

2011

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Recommended Citation

Tucker, Lee Anna. "Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty." *International Commercial Arbitration Brief* 1, no. 2 (2011): 15-23.

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INTERIM MEASURES UNDER REVISED UNCITRAL ARBITRATION RULES: COMPARISON TO MODEL LAW REFLECTS BOTH GREATER FLEXIBILITY AND REMAINING UNCERTAINTY

LEE ANNA TUCKER

I. Introduction

International arbitration has become increasingly attractive as an alternative mechanism for parties to international commercial disputes.¹ In many cases national courts are less suitable for settlement of such complex international transactions, and arbitration is structured specifically to facilitate resolution of disputes arising from transactions between parties from different countries.²

Because interim measures in international arbitration involve the intersection of national law and arbitral power, a degree of conceptual uniformity is required if interim measures are to complement arbitral effectiveness, as they are designed to do. In order to encourage harmonization regarding the definition and scope of interim protection of rights in international arbitration, the United Nations Commission on International Trade Law (“UNCITRAL”) amended Article 17 of the UNCITRAL Model Law (“Model Law”) provision on interim measures in 2006 to define tribunal powers to grant interim measures and to describe the enforcement role of national courts.³ Soon thereafter, the Commission undertook to revise the UNCITRAL Arbitration Rules (“Arbitration Rules”) to promote greater efficiency in arbitration and reflect developments in the practice

of international arbitration, which took the form of greater consistency between the Model Law and the Arbitration Rules.⁴ The new Rules became effective August 15, 2010.

Although several provisions of new Article 26 of the Rules on interim measures mirror the amended 2006 Model Law exactly, small but significant variations between them reflect the fundamental difference in their natures and objectives, as well as years of debate as to the implications of incorporating certain provisions.⁵ Most significantly, the revised Arbitration Rules incorporate no enforcement provisions, a broader definition of interim measures, a slightly dissimilar standard for damages liability for interim measures, and no mention whatsoever of highly controversial preliminary orders.⁶ Generally, the revised Arbitration Rules represent a prudent overhaul that will complement the Model Law, but in light of their disparities and the fact that very few states have adopted legislation based on the amended Model law,⁷ the modernized framework for interim measures may face certain challenges.

II. Background

Essentially, interim measures are grants of temporary relief⁸ aimed at protecting parties’ rights pending final resolution of a dispute.⁹ Many legal systems recognize the procedural necessity

¹ See Dana Renee Bucy, Comment, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT’L L. REV. 579 (2010) (explaining how increased volume of international commercial disputes results from rise in international trade, and that parties more frequently favor arbitration to national courts).

² See Julian D.M. Lew, *Foreword*, in ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION v (2005) (citing unacceptability of national courts and specific structure of arbitration as reasons for international arbitration’s success).

³ See U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], *UNCITRAL Model Law on Commercial Arbitration*, art. 17, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter 2006 Model Law] (expanding Article 17 into new Chapter IV A on Interim Measures).

⁴ See UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session*, ¶¶ 104-05, delivered to the General Assembly, U.N. Doc. A/CN.9/614 (Oct. 5, 2006) [hereinafter 2006 Working Group Report]. (agreeing that the new version of the Rules should be revised “in light of” Chapter IV A of the Model Law).

⁵ U.N. Comm’n on Int’l Trade Law [UNCITRAL], *Model Arbitration Rules as revised in 2010*, art. 26, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter 2010 Arbitration Rules].

⁶ *Id.* art. 26, ¶¶ 2, 8.

⁷ See UNCITRAL, *Status of Conventions and Model Laws, Note by the Secretariat*, ¶ 4(1), delivered to the General Assembly, U.N. Doc. A/CN.9/694 (May 26, 2010) (reporting that only three countries and the American state of Florida have adopted legislation based on the 2006 Model Law).

⁸ YESILIRMAK, *supra* note 2, at 6 (2005).

⁹ *Id.* at 7.

of interim measures as a complement to final awards,¹⁰ and in the context of international arbitration provisional measures may be even more crucial due to the special risks involved in international disputes.¹¹ Often the efficacy of the arbitration process as a whole depends on interim measures that may prevent adverse parties from destroying or removing assets so as to render final arbitral awards meaningless.¹² Interim measures are usually designed either to minimize loss, damage, or prejudice during proceedings, or to facilitate the enforcement of final awards.¹³ Under the 1976 Rules, little legal consensus existed as to the proper scope and implementation of interim measures in international arbitration, thus the UNCITRAL Arbitration Rules were revised to reflect accord with the Model Law and its standards. In particular, the new Arbitration Rules unify and clarify the function of interim measures in international arbitration and are intended for universal application.¹⁴

The 2010 UNCITRAL Arbitration Rules are presumed to apply to all arbitration agreements which reference the Rules. The Rules were originally published in 1976, when arbitration was not as widespread an alternative to domestic courts, and are intended for use by parties from both common and civil law systems. They represent the foremost set of *ad hoc* arbitration rules,¹⁵ which are rules for conducting arbitration without the oversight of an arbitral institution or other permanent administering body. Thus, the Rules are typically used in non-institutional arbitrations, but they also provide the basis for the international rules of some arbitral institutions, many of which offer to administer arbitrations conducted according to the Rules, or have adopted the Rules in whole or substantial part as their own institutional rules. Many bilateral investment treaties also cite the UNCITRAL Rules as an option for disputes to be referred to arbitration.¹⁶

The UNCITRAL Arbitration Rules are fundamentally different than the Model Law in that they are designed to enable greater flexibility and compatibility to parties from diverse states than are available under national laws.¹⁷ Because the Arbitration Rules are directed at parties, whereas the Model

Law is directed at legislatures, the UNCITRAL Working Group was tasked with revising the Rules to show consistency with the Model Law¹⁸ without altering “the structure of the text, its spirit, [or] its drafting style.”¹⁹ This mandate recognized that because the Rules have been so widely adopted and enjoy such widespread adherence, the revised version had to “respect the flexibility of the text rather than make it more complex.”²⁰ The Rules were thus expected to maintain their characteristically generic approach, which is easily adapted and applicable to a broad range of circumstances, because this very flexibility and simplicity make them attractive to diverse parties²¹ and because they are intended as a package that parties can utilize unchanged.²²

Although the Rules’ new Article 26 on Interim Measures is significantly more detailed than its predecessor from 1976, it is also much less substantial than Chapter IV A in the 2006 Model Law.²³ This variation in scope not only corresponds to a general difference in applicability, but also reveals more subtle differences in range of application when considered in light of smaller textual variations. The differences mean, on one hand, that the Rules are better suited for adherence by individual parties to international disputes; but on the other hand, certain ambiguities remedied by the amended Model Law remain unresolved under the Rules.

III. Analysis

There are four main areas in which the 2010 Arbitration Rules diverge from the 2006 Model Law on interim measures. First, the Rules do not include provisions on enforcement of interim measures, whereas the Model Law does. Second, the Rules include more specific wording in their definition of the circumstances and conditions in which interim measures are allowed, with the effect that the Rules’ regime on interim measures is wider in applicability than the Model Law’s. Third, the Rules more clearly allocate the risk of incurring liability for damages caused by imposition of interim measures than the Model Law. Lastly, and most perplexingly, the Model Law

¹⁰ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 920 (2d ed. 2001) (listing sequestration of property, preservation of status quo, posting of security, attachment of funds, and appointment of neutral third parties to specific tasks as general forms of provisional measures); THE UNCITRAL ARBITRATION RULES: A COMMENTARY 53 (Philip Alston & Vaughan Lowe eds., 2006) [hereinafter UNCITRAL ARBITRATION RULES COMMENTARY] (noting that both national and international legal systems provide remedies and procedures for interim measures in various forms, and that requests for interim measures have been relatively frequent in international legal fora).

¹¹ See BORN, *supra* note 10, at 920 (referring to increased danger international disputes that vital evidence will be removed from tribunals’ reach, or that assets necessary for enforcement of a final award may be removed to a jurisdiction where enforcement is unlikely).

¹² *Id.* at 920; Bucy, *supra* note 1, at 584.

¹³ Bucy, *supra* note 1, at 586.

¹⁴ Compare 2010 Arbitration Rules, *supra* note 5, art. 26, with UNCITRAL Arbitration Rules, art. 26, G.A. Res. 31/98, U.N. GAOR 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter 1976 Arbitration Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

¹⁵ See BORN, *supra* note 10, at 45-46.

¹⁶ UNCITRAL ARBITRATION RULES COMMENTARY, *supra* note 10, at 10.

¹⁷ 2006 Working Group Report, *supra* note 4, ¶¶ 17-19.

¹⁸ See *id.* ¶ 105 (noting that the revised Rules should either mirror the Model Law by clarifying the circumstances, conditions, and procedure for granting interim measures or by giving the same effect to party autonomy under Chapter IV A).

¹⁹ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Seventh Session*, ¶¶ 3, 7, delivered to the General Assembly, U.N. Doc. A/CN.9/641 (Sept. 25, 2007) [hereinafter 2007 Working Group Report].

²⁰ *Id.* ¶ 3.

²¹ 2006 Working Group Report, *supra* note 4, ¶¶ 17, 18.

²² See UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, Note by the Secretariat, ¶¶ 2-3, delivered to the General Assembly, U.N. Doc. A/CN.9/705 (May 5, 2010) (drawing the Commission’s attention to 1982 “Recommendations” issued as encouragement for parties and institutions to utilize the Rules without alteration, and suggesting that a similar set of guidelines be prepared to accompany the revised Rules).

²³ Compare 2010 Arbitration Rules, *supra* note 5, art. 26, with 2006 Model Law, *supra* note 3, art. 17.

contains extensive provisions on *ex parte* preliminary orders, whereas the Rules contain none. These differences may seem minor, but could have potential ramifications for the effectiveness of interim measures as an arbitral tool.

A. Enforcement Provisions Outside the Rules’ Scope and Therefore Excluded

Due to the nature of the Rules, as a structural framework for parties agreeing to arbitration instead of a legislative regime, the Working Group agreed in its earliest meeting that the provisions of Model Law Chapter IV A regarding enforcement of arbitral awards would not be included in the revised Arbitration Rules.²⁴ Where the Model Law contains detailed provisions relating to recognition and enforcement of interim measures²⁵ and court-ordered interim measures,²⁶ the Arbitration Rules are understandably silent. Model Law enforcement provisions requiring national courts to recognize arbitral interim measures, as well as specifying grounds for refusing recognition,²⁷ are outside the scope of any arbitral tribunal’s power. Likewise, no independent agreement to abide by the decisions of an arbitral tribunal could dictate the scope of national courts’ powers to issue interim measures concurrently; this is a matter solely within the purview of domestic legislatures.²⁸

Addition of enforcement provisions to the Arbitration Rules was never contemplated²⁹ because such provisions would have been incompatible with the Rules’ capacity, but this omission does not adversely affect the Rules’ applicability to arbitral agreements. To put it differently, the scope and function of interim measures under the Arbitration Rules are not adversely affected because the rules to which independent parties agree to abide by could never encompass such measures.

However, to the extent that enforcement of interim measures depends on enforcement by national courts, the Arbitration Rules’ range is limited as it always was. Because the Arbitration Rules were specifically revised to complement the Model Law, in states where domestic legislation reflects the Model Law or is equivalent in effect, effectiveness of arbitral interim measures should be assured because state courts are empowered to enforce them. Unfortunately, very few states have incorporated the amended Model Law by passing parallel legislature, so the intended effect of the combined UNCITRAL Model Law amendments and Arbitration Rules revisions regarding interim measures (enhanced efficacy of arbitration process via greater certainty regarding implementation of interim measures) is somewhat dampened, leaving enforcement of arbitral awards as

uncertain and subject to disparate domestic laws as ever.

B. Definition of Interim Measures so as to Provide Guidance without Limiting Applicability

Generally, the Arbitration Rules’ revised Article 26 evinces an approach to interim measures designed to provide clear guidelines for the interim measure process without limiting its applicability in a broad range of situations. Although the goal of the Rules revision was to delineate the circumstances, conditions and procedure for the granting of interim measures,³⁰ the Rules must be applicable to all types of arbitration regardless of the subject matter of the dispute, and easily adapted for use in a variety of circumstances.³¹ This approach was adopted from the outset of the Working Group when it agreed that the original wording of Article 26(1), which provided that arbitral tribunals “may take any interim measures deemed necessary in respect of the subject-matter of the dispute,”³² should be modified in accordance with the new Model Law. The words “in respect of the subject-matter of the dispute” were deleted from equivalent provisions of the Model Law, and the Working Group deleted them from the Arbitration Rules as well for being “overly restrictive”³³ as to what circumstances may justify interim measures.

The revised Rules also reflect a broad approach to applicability in their definition of interim measures. The decision to include a detailed definition of interim measures and the circumstances for their application in Article 26 was taken in order to “provide necessary guidance and legal certainty to the arbitrators and the parties” to disputes, particularly important for legal systems unfamiliar with the use of interim measures. Article 26(2) defines an interim measure as:

- ... 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, for example and without limitation, 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, (i) current or imminent harm or (ii) 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.³⁴

²⁴ 2006 Working Group Report, *supra* note 4, ¶ 104-05.

²⁵ 2006 Model Law, *supra* note 3, art. 17(H).

²⁶ *Id.* art. 17(I).

²⁷ *Id.* art. 17(H).

²⁸ *See id.* art. 17(J) (confirming that national courts have the same power to issue interim measures in relation to arbitral proceedings as they have in relation to their own domestic proceedings).

²⁹ *See UNCITRAL, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat, ¶ 2, delivered to Working Group II (Arbitration and Conciliation)*, U.N. Doc. A/CN.9/WG.II/WP.145/Add.1 (Dec. 6, 2006) [hereinafter 2006 Rules Revision] (containing Draft revision modeled after the Model Law, but not including measures on enforcement or national courts).

³⁰ 2006 Working Group Report, *supra* note 4, ¶ 105.

³¹ *Id.* ¶¶ 17, 18.

³² 2006 Rules Revision, *supra* note 29, ¶ 2.

³³ 2006 Working Group Report, *supra* note 4, ¶ 105.

³⁴ 2010 Arbitration Rules, *supra* note 5, art. 26(2).

This definition is very similar to Chapter IV A of the Model Law on interim measures. In response to opposition based on the difference in nature between the Rules and Model Law, and on the concern that a detailed definition might limit the power of arbitral tribunals to grant interim measures in jurisdictions that took a more liberal approach than the Model Law, the Working Group noted that this definition consists of a “generic and exhaustive list intended to cover all instances in which an interim measure might be granted,” and that detailed provisions on conditions for granting interim measures are necessary to avoid difficulties of interpretation and application.³⁵ The Rules therefore parallel the Model Law closely, so as to “encourage development of practice” in accordance with UNCITRAL standards.³⁶

However, the Rules depart from the Model Law in several ways that reinforce their aim to be as broadly applicable as possible. For instance, the Arbitration Rules omit from their definition a clause contained in the Model Law providing that temporary measures are appropriate “whether in the form of an award or another form.”³⁷ By eliminating this clause, the Rules do not limit the form of the temporary measure, but avoid explicitly encouraging awards as a permissible form for interim measures. In the past practitioners might have used the form of an award with a view to enhancing enforceability,³⁸ but consistency with the Model Law would make such practice unnecessary because interim measures are to be enforced regardless of the form in which they are issued. Another reason for eliminating the explicit sanction of awards was to avoid confusion in light of Article 26(5), which permits arbitral tribunals to modify or suspend interim measures.³⁹ More generally, this revision provides leeway under the differing approaches of domestic legal systems, some of which permit interim measures in the form of awards and some of which do not.⁴⁰

Because the Model Law’s enforcement mechanisms have not been universally adopted, requests for interim measures in the form of awards may still be attractive as a tool for enhancing enforceability in some arbitral seats, but the Rules’ silence as to what form interim measures may take do not preclude the use of awards. Instead, they merely refuse to expressly sanction the form of awards, which makes the Rules more flexible and broadly acceptable where domestic law prohibits interim awards.

Furthermore, the Rules’ definition of interim measures diverges from the Model Law by including the words “for example and without limitation” in the chapeau of Article 26(2).

This addition was made to clarify that the Rules’ definition of interim measures should be widely construed.⁴¹ Although the definition and list, which mirrors the Model Law almost exactly, is intended to be comprehensive, the insertion of “without limitation” contemplates the possibility of other types of interim measures not found in the list.⁴² The draft clause providing that the definition of an interim measure “includes [the listed items], without limitation” was further changed to “for example and without limitation” so as to emphasize the non-exclusive nature of paragraph (2).⁴³

Another small difference between the Model Law and the Arbitration Rules is the editorial clarification of Article 26(2) (b): by clearly separating “current or imminent harm” from “prejudice to the arbitral process,”⁴⁴ the Rules expressly broaden the range of actions to be prevented or refrained from. Without the clear distinction between harm and prejudice, the clause could be understood to refer only to prejudice to the arbitral process. Thus, by eliminating ambiguity that existed under the Model Law, the Rules’ seemingly minute clarification explicitly widens the categories of circumstances under which interim measures may be granted.

The overall effect of the Arbitration Rules’ small departures from the Model Law in their definition of interim measures is actually to provide more detailed guidelines regarding the scope and conditions for interim measures, without limiting their applicability and acceptability to a wide variety of parties and disputes. By eliminating language singling out awards as appropriate forms for interim measures and by explicitly noting that the definitions listed in Article 26(2) are not necessarily exhaustive, the Rules embrace a wider range of options than the Model Law. By making a clear distinction between conditions triggering imposition of interim measures, the Rules ensure that such measures can be used to prevent prejudice to the arbitral process as well as other kinds of current or imminent harm. This modified definition combined with a less restrictive description of the circumstances justifying use of interim measures means that even though the revised Rules on interim measures are much more substantial than the simple text of 1976, they do not depart from their characteristic motif of universal applicability.

C. Liability for Damages Carries Assumption of Risk

Article 26(8) of the revised Arbitration Rules provides that the party requesting interim relief may be liable for any costs

³⁵ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session*, ¶¶ 87-88, delivered to the General Assembly, U.N. Doc. A/CN.9/669 (March 9, 2009) [hereinafter 2009 Working Group Report].

³⁶ *Id.* ¶ 89.

³⁷ 2007 Working Group Report, *supra* note 19, ¶ 51; compare 2010 Arbitration Rules, *supra* note 6, art. 26(2), with 2006 Model Law, *supra* note 3, art. 17(2).

³⁸ See YESILIRMAK, *supra* note 2, at 190-97 (noting that awards are generally considered enforceable under the New York Convention where other orders are not, and that parties request interim awards to enhance the possibility of enforcing the final award).

³⁹ *Id.* ¶ 51.

⁴⁰ See *id.* at 193 (noting the view that the form of awards for interim measures may be inappropriate because interim measures are not intended to have final effect and can be “revised at any time”).

⁴¹ Compare UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, Note by the Secretariat, ¶ 13, art. 26(2), delivered to Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/WG.II/WP.151/Add.1 (Aug. 6, 2008) [hereinafter 2008 Rules Revision], with 2010 Arbitration Rules, *supra* note 5, art. 26(2).

⁴² 2009 Working Group Report, *supra* note 35, ¶ 92.

⁴³ Compare 2009 Working Group Report, *supra* note 35, ¶¶ 93-94, with 2010 Arbitration Rules, *supra* note 5, art. 26(2).

⁴⁴ Compare 2010 Arbitration Rules, *supra* note 5, art. 26(2)(b), with 2006 Model Law, *supra* note 3, art. 17(2)(b).

and damages caused by the interim measure. The final adopted version is carefully worded so as to elucidate the scope of risk the parties to a dispute accept. The draft of the revisions required that in order for such liability to occur, the arbitral tribunal would have to grant an interim measure and later determine that “in the circumstances, the measure should not have been granted.”⁴⁵ One concern regarding the provision was that the allocation of risk according to this standard would be unbalanced because the party requesting an interim measure would be liable in situations where that party disclosed in good faith all the information and documents in its possession and where the arbitral tribunal made a later determination that the measure was unjustified.⁴⁶ On the other hand, however, the Working Group noted that the party requesting a measure takes the risk of damaging other parties, and such damage should be repaired if the measure is later determined not to have been justified.⁴⁷ It also acknowledged that some national laws and arbitration rules contain similar provisions, serving the useful purpose of indicating to parties the risks associated with a request for an interim measure.⁴⁸

The Rules needed to address the possible effect of the provision that a requesting party sustains liability for costs and damages in situations where the conditions of Article 26 on interim measures had been met but the requesting party loses the arbitration.⁴⁹ This includes situations in which the granting of the interim measure was not justified in light of the outcome of the case, in particular where the arbitral tribunal found the claim for which the interim measure was sought invalid.⁵⁰ In order to address this concern, various proposals were made. One suggestion was to eliminate a definition of the conditions triggering liability for costs and damages, leaving those aspects to be dealt with under applicable domestic law.⁵¹ In this vein, the Working Group examined how several domestic legal systems dealt with the assignation of liability for damages that might result from the granting of interim measures⁵² and considered several textual alternatives, including substitution of “was not justified” for “should not have been granted.”⁵³

Ultimately, the provision was included and worded so that damages can be awarded “if the arbitral tribunal determines that,

in the circumstances then prevailing, the measure should not have been granted.”⁵⁴ This pairing of the temporal requirement and the determination that the measure “should not have been granted” is consistent with the Model Law but provides more clearly for liability in cases where an interim measure was granted in compliance with all conditions, but was later found to cause damages. Thus, the final version adopted in the revised Arbitration Rules provides for allocation of risk to the party requesting an interim measure, so that the requesting party will incur damages if it loses the arbitration and the claim for which it sought the interim measure is invalidated, even if the conditions for granting an interim measure were met. This allocation of risk will not only dissuade parties from acting in bad faith by requesting measures that will later turn out to be unjustified,⁵⁵ but will ensure a fair outcome by awarding damages caused by interim measures based on the ultimate outcome of the dispute.

D. Omission of Preliminary Orders from Rules Regime

The most controversial issue the Working Group faced regarding revision of the Arbitration Rules was whether and how to include provisions on *ex parte* preliminary orders. Under the 2006 Model Law regime, an arbitral tribunal may grant a preliminary order upon request by a party, without notice of the request to any other party, if in the circumstances the arbitral tribunal found that prior disclosure of the request might frustrate the purpose of the measure.⁵⁶ This type of preliminary order may be desirable when the need for interim protection of rights is exceptionally urgent or when the element of surprise is necessary.⁵⁷ The Model Law provisions on preliminary orders had been quite controversial, but the main debate within the Working Group on Arbitration Rules did not concern the content of these provisions; instead, the question was whether inclusion of provisions on preliminary orders was appropriate for the Rules context.⁵⁸

On one hand, inclusion of provisions on preliminary orders would clarify procedures and enhance effectiveness of interim

⁴⁵ 2006 Rules Revision, *supra* note 29, ¶ 2.

⁴⁶ 2007 Working Group Report, *supra* note 19, ¶ 49.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 2009 Working Group Report, *supra* note 35, ¶ 116.

⁵⁰ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Second Session*, ¶ 92, delivered to the General Assembly, U.N. Doc. A/CN.9/688 (Feb. 19, 2010) [hereinafter 2010 Working Group Report]; see UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, Note by the Secretariat, ¶ 28, delivered to Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/WG.II/WP.157/Add.1 (Dec. 10, 2009) [hereinafter 2009 Rules Revision] (illuminating the particular situation of concern in which liability incurs when the claim for which interim measure sought is judged invalid).

⁵¹ 2009 Working Group Report, *supra* note 35, ¶ 117.

⁵² *Id.* ¶ 118; see UNCITRAL, *Settlement of Commercial Disputes: Interim Measures of Protection—Liability Regime*, Note by the Secretariat, delivered to Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/WG.II/WP.127 (Jan. 27, 200) (presenting a summary of liability regimes in several countries and relevant work of international organizations).

⁵³ 2010 Working Group Report, *supra* note 50, ¶ 93; see 2009 Rules Revision, *supra* note 50, ¶ 25 (suggesting textual alternatives “in view of all the circumstances” and “was not justified”).

⁵⁴ 2010 Arbitration Rules, *supra* note 5, art. 26(8).

⁵⁵ See UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, *Compilation of Comments by Governments and International Organizations*, 10-11, delivered to the General Assembly, U.N. Doc. A/CN.9/704 (May 4, 2010) (in which the Arab Association for International Arbitration (AAIA) approves adoption of Article 26(8) because it will deter parties from acting in bad faith).

⁵⁶ 2007 Working Group Report, *supra* note 19, ¶¶ 53-60.

⁵⁷ YESILIRMAK, *supra* note 2, at 220 (giving as examples the likelihood trade secrets will be disclosed, assets dissipated, or vital evidence disposed of).

⁵⁸ 2007 Working Group Report, *supra* note 19, ¶ 53.

measures; but, on the other hand, they may also be inappropriate due to the nature of the Rules, as well as create confusion as to arbitrators' ability to grant such measures. Omission of provisions on preliminary orders would acknowledge the different natures and purposes of the Rules (directed at parties) and the Model Law (directed at legislatures), and the lack of consensus among international arbitration practitioners as to the acceptability of such procedures.⁵⁹ Inclusion of provisions on preliminary orders could also undermine their acceptability in certain contexts,⁶⁰ or create the false impression that arbitrators are empowered to grant such orders even though the applicable domestic law prohibits them.⁶¹ Furthermore, in order to maintain the Rules' wide acceptability and applicability, the Working Group was charged with revision that did not alter the "style, structure, and drafting style" of the original Rules, such that inclusion of lengthy provisions on preliminary orders like those in the Model Law might create the impression that the mechanism is a key aspect of the Rules, whereas preliminary orders are rarely used in practice. According to the revision mandate, then, the Rules' flexibility would be best maintained by keeping them short and simple.⁶²

However, justification for inclusion of *ex parte* preliminary order provisions in the Arbitration Rules stems from the notion that the Rules are part of a compromise package, accepted by the parties to arbitration, which enable the arbitral tribunal to prevent frustration of the purpose of an interim measure, subject to safeguards.⁶³ Additionally, because in some cases arbitrators do issue preliminary orders, inclusion of relevant provisions would provide procedural guidance and contribute to harmonization on a relatively unsettled practice in international arbitration.⁶⁴ In fact, failure to include such provisions could undermine the effectiveness of interim measures, so that lengthiness of the provisions should not prevent their inclusion.⁶⁵ Because application of the Rules would come as a result of parties' agreement to abide by their provisions, empowerment of the arbitral tribunal to issue preliminary orders would be the result of a conscious decision of the parties instead of a source of conflict (between parties or with the applicable domestic law).⁶⁶

The Working Group agreed that unless prohibited by applicable domestic law the Rules in and of themselves do not prohibit the arbitral tribunal from issuing preliminary orders⁶⁷

and crafted the following provision as compromise effort to outline a basic structure for granting of *ex parte* interim measures:

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.⁶⁸

This short provision departed substantially from the lengthy provisions on preliminary orders contained in the Model Law,⁶⁹ and omitted the specific terminology "preliminary orders" so as to avoid controversy over the definition of that term and allow for deference to governing domestic law.⁷⁰ However, it was unable to overcome several basic objections. First, as a derivative of the fundamental difference between the Rules (contractual in nature, directed at parties) and the Model Law (legislative in nature), the characteristics of *ex parte* preliminary orders are contrary to the consensual nature of arbitration. Indeed, many legal systems do not permit preliminary orders under their domestic law on arbitration, and even several states considering enactment of Chapter IV A of the Model law are contemplating omission of its provisions on preliminary orders.⁷¹ In several jurisdictions, the granting of *ex parte* preliminary orders could give rise to objections based on violations of due process of law and parties' right to be heard.⁷²

Opposition to the provision considered omission of preliminary orders from the Rules regime the most prudent way to accommodate widely varying approaches to such mechanisms in different legal systems. Specifically, in some jurisdictions domestic courts grant preliminary orders pursuant to certain safeguards, whereas those safeguards might be absent under the arbitration proceedings. The principle of judicial impartiality is particularly implicated in this regard.⁷³ For example, in a domestic court the judge granting the preliminary order may not be the same judge to decide the merits of the case, whereas in arbitration the arbitrator would decide both issues, potentially

⁵⁹ *Id.* ¶ 54.

⁶⁰ *See id.* ¶ 55 (noting that States in particular may object, especially in the context of investor-state disputes).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* ¶ 56.

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 57.

⁶⁶ *Id.* ¶ 58.

⁶⁷ *Id.* ¶ 59.

⁶⁸ 2008 Rules Revision, *supra* note 41, ¶ 13, art. 26(5).

⁶⁹ *See* 2006 Model Law, *supra* note 3, art. 17(B), (C) (including eight separate provisions on preliminary orders).

⁷⁰ 2007 Working Group Report, *supra* note 19, ¶ 60.

⁷¹ 2009 Working Group Report, *supra* note 35, ¶ 101.

⁷² *Id.*; *see also* YESILIRMAK, *supra* note 2, at 222-23 (noting that both the ICSID and ICC Arbitration regimes do not permit *ex parte* measures due to inconsistency with their provisions on the right to be heard, which is also recognized in the Arbitration Rules; but that many legal systems do recognize *ex parte* measures as valid when urgency is a factor).

⁷³ *See* YESILIRMAK, *supra* note 2, at 224-225 (proposing that impartiality of a fact-finder would normally prevent *ex parte* communication with parties to the dispute, but that *ex parte* interim measures could be an exception based on fairness and urgency).

prejudicing the outcome of the proceedings.⁷⁴ These kinds of discrepancies could undermine the acceptability of the Rules to a broad category of parties.

Advocates of the provision on preliminary measures invoked its necessity as a guiding and harmonizing measure directed at existing arbitral practice that is not incompatible with applicable domestic laws.⁷⁵ Omission of the provision would not preclude arbitral tribunals from issuing preliminary orders, and when applicable domestic law prohibited preliminary orders that law would supersede the Rules in any case.⁷⁶ Furthermore, deletion of the provision could produce undesirable interpretations of the Rules as generally disallowing preliminary orders, and produce inconsistency with UNCITRAL arbitration standards and the Model Law by allowing parties to agree to arbitration, but obliging or encouraging them to turn to domestic courts to obtain preliminary orders.⁷⁷ Accordingly, some objections to the provision could be addressed via clarification that arbitral tribunals are not empowered to grant preliminary orders in legal systems prohibiting them, or that power to grant preliminary orders must derive from domestic legislation.⁷⁸

The Working Group finally agreed to replace the original draft provision with a more neutral approach to preliminary orders aimed at reconciling these diverging views.⁷⁹

Nothing in these rules shall have the effect of creating, (where it does not exist), or limiting, (where it does exist), any right of a party to apply to the arbitral tribunal for, and any powers of the arbitral tribunal to issue, an interim measure without prior notice to a party.⁸⁰

In this form, however, the provision did not mention “preliminary orders,” and so the term was added along with a descriptive phrase to clarify meaning for parties unfamiliar with it.⁸¹ In order to avoid the awkwardness of bracketed text, it was deleted and the provision supplemented with an additional phrase, so that the final version of the compromise draft article read:

Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.⁸²

This version of Article 26(9) was included in the final draft of the revised Arbitration Rules presented to the General Assembly before their adoption in June 2010.⁸³

Unfortunately, these hasty revisions may have been the undoing of preliminary orders as part of the Rules regime on interim measures, because Article 26(9) on preliminary orders mysteriously disappeared from the adopted revision of the Arbitration Rules that went into effect in August 2010. The provision was confirmed in an intermediate 2009 draft as the agreed upon proposal to reconcile diverging perspectives on inclusion of preliminary orders, with a note that the Working Group may wish to return to the issue. However, the Working Group did not address Article 26(9) in subsequent sessions, and sent it unchanged to the General Assembly in 2010. Yet the adopted version of the Arbitration Rules omits the provision on preliminary orders entirely, and no further explanation of its removal exists anywhere.

The only clue to its disappearance lies in a close reading of the provision in comparison with previous draft versions, and in the comments of several governments and international organizations on the draft articles, both of which suggest that the amended wording of Article 26(9) is legally incomprehensible.⁸⁴ In its original form, the text of the draft compromise provision indicated that nothing creates a nonexistent right or limits an existing right of a party to apply for *ex parte* interim measures, just as nothing creates a nonexistent power or limits an existing power of an arbitral tribunal to award such measures. This neutral wording explicitly confirmed that the arbitral agreement could neither affect, nor create any additional arbitral powers outside of, the applicable domestic legal regime for preliminary measures; but it also allowed for the right of parties to request and the power of arbitral tribunals to issue preliminary orders *ex parte* unless applicable domestic law prohibited such measures, although it did not explicitly confirm that right or power.

However, after the brackets were deleted, the phrase “which may exist outside these rules” was inappropriately added so that instead of referring to both party rights and arbitral tribunal powers under the applicable domestic regime, it referred only to limitation of party rights under domestic law. This had the odd effect of protecting the rights of parties under domestic law to request *ex parte* orders if such rights existed, but *not* affording such rights to parties under the arbitration agreement, even if such rights existed under domestic law. Even more confusing was the provision’s treatment of “any power of the tribunal to issue ... a preliminary order,” because the text does not indicate whether that power is not created *or* not limited, and if it were limited then such limitation would seem to apply only to powers that exist “outside [the] Rules.” Thus, the final wording of the draft provision’s legal effect was completely contrary to its aim,

⁷⁴ 2009 Working Group Report, *supra* note 35, ¶ 102.

⁷⁵ *Id.* ¶ 103.

⁷⁶ *Id.*

⁷⁷ *Id.* ¶¶ 102, 103.

⁷⁸ *Id.* ¶ 106.

⁷⁹ *Id.* ¶ 111, 112.

⁸⁰ 2009 Working Group Report, *supra* note 35, ¶ 109.

⁸¹ *Id.* ¶ 111.

⁸² 2009 Rules Revision, *supra* note 50, ¶ 25, art. 26(9).

⁸³ UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, ¶ 8, delivered to the General Assembly, U.N. Doc. A/CN.9/703/Add.1 (March 5, 2010) [hereinafter 2010 Rules Revision].

⁸⁴ See UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations*, 13, delivered to the General Assembly, U.N. Doc. A/CN.9/704 (May 4, 2010) (in which the international organization Corporate Counsel International Arbitration Group (CCIAG) complains that Article 26(9) is “incomprehensible” and suggests a more workable wording).

and this may be a good reason for its absolute omission from the Rules. If the aim of the provision was to allow for preliminary orders as long as the applicable domestic law did not prohibit them, while leaving all rights and powers of parties, domestic courts, and arbitral tribunals intact according to the domestic law no matter what, the provision as submitted to the General Assembly did the opposite: it seemed to disallow preliminary orders under the arbitral regime while allowing them under applicable domestic law, if that law allowed them, so that if parties wished to request preliminary orders they would be obliged to apply to a domestic court.⁸⁵

In the end, nothing further illuminates exactly why the provision on *ex parte* preliminary orders was summarily omitted from the Arbitration Rules after a lengthy deliberation process finally concluding in a compromise acceptable to the entire Working Group, but its elimination has several implications. For one, opposition to inclusion of preliminary orders in the Rules regime was very strong and based on fundamental concerns that such a provision would undermine the Rules' wide acceptability. Perhaps, in the end, the interests of maintaining the Rules' attractiveness to a broad spectrum of parties and institutions superseded the impetus to provide guidelines regarding a controversial arbitration practice. Secondly, however, the absence of a provision on preliminary orders means that the Rules are silent on a very controversial area of existing practice, and this ambiguity seems contrary to the revisionary goal of updating guidelines so as to bring consistency to international commercial arbitration practices. Finally, that the Working Group overcame such contention to arrive at a compromise provision indicates that its inclusion was an important part of the modernization effort bringing consistency to the UNCITRAL arbitration system, so that its elimination from the adopted revision of the Arbitration Rules points to a significant gap between the Model Law and the Rules, as well as a general inconsistency with the aims of the UNCITRAL regime as a whole.

Because the Model Law includes extensive provisions on preliminary orders, but the Arbitration Rules do not mention them at all, rights of parties to request and arbitral tribunals' powers to grant such orders are left completely to the applicable domestic law. This could be problematic, for instance, because many states have not adopted the 2006 Model Law, and when both domestic law and the arbitration agreement are silent as to whether preliminary orders are acceptable, parties and arbitrators may be confused as to their rights and powers. Indeed, because the Rules are silent on preliminary orders entirely, parties, domestic courts, and arbitral tribunals may interpret the Rules incorrectly as generally disallowing preliminary orders even where applicable domestic law allows them.

IV. Conclusion

The UNCITRAL Arbitration Rules were revised in order to reflect changes in international arbitration practice, provide guidelines for parties and arbitral tribunals, and bring consistency to the UNCITRAL system in conflux with the new 2006 Model Law. However, several differences between the Model Law and the revised Arbitration Rules reveal their different scopes and range of applicability. Much of this is due to the fundamental differences in nature, such that the Rules must be more widely acceptable to parties agreeing to an arbitration format. This means that the Rules are shorter, simpler, and more flexible than the Model Law, which is intended as a model for lawmakers. This greater flexibility in the Rules takes the form, for instance, of textual differences broadening the definition of circumstances and conditions that may justify the use of interim measures. At the same time, the Rules attempt to provide clarity for parties and arbitrators, for instance by clearly allocating the risk of later assignment of liability for damages to parties requesting interim measures, in the event that a determination on the merits of the dispute proves the interim measure was unjustified.

However, even though the revised Rules do provide greater clarity and consistency with the Model Law, some of the differences between them reveal gaps in the international arbitration system as a whole that may prove problematic. One such gap arises from the fundamental distinct natures of the Rules and Model Law: in states that have not implemented legislation based on the Model Law, mechanisms ensuring enforcement of interim measures may be lacking, and because the Rules' reach goes only so far as contracting parties—and not national legislation or enforcement—in these states enforcement of interim measures may be as handicapped as ever. In these instances, the modifications of the UNCITRAL regime on interim measures would be moot.

Another gap arises regarding the issue of *ex parte* preliminary orders, because where the Model Law contains extensive provisions on preliminary orders, the Arbitration Rules are completely silent. This has the overall effect of creating ambiguity as to the permissibility of preliminary orders under the UNCITRAL regime, because although the Model Law permits them the implication of the Rules' silence could be that preliminary orders are not permissible in arbitration contexts. In states that have not adopted the Model Law, this means that the Rules' omission of a provision on preliminary orders mitigates against the acceptability of such measures regardless of whether domestic legislation permits them. In states that have adopted legislation based on the Model Law, the Rules' omission could still have the same affect, in that although the domestic legislation

⁸⁵ See UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations*, 8, delivered to the General Assembly, U.N. Doc. A/CN.9/704/Add.1 (May 10, 2010) (in which El Salvador complains that Article 26(9) cannot be understood, and points out that the provision “seems to be referring to the right to appeal to a judicial tribunal” but in fact refers to an arbitral tribunal); UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations*, 6-7, delivered to the General Assembly, U.N. Doc. A/CN.9/704/Add.3 (May 12, 2010) (in which the international organization Forum for International Conciliation and Arbitration (FACACIC) complains that Article 26(9) is unclear and seems to indicate a prohibition of any *ex parte* applications by the Rules regardless of domestic law).

clearly intends to allow preliminary orders, the arbitral tribunal and the parties may not find support for preliminary orders as a matter of contract. Both cases are inconsistent with the overall aim of the UNCITRAL system regarding *ex parte* preliminary orders, which is not to preclude such measures as an arbitral mechanism long as applicable domestic law does not prohibit them.

In conclusion, the revised UNCITRAL Arbitration Rules do provide greater clarity and more specific guidelines for practice, within a framework that is more flexible and widely applicable than the Model Law. In some cases, this greater flexibility was even achieved through greater textual specificity and more detailed definitions. However, in the opposite circumstance, where the Rules are less specific than the Model Law (as is the case

with the issue of preliminary orders), lack of specificity does not necessarily equate with more flexibility. In fact, these areas may be in need of clarification in order to preserve the very flexibility so vital to the Rules' widespread acceptance and usefulness. Unfortunately, the provision on preliminary measures—on which there *was* impetus to adopt a neutral provision, though perhaps the hasty revisions made it incomprehensible, resulting in its unfortunate deletion—is one such issue, and only future practice or further revision remain to illuminate how the gaps between the Model Law and the Arbitration Rules will affect the availability of *ex parte* preliminary orders in international commercial arbitration.