COMMENT

HOW TO BEST PROTECT PARTY RIGHTS: THE FUTURE OF INTERIM RELIEF IN INTERNATIONAL COMMERCIAL ARBITRATION UNDER THE AMENDED UNCITRAL MODEL LAW

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INTRODUCTION

Due to the rise of globalization and the expansion of trading frontiers, international commercial transactions have significantly increased in both number and complexity.[1] Not surprisingly, this resulted in an increasing number of disputes.[2] Although national courts are the traditional venues for dispute resolution, parties are more frequently turning to arbitration as a favorable alternative.[3] In

1. *See* KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 1-2 (2003) (explaining that technological innovations and free trade agreements led to an increase in the number of cross-border transactions, making business strategies and practices increasingly complex).

2. *See* William Wang, Note, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1059 (2003) (noting that increased international trade fostered disputes between states, businesses, and individuals); *see also* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 1 (2003) (identifying differing commercial and legal traditions, cultural norms, geography, and politics as sources of disputes in international transactions).

3. *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 778 (2002) (noting the emerging primacy of international commercial arbitration as the mechanism for resolving contractual disputes); Michael Pryles, *The Growth of International Arbitration*, AUSTRALIAN GOVERNMENT, ATTORNEY-GENERAL'S DEPARTMENT http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/0417185A03AF31B7CA256C8A00025187/$file/GrowthINtArb.pdf (last visited Apr. 14, 2010) (analyzing available arbitration statistics from different Asian and Pacific regions and identifying an upward trend in the use of arbitration); Tatyana V. Slipachuk & Per Runeland, *Kiev: From Zero to 800 Cases Per Year in Less than 10 Years*, 11 AM. REV. INT'L ARB. 585, 586 (2000) (charting the consistent increase in arbitration cases submitted to the International Commercial Arbitration Court from 1993-1999); Richard W. Naimark & Stephanie E. Keer, *Analysis of UNCITRAL Questionnaires*

the context of contractual business disputes, international commercial arbitration provides a number of benefits not available through litigation.[4] However, arbitration is not free from downsides,[5] such as difficulties related to the arbitral tribunals' willingness and ability to order and enforce interim measures of protection during international commercial arbitration proceedings.[6]

Notwithstanding the increasingly frequent use of interim measures, there is little consensus about the scope of the arbitral tribunal's powers and how interim actions are enforced.[7] In an effort to encourage uniformity, the United Nations Commission on International Trade Law ("UNCITRAL") amended its provision on

on Interim Relief, 16-3 MEALEY'S INT'L ARB. REP. 11 (2001) (remarking on the distinctions among the use of arbitration in the fields of labor, securities, business disputes, and consumer transactions).

4. *See* PIETER SANDERS, QUO VADIS ARBITRATION?: SIXTY YEARS OF ARBITRATION PRACTICE 7-8 (1999) (identifying the parties' ability to choose the composition of the arbitral tribunal, language of the proceeding, and rules governing the arbitration as special advantages to international arbitration); Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENTS: INT'L TRADE L.J. 55, 55 (2003) (confirming simplicity, lower costs, confidentiality, and speed of resolution as reasons for favoring arbitration over civil litigation); Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46*, 9 AM. REV. INT'L ARB. 155, 156-57 (1998) (adding the availability of expert arbitrators, the ability to choose in advance the governing substantive law, and the avoidance of unpredictable jury trials as advantages to arbitration).

5. *See* SANDERS, *supra* note 4, at 7 (considering the possibility of a final arbitral award being set aside as a main drawback to arbitration because of the cost and delay involved with post-arbitration court proceedings and the possibility of having to initiate new arbitration proceedings to resolve the dispute).

6. *See* Ferguson, *supra* note 4, at 55 (identifying issues of enforceability, the inability of parties to request interim measures prior to the formation of the arbitral tribunal, and the reluctance of the tribunal to order interim measures as drawbacks arising in international commercial arbitration).

7. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 3 (2d ed. 2001) [hereinafter INTERNATIONAL COMMERCIAL ARBITRATION 2001](finding significant differences among national arbitration laws on the issuance of interim measures by arbitral tribunals); *see, e.g.*, ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 347 (4th ed. 2004) (exemplifying the disagreement by contrasting an arbitral tribunal ruling under the ICC Rules and a domestic court ruling under the Ethiopian Civil Code).

interim measures in 2006.[8] The revisions to the UNCITRAL Model Law ("Model Law") elaborated on the powers of the arbitral tribunal to grant interim measures, defining scope of interim measures and the courts' role of support and enforcement.[9]

Despite UNCITRAL's efforts to foster uniformity and harmonization through a model legislative provision and the predicted success of the changes,[10] the majority of states have yet to adopt the amendments to Article 17.[11] This Comment argues that states should adopt the 2006 amendments to Article 17 because the absence of harmonized legislation undermines the validity of international commercial arbitration proceedings.

Part I discusses interim measures in the context of international commercial arbitration and explains the 2006 amendments to the Model Law. Part II analyzes the Model Law amendment's contributions to international commercial arbitration practice and presents reasons for states to incorporate the Model Law amendments. Part III recommends how states and arbitral institutions should respond to the Model Law amendment and how UNCITRAL may be able to improve on the current version of Article 17.

8. *See* G.A. Res. 61/33, pmbl., U.N. Doc. A/RES/61/33 (Dec. 18, 2006) (recognizing the need for revisions to the Model Law in light of current practices on interim measures in arbitration, and adopting the amendments proposed by the Working Group).

9. *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*] (incorporating the amendments in Article 17 of the new "Chapter IV A" relating to interim measures and preliminary orders).

10. *See* Ferguson, *supra* note 4, at 55, 64-65 (predicting that the revisions to Article 17 will be widely accepted and will have a significant impact on national legislation and institutional arbitration rules).

11. *See* UNCITRAL, *Status of Conventions and Model Laws, Note by the Secretariat*, ¶ 5, *delivered to the General Assembly*, U.N. Doc. A/CN.9/674 (May 14, 2009) [hereinafter *Status of Model Law*] (indicating that only four states have enacted legislation based on the 2006 Model Law provisions on interim measures, significantly lower than the number of states that incorporated the previous 1985 version of Article 17).

I. BACKGROUND

It is not difficult to understand why parties seeking to settle contractual disputes rely on international commercial arbitration.[12] Arbitration proceedings can be highly favorable compared to the rigidity and complexity of litigating in national courts.[13] International commercial arbitration gives parties the freedom to choose the arbitrators who will decide their dispute and a confidential forum based on the laws and criteria the parties chose.[14] Such features are particularly important when parties wish to avoid the publicity accompanying litigation and to preserve business relationships.[15]

A. INTERIM MEASURES OF PROTECTION DEFINED

At the most fundamental level, interim measures of protection are forms of temporary relief[16] intended to safeguard the rights of the parties until the arbitral tribunal issues a final award.[17] Interim

12. *See* SANDERS, *supra* note 4, at 2-6 (discussing arbitration's advantages of expediency, confidentiality, and cost efficiency).

13. *See id.* at 3 (noting that arbitral proceedings are streamlined as compared to national court proceedings, and that arbitral appeals are the exception, rather than the rule); *see also* INTERNATIONAL COMMERCIAL ARBITRATION 2001, *supra* note 7, at 3-4 (contending that although arbitration is an alternative to litigation in national courts, it still requires the support of national arbitration legislation and national courts to function effectively).

14. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1-3 (2008) (outlining consensual agreements, non-governmental decision-makers, and final and binding awards as defining characteristics of international commercial arbitration).

15. *See* OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 8 (1994) (recognizing that arbitration's privacy is particularly well suited for disputes involving sensitive information like trade secrets or defective products).

16. *See* John Charles Thomas, *Selected Issues: Interim Measures in International Arbitration: Finding the Best Answer*, 12 CROATIAN ARB. Y.B. 213, 213-14 (2005) (distinguishing interim measures, which are temporary actions by the tribunal subject to the final award, from partial or interlocutory awards).

17. *See* UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretariat*, 42, *delivered to the General Assembly*, U.N. Doc. A/CN.9/264 (Mar. 25, 1985) (enunciating that interim measures are meant to "prevent or minimize any disadvantage"); HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 542 (1989) (excerpting the Seventh Secretariat Note on the power of an arbitral tribunal to order interim measures to protect parties' rights until the final award is rendered); ALI YESILIRMAK, PROVISIONAL MEASURES IN

measures of protection arise in a variety of circumstances in international arbitration and their uses vary depending on the context and forum.[18] Still, they are a procedural necessity in both public and private means of dispute resolution.[19] In many cases, interim measures determine the efficacy of the arbitral award.[20] Interim relief can have "final and significant consequences"[21] without which an adverse party may easily render an award meaningless.[22]

INTERNATIONAL COMMERCIAL ARBITRATION 4 (2005) (insisting the underlying principle of interim measures is that no party's rights should be negatively affected as a result of the duration of the proceedings).

18. *See generally* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1943-2019 (2009) [hereinafter INTERNATIONAL COMMERCIAL ARBITRATION 2009] (surveying the use of interim measures in international arbitration proceedings and explaining the relevant authorities that authorize and govern their use); Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11 ICC INT'L CT. OF ARB. BULL. 31, 31 (Spring 2000) (discussing the importance of interim measures in protecting party rights during ICC arbitrations); Julian D. M. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11 ICC INT'L CT. OF ARB. BULL. 23, 26-30 (Spring 2000) (illustrating through an analysis of ICC awards how arbitral tribunals use interim measures in international commercial arbitration practice); *see also* Douglas D. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 INT'L TAX & BUS. LAW. 368, 370-74 (1986) (distinguishing between interim measures issued by arbitral tribunals and provisional remedies available through the courts to support arbitration proceedings).

19. *See, e.g.*, Alan Redfern, *Interim Measures*, *in* THE LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 203, 209 (Lawrence W. Newman & Richard D. Hill ed., 2008) [hereinafter LEADING ARBITRATOR'S GUIDE] (noting the increased importance of interim measures in disputes involving international transactions due to the relative ease with which evidence and assets can be moved across borders); LAWRENCE COLLINS, *Provisional and Protective Measures in International Litigation*, *in* ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 1, 10 (1994) (assessing the interim protection of rights as an established general principle of law in all legal systems).

20. *See* Bernardo M. Cremades, *The Need for Conservatory and Preliminary Measures*, 27 INT'L BUS. LAW. 226, 226-27 (1999) (bemoaning that recalcitrant parties, if left unchecked, can render a final award meaningless and unenforceable through bad faith and obstruction).

21. UNCITRAL, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Report of the Secretary General*, ¶ 66, *delivered to the General Assembly*, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000) [hereinafter *Possible Uniform Rules*] (contending that such consequences may not be reversible even if the interim order is later modified).

22. *See* UNCITRAL, Working Group on Arbitration, *Possible Future Work: Court-Ordered Interim Measures of Protection in Support of Arbitration, Scope of Interim Measures that May be Issued by Arbitral Tribunals, Validity of the*

Generally, there is little consensus as to the scope, function, and proper use of interim measures in arbitration.[23] However, certain characteristics are common.[24] A party to the arbitration must make a request[25] for a temporary or provisional protective measure under conditions demonstrating urgency[26] and a risk of serious or irreparable harm.[27] Additionally, interim measures are binding only on the parties to the arbitration[28] and the issuing body may review and modify the order.[29]

Agreement to Arbitrate, Report of the Secretary General, ¶ 7, *delivered to the General Assembly*, U.N. Doc. A/CN.9/WG.II/WF.111 (Oct. 12, 2000) [hereinafter *Interim Measures*] (decrying the ease with which parties can remove assets from a jurisdiction to avoid an arbitral award).

23. *See* REDFERN & HUNTER, *supra* note 7, at 340-50 (noting the disparity amongst national and institutional rules regarding the use of interim measures). Even the names used for identifying interim measures differ by forum. *See, e.g.*, *2006 Model Law*, *supra* note 9, arts. 9, 17 ("interim measures"); Bunesgesetz über das Internationale Privatrecht [Federal Code on Private International Law] Dec. 18, 1987, SR 291, art. 183 (Switz.), *translated in* SWISS CPIL, (Umbricht Attorneys, 2007) *available at* http://www.umbricht.com/pdf/SwissPIL.pdf ("provisional or protective measures"); London Court of International Arbitration [LCIA], Arbitration Rules, Art. 25 ("interim and conservatory measures"); Int'l Chamber of Commerce [ICC], Rules of Arbitration, at 23(2) (Jan. 1, 2008) ("interim or conservatory measures"); International Centre for the Settlement of Investment Disputes [ICSID], Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Rule 39 (Oct. 14, 1966) ("provisional measures").

24. *See* YESILIRMAK, *supra* note 17, at 5-7 (2005) (delineating nine essential characteristics of interim measures in arbitration that are not subject to variation from one country to another, including that interim relief "should not exceed the final relief. . ." and "should normally be granted where it is risky to await the final relief").

25. *See, e.g.*, *2006 Model Law*, *supra* note 9, art. 17 (providing for interim measures only at the request of a party).

26. *See Partial Award in Case 8113*, 11 ICC INT'L CT. OF ARB. BULL. 65, 67-68 (Spring 2000) [hereinafter *Case 8113*] (reiterating that urgency is the basic requirement for granting provisional relief); Panacaviar, S.A. v. Iran, Case No. 498, Award No. ITM 64-498-1 (Dec. 4, 1986), *reprinted in* 13 IRAN-US CTR 193, 196-98 (denying a request for the stay of court proceedings because the request demonstrated no urgency as it was made six years after the commencement of the proceedings).

27. *See, e.g.*, *Case of 8113*, *supra* note 26, at 65-69 (refusing to grant interim measures when the damages awarded would fully compensate for loss incurred); Markus Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA BULL. 31, 36-37 (2000) (defining the level of detriment as that which cannot "easily be remedied (exposure to 'irreparable' harm)").

28. *See* Houston Putnam Lowry, *Recent Developments in International*

Interim measures generally fall into two broad categories:[30] 1) measures aimed at avoiding or minimizing loss, damage, or prejudice;[31] and 2) measures facilitating the enforcement of arbitral awards.[32] Measures meant to avoid loss, damage, or prejudice usually serve the purpose of preserving the state of affairs pending the final resolution of the dispute.[33] They are functionally similar to court injunctions in that they may require a party to continue performance or abstain from taking certain actions that may frustrate the resolution of the dispute.[34] Common examples of such measures include orders for the preservation of evidence related to the subject matter of the dispute, orders for the sale of perishable goods to

Commercial Arbitration, 10 ILSA J. INT'L & COMP. L. 335, 340 (2004) (recognizing that it is hornbook law that arbitrators' decisions are not binding on third parties); *see also* UNCITRAL, *Report of the Working Group on Arbitration on the Work of its Thirty-Second Session*, ¶ 64, *delivered to the General Assembly*, U.N. Doc. A/CN.9/468 (Apr. 10, 2000) [hereinafter *Report of the Thirty-Second Session*] (highlighting that although arbitral tribunals cannot bind third parties, they can still significantly affect parties outside the arbitration who may, for example, possess assets of a party).

29. *See Report of the Thirty-Second Session*, *supra* note 28, ¶ 64 (characterizing the ability to review or modify interim measures based on situation specific circumstances or case progress as a salient procedure to be included in any uniform provision). The ability to review or modify awards is also present in many sets of arbitration rules. *See, e.g.*, International Centre for Settlement of Investment Disputes [ICSID] Arbitration Rules, Rule 39 (stipulating that the tribunal may modify or revoke awards only after giving the parties the opportunity to present their observations); Singapore International Arbitration Centre [SIAC] Arbitration Rules, Rule 26.1 (1997) (allowing for confirmation or amendment of a provisional order by any arbitrator possessing jurisdiction); Rules of Court, 1978 I.C.J. Acts & Docs., art. 76(1) (condoning modification if justified by a change in the situation).

30. *See* UNCITRAL, Working Group II, *Settlement of Commercial Disputes, Preparation of Uniform Provisions on Interim Measures of Protection, Note by the Secretariat*, ¶ 16, *delivered to the General Assembly*, U.N. Doc. A/CN.9/WG.II/WP.119 (Jan. 30, 2002) [hereinafter *Settlement of Commercial Disputes*] (noting that distinctions between specific types of interim measures are not always clear and that interim measures can fall into more than one category).

31. *See id.* ¶ 17 (encompassing measures that maintain the respective positions of the parties until the final award).

32. *See id.* ¶ 18 (including measures concerning assets, property, and security for costs that ensure that there will be sufficient available resources to satisfy the arbitral award).

33. *See id.* ¶¶ 16-17 (explaining that such measures ensure that the parties do not cause unnecessary harm through their actions, or inactions, during the arbitration proceedings).

34. *See* LEW ET AL., *supra* note 2, at 596-97 (discussing measures that regulate and stabilize party relations during arbitral proceedings).

minimize damages, and orders ensuring confidentiality of information disclosed during the proceedings.[35]

Equally important are those measures aimed at facilitating later enforcement of the arbitral award.[36] Interim measures ensure that actions taken by an adverse party during the arbitration proceedings to avoid enforcement do not render the arbitral tribunal's final award meaningless.[37] These measures include ordering parties to provide security for costs,[38] attaching or freezing assets to prevent removal from the jurisdiction,[39] or depositing the assets that would be used to satisfy the award with a third party pending the resolution of the dispute.[40]

35. *See Settlement of Commercial Disputes*, *supra* note 30, ¶ 17 (including also the appointment of administrators to manage income-producing assets during the proceedings, orders for inspections at an early stage of the proceedings when there is the strong possibility the situation may change, and orders preventing the loss of a party's right).

36. *See id.* ¶ 18 (providing that parties may request orders to freeze assets and post security for the amount in dispute and the cost of arbitration).

37. *See* Lawrence F. Ebb, *Flight of Assets from the Jurisdiction "In the Twinkling of a Telex": Pre- and Post- Award Conservatory Relief in International Commercial Arbitrations*, 7 J. INT'L ARB. 9, 9-10 (1990) (lamenting the ease and frequency with which losing parties can remove mobile assets from the jurisdiction to avoid enforcement of the arbitral award).

38. *See* BLACK'S LAW DICTIONARY 1387 (Bryan A. Garner ed., 8th ed. 2004) (defining "security for costs" as "[m]oney, property, or a bond given to a court by a plaintiff or appellant to secure the payment of court costs if the party loses"); YESILIRMAK, *supra* note 17, at 214-15 (applying the traditional definition of security for costs to arbitration and recognizing that under a number of arbitration rules, arbitrators can require a party to provide security for costs, which can include the costs of the arbitration proceedings, but also acknowledging that such orders are highly debated); *Interim Award in Case 8786* 11 ICC INT'L CT. OF ARB. 81, 82-83 (Spring 2000) (citing cases granting security for payment).

39. *See* Kevin J. Brody, Note, *An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention*, 18 CORNELL INT'L L.J. 99, 100 (1985) (finding pre-award attachment or garnishment useful in coercing adverse party cooperation); Joseph D. Becker, *Attachments in Aid of International Arbitration—the American Position*, 1 ARB. INT'L 40, 40-41 (1985) (explaining attachments are used for the purpose of security in arbitration proceedings).

40. *See, e.g.*, Nederlands Arbitrage Instituut [NAI], Interim Award in Case No. 1694, American Producer v. German Constr. Co., XIII YBCA 97 (Dec. 12, 1996) (ordering a party to provide a $6.5 million bank guarantee).

B. POWER OF ARBITRATORS TO ISSUE INTERIM MEASURES OF PROTECTION

Historically, states viewed the power to issue interim measures as belonging solely to the national courts,[41] which was rooted in public policy concerns.[42] However, over time, states began to recognize the effectiveness and reliability of arbitration in resolving disputes.[43] To acknowledge the increasing use of arbitration and the necessity for protections of party rights comparable to those provided by national courts, states amended national arbitration laws to allow arbitrators some power to order interim relief.[44] States began to view the courts' role as supportive of arbitration, rather than considering them separately. As a result, states modernized their national arbitration laws to either expressly allow for the issuance of interim orders by arbitral tribunals or to allow parties to agree to confer such power.[45]

41. *See* LEADING ARBITRATOR'S GUIDE, *supra* note 19, at 209 (observing that states were initially reluctant to grant arbitral tribunals the power to issue interim measures); *see, e.g.*, C. Proc. Civ. Y Com. 766, Art. 753 [Argentine National Code of Civil and Commercial Procedure] ("Arbitrators cannot order compulsory measures or measures leading to enforcement."); Italian Code of Civil Procedure, Title VII, Art. 818 (1997), *available at* www.camera-arbitrale.com ("The arbitrators may not grant attachments or other interim measures of protection."); P.R.C.: Arbitration Law, art. 68, *translated in* 34 I.L.M. 1650 (1995) [hereinafter China Arbitration Law] (asserting that any request for interim relief must be referred to the courts).

42. *See* Lew, *supra* note 18, at 24 (supporting the delegation of power to issue interim measures solely to the national courts in response to the difficulties national courts faced in enforcing an arbitral tribunal's orders for interim measures and a tribunal's lack of coercive powers to enforce their own orders).

43. *See, e.g.*, Neil E. McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANSNAT'L L. 273, 275-77 (1984) (comparing the development of several national laws regarding the availability of provisional relief in arbitration proceedings).

44. *See* EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 715-16 (1999) (elaborating on the modernization of national laws to allow for concurrent powers regarding conservatory measures in arbitration proceedings).

45. *E.g.*, Houdende het gerechtelijk wetboek [Belgian Judicial Code], art. 1696., *available at* http://www.jus.uio.no/lm//belgiu m.code.judicature.1998/sisu _manifest.html (permitting the tribunal to issue interim relief at the request of a party with the exception of attachment orders); Arbitration Act, 1996 c. 23, § 39 (Eng.), *available at* www.opsi.gov.uk/acts/acts1996/ukpg a_19960023_en_3#pt1-pb7-L1g39 (permitting the parties to agree to give the tribunal the power to issue interim relief); Arbitration Act, 1986, art. 1051 (Neth.) (permitting an agreement allowing the tribunal to issue an award in a summary proceeding, within certain

C. UNCITRAL'S 2006 AMENDMENT TO MODEL LAW ARTICLE 17

The UNCITRAL Model Law, originally adopted in 1985,[46] is a cornerstone of international commercial arbitration practice.[47] By 2005, at least forty-three states specifically incorporated Model Law provisions on interim measures into their national arbitration laws.[48] However, as of 2004, over half of these incorporated more detail into their national legislation than was provided in the Model Law.[49]

In an effort to modernize the Model Law to conform to the actual practices of international commercial arbitration, the UNCITRAL Secretariat identified thirteen potential topics for future work by the Commission and recognized the use and enforceability of interim measures as a priority.[50] UNCITRAL assigned this project to Working Group II, which conducted deliberations for review and revision, and subsequently produced draft provisions for amending the Model Law.[51]

In explaining the need for UNCITRAL's attention to interim measures, the Secretary General said:

> [P]arties are seeking interim measures in an increasing number of cases. This trend and lack of clear guidance to arbitral tribunals as to the scope of interim measures that may

limits).

46. G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985).

47. *See* Eric E. Bergsten, *UNCITRAL Model Law on International Commercial Arbitration From International to National Legislation: Implementation of the UNCITRAL Model Law on International Commercial Arbitration into National Legislation*, 10 CROATIAN ARB. Y.B. 101, 101 (2003) (declaring the Model Law to be "an extraordinarily successful example of international preparation of a legal text").

48. PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 394-95 (2d. ed. 2005).

49. *Id.* (providing a comparison chart with forty-six countries as to the amendmendments these countries have made to their arbitration laws).

50. *See Report of the Thirty-Second Session*, *supra* note 286, ¶ 9 (including the enforcement of interim measures as one of four priority items for the creation of uniform provisions).

51. *See generally* UNCITRAL, Working Group II, *2000 to Present: International Arbitration and Conciliation*, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited Apr. 15, 2010) (providing the session reports of the Working Group on Arbitration detailing its deliberations and progress).

> be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration. . . . [T]his may lead to undesirable consequences . . . [and] 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 . . . .[52]

The purpose of revising Article 17 was to clarify three important elements regarding the use of interim measures: 1) the scope of the arbitral tribunal's power to order interim relief; 2) the enforcement of tribunal ordered interim measures; and 3) the role of the courts in supporting arbitration; all of which were left open-ended and undeveloped by the previous provision.[53] Before the 2006 amendment, Article 17 read:

> *Power of arbitral tribunal to order interim measures*
>
> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.[54]

Based in part on the UNCITRAL Arbitration Rules,[55] this provision provides little, if any, guidance as to the scope and substance of the arbitral tribunal's power to issue interim measures.[56]

Additionally, Model Law Article 9 provides that requests to a national court for interim measures are not incompatible with the decision to arbitrate.[57] Under Article 9, courts may hear requests for

52. *Possible Uniform Rules*, *supra* note 21, ¶ 104.

53. *See id.* ¶ 103 (discussing the necessity for clarification in light of the many broad formulations of arbitrator powers found in national arbitration laws).

54. UNCITRAL, *UNCITRAL Model Law on Commercial Arbitration*, U.N. Doc. A/40/17,/Annex (June 21, 1985) [hereinafter *1985 Model Law*].

55. *See* UNCITRAL Arbitration Rules, art. 26(1) ("[T]he arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute.").

56. *See* BINDER, *supra* note 48, at 152 (recognizing the "consider necessary" clause as the only limit to the arbitral tribunal's discretion).

57. *See 2006 Model Law*, *supra* note 9, art. 9 (ensuring that a request for

interim measures by parties in arbitration, but the Article lacks clear guidance on the courts' role in ordering such measures once arbitral proceedings are initiated.[58] Both Articles 9 and 17 fail to address the scope and procedural issues involved with concurrent jurisdiction.[59]

By amending Article 17, UNCITRAL sought to provide clarity and guidance. After nearly six years, Article 17 grew from a single paragraph provision to a detailed outline of the procedures for interim measures.[60] The goal of the amended Model Law was to acknowledge and harmonize existing legislation and practices in the field as opposed to creating new rules or standards for the arbitration process.[61] The amended version of Article 17 is intended to address the concerns, confusion, and criticisms surrounding the previous text by outlining in detail the procedural aspects of the use of interim measures that the provision lacked.[62]

II. ANALYSIS

UNCITRAL's recognition of the inadequacies of the previous Model Law on interim measures of protection led to the development

interim relief to the courts does not constitute a waiver of the right to arbitrate).

58. *See id.* (providing that a request to the court does not violate the arbitration agreement, but positing no further explanation of how the courts should respond).

59. *See* Christopher Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 9 VINDOBONA J. INT'L COM. L. & ARB. 69, 69, 74-75 (noting that the lack of a comprehensive description of the boundaries of Model Law provisions related to interim relief forces tribunals to define the scope of their mandate to award interim measures on a case by case basis).

60. *Compare 1985 Model Law*, *supra* note 54, art. 17 (granting arbitrators a general power to order interim relief related to the subject matter of the dispute), *with 2006 Model Law*, *supra* note 9, art. 17 (including provisions on the power of arbitral tribunals to issue interim measures, conditions for granting interim measures, procedures regarding preliminary orders, recognition and enforcement of interim measures, and the role of court-ordered interim measures).

61. *See* Ferguson, *supra* note 4, at 60 (discussing the objectives of the Model Law as harmonization, minimization of court intervention, respect for parties' freedom of choice, providing court assistance in support of proceedings and enforceability of awards, and ensuring fairness and due process in arbitration proceedings through mandatory provisions to be followed by arbitrators, courts, and parties to the dispute).

62. *See Interim Measures*, *supra* note 22, ¶¶ 6-29 (describing the difficulties arising from the previous text and prescribing as the remedy provisions on categories of interim measures available, guidelines on court enforcement, and the availability of court-ordered interim relief).

of what promised to be an essential text in arbitration.[63] But despite predictions of widespread acceptance, the majority of states have not integrated the new version of Article 17.[64] This, however, should not detract from the important purposes the amendment will serve.[65]

There are a number of compelling reasons why states should incorporate the amendments to Article 17.[66] In particular, states should consider that the efficacy of arbitration proceedings depends on the use and enforcement of interim measures. Furthermore, arbitration is a practical and efficient forum for ordering interim relief, and adoption of the Model Law amendment will harmonize national arbitration laws. This will inspire the confidence necessary for the survival of international commercial arbitration as a prominent dispute resolution mechanism.

A. STATES' FAILURE TO USE AND ENFORCE INTERIM MEASURES OF PROTECTION UNDERMINE THE EFFICACY OF INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDINGS

In preliminary discussions on possible Model Law amendments, UNCITRAL noted that interim measures of protection are critical to the facilitation of dispute resolution in every legal system.[67] Interim relief, or the lack thereof, can have a substantial or even determinative effect on the outcome of any case, whether submitted to litigation or arbitration.[68] When parties litigate disputes, national

63. *See* Huntley, *supra* note 59, at 69 (calling the Model Law "one of the most important bodies of law in the world of international commercial arbitration").

64. *See Status of Model Law*, *supra* note 11, ¶ 5 (indicating that of the nearly seventy jurisdictions operating under the Model Law, only Mauritius, New Zealand, Peru, and Slovenia have adopted legislation based on the 2006 amendments).

65. *See Interim Measures*, *supra* note 22, ¶¶ 10-11 (noting that, currently, while some countries have adopted adequate legislative regimes to address enforcement issues, these countries are still unable to enforce protective measures against parties in countries that lack adequate regulation).

66. *See e.g.* Ferguson, *supra* note 4, at 65 (noting a reduction in the caseloads of national courts as one expected impact of the revised articles on interim measures).

67. *See Interim Measures*, *supra* note 22, ¶ 6 (expressing interim relief's importance in the context of protecting party rights and effectively resolving disputes).

68. *See* Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57

courts have established procedures for determining when and to what extent they will grant interim relief.[69] Unfortunately, this is not the case in international commercial arbitration.

Still, interim measures of protection in arbitration proceedings are just as important as in litigation proceedings.[70] They ensure that disputes are resolved in a fair and effective manner, with the primary purpose of protecting parties' rights during the proceedings.[71] In discussing improvements to the Model Law provisions on interim measures, UNCITRAL noted the importance of ensuring "that parties choosing to resolve their disputes through arbitration do not forfeit any rights to avail themselves of any interim relief measure that they would have had in litigation."[72] Interim measures compel parties in arbitration to behave in a manner that allows for effective and efficient proceedings and ensures that the subsequent final award is not rendered meaningless.[73] Ultimately, interim measures are necessary because no party should sustain additional damages during the arbitration proceedings.[74]

As parties rely more on arbitration to resolve their disputes, it follows that there will also be an increase in requests for interim

DISP. RESOL. J. 62, 63 (2003) (emphasizing that the lack of interim relief compromises a party's ability to preserve necessary evidence and increases the risk that a prevailing party may not be able to recover the final award).

69. *See* INTERNATIONAL COMMERCIAL ARBITRATION 2001, *supra* note 7, at 920 (explaining that the range of provisional measures provided by national courts are generally the same among all developed legal systems).

70. *See id.* (adding that interim measures are, nonetheless, difficult to obtain in the international arbitration setting).

71. *See* Carbonneau, *supra* note 3, at 773-74 (suggesting such measures are especially necessary to accomplish these goals given the unique difficulties posed by cross-border transactions, including the diversity of regimes and the pursuit of nationalistic self-interest).

72. *Settlement of Commercial Disputes*, *supra* note 30, ¶ 15. *But see* Card v. Stratton Oakmont, Inc., 933 F. Supp. 806, 813-14 (D. Minn. 1996) (internal citation omitted) (characterizing arbitration as a "creature born of a contract," meaning that parties cannot expect to receive all of the procedural and substantive protections available in the courts, but rather only those protections to which they have agreed).

73. Ferguson, *supra* note 4, at 55.

74. *See* YESILIRMAK, *supra* note 17, at 5 (implying that parties' decision to arbitrate should not subject them to damages while awaiting the final award that would otherwise have not been incurred in litigation).

relief from arbitral tribunals.[75] This elevates the importance of incorporating procedures for interim measures into governing arbitration law.[76] Furthermore, it is a rational assumption that parties intend for arbitration proceedings to resolve the entire dispute.[77] If parties are unable to obtain comparable interim relief in the arbitral context and are instead forced to rely on courts to secure such relief, parties will be dissuaded from submitting their disputes to arbitration.[78]

The actual use of interim measures further demonstrates the necessity of incorporating them into governing arbitration laws.[79] A wide range of arbitration laws and rules empower arbitrators, albeit vaguely, to issue interim relief.[80] When an arbitral tribunal fails to

75. *See* Wang, *supra* note 2, at 1059-60 (viewing the rapid expansion in the use of arbitration as contributing to the importance of interim measures in arbitration proceedings and the need for a solid framework for their use). Although some argue that the number of requests for interim relief in arbitration proceedings is insufficient to support amending rules and legislation in order to empower arbitral tribunals to order interim measures, this critique ignores a key point: parties may not request interim relief from arbitration tribunals in the first place given the "widely felt uncertainty" as to the availability of such relief. LEW ET AL., *supra* note 2, at 589 n.13.

76. *See* David E. Wagoner, *Interim Relief in International Arbitration: Enforcement is a Substantial Problem*, 51 DIS. RESOL. J. 68, 69 (1996) (asserting the compelling need for the availability of interim relief in international arbitration to protect party rights pending a final decision by the arbitral tribunal).

77. *See* D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 TEX. INT'L L.J. 71, 72-73 (1995) [hereinafter *Arbitration and the Courts*] (positing that parties who employ an arbitration clause can reasonably be expected to resolve any disputes by the agreed upon method of dispute resolution, though also noting that in some instances parties prefer the greater power of the courts).

78. *Cf.* GAILLARD & SAVAGE, *supra* note 44, at 718-19 (reiterating that jurisdiction over the dispute is determined in almost all cases by the agreement of the parties, except that parties cannot, by agreement, augment the powers of the arbitrator to grant certain types of relief that remain within the exclusive power of courts).

79. *See generally* LEADING ARBITRATOR'S GUIDE, *supra* note 19, 203-21 (classifying interim measures into four broad categories: those intended to facilitate the arbitral proceeding, those intended to preserve the *status quo*, those intended to assist enforcement of future awards, and those intended to afford security for the costs of arbitration).

80. *See Settlement of Commercial Disputes*, *supra* note 30, ¶¶ 11, 13-33 (consolidating the results of a UNCITRAL survey on the practices of nations regarding their procedures for interim relief in arbitration and finding, *inter alia*, that several rules recognize the concurrent power of courts and arbitral tribunals to

order interim relief, either because existing legislation fails to grant this power to the tribunal[81] or because the tribunal chooses not to exercise its power,[82] the adverse party may remove assets from a jurisdiction, destroy evidence, or otherwise frustrate the proceedings.[83] Such actions can cause irreparable harm to the requesting party[84] and this failure to protect parties undermines the favorability of the arbitration process.[85]

UNCITRAL amended Article 17 to account for each of the above considerations. Article 17 recognizes the importance of interim measures and the need for arbitration procedures to meet the practical needs of the parties.[86] It also acknowledges that in order for these measures to be effective, there must be structure and standards for the use of interim measures.[87] The amended Model Law explicitly provides that arbitral tribunals have the power to issue interim

issue interim relief). *See also* Werbicki, *supra* note 68, at 64 (clarifying that even though arbitrators may have broad discretion to grant interim measures, their power is actually limited by a number of factors, including the difficulty of enforcement, the inability to respond to urgent requests for interim measures, and the effect of the governing law of arbitration in the jurisdiction).

81. *See, e.g.*, C. Proc. Civ. Y Com. 766, Art, 753 [Argentine National Code of Civil and Commercial Procedure] ("Arbitrators cannot order compulsory measures or measures leading to enforcement."); Italian Code of Civil Procedure, Title VII, Art. 818 (1997), *available at* www.camera-arbitrale.com ("The arbitrators may not grant attachments or other interim measures of protection.")

82. *See supra* Part I.B (discussing the reluctance of arbitrators to provide interim relief because of confusion or lack of coercive powers).

83. *See supra* Part I.A (discussing appropriate uses for and purposes of interim relief).

84. *See* Wagoner, *supra* note 76, at 69 (identifying environmental impact cases, trade secret disputes, and the direct appointment of a receiver as instances in which interim measures are required for effective management of the arbitration); *Interim Measures*, *supra* note 22, ¶¶ 7-12 (identifying the issue of unenforceable final awards as a primary concern for the Working Group).

85. *Cf.* Ira M. Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63 DISP. RESOL. J. 56, 57-58 (noting the pervasive, and erroneous, belief that parties cannot obtain interim relief in arbitration).

86. *See Report of the Thirty-Second Session*, *supra* note 28, ¶ 60 (recognizing the increased use of interim measures in arbitral proceedings and the necessity for such measures to be available and enforceable for the continued effectiveness of international commercial arbitration).

87. *See generally Interim Measures*, *supra* note 22, ¶¶ 30-32 (stating the Working Group's belief that conformity with the Model Law would ameliorate the existing disparities with regards to states' recognition of the authority of arbitral tribunals to grant interim measures).

measures, details which measures are available, and explains the conditions under which such measures can be granted.[88] For example, the amended Model Law acknowledges the inherent necessity for interim measures in cases where the requesting party can show that failure to issue such protective measures will likely result in harm not adequately reparable by an award of damages.[89]

States can provide sound procedural and substantive guidance for the use of interim measures by incorporating the amended Article 17 into national arbitration legislation. In doing so, states can also recognize the importance of interim measures in arbitration, respect participating parties' freedom to choose arbitration, and demonstrate support for the continued use of international commercial arbitration.

B. ARBITRAL TRIBUNALS ARE A PRACTICAL AND EFFICIENT FORUM FOR GRANTING INTERIM MEASURES

Parties more frequently request interim relief from arbitral tribunals.[90] However, arbitral tribunals have been hesitant to grant requests because of the confusion surrounding the scope of their powers.[91] In 1985, UNCITRAL attempted to remedy these concerns by providing in the Model Law that arbitrators were empowered to order interim relief.[92] However, this only superficially solved the problem because the provision did not delve into the procedural or

88. *2006 Model Law*, *supra* note 9, art. 17.

89. *See id.* art. 17A(1) ("[T]he party requesting an interim measure . . . shall satisfy the arbitral tribunal that . . . [h]arm not adequately reparable by an award of damages is likely to result . . . and such harm substantially outweighs the harm . . . to the party against whom the measure is directed . . . .").

90. *See* Naimark & Keer, *supra* note 3, at 11 (studying the use of interim relief in arbitration and finding an increase in requests for interim relief to arbitrators); *cf.* Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELEC. J. COMP. L. § 6 (1998), http://www.ejcl.org/22/art22-2.html (last visited Apr. 15, 2010) (implying that some states have amended their domestic arbitration laws to account for the growing use of interim relief).

91. *See* INTERNATIONAL COMMERCIAL ARBITRATION 2001, *supra* note 7, at 922 (doubting that an arbitrator will issue interim relief unless satisfied that an order is permissible under the applicable national arbitration legislation); *see also* Christian Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, 7 J. INT'L ARB. 7, 7-8 (1990) (discussing the risk of civil liability for arbitrators and arbitrators' resultant fear of misusing their authority).

92. *1985 Model Law*, *supra* note 54, art. 17.

substantive issues involved in allowing arbitrators to order interim measures.[93]

Still, the arbitral tribunal is well established as an appropriate forum for granting interim relief.[94] The arbitral tribunal is sometimes referred to as the "natural judge,"[95] because the arbitrator is in the best position to assess the claim's possibility of success on the merits and can appropriately evaluate the impact that interim measures may have on the parties and the arbitration proceedings.[96] Arbitrators are also better able to identify when requests for interim relief are abusive and employed for tactical purposes.[97] Additionally, allowing arbitral tribunals to issue interim relief prevents unnecessary costs and delays that accompany a request for interim relief to the national courts.[98] It also further promotes freedom to choose arbitration as the means for resolving the dispute.[99]

However, the procedure for obtaining interim relief during arbitrations can be complicated when national courts have concurrent

93. *See* Lowry, *supra* note 28, at 339 (noting that a variety of promulgated rules, including UNCITRAL's 1985 Model law, recognize the power of arbitral tribunals to issue interim measures, but highlighting the lack of consensus about what types of interim measures can be issued or what enforcement mechanisms are available).

94. *See* Cecil Branson, *Global Development: Interim Measures of Protection in a Changing International Commercial Arbitration*, 9 CROATIAN ARB. Y.B. 9, 11 (2002) (affirming that measures aimed at facilitating arbitral proceedings should be within the scope of arbitrators' powers because of the tribunal's emphasis on party autonomy and fairness); Biwater Gauff Ltd. V. United Republic of Tanzania, Procedural Order No. 3, ICSID Case No. ARB/05/22 ¶ 135 (Sept. 29, 2007), *available at* http://icsid.worldbank.org (observing that it is a matter of settled law that arbitral tribunals can order parties to take provisional measures).

95. YESILIRMAK, *supra* note 17, at 66.

96. *See* LEW ET AL., *supra* note 2, at 589 (noting that an arbitrator's familiarity with the legal and factual intricacies of the case make the arbitral tribunal a more appropriate forum to determine the appropriateness of interim measures than a domestic court).

97. *Id.*

98. *See* Michael E. Chionopoulos, *Preliminary Injunction Through Arbitration: The Franchisor's Weapon of Choice in Trademark Disputes*, 20 FRANCHISE L.J. 15, 15 (2000) (advising parties already engaged in arbitration against filing for interim relief in court since it requires payment of additional filing fees, attorneys' fees, and other miscellaneous costs involved with court proceedings).

99. *See* Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Commercial Arbitration*, 52 DISP. RESOL. J. 24, 24 (1997) (recognizing respect for party autonomy as fundamental to arbitration practice).

jurisdiction.[100] Although arbitrators may possess a degree of power and discretion to issue interim measures, a party to an arbitration can still apply for interim relief to a court.[101] In determining whether to grant a request for interim relief, a court must consider both the moving party's likelihood of success on the merits and the necessity of interim relief.[102] This inevitably involves the court in the main issues of the dispute.[103] This is not to say that national courts have no place in procedures for granting interim relief during arbitration. In some cases, the national courts are the only forums from which parties can obtain interim relief.[104] Rather, arbitrators should be clearly vested with the power to order interim relief in situations where they constitute the most appropriate forum.[105] Despite concerns that concurrent jurisdiction may allow national courts to unnecessarily impose on arbitral disputes,[106] concurrent jurisdiction does not allow courts to rule on the substance of the dispute and thereby intervene in matters under the arbitral tribunal's

100. *See* Bernardo M. Cremades, *Is Exclusion of Concurrent Courts' Jurisdiction Over Conservatory Measures to be Introduced Through a Revision of the Conventions?*, 6 J. INT'L ARB. 105, 111 (1989) (highlighting the complex, but sometimes complimentary, effect of concurrent jurisdiction).

101. *2006 Model Law*, *supra* note 9, art. 9.

102. *See* Alison C. Wauk, Comment, *Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Court Jurisdiction*, 44 UCLA L. REV. 2061, 2073-75 (1997) (finding that a court cannot decide to grant relief without first examining, to some extent, the facts and underlying issues of the dispute). Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, 367-368 ("There is always a tension when the court is asked to order, by way of interim relief in support of arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators . . . ."). This perspective exemplifies national courts' hesitation to grant interim relief when doing so may prejudice the ability of arbitral proceedings to effectively resolve the dispute. *See* REDFERN & HUNTER, *supra* note 7, at 349.

103. *See id.*

104. *See*, *e.g.*, China Arbitration Law, *supra* note 41, arts. 28, 46; Czech Republic Law on Arbitral Proceedings and Enforcement of Arbitral Awards 1994, Section 22; Québec Code of Civil Procedure, R.S.Q., ch. 1, art. 940.4 (Can.) (noting that parties cannot obtain interim relief from arbitral tribunals and must therefore resort to national courts).

105. *See* INTERNATIONAL COMMERCIAL ARBITRATION 2009, *supra* note 18, at 1950 n.38 ("[I]f a tribunal is competent to decide an issue finally, with binding effect, why should it not be competent to decide the same issue provisionally?").

106. *See* Wauk, *supra* note 102, at 2075-78 (finding concurrent jurisdiction on matters of interim relief to be an infringement on party autonomy and arbitrators' powers).

jurisdiction.[107] Instead, concurrent jurisdiction often remedies the shortcomings of arbitration and ensures the effectiveness of the arbitration proceedings.[108] Major criticisms of orders for interim relief by arbitral tribunals include the unavailability of relief prior to the formation of the arbitral tribunal,[109] the tribunal's inability to bind third parties,[110] and the tribunal's lack of *imperium* to enforce its awards.[111] Concurrent jurisdiction addresses these concerns by providing a forum in the courts to request measures prior to the formation of the tribunal, the ability of court orders to bind third parties if necessary, and the ability to enforce both their own and arbitral tribunal orders.[112]

Recognizing the important functions of both the arbitrators and the courts in procedures for interim relief, UNCITRAL amended Article 17 to provide a procedural framework incorporating concurrent jurisdiction.[113] To remedy the confusion surrounding the

107. *See* YESILIRMAK, *supra* note 17, at 68 (explaining that under the concurrent jurisdiction approach, the substance of a dispute remains with the arbitrators).

108. *See* GAILLARD & SAVAGE, *supra* note 44, at 711 (identifying as a rationale behind concurrent jurisdiction the notion that parties should not be deprived of the expediency of courts in the provision of interim relief solely because of the existence of an arbitration agreement).

109. *See, e.g.*, ICC Rules, *supra* note 23, art. 23(2) (directing parties to apply to judicial authorities for interim relief in the event the file has not yet been transmitted to the Arbitral Tribunal); *see also* Ferguson, *supra* note 4, at 58 (highlighting the lack of procedures available to parties for acquiring interim relief prior to the formation of the arbitral tribunal).

110. *See Report of the Thirty-Second Session*, *supra* note 28, ¶¶ 64, 70 (emphasizing that the tribunal can only act in regard to the parties to the dispute); Intertec Contracting A/S v. Turner Steiner Int'l, SA, No. 98 Civ. 9116 (CSH), 2000 WL 709004 at *8 (S.D.N.Y. 2000) (finding that actions taken regarding the arbitration agreement are "restricted to the immediate parties [to the contract]").

111. *See* Christian Hausmaninger, *The ICC Rules for a Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration?*, 7 ICSID REV.-FOREIGN INV. L.J. 82, 87 (1992)(stating that arbitrators lack the coercive powers to enforce their orders); Interim Award in Case 5835, 8 ICC INT'L CT. ARB. BULL. 67, 69 (May 1997) (admitting that arbitrators' interim orders are less protective due to the lack of enforcement power). *But see Possible Uniform Rules*, *supra* note 21, ¶ 75 (noting that, although arbitral tribunals lack coercive powers, coercion is usually unnecessary for party cooperation).

112. *See* GAILLARD & SAVAGE, *supra* note 44, at 711 (finding the parties' requests to the courts for interim relief more effective in cases requiring urgency or readily enforceable orders).

113. *See 2006 Model Law*, *supra* note 9, pt. 2, ¶¶ 28-30, (discussing the

appropriateness and power of arbitrators to issue interim relief, Article 17 explicitly empowers arbitral tribunals to order interim measures unless otherwise agreed by the parties.[114] It also provides arbitrators with guidance on the types of interim measures they can issue, thereby reinforcing that they have the discretion to do so.[115] Furthermore, Article 17 delineates the courts' role in enforcing orders for interim measures made by the arbitral tribunal.[116]

Adoption of Article 17 would resolve the confusion about the respective powers of arbitral tribunals and the courts in granting interim relief.[117] This would result in a more efficient procedural framework leaving arbitral tribunals to focus on the substantive and procedural issues necessary to effectively resolve a dispute,[118] while the courts would be precluded from making factual determinations and focus solely on enforcing the tribunal's decisions.[119]

empowerment of arbitrators to order interim relief and adding that Article 17 was drafted to ensure that a competent court may also issue interim relief).

114. *See id.* art. 17(1). Additionally, arbitration agreements can express the parties' views on recourse to national courts for interim relief. *See, e.g.*, Remy Amerique, Inc. v. Touzet Distribution, S.A.R.L., 816 F. Supp. 213, 215 (S.D.N.Y. 1993) (containing an arbitration agreement that explicitly provided that the parties could seek interim relief from any appropriate court).

115. *See 2006 Model Law*, *supra* note 9, art. 12(2)(a)-(d) (providing that the "interim measures" an arbitral tribunal can issue are those orders that maintain or restore the status quo, prevent harm to the parties or prejudice to the arbitration proceedings, preserve assets to satisfy a final award, and preserve evidence).

116. *See id.* art. 17H-17I (outlining the courts' responsibility to recognize interim measures issued by an arbitral tribunal and detailing the grounds for refusing recognition or enforcement).

117. *See id.* art. 17 (providing that both arbitrators and the courts maintain concurrent powers to issue enforceable interim measures of protection); *see also, id.* art. 9 (stating that a request to the courts is not incompatible with an arbitration agreement).

118. *See Report of the Thirty-Second Session*, *supra* note 28, ¶ 82 (observing that guidelines providing clarifications of arbitrators' power to order interim measures would also foster states' acceptance of both those guidelines and uniform legislation enforcement).

119. *See id.* ¶ 71 (underscoring the point that courts should limit their discretion to the procedural aspects of enforcing interim measures and should not involve themselves in the substance of the measure or the tribunal's conclusions).

C. ADOPTION OF ARTICLE 17 WILL FOSTER HARMONIZATION OF THE RELEVANT PROVISIONS IN NATIONAL ARBITRATION LAWS

There is currently no uniform practice in granting interim relief in arbitration.[120] National laws differ significantly on the scope of the arbitrators' powers and in some cases use language so vague that any power lying with the arbitrators is implied.[121] This lack of clarity and uniformity raises concerns about predictability and enforcement.[122] These concerns, if left unaddressed, could have serious implications for the future of arbitration, given that the success of arbitration is dependent on the satisfaction of parties and their confidence in the mechanism.[123]

When a party requests interim relief, the tribunal must determine whether they have the authority to grant the request based on the applicable standards and procedures.[124] National arbitration laws, specifically those modeled on the 1985 version of Article 17, lack clarity regarding the scope of the arbitrators' authority.[125] Consequentially, arbitrators must reconcile governing national laws,[126] institutional arbitration rules if incorporated into the

120. *See* Wang, *supra* note 2, at 1075.

121. *See* LEW AT AL., *supra* note 2, at 593 (indicating that when neither the governing law nor the applicable rules provide for or exclude the power of arbitrators to order interim relief, such power has been inferred by a number of tribunals); Yesilirmak, *supra* note 18, at 32 (noting that certain arbitral tribunals have inferred their power to order interim rule from existing rules).

122. *See* Naimark & Keer, *supra* note 3, at 11; Jernej Sekolec, *The Need for Modern and Harmonized Regime for International Arbitration*, 1 CROATIAN ARB. Y.B. 27, 28 (1994) (recognizing the necessity of standardized rules for clarity and legal certainty in arbitration).

123. *See* Guiseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 304 (2006) (asserting that countries benefit from the confidence of investors in arbitration).

124. *See* INTERNATIONAL COMMERCIAL ARBITRATION 2001, *supra* note 7, at 921 (establishing that a determination of arbitrators' authority to order provisional relief is a threshold question for the party requesting relief); YESILIRMAK, *supra* note 17, at 59, 160 (recognizing that national procedural rules can constrain the authority of arbiters).

125. *See 1985 Model Law*, *supra* note 54, art. 17 (allowing for any measures which the arbitrators consider necessary); Lowry, *supra* note 28, at 340 (recognizing the lack of a clear dividing line between arbitrators and the courts).

126. *See Possible Uniform Rules*, *supra* note 21, ¶ 92 (recognizing that

arbitration agreement,[127] and the will of the parties to determine the extent of their authority.[128] While some argue that such provisions should remain somewhat vague to give broad discretion to arbitrators,[129] others argue that arbitration legislation must balance flexibility with sufficient guidance to ease arbitrators' confusion and hesitation.[130] Arbitrators have attempted to glean coherent guidance from the disarray of arbitration laws and rules,[131] but there is no clearly established framework on which arbitrators can rely.[132]

Moreover, some states are perceived as unfriendly seats for arbitration[133] because of the disparity within their arbitration law on interim measures and enforcement problems.[134] The significance of

arbitrators must account for the laws of the seat of the arbitration in determining their power to order interim relief).

127. *See* LEW ET AL., *supra* note 2, at 167 (referring to the parties' choice of ad hoc or institutional arbitration and the subsequent governing procedural rules when drafting an arbitration agreement).

128. *See* Interim Award in Case 7962 of 1995, 11 ICC INT'L CT. OF ARB. BULL. 62, 62 (Spring 2000) (upholding an agreement to arbitrate, which granted the power to issue interim measures by the arbitral tribunal); *Case 8113*, *supra* note 26, at 65 (illustrating how the arbitration agreement can limit powers of the tribunal).

129. *See, e.g.*, KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 338 (1993) (arguing that strict guidelines may curb arbitrators' ability to tailor their orders for relief on a case-by-case basis).

130. *See* Sekolec, *supra* note 122, at 35 (pointing to the need of harmonized guidance for arbitrators if the needs of international arbitration are to be met).

131. *See* YESILIRMAK, *supra* note 17, at 160-64 (outlining the different sources an arbitrator must consider when determining the scope of their power); Rolf A. Shütze, *The Precedential Effect of Arbitration Decisions*, 11 J. INT'L ARB. 69, 69, 72 (1994) (noting that while there is no true precedent in arbitration, in practice, published case extracts provide guidance to arbitrators).

132. *See* Lew, *supra* note 18, at 26 (observing that unlike national court procedures that clearly establish conditions under which interim measures can be issued, the comparatively small number of arbitration cases do not provide a comparable standard).

133. *See, e.g.*, Phillip Capper, *Section 69 and the "Interventionism" of English Courts*, KLUWER ARB. BLOG, Sept. 23, 2009, http://kluwerarbitrationblog.com/blog/2009/09/23/section-69-and-the-"interventionism"-of-english-courts/ (discussing the "lingering perception" of English courts as interventionist and therefore unfriendly to arbitration proceedings).

134. The traditional approach was that only "final" awards were enforceable as an arbitral award and that interim orders given their temporary nature did not qualify as "final." *See* Publicis Commc'n v. True North Commc'ns, Inc., 206 F.3d 725, 728-29 (7th Cir. 2000) (finding that an arbitral order must be in the form of a final award for judicial enforcement); Hart Surgical, Inc, v. Ultracision, Inc., 244

this is two-fold: first, the state may garner a negative reputation within the international arbitration community and second, this can lead to unnecessary forum shopping, as the parties determine the seat of the arbitration.[135]

UNCITRAL believes that uniform provisions detailing the procedures for the enforcement of interim relief would be a significant step to addressing these concerns.[136] By adopting the amendments to Article 17, states will establish the uniform framework that arbitration proceedings lack.[137] States will harmonize their national laws, and in doing so, will foster stability and predictability in arbitration proceedings.[138] This will ease enforcement of interim orders because states will have uniform standards for the scope of power of arbitral tribunals. This will eliminate the confusion from differing arbitration laws and will ensure that all states are equally appealing as potential arbitral seats.[139]

Furthermore, adoption of the amendments to Article 17 will lead to greater confidence in international commercial arbitration. When parties are aware that a procedure exists that protects their rights in a

F.3d 231, 233 (1st Cir. 2001); Mobil Oil Indon., Inc. v. Asamera Oil (Indon.) Ltd., 372 N.E.2d 21, 23 (N.Y. 1977) (commenting that a final award requires the complete determination of submitted claims by the arbitrators); Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980) (finding a preliminary order unenforceable because it was not a final resolution of the issues).

135. *See 2006 Model Law*, *supra* note 9, pt. 2, ¶ 9 (commenting that because of the disparity in national laws, "[a] party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand").

136. *See id.* pt. 2, ¶ 2 (emphasizing that the model law would harmonize national laws and that it reflects a "worldwide consensus").

137. *See Possible Uniform Rules*, *supra* note 21, ¶¶ 86, 93 (raising the variety of approaches employed by states regarding interim relief and how an inclusion of relevant provisions in the Model Law would lead to harmonization and greater overall efficiency).

138. *See* Gu Weixia, Comment, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT'L ARB. 607, 636 (2004) (noting that fostering stability and predictability are "paramount requirements" considered by parties in choosing arbitration).

139. *See* Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461, 478 (2003) (asserting that jurisdictions unfriendly to arbitration hamper and constrain party autonomy).

manner that respects their choice of forum, they will feel more comfortable with their decision and have greater confidence when entering into arbitration agreements.[140] This confidence stems from parties' notions that arbitration procedures will meet their expectations and minimize unexpected hurdles and setbacks.[141] By recognizing the need for harmonization and codifying the provisions set forth in Article 17, states can inspire this requisite confidence and ensure the continuing reliability and stability of the field of international commercial arbitration.[142]

III. RECOMMENDATIONS

A. STATES SHOULD INCORPORATE AMENDED ARTICLE 17 INTO NATIONAL ARBITRATION LAWS

As the processes and standards for the conduction of arbitration have evolved and developed over time, so too have national arbitration laws. States' responses to the development of arbitration laws should account for advancements in model legislation regarding interim relief.[143] To date, Mauritius, Slovenia, New Zealand, and Peru incorporated the Model Law amendments into their national law.[144] By following suit and codifying the amendments to Article 17, other states will facilitate the resolution of international

140. *Cf.* Christopher R. Drahozal, *Party Autonomy and Interim Measures in International Commercial Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 179, 180 (Albert Jan van den Berg ed., 2003) (arguing that party choices should be taken into consideration when allocating the power to order interim relief due to the contractual nature of arbitration).

141. *See* AXEL BÖSCH, PROVISIONAL REMEDIES IN INTERNATIONAL COMMERCIAL ARBITRATION - A PRACTITIONER HANDBOOK 5 (1994) (opining that "the unrestricted availability of provisional relief from public courts despite the existence of an arbitration agreement could threaten to destroy completely the advantages of arbitration").

142. *See* Stephen W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 105 (2007) (heralding stability and predictability as hallmarks of fair legal systems).

143. *See* JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 905 (2d ed. 2007) (insisting that harmonization between the courts and arbitrators alone is insufficient for effective arbitration and advocating for a harmonization among states in arbitration matters).

144. *See Status of Model Law*, *supra* note 11, ¶ 5.

commercial disputes by harmonizing arbitration legislation, increasing enforceability of interim measures,[145] increasing confidence in international commercial arbitration as a dispute resolution mechanism, and making all states equally attractive as seats for arbitral disputes.[146]

Unfortunately, despite widespread support for the amendment within UNCITRAL, the majority of states have yet to seriously consider the incorporation of the amendment into national law.[147] It may be that it is simply too soon to expect widespread acceptance. Additionally, states may have public policy reasons for not codifying the amendments to Article 17. For example, states may not want to empower arbitrators to provide interim relief or may generally place stricter limitations on arbitrators' powers.[148] States may also disagree with certain provisions of the Model Law amendment, such as the debated inclusion of a provision on *ex parte* measures.[149] However, UNCITRAL anticipated these concerns by choosing to advance these improvements in the form of model legislation.[150] While UNCITRAL hopes that states' deviations from the Model Law text will be minimal, it recognizes that states may wish to make changes for various reasons.[151]

145. *See* Kieran Robert Hickie, *The Enforceability of Interim Measures of Protection Granted by Arbitral Tribunals Outside the Seat of Arbitration: A New Approach*, 12 VINDOBONA J. OF INT'L COM. L. & ARB. 221, 247-48 (2008) (arguing that a standard uniform framework is an important step in increasing the enforceability of foreign measures of interim relief).

146. *See generally Interim Measures*, *supra* note 22, ¶ 11 (noting that a country's failure to adopt the Model Law may prohibit perspective users of arbitration from accessing effective court assistance in that country).

147. *See Report of the Thirty-Second Session*, *supra* note 28, ¶ 81.

148. *See, e.g.*, Mathew Coleman, *Arbitration in Africa*, AFR. LEGAL INT'L LEGAL SERV. (2006), http://www.africalegal.co.za/ news/news_06112006.html (noting that South Africa's hesitation to adopt the Model Law is rooted in its concerns over the scope of the court's power in relation to the arbitration proceedings).

149. *See* UNCITRAL, *Report of the Working Group on Arbitration on the Work of its Thirty-Seventh Session*, ¶¶ 16-18, *delivered to the General Assembly*, U.N. Doc. A/CN.9/523 (Nov. 11, 2002) (noting the divergent views concerning the inclusion of *ex parte* provisions).

150. *See 2006 Model Law*, *supra* note 9, pt. 2, ¶ 3 (finding model legislation to be the best vehicle for harmonization and modernization of national arbitration laws because of the flexibility it provides states when incorporating it into national arbitration laws).

151. *See id.* (acknowledging the flexibility of model legislation, but encouraging

States that do not wish to incorporate the amendments fully should consider incorporating at least those provisions that are uncontroversial as a first step in achieving greater harmonization.[152] Additionally, if states are uncomfortable with adopting certain provisions of the Model Law, they should discuss alternative methods for achieving the goals of creating uniformity to protect parties' rights and facilitate arbitration proceedings.[153] Last, if states continue to refrain from adopting the new Article 17 provisions, they should express the reasons for their hesitation and maintain an open dialogue about the future. By providing justifications for their reluctance, states can identify lingering concerns.[154]

B. UNCITRAL SHOULD CONSIDER ADDING A PROVISION TO THE MODEL LAW REGARDING THE ISSUANCE OF INTERIM RELIEF PRIOR TO THE FORMATION OF AN ARBITRAL TRIBUNAL

One of the major criticisms of delegating the power to order interim relief primarily to the arbitral tribunal is the difficulty of acquiring interim measures before the tribunal's formation.[155] To encourage adoption of the Model Law provisions on interim measures, and to make them more comprehensive, UNCITRAL should consider adding a provision on obtaining interim relief before the arbitral tribunal is formed.[156] This provision should provide for

states incorporating the Model Law to make as few changes as possible).

152. *See, e.g.*, International Arbitration Act 2008, Act. No. 37, pt. IV (Dec. 13, 2008) (Mauritius) *available at* http://supremeco urt.intnet.mu/Entry/dyn/GuestGet Doc.Asp?Doc_Idx=7110944&Mode=Html&Search=No (codifying the majority of the 2006 version of Model Law Article 17, but choosing to refrain from including provisions on ex parte preliminary orders).

153 *See, e.g.*, *Launch of a New International Arbitration Forum Via E-Mail*, 12 AM. REV. INT'L ARB. 279, 279 (2001) (announcing the creation of a discussion forum for the purposes of exchanging information and hosting debates on arbitration issues).

154. *Cf.* Tómas Kennedy-Grant, *Promised Land or Fire Swamp? Interim Measures – The New Zealand Revolution: A Commentary* 24 (Nov. 30, 2007) *available at* http://www.kennedygrant.com/docs/Fire%20Swamp .pdf (responding to concerns regarding the risks of "trailblazing" in the field).

155. *See Arbitration and the Courts*, *supra* note 77, at 82-86 (enunciating the difficulties encountered in securing interim relief by parties to an arbitration prior to the formation of the arbitral tribunal).

156. *See, e.g.*, International Centre for Dispute Resolution, *International Dispute Resolution Procedures*, art. 37 (June 1, 2010) (permitting the use of emergency

the rapid appointment of a temporary authority to resolve only those matters related to immediate interim relief.[157]

One could argue that such measures are unnecessary because of the courts' concurrent jurisdiction.[158] However, having a provision that allow parties to obtain interim relief without recourse to the courts demonstrates respect for the parties' choice of arbitration and meets their expectation that arbitration will effectively resolve their dispute.[159] Including a provision on attaining relief prior to the formation of the tribunal and without recourse to the courts would help alleviate parties' uncertainty about whether such relief is available prior to the formation of the arbitral tribunal, and would assist in harmonizing existing arbitration rules leading to a more effective overall system.

C. THE UNCITRAL MODEL ARBITRATION RULES SHOULD BE AMENDED TO CREATE UNIFORMITY WITH THE MODEL LAW

In light of the amendments made to the Model Law, UNCITRAL undertook work to amend the Model Rules on Arbitration,[160] which are primarily used for ad hoc arbitration proceedings.[161] The Working

measures of protection by a specially appointed emergency arbitrator); ICC Rules, *supra* note 23, art. 20(4) (allowing for the appointment of an independent individual for the limited purpose of inspected disputed property to make a statement regarding their condition); *see also* Schwartz, *supra* note 85, at 58 (tracking the incorporation of provisions on emergency relief prior to the appointment of the arbitral tribunal into institutional rules).

157. *See* INTERNATIONAL COMMERCIAL ARBITRATION 2009, *supra* note 18, at 1971 (explaining that under certain emergency procedures, a sole arbitrator can be appointed to hear requests for provisional relief).

158. *See supra* Part II.B (explaining that requests to courts for interim relief are not incompatible with the arbitration agreement).

159. *See* YESILIRMAK, *supra* note 17, at 2 (reiterating the challenge of meeting the expectations of a business person with regard to the interim protection of rights in arbitration).

160. UNCITRAL, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, ¶ 1, *delivered to the general assembly*, U.N. Doc. A/CN.9/WG.II/WP.145/Add.1 (Dec. 6, 2006) [hereinafter *UNCITRAL Rules Revision I*] (designating the revision of the UNCITRAL Rules as a priority for the Working Group and instructing the Working Group to identify areas of improvement).

161. *See* Judith Levine, *UNCITRAL Working Group on Arbitration Proposes Revisions to Arbitration Rules*, 19(4) WHITE & CASE INT'L DISP. RESOL. 1, 4 (Dec. 2006) (identifying the UNCITRAL Model Rules as the most widely used procedural rules in ad hoc arbitrations). It should also be noted that many regional

Group on Arbitration and Conciliation is currently drafting revisions to the Model Rules, among them provisions on interim measures of protection in Article 26.[162] The draft text proposed by the Working Group is modeled closely on Article 17 of the Model Law,[163] based on the general consensus that the revision will further clarify the conditions, circumstances, and procedures for granting interim relief.[164] The only area of contention is whether to include the provision on *ex parte* measures into the Article 26 of the Model Rules.[165] To foster consistency and further harmonization, UNCITRAL should adopt the proposed revisions of the Working Group on Article 26 of the Model Rules.

CONCLUSION

As the field of international commercial arbitration develops to meet the needs of globalizing trade and commerce, the availability of interim measures in the arbitral context has become a primary concern. UNCITRAL attempted to remedy these concerns by providing model legislation on interim measures for states to incorporate into their national laws. For the reasons set forth above, there should be widespread adoption of the amended Article 17. The Model Law's purpose is to promote a uniformity of procedure among states with diverse legislation, which will ultimately increase the effectiveness and efficiency of the international commercial arbitration system as a whole. The advantages that draw parties to

arbitration centers have also adopted the UNCITRAL Model Rules. *See id.*

162. *See* UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, ¶ 26, *delivered to the General Assembly*, A/CN.9/WG.II/WP.149 (Nov. 30, 2007) [hereinafter *UNCITRAL Rules Revision II*] (redlining Article 26, removing the old article completely and substituting a much more in depth approach to interim measures).

163. *See id.* (providing the draft text of the proposed revisions to Article 26 with minor deviations in language and substance, but not including a provision on ex parte measures).

164. *See UNCITRAL Rules Revision I*, *supra* note 160, ¶ 25 (attempting to create consistency with the amended provisions to Article 17 in the model law and ensure that party autonomy is given proper effect).

165. *See UNCITRAL Rules Revision II*, *supra* note 162, ¶¶ 28-29 (avoiding language on "preliminary orders," but agreeing to consider adding a provision to allow the tribunal to take appropriate measure to avoid frustration of the final award).

arbitration amount to nothing unless the tribunal is able to protect the parties' rights during the arbitral process. States and arbitral institutions should incorporate the improvements made by UNCITRAL into their laws and rules to secure the rights of parties both to choose their means for dispute resolution and to receive fair and effective process.