text" might take.[19] But it declared unambiguously that arbitrators' own issuance of interim measures – not a subject that had previously been thought to require UNCITRAL's attention – warranted further guidance:

---

[16] UNCITRAL, *Report of UNCITRAL on the work of its thirty-second session*, ¶ 374, U.N. Doc. A/54/17 (May 17 –June 4, 1999).

[17] The Secretary General, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement,* ¶ 73, U.N. Doc. A/CN.9/WG.II/WP.108 ("The need for enforceability is usually supported by arguments such as that the final award may be of little value to the successful party if actions of the recalcitrant party have rendered the outcome of the proceedings largely useless (e.g. by dissipating assets or removing them from the jurisdiction); or that preventable loss or damage should not be allowed to happen (e.g. if a party refuses to take precautionary measures at the construction site or it fails to continue construction works while the dispute is being resolved). Thus, it is argued, in some cases an interim order may in practice be as important as the award.").

[18] *Id.* ¶¶ 102-108.

[19] *Id.* ¶ 105 (it was noted that the text might be "in the form of uniform legislative provisions or … of a non-legislative text such as model contractual rules on which parties could agree … [or even] guidelines or practice notes to assist parties and arbitrators").

> Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases. This trend *and the lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance* may hinder the effective and efficient functioning of international commercial arbitration. *To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making assets inaccessible to the claimant.* Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure; this causes unnecessary cost and delay (e.g. because of the need to translate documents into the language of the court and the need to present evidence and arguments to the judge).[20]

This observation did not initially persuade delegates to stray beyond the Commission's announced agenda, which was to facilitate court enforcement of arbitral interim measures. But ultimately delegates did conclude that more guidance should be given as to the issuance of provisional measures. And, contrary to what some observers may have thought, delegates from many civil-law jurisdictions were just as willing as their common-law colleagues to accomplish this goal by redrafting Article 17 in a more detailed style.

Moreover, that willingness grew once delegates realized that courts might be more receptive to enforcing arbitral interim measures if the Model Law were to specify that a given measure fell within the arbitrators' clear authority. Delegates came to see that crucial connection in the following way.

An early draft of a new Article 17 that was presented to Working Group II conditioned courts' obligation to enforce a tribunal's interim measure on a finding that the measure met a new definition. The proposed definition of "interim measure" was

---

[20] *Id.* ¶ 104 (emphasis added).

very broad: courts were to enforce any "temporary measure … ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided."[21]

This definition provoked a mixed response in the Working Group. Some delegates regarded its extreme generality as problematic. As the report of this discussion summarized:

> [I]t was suggested to draft language that would address the conditions or the criteria for the issuance of [interim] measures. It was also suggested that the draft provision should set out in a generic way the types of interim measures of protection that were intended to be covered. Those additions (which would enhance the certainty as to the power of the arbitral tribunal to issue interim measures of protection) *were thought to be desirable because they would also enhance the acceptability of the provision establishing an obligation on courts to enforce those measures*.[22]

Thus, delegates holding this view wanted to describe a tribunal's power to issue interim measures more precisely in order to reassure national legislatures as they pondered whether to enact the new Model Law. Legislatures would favor requiring national courts to enforce tribunals' interim measures if the measures to be enforced were strictly defined.

At first, many delegates resisted this proposal to define arbitral "interim measures" more precisely, fearing that "additional detail would undesirably limit discretion of the arbitral tribunal, invite argument and hamper the development of arbitration practice."[23] Accordingly, UNCITRAL's Secretariat was asked to "prepare alternative texts for consideration at a future session."[24]

---

[21] The Secretary-General, *Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation,* ¶ 18, U.N. Doc. A/CN.9/WG.II/WP.113 (draft Article 17(2) and draft "New Article: Enforcement of interim measures of protection," ¶ (1)).

[22] UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-fourth session*, ¶ 66, U.N. Doc. A/CN.9/487 (May 21 – June 1, 2001) (emphasis added).

[23] *Id.*

[24] *Id.* ¶ 68.

The Secretariat approached this task comprehensively: it surveyed arbitrators and counsel on the types of interim measures commonly issued in proceedings, and it canvassed provisions of national laws that regulate issuance of arbitral interim measures.[25] It found that,

> the preconditions for the granting of interim measures are generally set out in the applicable law although there is no uniformity in this area and the law and rules do not provide any detail on the prerequisites even though interim measures of protection have potentially far-reaching consequences.[26]

As a result of this research, the Secretariat proposed a new draft of Article 17 of the Model Law that reworked the original two sentences of that provision into a much longer text of nine paragraphs (and many sub-paragraphs). The lengthier text still focused solely on tribunals' authority to issue interim measures, but it regulated such ancillary matters as the conditions that a tribunal must find to exist before granting an interim measure, the types of measures that arbitrators may grant, the liability of a party if it is later determined that a measure "should not have been granted," the ability of a tribunal to "modify, suspend or terminate" any interim measure it has ordered, the possibility of applying *ex parte* for such a measure, and other procedural aspects of this practice.[27] The Secretariat separately proposed other new paragraphs to deal with the related issues of court enforcement of tribunals' interim measures and courts' own authority to grant interim measures in aid of arbitration.[28]

Once this far more extensive regulation of interim measures was presented to the Working Group, there seemed to be no turning back. From that point onward, delegates never really considered retaining the simpler approach of the "general

---

[25] UNCITRAL, Secretariat, *Preparation of uniform provisions on interim measures of protection*, ¶¶ 7, 14-48, U.N. Doc. A/CN.9/WG.II/WP.119 (Jan. 30, 2002).

[26] *Id.* ¶ 43.

[27] *Id*, ¶ 74.

[28] *See id.* ¶¶ 79, 83.

principle" under the original Article 17. Indeed, after the Secretariat proposed the expanded text, delegates entered directly into lengthy debate over the wording and scope of each new clause. This consumed most of the next two working sessions,[29] and parts of later sessions as well.

In a subsequent debate, a final justification emerged for expanding the Rules' guidance on interim measures. This occurred during delegates' discussion of the proposed clause listing the types of interim measures that might be granted. The question arose whether the list should be illustrative or exclusive. Since the clause was not going to identify particular examples of interim measures (e.g., an order to sell perishable goods) but would rather describe available measures generically (e.g., to "maintain or restore the status quo pending determination of the dispute"), delegates concluded that the list could safely be framed as exclusive. The Working Group then noted that,

> an exhaustive generic list was preferable because it provided clarity in respect of the powers of the arbitral tribunal and might reassure courts at the point of recognition or enforcement of an interim measure.[30]

Thus, by describing arbitrators' interim measures powers more precisely, the Model Law would encourage courts to fulfill their new role of enforcing tribunals' interim measures.

In sum, the Working Group gradually came to see three reasons for regulating arbitral interim measures in much more detail under the Model Law: (i) to give tribunals themselves greater confidence in the exercise of their interim authority, (ii) to reassure courts that were asked to enforce arbitral interim measures that these measures were issued pursuant to a tribunal's clear authority, and (iii) to encourage national

---

[29] UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-sixth session*, ¶¶ 51-94, U.N. Doc. A/CN.9/508 (Mar. 4-8, 2002); UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-seventh session*, ¶¶ 15-76, U.N. Doc. A/CN.9/523 (Oct. 7-11, 2002).

[30] UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-ninth session*, ¶ 21, U.N. Doc. A/CN.9/545 (Nov. 10-14, 2003).

legislatures to enact a Model Law that required courts to enforce such measures.

The Working Group ultimately proposed – and the Commission adopted – a revised Article 17 and seven new successor provisions (Articles 17A through 17G) dealing just with tribunals' issuance of interim measures.[31] These provisions would now work in tandem with new Articles 17H and 17I, which require courts – upon application – to enforce an interim measure ordered by an arbitral tribunal "irrespective of the country in which it was issued," subject to certain grounds for refusing enforcement that closely follow the grounds for refusing enforcement of awards under Article 36 of the Model Law. And, finally, the new Article 17J grants each national court in a Model Law jurisdiction "the same power of issuing an interim measure in relation to arbitration proceedings … as it has in relation to proceedings in courts."

III. WHAT HATH THE UNCITRAL REVISION WROUGHT?

Once Working Group II completed its selective amendment of the Model Law in 2006,[32] it embarked on a much more comprehensive revision of the UNCITRAL Rules in the fall of that same year. During that work, delegates decided to incorporate into the Rules – nearly verbatim – the new regime regulating arbitrators' issuance of interim measures from the 2006 Model Law (Articles 17A to 17G). Paradoxically, this follow-on effect may have been the most important outcome of the Model Law amendment. That is because a tribunal is much more likely to be guided on procedural matters (such as the handling of requests for interim measures) by the arbitration rules under which it operates than by any arbitration law that may apply. There are two reasons for this.

---

[31] Article 17A (*Conditions for granting interim measures*); Article 17B (*Applications for preliminary orders and conditions for granting preliminary orders*); Article 17C (*Specific regime for preliminary orders*); Article 17D (*Modification, suspension, termination*); Article 17E (*Provision of security*); Article 17F (*Disclosure*); and Article 17G (*Costs and damages*).

[32] The 2006 amendments to the Model Law substantially revised only two provisions: Article 17 (on interim measures) and Article 7 (which defines enforceable arbitration agreements).

First, under many arbitration rules and therefore as a general matter of practice, arbitrators enjoy substantial procedural autonomy in international proceedings, relatively unconstrained by the forum's procedural law. This is recognized in the text of the UNCITRAL Rules themselves (both the 1976 and 2010 versions). Article 1(2) clarifies that the Rules are superseded only by *mandatory* provisions of applicable law, while Article 15 (Article 17 of the 2010 version) confers broad discretion upon the arbitral tribunal "to conduct the arbitration in such manner as it deems appropriate." Commenting on these provisions, Professor Karl-Heinz Böckstiegel observes that they "create a presumption in favour of freedom from national arbitration law," which presumption "is also found in very similar terms in Article 11 of the ICC Rules and Article 44 of the ICSID Convention."[33] Thus, the Model Law's 2006 provisions guiding issuance of interim measures may have little impact on arbitrators, even when they are seated in jurisdictions that have adopted that Law.[34]

Indeed, according to Gary Born, while the law of the arbitral seat will normally determine arbitrators' *power* to issue interim measures, "the law providing the *standards* for a tribunal's decision whether to grant provisional measures is at least arguably supplied by a different legal system."[35] Mr. Born

---

[33] Karl-Heinz Böckstiegel, *The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules*, 1 J. INT'L ARB. 223, 227 (1984).

[34] Under Article V(1)(d) of the New York Convention, a court may refuse recognition or enforcement of an arbitral award on grounds that "the arbitral procedure was not in accord with the agreement of the parties" but only "failing such agreement" may the court refuse enforcement because the arbitral procedure "was not in accordance with the law of the country in which the arbitration took place." *See* A. J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 323 (1981) ("Ground [V(1)]d can be deemed to be the result of the desire of the drafters of the Convention to reduce the role of the law of the country where the arbitration took place in the enforcement proceedings in other Contracting States … [F]ew courts have dealt with this provision of the Convention. … As far as the agreement on the arbitral procedure is concerned, which agreement is usually embodied in Arbitration Rules of a specific arbitral institution, such an agreement generally affords wide discretionary powers to arbitrators as to the conduct of the arbitral procedure. It therefore rarely happens that the arbitral procedure has not been conducted in accordance with the agreement of the parties.").

[35] GARY BORN, *supra* note 3, at 1976 (emphasis added).

believes that "the better view is that international sources provide the appropriate standards ... consist[ing] of arbitral awards, where tribunals have considered similar issues, drawing on common principles of law in developed states."[36] As Mr. Born points out, "[t]his also accords with the treatment of other 'procedural' issues in international arbitral proceedings – such as standards for disclosure, evidence-taking and conflicts of interest."[37]

The second reason why the Rules rather than the Model Law may have a greater impact on arbitrators' procedural decisions derives from the comparative frequency of these documents' use. To date, few leading venues for international arbitration have adopted the 2006 Model Law,[38] so the number of arbitrations subject to that Law may be limited. By contrast, the UNCITRAL Rules apply to any arbitration conducted under them, anywhere in the world.

Does this mean that UNCITRAL's prolonged amendment of the Model Law was to little avail? Not at all. To begin with, even if the Model Law's new provisions only modestly affect arbitrators' handling of interim measures, those provisions will likely still serve their other intended functions: (i) reassuring courts that arbitral interim measures are well-defined and therefore merit enforcement, and (ii) encouraging national legislatures to enact the new Model Law requiring such court enforcement. More to the point, the lengthy debate on interim measures during amendment of the Model Law led directly to the more consequential amendment of interim measures provisions in the UNCITRAL Rules. This is confirmed by the record of deliberations. Whereas the Working Group debated many revisions to the Arbitration Rules at length, it agreed fairly readily to incorporate the new Model Law provisions on interim measures into the

---

[36] *Id.* at 1978.

[37] *Id.* at 1979 (citing, for example, the IBA Rules on the Taking of Evidence and Guidelines for Conflicts of Interest).

[38] As of December 2011, these jurisdictions had adopted arbitration statutes based on the 2006 Model Law: Australia, Brunei Darussalam, Hong Kong, Costa Rica, Georgia, Ireland, Mauritius, New Zealand, Peru, Rwanda, and Slovenia, as well as certain Australian and U.S. states and an Australian territory.

Rules – precisely because their advantages had already been confirmed during amendment of the Model Law.[39]

One additional reason why delegates readily amended the UNCITRAL Rules on this point was that the 1976 wording of Article 26 was arguably more restrictive than the interim measures provision that the Working Group had already amended in Article 17 of the Model Law. That is because Article 26 originally provided a sole example of measures that might be "necessary in respect of the subject matter of the dispute," namely, "measures for the conservation of the goods forming the subject-matter of the dispute, such as ordering their deposit with a third person or the sale of perishable goods." Although that example was likely only illustrative, it had already been invoked to support a narrower construction of tribunals' provisional measures' authority under the Rules.[40]

If the primary consequence of revising Article 17 of the Model Law was the corresponding change it produced in Article 26 of the UNCITRAL Rules, the question remains: Will even the new Rules alter tribunals' handling of interim measures? Recall that a key premise of the new interim measures provisions was that,

---

[39] *See, e.g.,* UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session*, ¶¶ 86, 88, U.N. Doc. A/CN.9/669 (Feb. 9-13, 2009) (noting that "article 26 [of the draft revised Arbitration Rules] mirrored the provisions on interim measures of chapter IV A of the UNCITRAL Arbitration Model Law" and rejecting an alternative, much shorter text of article 26 because, although the shorter style matched that of other provisions in the Rules, "the details included in article 26 did not serve only an educational purpose, but were intended to provide necessary guidance and legal certainty to the arbitrators and the parties"). *See also* Pierre Pic, *Le Nouveau règlement d'arbitrage de la CNUDCI*, 2011 REV. ARB. 99, 114. Not everyone believes it was a good idea to incorporate all of the relevant sections of the Model Law into the Rules. *See* Michael Schneider, *The Revision of the UNCITRAL Arbitration Rules: Some Observations on the Process and the Results* 2011, 2011 PARIS J. OF INT'L ARB. 903, 927 (the chairman of the UNCITRAL Working Group during the Rules revision laments that, "in the present author's opinion, the satisfaction with its work for the corresponding revision of Model Law brought the Working Group to adopt a revised version of what is now Article 26 of the Arbitration Rules which is almost as long and detailed as the Model Law provision and thus out of proportion with the other articles of the Rules").

[40] *See* text accompanying *infra* notes 50-51.

"the lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration."[41] The UN working paper that set forth that premise cited no evidence for it. Is it plausible that, by authorizing interim measures in overly general terms, the 1976 UNCITRAL Rules (and the 1985 Model Law) "hinder[ed]" such measures' effective use or that, conversely, by providing greater guidance to tribunals, the 2010 Rules will facilitate such measures' issuance?

Some evidence supporting at least the first of those propositions might be found in the records of the Iran-U.S. Claims Tribunal, one of the few public sources of information about how the 1976 Rules have actually been applied. Certain decisions by that Tribunal suggest that the broadly worded grant of interim measures authority in the UNCITRAL Rules creates uncertainty about the scope of arbitrators' powers.

For example, in numerous cases, parties before the Iran-U.S. Claims Tribunal requested an interim measure to suspend national court proceedings initiated against them that might conflict with adjudication of their claims by the Tribunal. Beginning with its decision in *E-Systems Inc. v Islamic Republic of Iran, et al*.,[42] the Tribunal ordered many parties that had initiated such parallel proceedings to seek to stay them.[43] But the Tribunal's decision in *E-Systems*, which established the authority for such orders, did not rely at all on Article 26 of the UNCITRAL Rules. Rather, the Tribunal invoked only its "inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction

---

[41] The Secretary General, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written form for Arbitration Agreement*, ¶ 104, U.N. Doc. A/CN.9/WG.II/WP.108 (2000).

[42] 2 Iran–U.S. Cl. Trib. Rep. 51, Award No. ITM 13-388-FT (1983-I) [hereinafter *E-Systems*].

[43] *See, e.g.,* RCA Global Communications Inc. et al. v. The Islamic Republic of Iran et al, 4 Iran-U.S. Cl. Trib. Rep. 5, 14 n.1, Award No. ITM 29-160-1, (1983-III) [hereinafter *RCA GlobComm*] (Holtzmann, J., dissenting) (listing early cases in which the Iran-U.S. Claims Tribunal issued such interim orders).

and authority are made fully effective."[44] The Tribunal concluded that, in light of this power and "in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the Iranian court be stayed until proceedings in this Tribunal have been completed."[45]

It is unclear why the Tribunal relied only on its "inherent power." It was certainly aware of Article 26, since (in a separate concurrence in *E-Systems*) two of the Tribunal's nine judges pointed out that "the action of the Tribunal is supported not only by its 'inherent power,' upon which the Tribunal relies, but also is authorized by Article 26, paragraph 1 of the Provisionally Adopted Tribunal Rules, which article empowers the Tribunal to grant interim measures of protection."[46] The concurring opinion went on to demonstrate that Article 26 was "appropriate to protect the jurisdiction of the Tribunal."[47]

Conceivably, the Tribunal invoked its "inherent power" because it lacked exclusive jurisdiction over the claims filed in the Tehran court. Indeed, the Tribunal construed the Algiers Accords (which established the Iran-U.S. Claims Tribunal) as creating asymmetrical jurisdiction: U.S. nationals were barred from litigating covered claims against Iran in U.S. courts (and could only pursue them before the Tribunal), while "the Government of Iran [remained] free to initiate claims before Iranian courts, even where the claims had been admissible as counterclaims before the Tribunal."[48] To the extent it was ordering Iran to stay adjudication of claims over which it lacked exclusive jurisdiction, the Tribunal may have hesitated to base that order on its Article 26 power to "take any interim measures it deems necessary in

---

[44] *E-Systems, supra* note 42, at 57.

[45] *Id.*

[46] *E-Systems, supra* note 42, at 60 (Holtzmann & Mosk, J., concurring). The text of Article 26(1) of the Tribunal Rules was identical to Article 26(1) of the UNCITRAL Arbitration Rules (1976). *See* U.S.-Iran Claims Tribunals Rules of Procedure, 2 Iran-U.S. Cl. Trib. Rep. 429 (1983-I) (reproducing text of the Tribunal Rules).

[47] *Id.* at 61.

[48] *Id.* at 57.

respect of the subject matter of the dispute" – construing the "dispute" as the contested claims actually pending before it.[49]

It seems also likely, however, that the Tribunal invoked its "inherent power" to sidestep a disagreement over the scope of Article 26. Iran took the view that, notwithstanding the broad language at the beginning of Article 26 (authorizing the tribunal to "take any interim measure it deems necessary"), a measure ordering a party to stay parallel court proceedings "falls outside the scope of the discretion to take interim measures."[50] As one of the Iranian arbitrators explained (adopting this view), because Article 26's text went on to specify that this general authority to take interim measures "includ[es] measures for the conservation of the goods forming the subject matter of the dispute," the Tribunal's interim measures authority was focused on "cases where urgent proceedings are necessary for the sake of conserving the goods in dispute."[51]

This reading of Article 26 seems more restrictive than its wording requires; the text appears to refer to preservation of goods only to illustrate ("including measures …"), not to limit, the relief that can be granted.[52] But rather than object to this narrow reading of Article 26, the Tribunal simply noted that its "inherent power is in no way *restricted* by the language of Article 26 of the Tribunal Rules."[53] The Tribunal's reluctance to read Article 26 more broadly was cited during the Working Group's revision of the Model Law as one justification for providing more explicit guidance to tribunals in this area.[54]

---

[49] UNCITRAL, Arbitration Rules, art. 26(1) (1976).

[50] *See, e.g., RCA GlobComm, supra* note 43, at 7.

[51] RCA Global Communications Inc. et al. v. The Islamic Republic of Iran et al*,* 5 Iran-U.S. Cl. Trib. Rep. 121, 128 (Case No. 160) (1984) (dissenting opinion of Judge Kashani).

[52] *See, e.g.,* Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COMM. ARB. 172, 195 (1977) (stating that references in Article 26 to the sale of perishable goods or deposit of goods "are merely examples, many others could be given of where an interim measure might be appropriate"). Professor Sanders, of course, played a pivotal role in drafting the 1976 Rules.

[53] *RCA GlobComm, supra* note 43, at 7 (emphasis added).

[54] As previously noted, *supra* note 46, Judge Holtzmann co-authored the concurrence to the Interim Award in *E-Systems Inc.*, pointing out that the

In a second category of interim measures cases at the Iran-U.S. Claims Tribunal, parties sought relief related to the goods at issue in the dispute rather than to potential interference from parallel proceedings. In *United Technologies Int'l Inc. v. Islamic Republic of Iran et al.*,[55] for example, the claimant held certain repaired helicopter parts belonging to Iran but the parties disputed whether it was contractually required to deliver these to Iran (and whether U.S. military regulations, which prohibited their export, excused any such duty). In the meantime, the parts were kept at the claimant's expense in an air conditioned U.S. warehouse but were nonetheless deteriorating. The claimant therefore sought an interim measure directing either that the parts be sold while they still retained value or that the respondent pay for continued storage.

In evaluating whether it could issue such an order under Article 26 of the Rules, the Tribunal noted that "[t]he circumstances in which interim measures can be granted have been clearly stated in several decisions of the International Court of Justice."[56] From that jurisprudence, the Tribunal extracted two principles deemed relevant to the case at hand: that "the object of interim protection is 'to preserve the respective rights of the Parties pending the decision of the Court,'"[57] and that "the violation of a right must cause 'irreparable prejudice' to justify the granting of interim measures."[58] The Tribunal formulated its decision according to these factors, *i.e.*, the interim measure's permissible objective (preserving the *status quo*) and the

---

Tribunal could have relied upon Article 26 in ordering Iran to seek a stay of parallel proceedings in Iranian court. Judge Holtzmann was a member of the U.S. delegation to UNCITRAL during its original drafting of the 1976 Rules and of the delegation to Working Group II during amendment of the Model Law (2006) and revision of the Rules (2010). However, the author recalls that it was not Judge Holtzmann but a member of another delegation who, during the Working Group session, invoked both the Tribunal's flawed decision in *E-Systems* and Judge Holtzmann's persuasive concurrence in the same case as reasons to establish tribunals' interim measures authority in greater detail.

[55] 13 Iran-U.S. Cl. Trib. Rep. 254, Decision No. DEC 53-114-3 (1986).

[56] *Id.* ¶ 18.

[57] *Id.* (quoting from Anglo Iranian Oil Co. Case (United Kingdom v. Iran), 1951 I.C.J. 89, 93).

[58] *Id.* (citing *Anglo Iranian Oil Co.* and other I.C.J. decisions).

condition for granting it (avoiding irreparable prejudice). Of course, neither of these factors was mentioned in Article 26 of the Rules.

Applying these standards, the Tribunal rejected the request for interim relief. It implicitly found that ordering sale of the parts would conflict with preservation of the parties' respective rights (*i.e.*, the *status quo*) since the respondent owned the parts and sought, *inter alia*, an award for their delivery.[59] On the other hand, ordering the respondent to pay for continued storage was unnecessary to avoid irreparable prejudice; any award the Tribunal might finally make for storage costs could be satisfied by the Security Account that Iran funded under the terms of the Algiers Accords.[60]

Similarly, in *Behring Int'l Inc. v. Islamic Republic Iranian Air Force et al.*,[61] the Tribunal again invoked "irreparable prejudice" as a condition for granting interim measures under Article 26 and again explored relevant international precedents establishing this concept. It concluded that the term's meaning "in international law arguably is broader than the Anglo-American law concept of irreparable injury."[62] Based on that understanding, the Tribunal ordered the claimant to move the respondent's property "from its present location … in order to prevent unnecessary damage and/or deterioration."[63] It also ordered an appointed expert to inventory the goods and confirm their condition, believing that this could "define and confine the dispute" and thus serve another permissible objective of provisional measures, namely, preventing "any action which might 'aggravate or extend' the dispute submitted to the Court."[64]

---

[59] *Id.* ¶¶ 19-23.

[60] *Id.* ¶¶ 24-26.

[61] 8 Iran-U.S. Cl. Trib. Rep. 238, Award No. ITM/ITL 52-382-3 (1985).

[62] *Id.* at 276 n. 50.

[63] *Id.* at 276.

[64] *Id.* at 277 n.52 (citations omitted).

In other cases, the Iran-U.S. Claims Tribunal imposed conditions for granting an interim measure under Article 26 without invoking international jurisprudence as a basis for doing so. Thus, for example, in *Boeing Co. v. Iran*, the Tribunal rejected Iran's request for an order to stay execution of a U.S. court judgment against it simply on the ground that such a measure was "not necessary either to protect a party from irreparable harm or to avoid prejudice to the jurisdiction of this Tribunal."[65] The Tribunal subsequently applied these same *Boeing* factors in evaluating other types of interim measure requests, including for the protection of goods.[66]

In cases like *United Technologies, Behring Int'l*, and *Boeing*, the Iran-U.S. Claims Tribunal did not explain why it superimposed objectives and conditions on Article 26's broad grant of authority, so we are left to speculate. One plausible reason is that it may otherwise be discomfiting to order a party to take action with potentially lasting consequences (which is often the case for interim measures), purely as an exercise of discretionary authority. Thus, arbitrators may hesitate to order such actions solely on the basis that they are deemed "necessary in respect of the subject-matter of the dispute" (the lone condition imposed by the 1976 Rules and the 1985 Model Law). Relying only on that justification may foster contentions that the discretion has been inconsistently – or even arbitrarily – exercised. Justifying a measure, instead, by reference to objectives and conditions – particularly ones applied by similarly situated tribunals – may preempt such allegations. In short, while UNCITRAL's broad, original language on interim measures ostensibly exalts arbitrators' authority, a more structured set of interim measures requirements may better serve their interests.

---

[65] 5 Iran-U.S. Cl. Trib. Rep. 152, 154, Award No. ITM/ITL 34-222-1 (1984).

[66] *See, e.g.,* Islamic Republic of Iran v. United States of America, 22 Iran-U.S. Cl. Trib. Rep. 105, 108, Decision No. DEC 85-B1-FT (1989) (declining to stay the United States' proposed sale of military equipment for which the U.S. is to compensate Iran); Islamic Republic of Iran v. United States of America, 33 Iran-U.S. C. Trib. Rep. 362, 364, Decision No. DEC 129-A4/A7/A15(I:F and III)-FT (1997) (declining to order the U.S. to cease the leasing of Iran's diplomatic and consular properties).

It is also likely that the Iran-U.S. Tribunal's reluctance to invoke its full interim measures authority reflected the waning influence of an era when many jurisdictions allowed only courts to grant such relief. "Historically, national law not infrequently denied arbitrators the power to order interim measures."[67] By the time the Iran-U.S. Claims Tribunal was established, such proscriptions were gradually falling away. But, given this legal landscape, one can imagine that arbitrators may have exercised their authority cautiously, particularly since (i) their power to issue interim measures had (in many jurisdictions) only recently been established, (ii) its scope was broadly drawn but ill-defined, and (iii) any party ordered to take provisional action might challenge the tribunal's authority to do so. In fact, especially in the early days of the Iran-U.S. Claims Tribunal, there was relatively little experience issuing provisional measures in international arbitration – even under other sets of arbitration rules.[68]

To some extent, then, the Iran-U.S. Tribunal decisions do support the U.N. Secretary General's hypothesis that "the effective and efficient functioning of international commercial arbitration" might be "hinder[ed] by the lack of clear guidance"[69] on interim measures in the UNCITRAL Model Law (and, by extension, in the UNCITRAL Rules). But at least that Tribunal demonstrated that it could supply such guidance when it was missing from the Rules – it simply borrowed (either expressly or implicitly) the jurisprudence of other fora, such as the International Court of Justice. Of course, the Iran-U.S. Claims Tribunal numbered among its early presidents and chamber chairmen such senior legal

---

[67] GARY BORN, *supra* note 3, at 1949-50 n.37 (noting that such major European jurisdictions as Switzerland, Italy, Spain, Germany, Austria and Greece have barred arbitrators from issuing interim measures; the rule still prevails in Italy and was abandoned in Austria only in 2006, and in Switzerland and Germany in 1987 and 1988, respectively).

[68] *See, e.g.,* ERIC SCHWARTZ, *The Practices and Experience of the ICC Court*, *in* ICC, CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 45, 47 (1993) (noting that only 25 ICC cases had addressed the subject of provisional measures in the previous 15 years).

[69] The Secretary General, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, written form for Arbitration Agreement*, ¶ 104, U.N. Doc. A/CN.9/WG.II/WP.108 (2000).

figures as Gunnar Lagergren, Karl-Heinz Böckstiegel, Robert Briner, Michel Virally, Pierre Bellet and Nils Mangård. Less experienced jurists – and the Model Law and Arbitration Rules were also drafted with them in mind[70] – might lack either the instinct or the confidence to supplement the Rules in the same way.

Not surprisingly, when the UNCITRAL Working Group substantially amended Article 17 in the 2006 Model Law, the supplemental guidance that it added included the same factors embraced by the Iran-U.S. Claims Tribunal. Thus, for example, the revised Article 17 now enumerates permissible objectives for interim measures: any measure must direct a party either 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.

Similarly, Article 17A requires that, before issuing any provisional order, the tribunal must be satisfied that (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, (b) 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 (c) there is a reasonable possibility that the requesting party will succeed on the merits of its claim.[71]

---

[70] *See, e.g.,* UNCITRAL, *Report of the Working Group II on the work of its 41st session*, ¶ 42, UN Doc A/CN.9/569 (Vienna, 13-17 September 2004) ("Concern was expressed that requiring arbitrators to apply standards such as 'substantial likelihood' and 'reasonable basis for concern' might … not offer the simple guidance called for, in particular *by less experienced arbitrators*") (emphasis added); *Report of the Working Group II on the work of its 50th session*, ¶ 88, UN Doc A/CN.9/669 (New York, 9-13 February 2009) (noting that the purpose of revising Article 26 of the UNCITRAL Rules concerning interim measures was to provide "necessary guidance and legal certainty to the arbitrators and the parties" and that this "was particularly important in respect of *many legal systems, which were unfamiliar with the use of interim measures in international arbitration*") (emphasis added).

[71] UNCITRAL Model Law on Commercial Arbitration, art. 17A (2006).

Will this more detailed language result in more effective deployment of interim measures? Practitioners' assessments have thus far been mixed, though also limited.[72] Gary Born, for one, questions the need for more prescriptive language, believing that UNCITRAL's former, general wording "[did] not purport to leave provisional measures entirely to the arbitrators' unguided discretion" and should rather "be understood as contemplating that arbitral tribunals will formulate and apply legal standards specifying when provisional measures will be granted."[73] This, of course, presumes that arbitrators invariably take the initiative to "formulate and apply" such legal standards. Perhaps, that is a valid assumption, but UNCITRAL delegates were obviously less sanguine on this point. Indeed, there is really no empirical basis for concluding one way or the other. That is because most proceedings governed by either the 1976 Rules or the 1985 Model Law are commercial arbitrations whose procedural records remain confidential. Moreover, UNCITRAL delegates recognized that even those arbitrators likely to supplement (rather than shrink from) the original Rules' lack of guidance might still hesitate (as even the Iran-U.S. Claims Tribunal hesitated – *viz.* the decision in *E-Systems*) to exploit their interim measures authority fully.

---

[72] *Compare* Georgios Petrochilos, *Interim Measures Under the Revised UNCITRAL Arbitration Rules*, 28 ASA BULL. 878 (2010) (noting that the further guidance on such matters as the circumstances in which interim measures may be granted "is perhaps particularly useful in the context of *ad hoc* proceedings"), *with* GARY BORN, *supra* note 3, 1979-80 n.187 (criticizing the substance of the Model Law's more detailed language as "lacking in many respects" and criticizing the inclusion of any such language as "affirmatively damaging because it threatens this ongoing development of international standards, tailored to the needs of particular cases") *and* Tómas Kennedy-Grant, *Promised Land or Fire Swamp? Interim Measures – The New Zealand Revolution* 24-25 (paper presented at the Second New Zealand Arbitration Day 2007), available at http://www. kennedygrant.com/docs/ Fire%20Swamp.pdf (asserting that the 2006 Model Law provisions, which New Zealand adopted into its own Arbitration Act, are "revolutionary" because they "considerably wide[n] the powers of arbitral tribunals" while "affect[ing] the powers of courts to grant interim measures" and thus "create opportunity and carry risk").

[73] GARY BORN, *supra* note 3, at 1980 (commenting only on the revision of the 2006 Model Law; the revised UNCITRAL Rules had not yet been promulgated at the time Mr. Born's treatise was published).

Now that the revised Model Law and Rules have been in effect for some time, one would hope to cite some evidence of the new regime's effect, but unfortunately this has not yet emerged in the public domain. UNCITRAL's digest of national court decisions in its CLOUT[74] system does not yet reflect any cases involving Article 17 of the 2006 Model Law. Nor is the author aware of any published decisions by tribunals acting under the 2010 UNCITRAL Rules that have applied the new provisions of Article 17 and 17A through 17G. However, one recent decision by a tribunal operating under the 1976 Rules indirectly confirms the possible utility of the new interim measures language.

In *Sergei Paushok et al. v. Mongolia*,[75] the claimants initiated an UNCITRAL arbitration on the basis that Mongolia's new windfall profits tax on gold mining violated the country's bilateral investment treaty with the Russian Federation. The claimants also sought an interim measure ordering Mongolia, *inter alia*, to suspend enforcement of the new tax. In seeking to resolve that request under the broad language of the 1976 UNCITRAL Rules, the tribunal declared that "[i]t is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures" and identified these standards as: "(1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity), and (5) proportionality."[76] No authority was cited for these "internationally recognized … standards," but in fact each of them (save for "urgency") corresponded to conditions that the Working Group was at that time inserting into what would become the revised UNCITRAL Rules. The tribunal's analysis of these factors led it to grant the interim measure. It is doubtful whether any tribunal would have ordered suspension of a sovereign's tax collections (a serious step by any reckoning) simply on the basis that it was "necessary in relation to the subject-matter of the dispute."

---

[74] Case Law on UNCITRAL Texts-CLOUT, *available at* http://www.uncitral.org/uncitral/en/case_ law.html.

[75] UNCITRAL, Order on Interim Measures, 2, 2008, *available at* http://italaw.com/documents/ Paushok-Interim.pdf .

[76] *Id*. at 7-8.

The first two of the tribunal's "standards" (*prima facie* jurisdiction and "establishment of the case") are now encompassed by Article 26(3)(b) of the 2010 Rules ("a reasonable possibility that the requesting party will succeed on the merits"). The tribunal cited these factors in deciding that the claimant's alleged failure to comply with the treaty's six-month amicable settlement period need not bar interim relief. Reminding the parties that it would finally decide this compliance issue only when it ruled definitively on jurisdiction, the tribunal nonetheless noted that similar waiting periods had been found not to bar provisional measures jurisdiction where, for example, further negotiation efforts "were clearly futile" and where the claimant's claims otherwise appeared to meet a BIT's jurisdictional requirements.

As for the last two "standards" invoked by the *Paushok* tribunal ("irreparable prejudice" and "proportionality"), these largely correspond to conditions imposed by Article 26(3)(a) of the 2010 Rules.[77] They proved relevant to Mongolia's objection that interim measures were unavailable if the underlying claim was for monetary relief. Pointing to the Iran-U.S. Claims Tribunal's determination in *Behring Int'l*[78] that "irreparable prejudice in international law arguably is broader than the Anglo-American concept of irreparable injury" and noting also that Article 17A of the 2006 Model Law avoids the term "irreparable harm" (referring instead to "[h]arm not adequately reparable by an award of damages"), the *Paushok* tribunal concluded that the UNCITRAL Rules did not limit interim relief to cases where the claimant sought specific performance.[79]

The tribunal thus found that the claimants faced "very substantial prejudice" because "[i]mmediate payment of the [windfall profits tax] allegedly owing to Mongolia would likely lead to the insolvency and bankruptcy of [the claimants' gold

---

[77] "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."

[78] *See* text accompanying *supra* note 62.

[79] *Paushok.* at 12-13.

mining concern] … and the complete loss of Claimants' investment in that company."[80] This was not outweighed by potential harm to the respondent if enforcement of the tax were suspended, given (i) the government's admission that the new tax "was not achieving the objectives it had in mind when [the tax] was adopted," (ii) the fact that "a sudden collapse" of the claimant's gold mining concern would render the respondent "unable to realize a large share of the amount owing to it under the [new tax] Law," and (iii) the tribunal's ability to order claimant's posting of a substantial security amount.[81]

Given how readily the *Paushok* tribunal supplemented the Rules with five "internationally recognized" standards for granting interim measures, one might conclude that every tribunal could discern the same standards and that it was therefore unnecessary to revise the Rules to include them. On the other hand, the *Paushok* interim order benefited from vast arbitral experience: the tribunal comprised three senior arbitrators, including one former minister of justice, a former secretary-general of the ICC Court of Arbitration, and a prominent international law professor. So, one could just as readily conclude from *Paushok* that less seasoned arbitrators might hesitate to proclaim (without attribution!) "internationally recognized" standards. And, if so, perhaps the Rules *should* reflect the *Paushok* tribunal's expertise so that all UNCITRAL arbitrators can exploit such guidance – including those having far less experience and facing decisions of far less public moment than the suspension of tax collections. That is the premise on which UNCITRAL revised the Rules (and one of the premises on which it previously revised the Model Law). We must wait to see whether the arbitral practice that emerges will confirm the wisdom of these new interim measures regimes.

---

[80] *Id.* at 14.

[81] *Id.* at 14-15.

JAMES CASTELLO

James Castello, a partner in King & Spalding's Paris office and a member of its international arbitration group, has been a lawyer for more than 25 years. He has advised and represented clients in a wide range of legal disputes, particularly international arbitrations (commercial and investor-state; institutional as well as *ad hoc*). James has served since 2001 on the U.S. delegation to the Arbitration Working Group at UNCITRAL; the views expressed in this essay, however, are not necessarily those of the U.S. government.

In 2007, James was named to the Court of the London Court of International Arbitration, and since 2009 he has been a member of the International Advisory Board of the Vienna International Arbitral Centre as well as the editorial board of *Global Arbitration Review*. He writes and speaks frequently on arbitration topics and is the author, *inter alia*, of the chapter on the UNCITRAL Arbitration Rules in *The Practitioner's Handbook on International Commercial Arbitration* (Oxford 2009). At the beginning of his legal career, James served as law clerk to Justices William J. Brennan Jr. and Thurgood Marshall on the U.S. Supreme Court, to Judge Abner J. Mikva on the U.S. Court of Appeals for the District of Columbia Circuit, and to Judge Howard M. Holtzmann on the Iran-U.S. Claims Tribunal. He holds a J.D. and M.A. (Econ.) from the University of California, Berkeley, and a B.A. from Yale University.

Mr. Castello can be reached at JCastello@kslaw.com.