

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DONUTS INC., ) ICDR CASE NO. 01-14-0001-6263  
 )  
 Claimant, )  
 )  
 and )  
 )  
 INTERNET CORPORATION FOR ASSIGNED )  
 NAMES AND NUMBERS, )  
 )  
 Respondent. )  
\_\_\_\_\_ )

**ICANN'S CONSOLIDATED RESPONSE TO CLAIMANT DONUTS  
INC.'S REQUEST FOR INDEPENDENT REVIEW PROCESS  
AND REQUEST FOR EMERGENCY RELIEF**

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For Assigned Names and Numbers

14 November 2014

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## **I. INTRODUCTION**

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) and the Request for Emergency Relief (“Emergency Request”) submitted by claimant Donuts Inc. (“Donuts”) on 8 October 2014.

1. Donuts brings its Emergency Request pursuant to Article 6 of the ICDR Rules, which provides a means for applying for emergency measures of protection.<sup>1</sup> Donuts asks the Emergency Panelist to recommend that a stay be issued to prevent ICANN from further processing the .SPORTS, .RUGBY and .SKI generic top level domains (“gTLDs”) to other applicants for those gTLDs, pending the outcome of Donuts’ IRP Request.

2. For the reasons stated herein, both Donuts’ Emergency Request and its IRP Request should be denied because the ICANN Board has not taken any action in regard to these three gTLDs, much less action that violates any provision of ICANN’s Bylaws or Articles of Incorporation (“Articles”). Because Donuts has failed to demonstrate any likelihood that it could prevail in this matter once a full IRP Panel is selected, ICANN urges the Emergency Panelist to deny Donuts’ Emergency Request.

3. This Independent Review Process (“IRP”) is conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which creates a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>2</sup> The IRP Panel has one (and only one) responsibility – to, in its

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<sup>1</sup> ICANN previously advised Donuts that, because ICANN had not yet put a “standing panel” of independent review panelists in place, ICANN was waiving Article 12 of the Supplementary Procedures that would otherwise apply so that Donuts would be eligible to pursue emergency relief under Article 6 of the ICDR rules.

<sup>2</sup> ICANN’s Bylaws, Cl. App. A, *also available at* <http://www.icann.org/en/about/governance/bylaws>. Donuts submitted three sets of numbered exhibits: (1) a Compendium of Exhibits; (2) an Appendix of Applicable Authorities; and (3) Witness Statements. Citations to “Cl. App. \_\_\_” refer to exhibits

opinion, “declar[e] whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>3</sup> The ICANN Board then considers that declaration. The declaration is not binding on the Board but, of course, ICANN takes the IRP results seriously.

4. IRPs, however, are limited to addressing actions of the ICANN Board. IRPs were not established to evaluate the conduct of ICANN staff, much less third party providers that have contracted with ICANN to provide services to the corporation. Absent Board action, there simply is nothing for the IRP Panel to evaluate. Because Donuts does not challenge Board action, but rather challenges determinations made by an independent third party dispute resolution provider, this IRP can be summarily resolved in ICANN’s favor.

5. Donuts argues that the Board violated its Bylaws or Articles by not reviewing the dispute resolution provider’s decisions, and by not instituting an appeals process with respect to the third party dispute resolution provider’s objection determinations. But ICANN, along with the entire ICANN community in adopting the Applicant Guidebook (“Guidebook”) that applies to applications for new gTLDs,<sup>4</sup> made clear that the Board would not undertake such responsibility, and nothing in the Bylaws or Articles could possibly be construed to require the Board to do so. It cannot be a violation of the Bylaws or Articles for the Board to “fail” to do something that the Board is not required to do, and should not do.

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(continued...)

submitted in Claimant Donuts’ Appendix of Applicable Authorities; citations to “Cl. Ex. \_\_\_” refer to exhibits submitted in Claimant Donuts’ Compendium of Exhibits; and citations to “Cl. \_\_\_ Stmt.” refer to exhibits submitted in Claimant Donuts’ Witness Statements. Citations to “Resp. Ex. \_\_\_” refer to exhibits submitted with ICANN’s Response.

<sup>3</sup> Bylaws, Cl. App. A, at Art. IV, § 3.4.

<sup>4</sup> Donuts included the New gTLD Applicant Guidebook (version of 4 June 2012) as Cl. App. C (“Guidebook”). The Guidebook is *also available* at <http://newgtlds.icann.org/en/applicants/agb>.

6. Donuts' IRP Request relates to its applications to operate the .SPORTS, .SKI and .RUGBY gTLDs.”<sup>5</sup> Donuts submitted its applications to ICANN in connection with ICANN's program to facilitate the creation of hundreds of new gTLDs to supplement those that have existed for many years, such as .COM, .NET, and .ORG. ICANN is administering this “New gTLD Program” pursuant to the Guidebook, which ICANN adopted in June 2011 following years of consideration and public input.<sup>6</sup> ICANN received 1,930 new gTLD applications during the first half of 2012.

7. Donuts submitted “standard” (not “community”) applications for the .SPORTS, .SKI and .RUGBY gTLDs. Other entities also applied to operate these same gTLDs. Pursuant to the procedures set forth in the Guidebook, objections were asserted to Donuts' applications essentially claiming that those gTLDs should only be operated on behalf of a “community.” The International Center of Expertise of the International Chamber of Commerce (“ICC”) is the independent dispute resolution firm that ICANN selected to administer community objections.<sup>7</sup> Expert panels (“Expert Panel”) selected by the ICC are tasked with determining whether “[t]here is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>8</sup> Under the terms of the Guidebook, if an Expert Panel determines that a community objection has merit, the objected-to gTLD application may not proceed. With respect to Donuts' applications for .SPORTS, .SKI and .RUGBY, the Expert Panels upheld the community objections, meaning that Donuts' applications are not, in fact, proceeding.

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<sup>5</sup> Donuts applied for over 300 new gTLDs. Request ¶ 2. This IRP involves only .SPORTS, .SKI and .RUGBY.

<sup>6</sup> Donuts included the New gTLD Applicant Guidebook (version of 4 June 2012) as Cl. App. C (“Guidebook”). The Guidebook is *also available at* <http://newgtlds.icann.org/en/applicants/agb>.

<sup>7</sup> Guidebook, Cl. App. C, at § 3.2.3.

<sup>8</sup> *Id.* at § 3.2.1.

8. In this IRP, Donuts is, as a practical matter, disputing the underlying Expert Panel Determinations, but because those Determinations are not Board actions, Donuts tries to craft an argument to make it appear as if the ICANN Board did something wrong by not reviewing (and reversing) those Determinations. Accordingly, Donuts claims that ICANN's Board violated its Bylaws and Articles by "allow[ing]" the Expert Panel's Determinations to remain in effect despite Donuts' challenges to the appointed panelists. Per ICC procedure, however, before the dispute resolution proceedings took place, Donuts challenged the expert panelist assigned to the .SKI objection proceedings. The ICC reviewed that challenge and determined that the panelist did not have a conflict. Donuts argues that the ICANN Board should have reviewed and overturned the ICC's decision with respect to the .SKI panelist, and also with respect to the appointment of the same panelist for .SPORTS even though Donuts did not even challenge the appointment of the .SPORTS panelist.<sup>9</sup> There is, however, no requirement that the ICANN Board second-guess the ICC panelist appointments or decisions on challenges to those appointments, and it would be improper for the ICANN Board to do so. Pursuant to the Guidebook, "each DRSP will follow its adopted procedures for requiring such independence [for selecting panelists], including procedures for challenging and replacing an expert for lack of independence."<sup>10</sup> In other words, the ICC, not the ICANN Board, is tasked with evaluating the impartiality of expert panelists, and resolving challenges in this regard. There simply is no Board action for this IRP Panel to review.

9. Second, Donuts claims that the Board failed to ensure the ICC's or its panelists' "consistent" application of applicable policies such as the Bylaws, the Guidebook and

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<sup>9</sup> See Request ¶ 66.

<sup>10</sup> *Id.* at § 3.4.4 (emphasis added).

“applicable law.”<sup>11</sup> Different outcomes by different expert panels related to different gTLD applications are to be expected; they are not evidence that the ICANN Board violated its Bylaws or Articles by “allowing” such results.

10. Third, Donuts asserts that the Board has failed to “build accountability into the new gTLD objection process” by not having an appellate mechanism within ICANN itself (as opposed to within the dispute resolution provider).<sup>12</sup> Notably, however, the decision not to have an appellate mechanism for objection proceedings was not a Board decision, but rather a community-driven decision, which among other things, was to help reduce the time and expense associated with the objection process. Neither the Bylaws, nor the Articles, nor the Guidebook, require ICANN to have an appellate mechanism for objection proceedings that are conducted as part of the New gTLD Program. The fact that there is no appellate mechanism could not possibly constitute conduct by the ICANN Board that violated any provision of the Bylaws or Articles.

11. Ultimately, Donuts has initiated this IRP because it disagrees with the Expert Panels’ Determinations and wants those decisions reversed. IRPs are not, however, a vehicle by which an Expert Panel’s determination may be challenged. Neither an expert determination, nor ICANN’s acceptance of an expert determination, constitutes Board action. For this reason, Donuts cannot prevail in this IRP, and its request for emergency relief should be denied.

## **II. BACKGROUND FACTS**

### **A. BACKGROUND INFORMATION ON ICANN**

12. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level,

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<sup>11</sup> Request ¶¶ 70-80.

<sup>12</sup> *Id.* ¶¶ 81-86.

the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems, including the domain name system (“DNS”).<sup>13</sup>

13. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors, approximately 300 staff members, and an Ombudsman. ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,<sup>14</sup> the ICANN community includes an independent Nominating Committee,<sup>15</sup> three Supporting Organizations,<sup>16</sup> four Advisory Committees,<sup>17</sup> a group of technical expert advisors,<sup>18</sup> and a large, globally distributed group of community members who participate in ICANN’s processes.

14. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers. ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs. In 2000, ICANN approved seven gTLDs in a “proof of concept” phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a handful of additional TLDs.

## **B. BACKGROUND INFORMATION ON THE NEW GTLD PROGRAM**

15. The New gTLD Program (“Program”) constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs,

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<sup>13</sup> Bylaws, Cl. App. A, at Art. I, § 1.

<sup>14</sup> *Id.* at Art. V.

<sup>15</sup> *Id.* at Art. VII.

<sup>16</sup> *Id.* at Arts. VIII-X.

<sup>17</sup> *Id.* at Art. XI.

<sup>18</sup> *Id.* at Art. XI-A, § 2.

including both new ASCII and non-ASCII internationalized domain name (“IDN”) gTLDs.<sup>19</sup> In developing the Program, numerous versions of the Guidebook were prepared and distributed throughout the ICANN community. Ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures for ICANN’s evaluation of gTLD applications.

16. Within the Program, section 3.2.1 of the Guidebook enumerates grounds upon which various objections to gTLD applications may be filed,<sup>20</sup> and several different dispute resolution providers were selected to administer objections filed against gTLD applications.<sup>21</sup> If an objection is filed on the grounds that “[t]here is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted,” Section 3.2.3 provides that the ICC will administer the dispute resolution process.<sup>22</sup>

17. Section 3.5.1 of the Guidebook provides that an objection will be upheld if the objector proves:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of

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<sup>19</sup> IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

<sup>20</sup> Guidebook, Cl. App. C, at § 3.2.1.

<sup>21</sup> The ICDR was selected to address string confusion objections, and the Arbitration and Mediation Center of the World Intellectual Property Organization was selected to administer legal rights objections. In addition to community objections such as those at issue here, the ICC was selected to administer limited public interest objections. Guidebook, Cl. App. C, at § 3.2.3.

<sup>22</sup> *Id.* at § 3.2.1; *id.* at § 3.2.3.

the community to which the string may be explicitly or implicitly targeted.<sup>23</sup>

18. Pursuant to the Guidebook, the relevant dispute resolution provider selects the expert panel that renders a final expert determination on an objection.<sup>24</sup> ICANN’s Board plays no role in selecting any expert panel or issuing any expert determination.

19. The Guidebook does not provide any procedure by which ICANN (or anyone else) is to conduct a substantive review of the Expert Panel’s results.<sup>25</sup> Notably, however, the decision not to have an appellate mechanism for objection proceedings was not a Board decision at all, but rather a community-driven decision, which among other things, was to help reduce the time and expense associated with the objection process. If the Board were to evaluate “appeals” relating to the approximately 270 objections submitted with respect to gTLD applications, the process of administering those applications – and doing the Board’s other considerable business – could grind to a halt. Indeed, if the Board adopted at this point in time an appellate mechanism for all objections, those who prevailed at various dispute resolution providers might credibly argue that ICANN had violated its Bylaws, Articles or Guidebook by instituting such a mechanism.

20. Although “appeals” were not permitted, the Guidebook did offer applicants the ability to file “reconsideration requests” with ICANN if the applicant believed that the dispute resolution providers or the expert panels did not follow the Guidebook or their own rules. A reconsideration request is another ICANN accountability mechanism by which ICANN’s Board Governance Committee (“BGC”) evaluates whether ICANN properly followed its policies and

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<sup>23</sup> *Id.* at § 3.5.4.

<sup>24</sup> *Id.* at § 3.4.4, 3.4.6.

<sup>25</sup> *Id.* at § 3.4.6.

procedures in taking the challenged action (although the BGC, like the Board, does not review the substance of expert panel determinations).<sup>26</sup>

**C. RELEVANT FACTS REGARDING DONUTS' APPLICATIONS FOR .SPORTS**

21. Donuts submitted a standard<sup>27</sup> application for .SPORTS. Two other applicants applied for the singular version of the string, .SPORT: SportAccord (“SA”) submitted a community application, and dot Sport Limited submitted a standard application.<sup>28</sup>

22. On 13 March 2013, SA objected to Donuts’ .SPORTS application (“.SPORTS Objection”), claiming that the “Sport community” would suffer material detriment should Donuts’ application proceed.<sup>29</sup>

23. On 25 June 2013, the ICC appointed Mr. Jonathan Peter Taylor as the expert panelist (“SPORTS Panel”) to consider the .SPORTS Objection.<sup>30</sup> Donuts did not object to Mr. Taylor’s appointment in this proceeding.

24. Also on 25 June 2013, with respect to a community objection concerning .SPORT (the singular and not the plural), an applicant objected to the appointment of Mr. Taylor.<sup>31</sup> The ICC sustained the objection, removing Mr. Taylor from the .SPORT Panel.<sup>32</sup>

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<sup>26</sup> Bylaws, Cl. App. A, at Art. IV, § 3.2.

<sup>27</sup> A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application. A standard application is one that has not been designated as community-based. See Terms Applicable to the gTLD application process, *available at* <http://newgtlds.icann.org/en/applicants/glossary>.

<sup>28</sup> See SA Application Details, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1593>; dot Sport Limited application, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1262>.

<sup>29</sup> Cl. Ex. 2, at p. 7.

<sup>30</sup> Cl. Ex. 7.

<sup>31</sup> Cl. Ex. 10.

<sup>32</sup> Cl. Ex. 13.

25. On 22 January 2014, Mr. Taylor issued an expert determination in favor of SA and against Donuts (the “.SPORTS Determination”).<sup>33</sup> The ICC notified the parties of this .SPORTS Determination, and ICANN staff posted the .SPORTS Determination on ICANN’s website.

**D. RELEVANT FACTS REGARDING DONUTS’ APPLICATIONS FOR .SKI**

26. Donuts submitted a standard application for .SKI. One other applicant applied for .SKI: Starting Dot Limited filed a community application.<sup>34</sup>

27. On 13 March 2013, the Fédération Internationale de Ski (“FIS”) objected to Donuts’ .SKI application (“.SKI Objection”), claiming that the “Ski community” would suffer material detriment should Donuts’ application proceed.<sup>35</sup>

28. On 19 June 2013, the ICC appointed Mr. Taylor as the expert (“SKI Panel”) to consider the .SKI Objection.<sup>36</sup> On 30 June 2013, Donuts challenged Mr. Taylor’s appointment and requested he be removed as the .SKI Panel on the grounds of the appearance of a conflict of interest.<sup>37</sup> FIS opposed the removal request,<sup>38</sup> and the ICC denied Donuts’ request to remove Mr. Taylor.<sup>39</sup>

29. On 21 January 2014, the .SKI Panel issued an expert determination in favor of FIS and adverse to Donuts (the “.SKI Determination”).<sup>40</sup> The ICC then notified the parties of the .SKI Determination and ICANN staff posted it on ICANN’s website.

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<sup>33</sup> Cl. Ex. 14.

<sup>34</sup> See Starting Dot Limited Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1609>.

<sup>35</sup> Cl. Ex. 19.

<sup>36</sup> Cl. Ex. 21.

<sup>37</sup> Cl. Ex. 24.

<sup>38</sup> Cl. Exs. 25, 27.

<sup>39</sup> Cl. Ex. 28.

<sup>40</sup> Cl. Ex. 34.

**E. RELEVANT FACTS REGARDING DONUTS' APPLICATIONS FOR .RUGBY**

30. Donuts submitted a standard application for .RUGBY. Two other applicants submitted standard applications for .RUGBY: IRB Strategic Developments Limited and dot Rugby Limited.<sup>41</sup> No applicant submitted a community application.

31. On 13 March 2013, the International Rugby Board (“IRB”) objected to Donuts’ .RUGBY application (“.RUGBY Objection”), claiming that the “Rugby Community” would suffer material detriment should Donuts’ application proceed.<sup>42</sup> IRB is an affiliate of applicant IRB Strategic Developments Limited.<sup>43</sup>

32. The ICC appointed Mr. Richard McLaren as the expert to consider the .RUGBY Objection. Donuts objected to Mr. McLaren’s appointment and requested that he be removed as the .RUGBY expert panel on the grounds of the appearance of a conflict of interest.<sup>44</sup> The ICC granted Donuts’ request to remove Mr. McLaren and appointed Mr. Mark Kantor as the new expert (“RUGBY Panel”).<sup>45</sup> Donuts did not object to Mr. Kantor’s appointment.

33. On 31 January 2014, the RUGBY Panel issued its determination in favor of IRB (the “.RUGBY Determination”).<sup>46</sup> The ICC then notified the parties of the .RUGBY Determination, and ICANN staff posted it on ICANN’s website.

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<sup>41</sup> See IRB Strategic Developments Limited Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/269>; dot Rugby Limited Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1221>.

<sup>42</sup> Cl. Ex. 40.

<sup>43</sup> Cl. Ex. 47 ¶ 38. IRB also objected to dot Rugby Limited’s application for .RUGBY, and prevailed. Cl. Ex. 47.

<sup>44</sup> Cl. Ex. 42 at pp. 24-25. Dot Rugby Limited joined in that request. Cl. Ex. 43.

<sup>45</sup> Cl. Exs. 46-47.

<sup>46</sup> Cl. Ex. 34.

### **III. NO EMERGENCY RELIEF IS WARRANTED**

34. Donuts asks the Emergency Panelist to recommend that a stay be issued to prevent ICANN from further processing the other applications for .SPORTS, .RUGBY and .SKI gTLDs pending the outcome of Donuts' IRP Request. In deciding whether or not to stop processing the other applications for the .SPORTS, .RUGBY and .SKI gTLDs, ICANN has had to be cognizant of the potential for injury that might occur to the other applicants for those strings as a result of delay (which could be significant, as IRPs routinely take at least several months to conclude). ICANN has also weighed that potential injury against the likelihood that the IRP Panel would conclude that Donuts' claim was meritorious, a likelihood that ICANN considers to be extremely low because of the absence of Board action. After weighing the options, ICANN has elected to proceed with the processing of the other applications for .SPORTS, .RUGBY and .SKI.

35. Donuts' Emergency Request seeks a ruling (which can be nothing more than a recommendation in any event) that "effective immediately, (i) the status of all applications for .SPORTS, .SKI and .RUGBY be placed 'on hold,' and (ii) the Board stay all contracting and delegation processes pertaining to the same."<sup>47</sup> Donuts appears to believe that, simply because it has initiated IRP proceedings, ICANN should stop processing the remaining active applications for .SPORTS, .RUGBY and .SKI. The problem, however, is that Donuts has not demonstrated any likelihood of success on the merits. Filing a lengthy brief accompanied by numerous declarations does not mean that a claimant actually has demonstrated a reasonable chance of winning the IRP. As explained herein, Donuts has no viable basis to obtain IRP relief, which is why ICANN opposes the request for an emergency stay recommendation.

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<sup>47</sup> See Emergency Request.

36. It is generally accepted under both U.S. and international law that, in order to demonstrate entitlement to interim relief, the party seeking relief must demonstrate a reasonable probability of success on the merits. For example, Article 27(A)(1)(b) of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on International Commercial Arbitration states that a party requesting an interim measure must demonstrate that "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim."<sup>48</sup> Similarly, tribunals under the International Chamber of Commerce have required a party seeking interim relief to demonstrate a likelihood of success on the merits, noting that the requirement is generally "found both in judicial and arbitral practice."<sup>49</sup> Likewise, under U.S. law, a party seeking a preliminary injunction must at least demonstrate that "the likelihood of success is such that serious questions going to the merits were raised."<sup>50</sup>

37. In its Emergency Request, Donuts does not propose any particular legal standard that should apply to determine whether emergency relief is warranted. Further, Donuts' IRP Request does not demonstrate any likelihood of success on the merits, and in fact fails to set forth even a *prima facie* case that IRP relief is warranted. As a result, no emergency relief should be provided.

#### **IV. IRP STANDARD OF REVIEW**

38. The IRP is a unique, non-binding process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with

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<sup>48</sup> UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(1)(b), Resp. Ex. 1, *also available* at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

<sup>49</sup> *See, e.g.,* Distributor A v. Manufacturer B, ICC Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 68 n.3 (2005), Resp. Ex. 2.

<sup>50</sup> *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (internal quotation marks omitted); *see also Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008).

ICANN's Bylaws or Articles.<sup>51</sup> The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Bylaws or Articles.<sup>52</sup> ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>53</sup>

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.<sup>54</sup>

39. ICANN has appointed the ICDR as ICANN's IRP Provider. ICANN's Bylaws and the Supplementary Procedures that the ICDR has adopted specially for ICANN IRP proceedings apply here.<sup>55</sup> The Bylaws provide that the IRP be conducted via "email and otherwise via the Internet to the maximum extent feasible."<sup>56</sup> The IRP Panel may also hold meetings via telephone where necessary, and "[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."<sup>57</sup>

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<sup>51</sup> Bylaws, Cl. App. A, at Art. IV, §§ 3.1, 3.2.

<sup>52</sup> *See id.* at Art. IV, §§ 3.2, 3.4.

<sup>53</sup> *Id.* at § 3.4.

<sup>54</sup> *See id.*

<sup>55</sup> In the event of any inconsistency between the Supplementary Procedures and the ICDR's Rules, the Supplementary Procedures shall govern. Bylaws, Cl. App. A, at Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process, § 2, *available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf> ("ICDR Supplemental Procedures").

<sup>56</sup> Bylaws, Cl. App. A, at Art. IV, § 3.12

<sup>57</sup> *Id.*, at Art. IV, § 3.12; ICDR Supplementary Procedures, ¶ 10.

40. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>58</sup> The Board will give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>59</sup>

V. **ARGUMENT**

41. An IRP is available only to persons “materially affected by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”<sup>60</sup> IRPs are not available as a means to challenge the conduct of third parties or ICANN staff.

42. As summarized above, Donuts raises three arguments in its IRP Request. First, Donuts claims that the .SPORTS and .SKI Determinations were the result of a conflict of interest because Mr. Jonathan Taylor, the designated expert panelist for the .SPORTS and .SKI Objections, was allegedly biased against Donuts and should have been removed. Second, Donuts argues that the Board failed to ensure consistent application by the ICC and its expert panels of ICANN’s Bylaws, the Guidebook and what Donuts deems to be “applicable law.”<sup>61</sup> Third, Donuts asserts that the Board failed to “build accountability into the new gTLD objection process.”<sup>62</sup>

43. None of these grounds is a proper basis to seek independent review under ICANN’s Bylaws. All three claims are thinly veiled challenges to the ICC expert panels’ determinations, and neither the determinations themselves nor ICANN’s acceptance of them

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<sup>58</sup> *Id.* at Art. IV, § 3.18.

<sup>59</sup> *Id.* at Art. IV, § 3.21.

<sup>60</sup> Bylaws, Cl. App. A, at Art. IV, § 3.2 (emphasis added).

<sup>61</sup> Request ¶¶ 78-80

<sup>62</sup> *Id.* ¶¶ 81-86.

constitute Board actions. ICANN has properly delegated the community objection determination process to an internationally renowned independent dispute resolution provider, the ICC, as required by the Guidebook.<sup>63</sup> Nothing in ICANN’s Bylaws or Articles requires the ICANN Board to review expert panel determinations for any reason or to provide appellate review of those determinations.

**A. THE BOARD HAS NO OBLIGATION TO REVIEW ICC DECISIONS REGARDING ICC EXPERT PANELISTS’ IMPARTIALITY**

44. Donuts argues that ICANN breached its Bylaws because it “[a]llowed [d]ecisions on .SPORTS and .SKI to [r]esult from [c]onflicts.”<sup>64</sup> However there is no provision in the Bylaws or Articles that requires the ICANN Board to evaluate expert panelists for conflicts of interest. To the contrary, the Guidebook specifically states that this is the ICC’s job.

45. The Guidebook is clear that the designated dispute resolution provider (here the ICC) – not ICANN – will appoint “one expert in proceedings involving a community objection.”<sup>65</sup> Further, pursuant to the Guidebook, “each DRSP will follow its adopted procedures . . . [for selecting panelists], including procedures for challenging and replacing an expert for lack of independence.”<sup>66</sup> Nothing in the Guidebook provides for the Board to be involved in any way in the panel selection process.

46. Donuts’ IRP Request actually demonstrates that: (i) the ICC takes seriously allegations of bias with respect to its expert panelists; (ii) the ICC was cognizant of and abided by its rules with respect to expert panelist impartiality; and (iii) it was the ICC’s responsibility and not ICANN’s (much less ICANN’s Board) to manage such issues. Twice, the ICC removed

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<sup>63</sup> Guidebook, Cl. App. C, §§ 3.2.3, 3.4.4-4.6.

<sup>64</sup> Request at p. 16.

<sup>65</sup> Guidebook, Cl. App. C, at § 3.4.4.

<sup>66</sup> *Id.* at § 3.4.4 (emphasis added).

panelists initially selected for these (or similar) gTLD applications: the ICC removed Mr. McLaren after Donuts challenged his appointment for the .RUGBY objection;<sup>67</sup> and the ICC removed Mr. Taylor with respect to an objection to an application for .SPORT.<sup>68</sup> The ICC obviously knew how to evaluate (and sustain) challenges to the designation of its panelists. The fact that the ICC did not remove Mr. Taylor from the .SKI Objection does not mean that the ICC “got it wrong”<sup>69</sup> or that the ICANN Board should have intervened in some way. And, of course, Donuts did not even object to Mr. Taylor’s appointment for the .SPORTS Objection.<sup>70</sup>

47. Donuts itself recognizes that its real objection lies with the outcome of the .SPORTS and .SKI Determinations, not with any ICANN Board action or inaction relating to panel selection, as Donuts cites ICANN’s Bylaws requiring neutral and fair policies and then claims “[t]he Panels for the .SPORTS and .SKI objections . . . breached these fundamental principles.”<sup>71</sup> This issue relates to the expert determinations, and not the ICC’s panel selection or removal process. Notably, Donuts concedes that it is the ICC, and not the ICANN Board that is responsible for constituting panels and removing expert panelists, as evidenced by Donuts

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<sup>67</sup> Cl. Exs. 42, 46.

<sup>68</sup> Cl. Ex. 13.

<sup>69</sup> In any event, Donuts has not identified any actual bias with respect to Mr. Taylor’s appointment. Donuts complains that Mr. Taylor engaged in “direct representation” of “interests” that caused him to be biased in favor of objector SA and against Donuts. Request ¶ 64. Even were the Board required to review expert panelists’ impartiality, there is no evidence of any actual bias on the grounds Donuts asserts. Donuts notes that Mr. Taylor was a panelist in 2011 at a conference run by the Objector, SA, has represented in his legal practice one of the supporters of the SPORTS Objection, and various other links between Mr. Taylor and members of SA, which (by its own description) is a “not-for-profit association . . . composed of autonomous and independent international sports federations . . . [and] is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events.” Cl. Ex. 14 at 6 (SA’s .SPORTS Objection). In other words, SA is a large umbrella organization involved in many aspects of many different varieties of organized sports. Donuts presumably wishes the .SPORTS Objection to be determined by an expert with knowledge and experience relevant to the string; most such persons will have had some connections with SA over the years given its size and prominence. The ICC reasonably concluded that no removal was necessary.

<sup>70</sup> Request ¶ 66.

<sup>71</sup> *Id.* ¶ 62 (emphasis added).

admission that, when presented with claims of bias, “[t]he ICC has shown that it knows when it should remove panelists.”<sup>72</sup> Nothing in the Bylaws, Articles or Guidebook requires the ICANN Board to interfere with the ICC’s judgment in this regard.

48. Most importantly for this proceeding, the ICC’s decisions have absolutely no bearing on whether the ICANN Board violated any of its Bylaws or Articles. There is no basis to attribute to the ICANN Board a decision of the ICC about who serves as panelists. To the contrary, a lengthy community-based effort for developing implementation plans for new gTLD dispute resolution processes resulted in identification of independent third party providers, such as the ICC, to handle objections, not the ICANN Board. This same community-based effort resulted in those third party providers’ rules on panelists’ alleged impartiality being the rules that must be followed in this regard.

49. Understanding that the ICANN Board played no role, Donuts is forced to argue that the ICANN Board violated its Bylaws by its “lack of action.”<sup>73</sup> But the “lack of action” is more appropriately characterized as “no action to take” because the Guidebook does not call for the Board to review the ICC’s decision about selected panelists’ alleged conflicts of interest, and such review similarly is not required by any provision of the Bylaws or Articles.

50. Moreover, even Donuts’ complaints about the substance of the .SPORTS Determination do not demonstrate any obvious bias of the expert panelist who resolved the objection. The .SPORTS Panel found that the “Organised Sports Movement” is a “clearly delineated community,” a necessary criterion for a successful community objection (as set forth *supra*). While Donuts does not necessarily object to this finding, it complains that in the .SPORTS Objection, SA did not define the community as limited to *organized* sports, as it

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<sup>72</sup> *Id.* ¶ 68.

<sup>73</sup> *Id.* ¶ 69.

included (*inter alia*) “individuals . . . who associate themselves with Sport” and “any person in the world.”<sup>74</sup> Yet, the .SPORTS Panel explained that “when the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official sanctioned sports . . . .”<sup>75</sup> To delve into the correctness of this explanation is far outside the scope of any IRP.

51. And while the opinions of Donuts’ “experts” are not relevant at all to the question of whether the ICANN Board violated its Bylaws or Articles, the expert opinions do not demonstrate any grounds for suggesting that the ICC’s decisions on whether its panelists were biased was wrong. For example, Donuts offers Dr. Arman Sarvarian as an “expert on professional ethics in international courts and tribunals.”<sup>76</sup> Dr. Sarvarian opines that of Donuts’ litany of reasons why Mr. Taylor purportedly suffered from a conflict of interest that prevented him from issuing an impartial determination with respect to the .SPORTS and .SKI Determinations, only one could even arguably qualify as a potential conflict of interest,<sup>77</sup> and even that one conflict could have been remedied, Dr. Sarvarian notes, by mere disclosure.<sup>78</sup> Although Mr. Taylor did not disclose this one conflict of interest, Dr. Sarvarian only “consider[s] the conflict of interest to have the level of seriousness to potentially merit disqualification,”<sup>79</sup> and recognizes the assessment as to whether disqualification is warranted would require more investigation.<sup>80</sup> But the Guidebook authorizes the ICC, not independent experts selected by the

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<sup>74</sup> *Id.* 63, Exs. 2, 14.

<sup>75</sup> *Id.* 63, Ex. 14.

<sup>76</sup> Cl. Sarvarian Stmt. ¶ 1.

<sup>77</sup> *Id.* ¶¶ 19-34.

<sup>78</sup> *Id.* ¶ 40.

<sup>79</sup> *Id.* ¶¶ 34 (emphasis added); *see also id.* ¶ 36 (noting the conflicts “taken cumulatively . . . have the *potential* to constitute grounds for disqualification”) (emphasis added).

<sup>80</sup> *Id.* ¶ 36.

applicants (much less the ICANN Board) to assess claims of potential conflicts of interest.<sup>81</sup>

Accordingly, Dr. Sarvarian’s opinion is utterly irrelevant to this proceeding.

52. Donuts also proffers Marc Edelman as an expert “in the sports business industry, with a particular emphasis on sports law and sports-related antitrust issues.”<sup>82</sup> Donuts cites Mr. Edelman’s report for the proposition that “[a]s part of a small group who often serve organized sports interests, often claiming more sweeping jurisdiction than they have, it comes as no surprise that Mr. Taylor sided with such interest against Donuts.”<sup>83</sup> Donuts cites portions of Mr. Edelman’s report that discuss his view that organized sports associations, and companies who work with them, have a nefarious agenda, because “[i]n terms of free market competition, formalized sports associations/federations create limitations on a number of levels”<sup>84</sup> and Mr. Edelman’s view is that if such a group, like SA, were to operate the .SPORTS string, a parade of horrors would ensue, including that “Nike, a gigantic [*sic*] company that pays huge fees for exclusive sponsorship rights to [SA] events, would likely gain access.”<sup>85</sup>

53. Inasmuch as Mr. Edelman’s report is squarely arguing the substance of the .SPORTS Determination, Donuts’ reliance on the report confirms that Donuts does not have a proper basis for independent review because this IRP Panel is not tasked with evaluating the “correctness” of the .SPORTS Determination. Yet, that is the entire focus of Mr. Edelman’s report, which provides a lengthy discussion of the history of sports, averring that “sports” does not necessarily denote organized sports. Mr. Edelman offers an opinion about whether there is a delineated sports community, whether the “Objector” represents it, and whether the “Objector”

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<sup>81</sup> Guidebook, Cl. App. C, § 3.4.4.

<sup>82</sup> Cl. Edelman Stmt. ¶ 2.

<sup>83</sup> Request ¶ 67.

<sup>84</sup> Cl. Edelman Stmt. ¶ 23.

<sup>85</sup> *Id.* ¶ 27.

demonstrated it would suffer material detriment if the string is not delegated to it.<sup>86</sup> All of this relates to the merits of the objection and has no relevance in an IRP. That Donuts found an expert who would have sided with its basis for objection is irrelevant to whether the ICANN Board violated its Bylaws or Articles by not intervening in the panel selection and removal process; a process that was unquestionably the ICC’s job.

**B. NO ICANN BOARD ACTION WAS THE CAUSE OF THE “INCONSISTENCIES” DONUTS ALLEGES**

54. Donuts argues that the ICANN Board failed to ensure consistent application of applicable policies such as the Bylaws, the Guidebook and purportedly “applicable law” in three ways. First, Donuts contends that the Board failed to comply with the Bylaws’ “call for ‘open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.’”<sup>87</sup> This Bylaws provision refers to ICANN’s policy development processes – not third-party dispute resolution mechanisms – and thus is utterly inapplicable here. Notably, Donuts does not explain how the Bylaws provision applies (because it does not); instead Donuts complains about various alleged substantive deficiencies of the .SPORTS, .SKI and .RUGBY Determinations. Since there is no requirement that ICANN’s Board review expert determinations, Donuts’ argument is irrelevant. Pursuant to the Guidebook, the “findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”<sup>88</sup> Following receipt of expert determinations, ICANN staff is tasked with taking the next step of accepting it, not the Board.

55. Second, Donuts complains that the substance of the various determinations are inconsistent, and asserts that the Board’s failure to take “corrective action” on the “back end”

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<sup>86</sup> See generally Cl. Edelson Stmt.

<sup>87</sup> Request ¶ 71.

<sup>88</sup> Guidebook, Cl. App. C, at § 3.4.6 (emphasis added).

violates ICANN’s Articles provisions stating that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”<sup>89</sup> However, contrary to Donuts’ allegations, no ICANN Board action was the cause of the purported inconsistencies. Different outcomes by different independent expert panels related to different gTLD applications was to be expected, and is hardly evidence that the Board violated its “standards, policies, procedures, or practices.” Donuts asserts that the three Determinations at issue here “single Donuts out for disparate and adverse treatment,”<sup>90</sup> but it offers no support for that statement other than the fact that it lost whereas other applicants prevailed.<sup>91</sup>

56. Third, Donuts claims that ICANN violated “applicable law,” including California’s covenant of good faith and fair dealing, which Donuts argues is imposed upon ICANN by virtue of the fact that the Guidebook is a contract between ICANN and new gTLD applicants.<sup>92</sup> An IRP, however, is not the proper venue for such a claim because independent review is limited to concerns regarding the ICANN Board’s alleged violations of ICANN’s Bylaws and Articles. Even if a breach of the covenant of good faith and fair dealing could form the basis of an IRP, no breach occurred here because Donuts does not challenge any Board action and, in any event, identifies no violation of the ICANN Bylaws or Articles.

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<sup>89</sup> Request ¶ 77; Articles, Cl. App. B, Art. II, § 3.

<sup>90</sup> Request ¶ 77.

<sup>91</sup> Indeed, to take Donuts at its word and create an appellate review process for all objection determinations would call into question the finality of the objection proceeding in which Donuts prevailed.

<sup>92</sup> Request ¶ 80.

**C. NO PROVISION OF ICANN’S BYLAWS OR ARTICLES REQUIRES THE ICANN BOARD TO INSTITUTE AN APPEALS PROCESS FOR EXPERT DETERMINATIONS**

57. Donuts contends that independent review is warranted on the grounds that the Board has failed to “build accountability into the new gTLD objection process” insofar as it “opted against an appellate process” for expert determinations on community objections.<sup>93</sup> Again, Donuts does not identify any provision of the Bylaws or Articles that requires ICANN to provide such an appeals process, and none exists. Moreover, as noted above, the decision not to have the Board involved in some sort of “appellate review” of all of the potential objections that apply to new gTLD applications was not a Board decision at all, but rather resulted from a community-driven process. Moreover, it was an utterly rational decision because implementation of the process Donuts proposes could have created a logistical nightmare for the Board in attempting to review “appeals” of the hundreds of objections that were filed in association with gTLD applications.<sup>94</sup>

58. Donuts also complains that the ICANN Board “selected a completely inexperienced provider in [its selection of] the ICC” as the dispute resolution provider for community objections. ICANN made this decision in 2011 and, thus, any objection to the selection of the ICC is time-barred.<sup>95</sup> In all events, however, the Guidebook was developed

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<sup>93</sup> *Id.* ¶ 81.

<sup>94</sup> ICANN has recently authorized a limited and targeted review of just two alleged inconsistent expert determinations. The basis for that decision, however, was that the applied-for gTLDs in each of the two relevant objection proceedings were the *same applied for gTLD* at issue in other objection proceedings that resulted in opposite conclusions by the respective expert panels. And ICANN has approved this limited further review only in two instances out of more than 270 objection proceedings. *See* 12 Oct 2014 NPGC Resolutions, 2(b), *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>. Further, the Board will not conduct that review; an independent dispute resolution provider is tasked with establishing a new three-member expert panel to do so.

<sup>95</sup> Request ¶ 83; Bylaws, Cl. App. A, at Art. IV, § 2.3.

through years of multi-stakeholder community input,<sup>96</sup> and ICANN did not violate its Bylaws or Articles by complying with the following Guidebook provision:

ICANN selected [dispute resolution service providers] on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.<sup>97</sup>

59. Donuts has also offered a witness statement from former ICANN executive Kurt Pritz, who opines that “ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in objection rulings[.]”<sup>98</sup> Mr. Pritz is entitled to his opinions of what ICANN could or should have done after the Guidebook was created, and after ICANN received over 1,900 gTLD applications, but what Mr. Pritz is really doing is confirming that ICANN has not acted contrary to its Bylaws, Articles or the Guidebook by declining to set up an “appellate” system for expert determinations made by third parties.

60. Mr. Pritz also claims ICANN policies were violated because he claims applicants have used objections as an “anticompetitive weapon” and because the determinations are inconsistent.<sup>99</sup> Again, Mr. Pritz’ opinion is of no relevance here. In any event, ICANN cannot and should not have any control over which parties choose to use the community developed objection processes. Further, the ICC is well-equipped to set up a dispute resolution system that

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<sup>96</sup> Guidebook, Cl. App. C, at § 3.2.3.

<sup>97</sup> *Id.* at § 3.2.3.

<sup>98</sup> Cl. Pritz Stmt. ¶¶ 4, 25.

<sup>99</sup> *Id.* ¶¶ 14-21.

minimizes inconsistency. As Mr. Pritz himself notes, the standards to be applied are brand new, and it was inevitable that different panels would reach different results.

**VI. CONCLUSION**

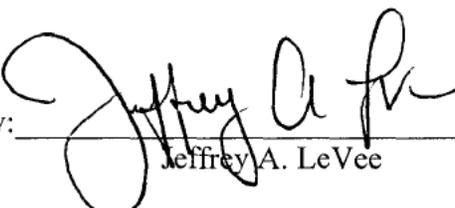
61. The decision to retain third-party dispute resolution providers to adjudicate objections to gTLD applications was not a Board decision, as the Guidebook was developed through years of multi-stakeholder community input.<sup>100</sup> Neither the decisions of those dispute resolution providers, nor the decisions of the panels those providers constitute, can form a basis for independent review under the very specific provisions of ICANN's Bylaws that created Independent Review Proceedings. Such proceedings can occur only with respect to conduct of the Board because the mandate of an IRP panel is limited to determining whether the Board acted consistent with ICANN's Bylaws and Articles.

62. The fact that Donuts disagrees with the outcome of the three objection proceedings that it lost does not mean that the Board was involved in any way with those outcomes or that independent review is warranted. Donuts' IRP Request should be denied and, because Donuts has failed to demonstrate a likelihood of success on the merits of its IRP Request, no emergency relief is warranted.

Respectfully submitted,

Dated: 14 November 2014

JONES DAY

By:   
Jeffrey A. LeVee  
Counsel for Respondent ICANN

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<sup>100</sup> Guidebook, Cl. App. C, at § 3.2.3.

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR CASE NO. 01-14-0001-6263

DONUTS INC.  
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
(Respondent)

**INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S RESPONSE TO  
CLAIMANT'S REQUEST FOR INDEPENDENT REVIEW PROCESS AND  
REQUEST FOR EMERGENCY RELIEF**

<b><u>Exhibit</u></b>	<b><u>DESCRIPTION</u></b>
<b>Resp. Ex.1</b>	UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(1)(b), Resp. Ex. 1, <i>available at</i> <a href="http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf">http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf</a> .
<b>Resp. Ex. 2</b>	<i>Distributor A v. Manufacturer B</i> , ICC Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 68 n.3 (2005).

**RESP. Ex. 1**

# UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments  
as adopted in 2006



The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments  
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UNITED NATIONS  
Vienna, 2008

**NOTE**

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

UNITED NATIONS PUBLICATION

Sales No. E.08.V.4

ISBN 978-92-1-133773-0

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## Resolutions adopted by the General Assembly

### *40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in international commercial relations,

*Convinced* that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

*Noting* that the Model Law on International Commercial Arbitration<sup>1</sup> was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

*Convinced* that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>2</sup> and the Arbitration Rules of the United Nations Commission on International Trade Law<sup>3</sup> recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

*112th plenary meeting  
11 December 1985*

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<sup>1</sup>Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.

<sup>2</sup>United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

<sup>3</sup>United Nations publication, Sales No. E.77.V.6.

[on the report of the Sixth Committee (A/61/453)]

*61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

*Recalling* its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,<sup>1</sup>

*Recognizing* the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

*Believing* that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

*Noting* that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

*Believing* that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,<sup>3</sup> and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

<sup>1</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

<sup>2</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>3</sup>*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;<sup>3</sup>

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

*64th plenary meeting  
4 December 2006*



*Part One***UNCITRAL Model Law on International  
Commercial Arbitration**

(United Nations documents A/40/17,  
annex I and A/61/17, annex I)

**(As adopted by the United Nations Commission on  
International Trade Law on 21 June 1985,  
and as amended by the United Nations Commission  
on International Trade Law on 7 July 2006)**

## CHAPTER I. GENERAL PROVISIONS

*Article 1. Scope of application<sup>1</sup>*

(1) This Law applies to international commercial<sup>2</sup> arbitration, subject to any agreement in force between this State and any other State or States.

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

*(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

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<sup>1</sup>Article headings are for reference purposes only and are not to be used for purposes of interpretation.

<sup>2</sup>The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

- (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

## *Article 2. Definitions and rules of interpretation*

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

*Article 2 A. International origin and general principles*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

*Article 3. Receipt of written communications*

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

*Article 4. Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

*Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

*Article 6. Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

## CHAPTER II. ARBITRATION AGREEMENT

*Option I**Article 7. Definition and form of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

## *Option II*

### *Article 7. Definition of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

### *Article 8. Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

### *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

## CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

*Article 10. Number of arbitrators*

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

*Article 11. Appointment of arbitrators*

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### *Article 12. Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### *Article 13. Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 14. Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

*Article 15. Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

#### CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

*Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

##### ***Section 1. Interim measures***

###### *Article 17. Power of arbitral tribunal to order interim measures*

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

*Article 17 A. Conditions for granting interim measures*

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

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

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

*Section 2. Preliminary orders**Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

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

*Article 17 C. Specific regime for preliminary orders*

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

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

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

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

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

### ***Section 3. Provisions applicable to interim measures and preliminary orders***

#### *Article 17 D. Modification, suspension, termination*

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

#### *Article 17 E. Provision of security*

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

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

*Article 17 F. Disclosure*

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

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

*Article 17 G. Costs and damages*

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

***Section 4. Recognition and enforcement of interim measures****Article 17 H. Recognition and enforcement*

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

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

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

*Article 17 I. Grounds for refusing recognition or enforcement<sup>3</sup>*

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

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

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

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

*Section 5. Court-ordered interim measures**Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

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<sup>3</sup>The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

## CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

### *Article 18. Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### *Article 19. Determination of rules of procedure*

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

### *Article 20. Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

### *Article 21. Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

*Article 22. Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

*Article 23. Statements of claim and defence*

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

*Article 24. Hearings and written proceedings*

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

*Article 25. Default of a party*

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

*Article 26. Expert appointed by arbitral tribunal*

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

*Article 27. Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### *Article 28. Rules applicable to substance of dispute*

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### *Article 29. Decision-making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

### *Article 30. Settlement*

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

*Article 31. Form and contents of award*

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
- (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

*Article 32. Termination of proceedings*

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
  - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings;
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

*Article 33. Correction and interpretation of award; additional award*

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
  - (a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII. RECOURSE AGAINST AWARD

### *Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

- valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### *Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.<sup>4</sup>

*(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

*Article 36. Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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<sup>4</sup>The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## *Part Two*

### **Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006<sup>1</sup>**

1. The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”. The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended “that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)”.

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

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<sup>1</sup>This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

### **A. Background to the Model Law**

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

#### ***1. Inadequacy of domestic laws***

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

## ***2. Disparity between national laws***

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

## **B. Salient features of the Model Law**

### ***1. Special procedural regime for international commercial arbitration***

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) *Substantive and territorial scope of application*

11. Article 1 defines the scope of application of the Model Law by reference to the notion of “international commercial arbitration”. The Model Law defines an arbitration as international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term “commercial”, the Model Law provides no strict definition. The footnote to article 1 (1) calls for “a wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”. The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of “commercial law” that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a “foreign” law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

*(b) Delimitation of court assistance and supervision*

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

## **2. Arbitration agreement**

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

*(a) Definition and form of arbitration agreement*

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (“*compromis*”) or a future dispute (“*clause compromissoire*”). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”. It also states that “the reference in a contract to any document” (for example, general conditions) “containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract”. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made “by reference”. The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958” (A/61/17, Annex 2).<sup>2</sup> The General Assembly, in its resolution 61/33 of 4 December 2006 noted that “in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

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<sup>2</sup>Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely”. The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the “more favourable law provision” contained in article VII (1) of the New York Convention, the Recommendation clarifies that “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

*(b) Arbitration agreement and the courts*

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

**3. Composition of arbitral tribunal**

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

#### **4. *Jurisdiction of arbitral tribunal***

##### *(a) Competence to rule on own jurisdiction*

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of “*Kompetenz-Kompetenz*” and of separability or autonomy of the arbitration clause. “*Kompetenz-Kompetenz*” means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators’ jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) *Power to order interim measures and preliminary orders*

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that “a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested”. Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if “it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure”. Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case “at the earliest practicable time”. In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term “preliminary order” is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that “a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts”. That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

### ***5. Conduct of arbitral proceedings***

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) *Fundamental procedural rights of a party*

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) *Determination of rules of procedure*

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

*(c) Default of a party*

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 (b)). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 (c)). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 (a)).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

**6. Making of award and termination of proceedings**

*(a) Rules applicable to substance of dispute*

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

*(b) Making of award and other decisions*

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal “place of arbitration”, the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is “on agreed terms” (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits “dissenting opinions”.

## **7. *Recourse against award***

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

*(a) Application for setting aside as exclusive recourse*

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating “recourse” (i.e., the means through which a party may actively “attack” the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

*(b) Grounds for setting aside*

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

### *8. Recognition and enforcement of awards*

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

#### *(a) Towards uniform treatment of all awards irrespective of country of origin*

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non-international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

#### *(b) Procedural conditions of recognition and enforcement*

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

*(c) Grounds for refusing recognition or enforcement*

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if “the parties to the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

UNCITRAL secretariat  
Vienna International Centre  
Contact  
Information  
Redacted

Contact Information Redacted

Internet: [www.uncitral.org](http://www.uncitral.org)  
Contact Information Redacted



### *Part Three*

## **Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session**

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,<sup>1</sup> has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

*Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

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<sup>1</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,<sup>2</sup> as subsequently revised, particularly with respect to article 7,<sup>3</sup> the UNCITRAL Model Law on Electronic Commerce,<sup>4</sup> the UNCITRAL Model Law on Electronic Signatures<sup>5</sup> and the United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>6</sup>

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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<sup>2</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

<sup>3</sup>*Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

<sup>4</sup>*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

<sup>5</sup>*Ibid.*, *Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

<sup>6</sup>General Assembly resolution 60/21, annex.





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Printed in Austria

V.07-86998—January 2008—3,100



United Nations publication  
ISBN: 978-92-1-133773-0  
Sales No. E.08.V.4  
V.07-86998—January 2008—3,100

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**RESP. Ex. 2**

# Distributor A (nationality not indicated) v Manufacturer B (nationality not indicated), Interlocutory Award, ICC Case No. 10596, 2000

## Facts

The manufacturer B concluded two distribution agreements with distributor A for certain pharmaceutical products including product X. One agreement covered the territory of Hong Kong and the other (the Distribution Agreement) covered the People's Republic of China (PRC). A dispute arose between the parties regarding the termination of the two agreements and A initiated ICC arbitration proceedings. Shortly after filing its Answer and Amended Claim B also filed an Application for Interim and Conservatory Measures (the Application) requesting that A deliver documentary materials to it issued by the authorities in the PRC (including the PRC Registration Certificate and Pricing Approval hereinafter the documents) and Hong Kong. A responded with a Counter application requesting the arbitral tribunal to make a declaration that A had no obligation whatsoever towards B with respect to the Hong Kong certificates and that the relief requested by B could not be granted by the tribunal. Further A also requested that B be ordered to take appropriate measures to mitigate its losses in particular to take any steps likely to enable B to be in possession of the PRC certificate if an order were to be made against it. A further requested security of US\$ 1 million. B subsequently withdrew its application with respect to the Hong Kong certificates.

B argued that it could not commercialise the products formerly distributed by A without the documents and that it was urgent that A return the documents as it was incurring losses which increased daily. A responded that the Pricing Approval did not exist as a separate document and that compliance therewith was impossible. In addition A stated that it had been trying to obtain the Registration Certificate from its distributor but the distributor would not comply unless the stock was repurchased which B was unwilling to do. A also objected that the relief sought was not an interim or conservatory measure in the meaning of Art. 23(1) of the ICC Rules and that the outcome of the request was too closely linked to the merits to be dealt with by way of interim relief. Moreover A argued that B's conduct was in breach of the duty to mitigate losses as it should have either obtained duplicate originals or repurchased the stock and finally that the relief sought lacked urgency.

The arbitral tribunal first established that the relief sought fell under the category of "interim and conservatory measures" holding that it was ICC practice not only to prohibit acts which would aggravate the dispute but also to order a party to perform certain contractual duties to avoid further losses. The arbitral tribunal then established that there was a likelihood of success on the merits since there was prima facie a right to obtain the relief sought. Under the terms of the Distribution Agreement A was prima facie under an obligation to return the documents at issue. It was relevant that the documents were held by a third party. Nor was A's reliance on B's duty to mitigate its losses of any avail as B could not reasonably be expected to step into A's relationship with the Chinese distributor. The arbitral tribunal also did not accept A's argument that the order could only be granted after a close review of the merits as the Distribution Agreement provided for the return of the documents in the event of any termination.

The arbitral tribunal found that although strictly speaking B's monetary loss would not be irreparable harm it would be unreasonable to refuse the relief because "any non marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief" as the purpose was to prevent the loss in the first place. Urgency was also to be broadly interpreted and the fact that the loss was likely to increase with the mere passing of time made it unreasonable to require a party to wait for the final award. Thus A was ordered to deliver the documents to B.

The arbitral tribunal granted the relief in the form of an award rather than an order because at least under French law a decision does

## Author

› Albert Jan van den Berg

## Jurisdiction

› France

## Organization

› International Court of Arbitration of the International Chamber of Commerce

## Case date

› 2000

## Case number

› CC Case No. 10596

## Parties

› Claimant: Distributor A (nationality not indicated)  
› Respondent: Manufacturer B (nationality not indicated)

## Key words

› jurisdiction to order interim relief  
› requirements for interim relief  
› interim relief in form of award

## Publication Source

› Unpublished

## Source

› **Distributor A (nationality not indicated) v Manufacturer B (nationality not indicated), Interlocutory Award, ICC Case No. 10596, 2000** in Albert Jan van den Berg (ed) Yearbook Commercial Arbitration 2005 Volume XXX Volume XXX © Kluwer Law International Kluwer Law International 2005 pp 66-76

not need to resolve an issue definitively in order to qualify as an award and because this possibility was envisioned in Art. 23(1) of the CC Rules. A's request for security was rejected.

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### **Excerpt**

#### ***I. Prima Facie Standard of Review***

[1] "These decisions on an application for interim relief. Consequently, it applies a prima facie standard of review that makes no final findings of fact or law. In other words, no findings made here in prejudice the merits of the dispute. In particular, the present decisions are rendered without consideration of the lawfulness of the termination of an issue which will be litigated on the merits. The provisional nature of the present dispute further means that all issues addressed in these decisions may be reargued by the parties in the later course of the arbitration and reviewed by the arbitral tribunal in the final award."

#### ***II. Applicable Rules***

[2] "Pursuant to Art. 1494(1) of the *Nouveau Code de Procédure Civile*, the present arbitration proceedings are governed by the rules chosen by the parties, i.e., by the CC Rules of Arbitration supplemented by any procedural rules to be agreed upon by the parties or determined by the tribunal."

#### ***III. Jurisdiction***

[3] "Art. 23(1) of the CC Rules expressly grants the tribunal jurisdiction to order 'any interim or conservatory measure it considers appropriate'. The tribunal does not accept A's argument that the relief sought by B does not fall under the category of 'interim and conservatory measures'. Under longstanding practice in CC arbitration (since well before the entry into force of Art. 23 of the 1998 version of the CC Rules) the parties must refrain from taking any action which may aggravate the dispute. Arbitrators sitting under the CC Rules have the power to issue decisions prohibiting such actions; this power flows from the jurisdiction to order interim relief.<sup>(1)</sup> Conversely, these principles apply to  [page "68"](#) any action which may aggravate the dispute; there are several instances in which arbitrators have ordered a party to continue to perform certain contract duties precisely in order to avoid further losses and an increase of the amounts in dispute.<sup>(2)</sup>

[4] "Therefore, assuming that the relief sought by B is likely to avoid the aggravation of the dispute, which will be seen below, it can be characterized as an 'interim measure' within the meaning of Art. 23(1) of the Rules, and the arbitral tribunal has jurisdiction and the power to grant such relief."

#### ***IV. Requirements for Interim Relief***

##### ***1. Likelihood of Success on the Merits***

[5] "The first requirement for interim relief is that the applicant render plausible that it has a prima facie contractual or legal right to obtain the relief it seeks.<sup>(3)</sup> Art. XV(7)(1) of the Distributions Agreement reads as follows:

7. Upon expiration or termination of this Agreement for any reason, A shall

7(1) Promptly and unconditionally cease any use of the Registration and put such Registration at B's disposal ...

The term Registration is defined ... as 'any official approval or licensing by the competent bodies of the territory regarding the Products, including if applicable, the reselling prices and social security approvals, allowing the lawful marketing of the Products within the territory.'<sup>(4)</sup>

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[6] "Accordingly, A's prima facie obligation to return the *Registration Certificate* and the *Pricing Approval* to B. We will deal below with A's objection that the latter is not a separate document

[7] A did not dispute that it is under a contractual duty to return the documents. This is particularly obvious from the fact that it requested a declaration that it complied with such duty with respect to Hong Kong. Similarly, when B asked it to return the documents, it never challenged its obligation to do so. Quite to the contrary, it allegedly attempted to recover the documents, but was unsuccessful.

[8] A rather objects that it is in no position to return the documents because they are held by its Chinese distributor. A also stated that the situation in the PRC was created by B because B's management of the term nation was heavy handed and contrary to local business practice.

[9] "The arbitral tribunal considers that these objections are irrelevant in the present context. Under Art. 1(1) of the Distributor Agreement, A is deemed to be an independent trader operating for its own profit and at its own risk. Art. 2(2) provides that A bears the costs of performing its contractual duties. Moreover, the broad wording of Art. XV(7)(1) implies that if the documents to be returned are held by a third party, A has a duty to recover them. Indeed, the parties probably contemplated that A would have to return certain documents to third parties, at least temporarily. Yet, the Distributor Agreement makes no reservation regarding A's duty to return the documents in that event.

[10] "Therefore, any difficulties which A may have with its sub-distributors must be solved at that level and do not concern B. If A becomes liable to B for a sub-distributor's refusal to return certain documents, then A may consider seeking compensation from that sub-distributor in any event. On a prima facie basis, the tribunal does not see which contractual provisions or legal principle would compel B to take an action vis-à-vis the Chinese distributor, which action should normally be taken by A.

[11] "In this context, A relies on B's duty to mitigate its losses. Such duties are of no avail here in accordance with Art. 44 of the Swiss Code of Obligations, which governs as a result of a contractual choice of law, that duty is limited to actions which can be reasonably expected from a party.<sup>(5)</sup> Stepping into A's relationship with its Chinese distributor cannot be reasonably expected of B.

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[12] "Still in relation to mitigation, A argues that, contrary to a submission made by B, 'obtaining a duplicate or genuine [of the Registration Certificate] is not only possible but ordinary proceedings' and that obtaining this type of document is best done through someone used to dealing with Chinese officials, adding that it has this experience and implying that B does not. If that is the case, then the arbitral tribunal does not understand why A itself has not sought or even offered to seek a duplicate or genuine. Whatever the reason, this fact also leads the arbitral tribunal to disagree with A on the issue of mitigation.

[13] "The tribunal does not either accept A's submission that the relief sought by B can only be granted after a close review of the merits, indeed, A does not dispute the termination as such. In particular, it does not seek specific performance of the Distributor Agreement. The parties' dispute hinges not upon the principle of the termination, but upon its cause and consequences. Thus, there is no issue that the contract will not continue to be performed. Hence, there is no need to review the merits to decide on the return of the certificates, as the Distributor Agreement provides for such return in the event of any termination, whatever its cause and consequences.

[14] "A objects that the Pricing Approval is not a separate document and, by implication, that it cannot be returned for this reason. Prima facie, at least, the document appearing as B's Exhibit 2 in the English translation ... seems to be a self-standing and separate document, not just an excerpt of a register. Admittedly, on its face, it is unclear whether it was issued to A or simply intended for internal use between administrative bodies in China.

[15] "Despite this uncertainty, the Document appears to fall within the definition of a 'Registration' of Art. 1(5) of the Distributor Agreement, which in particular includes 'any official approval ... by the competent bodies ... regarding the Products, including applicable the reselling prices ... allowing the lawful marketing of the Products within the territory'. Indeed, the contents of the document suggests that it is an approval of the selling prices. It annexes a 'Table of prices for 48 types of imported medicines, including product X and orders that these prices be implemented.

Under the "Provisions Measures for Managing Prices of

Medicines” and other supplementary regulations a table of the present applicable tax inclusive at port prices wholesale prices and retail prices for 48 types of examined and approved imported medicines including product X has been printed and is distributed to you herewith. Please implement these prices accordingly.

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Therefore, the arbitral tribunal considers B's entitlement to the return of the Pricing Approval sufficient, evidenced under prima facie standards of review.”

### **2. Risk of Imminent and Irreparable Harm/Aggravation of the Dispute**

[16] “A further requirement for interim relief is the risk of imminent and irreparable harm or of aggravation of the dispute.<sup>(6)</sup> B has argued that as long as it does not dispose of the documents, its incurring significant harm for it cannot commercialise the products with a different distributor. This situation impairs the shelf life of products already packaged for the PRC market and is detrimental to the product market profile and future sales opportunities are lost. On this basis, B contends that it cannot wait for the final award.

[17] “As stated above, A admits that B needs the documents to be able to commercialise its products, but it has argued that monetary loss is not irreparable harm as assuming that A were to be held liable for such loss, B would be able to recover it in the form of damages. Although strictly speaking, this view may be correct, the arbitral tribunal considers that it would be unreasonable to refuse the relief sought on those grounds. The tribunal has already explained that the parties must refrain from any conduct (whether act or inaction) which may aggravate the dispute, and that arbitrators sitting under the CC Rules have the power to issue decisions prohibiting such conduct.

[18] “Therefore, any non-marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief. Indeed, it would be foolish for the tribunal to wait for a foreseeable or at least plausibly foreseeable loss to occur, to then provide for its compensation in the form of damages (assuming that B is entitled to such damages, which is not the issue here), rather than to prevent the loss from occurring in the first place. Therefore, the fact that B may recover losses in the form of damages is no valid objection and does not preclude it from seeking provisional relief.”

### **3. Urgency**

[19] “A final requirement for interim relief under CC practice is that the request relates to a matter of urgency. It being understood that ‘urgency’ is broadly interpreted, the fact that a party's potential losses are likely to increase with the mere passing of time and that it would be unreasonable to expect that  page "72" party to wait for the final award suffices.<sup>(7)</sup> The considerations relating to the risk of irreparable harm apply equally to the requirement of urgency. B has made a plausible case that it is exposed to further economic harm if it does not recover the documents and that such harm may increase with the passing of time. Because the tribunal considers that this possible result should be avoided rather than remedied, the sooner action is taken, the better.

[20] “The tribunal cannot follow A's argument that B had failed to take any appropriate action prior to filing the Application and that therefore, the urgency is not met. From a factual and chronological standpoint, the argument is wrong. B had made requests to A regarding the documents before and after A filed its Request for Arbitration and filed its Answer and Counterclaim. The time elapsed between the latest correspondence on this issue between the parties and B's Application is a matter of a few weeks at most. In fact, the last letter from counsel for B is dated ... three days prior to the filing of the Application. B can hardly be deemed to have forfeited its right to seek interim relief merely for having sought to resolve the issue directly with A.

[21] “As a consequence, B's request meets the requirements for interim relief under Art. 23(1) of the CC Rules and the arbitral tribunal will grant such relief.”

### **V. Counterapplication**

(...)

#### **1. Declaration Relating to Mitigation of Damages**

[22] “The arbitral tribunal does not on a prima facie basis and at this stage agree with A’s reasons in support of its statement that B has failed to mitigate its damages. That being said pursuant to the law governing the substance of the dispute and to generally recognised principles of international trade law *both* parties are in any event under a duty to mitigate damages. A declaration to that effect by the arbitral tribunal would thus have no impact beyond a mere restatement of a statutory duty. For these reasons the tribunal denies this particular prayer for relief.”

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## **2. Declaration That the Relief Sought Cannot Be Granted**

[23] “For the reasons given above at [22] and V the arbitral tribunal cannot follow A’s position and denies this particular prayer for relief.”

## **VI. Form of the Decision**

[24] “B has requested a decision in the form of an award mainly for the purpose of enhancing the prospects for enforcement in the PRC. Alternatively it has requested an order. A argues that the tribunal cannot render a decision in the form of an award without an in-depth review of the merits. Should the tribunal nevertheless do so it would prejudice the case and exceed the powers vested in it by Art. 23(1) CC Rules. Furthermore, A alleges that an award could not be enforced as a matter of practice and that Art. 35 of the ICC Rules<sup>(8)</sup> compels the arbitral tribunal to take this fact into consideration.

[25] “Art. 23(1) CC Rules empowers the tribunal to grant interim relief in the form of an award without specifying under which circumstances an award is to be preferred over an order. Commentators of the CC Rules provide little guidance. The consideration most often referred to in favour of an award is that invoked by B namely the prospects of enforcement.<sup>(9)</sup> As for legal authorities, an *award* is usually defined as a decision by which the tribunal disposes of issues in dispute in other words under this view an interim or partial award is characterised by the fact that it resolves the questions it addresses and cannot [page "74"](#) later be revised by the tribunal.<sup>(10)</sup> Specifically in the recent *Brasoil* case cited by B the *Cour d’appel de Paris* held that the decision by which an arbitral tribunal declares a request for revision of an award inadmissible resolves part of the dispute submitted to arbitration and thus constitutes an award.<sup>(11)</sup>

[26] “It has however also been advocated that decisions by which the tribunal orders that certain measures be implemented for the duration of the arbitration proceedings can be considered as awards provided that they cannot be changed at any time.<sup>(12)</sup> Certain authors consider that finality is not a characteristic of an award<sup>(13)</sup> such as the case for awards ‘*avant dire droit*’ known under French law which decide an issue on a provisional basis and which can later be rescinded or amended.<sup>(14)</sup> Thus at least under French law a decision does not need to resolve an issue definitively in order to qualify as an award.

[27] “This conclusion is also evident from Art. 23(1) CC Rules. That provision could not contemplate the issuance of decisions on *interim relief* which is by essence temporary<sup>(15)</sup> in the form of an award if the award was necessarily a *final*<sup>(16)</sup> decision. Under the 1975 and 1988 versions of the CC Rules several [page "75"](#) decisions granting interim and provisional relief were rendered in the form of awards.

[28] “On the basis of the foregoing considerations the arbitral tribunal comes to the conclusion that the decision will be issued in the form of an award. The form so chosen does not mean that this decision is final. It is not and the arbitrators may revisit it in the final award if appropriate.”

## **VII. Security**

[29] “A requests security in the amount of US\$ 1 000 000. However it fails to substantiate any risk of loss which may arise out of the interim relief. The possibility of a loss is all the more so unlikely considering that A does not own the documents and that they have no intrinsic value which is not in dispute. Under these circumstances the tribunal dismisses A’s request.”

(...)

## VIII. Award

On the basis of the foregoing the arbitral tribunal

- 1 orders A to immediately deliver and/or procure delivery to B the Registration Certificate for product X issued by the Bureau of Drug Administration and Policy Ministry of Public Health the People's Republic of China and the Pricing Approval issued by the National Development Planning Committee the People's Republic of China
- 2 dismisses A's request for security
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<sup>4</sup> "The term 'Registration' is defined at Art. 1(5) and undoubtedly applies to the Registration Certificate sought by B"

<sup>5</sup> "Brehm R. *Berner Kommentar Das Obligationenrecht Die Entstehung durch unerlaubte Handlungen Kommentar zu Art. 41-69 OR* (Bern 1998) note 50 re Art. 44 CO; Engel P. *Traité des obligations en droit suisse Dispositions générales du CO* 2d ed (Bern 1997) p. 721; Otnger K. Stark E. *Schweizerisches Haftpflichtrecht 1 Bd Allgemeiner Teil* (Zürich 1995) pp. 261-264 paras. 40-47 and references in particular p. 262 para. 41"

<sup>6</sup> "See for instance Schwartz *op cit* pp. 60-61 and references"

<sup>7</sup> "Schwartz *op cit* p. 60; Bond S. 'The Nature of Conservatory and Provisional Measures' in *Conservatory and Provisional Measures in International Arbitration* CC no. 159 (Paris 1993) pp. 8-20, 18-19"

<sup>8</sup> Art. 35 of the International Chamber of Commerce Rules of Arbitration 1998 reads

in all matters not expressly provided for in these Rules the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law

<sup>9</sup> "See 'Final Report on Interim and Partial Awards by a Working Party to the Commission on International Arbitration' reprinted in Craig W.L., Park W., Paulsson J. *International Chamber of Commerce Arbitration* loose leaf binder vol. 2, Appendix V pp. 3-4 (hereinafter 'Final Report'). The Working Party has recommended that interim relief be granted in the form of an order and that an award should be issued only if 'appropriate' however other than prospects for enforcement the 'Final Report' cites few decisive factors; see 'Final Report' pp. 8-10. See also Craig W.L., Park W., Paulsson J. *Annotated Guide to the 1998 ICC Arbitration Rules* (1998) p. 138 (hereinafter 1998) Derans Y., Schwartz E. *A Guide to the New ICC Rules of Arbitration* (1998) pp. 36-37, 275; Schwartz *op cit* p. 64."

<sup>10</sup> "Resort Condominiums International Inc v Bolwell Supreme

Court of Queensland 29 October 1993 quoted and commented by Pryles M 'Interlocutory Orders and Consent on Awards: the Case of Resort Condominiums v Bolwell' 10 Arbitration Int'l (1994) pp 385-394, 391-392; Craig Park Paulsson (1998) p 33; Craig W L Park W Paulsson J *International Chamber of Commerce Arbitration* 2d ed (1990) p 322 (hereinafter 1988); Fouchard Gallard Goldman [*Traité de l'arbitrage commercial international* (Paris, Léc 1996)] pp 751-752 para 1355-1357; see further definitions supplied by Wirth M 'Enforceability of a Foreign Security Award in Switzerland' in *The New York Convention of 1958 ASA Special Series no 9* pp 245-256, 252-255"

<sup>11</sup> "Braspetro Oil Services Company ('Brasoil') c/ The Management and Implementation of the Great Man made River Project ('GMRA') Cour d'appel de Paris 1 July 1999 14 Int'l Arb Report (Aug 1999 no 8) the Cour d'appel also took into account the fact that the decision contained reasons and that it was rendered in adversarial proceedings after careful examination of the parties' arguments"

<sup>12</sup> "Besson S *Arbitrage international et mesures provisoires étude de droit comparé* (Zürich 1998) pp 139-140; see also authorities quoted by Wirth *op cit* pp 251-252 (on an order to issue a security for the amount under dispute)"

<sup>13</sup> "See for instance Craig Park Paulsson (1988) pp 418-419; Fouchard Gallard Goldman *op cit* p 730 para 1318; Schwartz *op cit* p 63; van den Berg A J 'The Application of the New York Convention by the Courts' in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* CCA Congress Series no 9 (1999) pp 25-34, 29"

<sup>14</sup> "M de Bosséon [*Le droit français de l'arbitrage interne et international* (1990)] p 287"

<sup>15</sup> "Final Report p 8 Bond *op cit* p 9"

<sup>16</sup> "A decision may qualify as an 'award' within the meaning of the CC Rules but not under the New York Convention under the law of the seat of the arbitration or under the law of the place where it is to be enforced; it is thus the applicant's ultimate responsibility and risk to seek and obtain enforcement of an award granting interim relief"

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**RESP. Ex. 2**

# Distributor A (nationality not indicated) v Manufacturer B (nationality not indicated), Interlocutory Award, ICC Case No. 10596, 2000

## Facts

The manufacturer B concluded two distribution agreements with distributor A for certain pharmaceutical products including product X. One agreement covered the territory of Hong Kong and the other (the Distribution Agreement) covered the People's Republic of China (PRC). A dispute arose between the parties regarding the termination of the two agreements and A initiated ICC arbitration proceedings. Shortly after filing its Answer and Amended Claim B also filed an Application for Interim and Conservatory Measures (the Application) requesting that A deliver documentary materials to it issued by the authorities in the PRC (including the PRC Registration Certificate and Pricing Approval hereinafter the documents) and Hong Kong. A responded with a Counter application requesting the arbitral tribunal to make a declaration that A had no obligation whatsoever towards B with respect to the Hong Kong certificates and that the relief requested by B could not be granted by the tribunal. Further A also requested that B be ordered to take appropriate measures to mitigate its losses in particular to take any steps likely to enable B to be in possession of the PRC certificate if an order were to be made against it. A further requested security of US\$ 1 million. B subsequently withdrew its application with respect to the Hong Kong certificates.

B argued that it could not commercialise the products formerly distributed by A without the documents and that it was urgent that A return the documents as it was incurring losses which increased daily. A responded that the Pricing Approval did not exist as a separate document and that compliance therewith was impossible. In addition A stated that it had been trying to obtain the Registration Certificate from its distributor but the distributor would not comply unless the stock was repurchased which B was unwilling to do. A also objected that the relief sought was not an interim or conservatory measure in the meaning of Art. 23(1) of the ICC Rules and that the outcome of the request was too closely linked to the merits to be dealt with by way of interim relief. Moreover A argued that B's conduct was in breach of the duty to mitigate losses as it should have either obtained duplicate originals or repurchased the stock and finally that the relief sought lacked urgency.

The arbitral tribunal first established that the relief sought fell under the category of "interim and conservatory measures" holding that it was ICC practice not only to prohibit acts which would aggravate the dispute but also to order a party to perform certain contractual duties to avoid further losses. The arbitral tribunal then established that there was a likelihood of success on the merits since there was prima facie a right to obtain the relief sought. Under the terms of the Distribution Agreement A was prima facie under an obligation to return the documents at issue. It was relevant that the documents were held by a third party. Nor was A's reliance on B's duty to mitigate its losses of any avail as B could not reasonably be expected to step into A's relationship with the Chinese distributor. The arbitral tribunal also did not accept A's argument that the order could only be granted after a close review of the merits as the Distribution Agreement provided for the return of the documents in the event of any termination.

The arbitral tribunal found that although strictly speaking B's monetary loss would not be irreparable harm it would be unreasonable to refuse the relief because "any non marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief" as the purpose was to prevent the loss in the first place. Urgency was also to be broadly interpreted and the fact that the loss was likely to increase with the mere passing of time made it unreasonable to require a party to wait for the final award. Thus A was ordered to deliver the documents to B.

The arbitral tribunal granted the relief in the form of an award rather than an order because at least under French law a decision does

## Author

› Albert Jan van den Berg

## Jurisdiction

› France

## Organization

› International Court of Arbitration of the International Chamber of Commerce

## Case date

› 2000

## Case number

› CC Case No. 10596

## Parties

› Claimant: Distributor A (nationality not indicated)  
› Respondent: Manufacturer B (nationality not indicated)

## Key words

› jurisdiction to order interim relief  
› requirements for interim relief  
› interim relief in form of award

## Publication Source

› Unpublished

## Source

› **Distributor A (nationality not indicated) v Manufacturer B (nationality not indicated), Interlocutory Award, ICC Case No. 10596, 2000** in Albert Jan van den Berg (ed) Yearbook Commercial Arbitration 2005 Volume XXX Volume XXX © Kluwer Law International Kluwer Law International 2005 pp 66-76

not need to resolve an issue definitively in order to qualify as an award and because this possibility was envisioned in Art. 23(1) of the CC Rules. A's request for security was rejected.

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### **Excerpt**

#### **I. Prima Facie Standard of Review**

[1] "These decisions on an application for interim relief. Consequently, it applies a prima facie standard of review that makes no final findings of fact or law. In other words, no findings made here in prejudice the merits of the dispute. In particular, the present decisions are rendered without consideration of the lawfulness of the termination of an issue which will be litigated on the merits. The provisional nature of the present dispute further means that all issues addressed in these decisions may be reargued by the parties in the later course of the arbitration and reviewed by the arbitral tribunal in the final award."

#### **II. Applicable Rules**

[2] "Pursuant to Art. 1494(1) of the *Nouveau Code de Procédure Civile*, the present arbitral proceedings are governed by the rules chosen by the parties, i.e., by the CC Rules of Arbitration supplemented by any procedural rules to be agreed upon by the parties or determined by the tribunal."

#### **III. Jurisdiction**

[3] "Art. 23(1) of the CC Rules expressly grants the tribunal jurisdiction to order 'any interim or conservatory measure' that considers appropriate. The tribunal does not accept A's argument that the relief sought by B does not fall under the category of 'interim and conservatory measures'. Under longstanding practice in CC arbitration (since well before the entry into force of Art. 23 of the 1998 version of the CC Rules), the parties must refrain from taking any action which may aggravate the dispute. Arbitrators sitting under the CC Rules have the power to issue decisions prohibiting such actions; this power flows from the jurisdiction to order interim relief.<sup>(1)</sup> Conversely, these principles apply to  [page "68"](#) any action which may aggravate the dispute; there are several instances in which arbitrators have ordered a party to continue to perform certain contract duties precisely in order to avoid further losses and an increase of the amounts in dispute.<sup>(2)</sup>

[4] "Therefore, assuming that the relief sought by B is likely to avoid the aggravation of the dispute, which will be seen below, it can be characterized as an 'interim measure' within the meaning of Art. 23(1) of the Rules, and the arbitral tribunal has jurisdiction and the power to grant such relief."

#### **IV. Requirements for Interim Relief**

##### **1. Likelihood of Success on the Merits**

[5] "The first requirement for interim relief is that the applicant render plausible that it has a prima facie contractual or legal right to obtain the relief it seeks.<sup>(3)</sup> Art. XV(7)(1) of the Distributions Agreement reads as follows:

7. Upon expiration or termination of this Agreement for any reason, A shall

7(1) Promptly and unconditionally cease any use of the Registration and put such Registration at B's disposal ...

The term Registration is defined ... as 'any official approval or licensing by the competent bodies of the territory regarding the Products, including applicable the reselling prices and social security approvals, allowing the lawful marketing of the Products within the territory.'<sup>(4)</sup>

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[6] "Accordingly, A's prima facie obligation to return the *Registration Certificate* and the *Pricing Approval* to B. We will deal below with A's objection that the latter is not a separate document

[7] A did not dispute that it is under a contractual duty to return the documents. This is particularly obvious from the fact that it requested a declaration that it complied with such duty with respect to Hong Kong. Similarly, when B asked it to return the documents, it never challenged its obligation to do so. Quite to the contrary, it allegedly attempted to recover the documents, but was unsuccessful.

[8] A rather objects that it is in no position to return the documents because they are held by its Chinese distributor. A also stated that the situation in the PRC was created by B because B's management of the term nation was heavy handed and contrary to local business practice.

[9] "The arbitral tribunal considers that these objections are irrelevant in the present context. Under Art. 1(1) of the Distributor Agreement, A is deemed to be an independent trader operating for its own profit and at its own risk. Art. 2(2) provides that A bears the costs of performing its contractual duties. Moreover, the broad wording of Art. XV(7)(1) implies that if the documents to be returned are held by a third party, A has a duty to recover them. Indeed, the parties probably contemplated that A would have to remit certain documents to third parties, at least temporarily. Yet, the Distributor Agreement makes no reservation regarding A's duty to return the documents in that event.

[10] "Therefore, any difficulties which A may have with its sub-distributors must be solved at that level and do not concern B. If A becomes liable to B for a sub-distributor's refusal to return certain documents, then A may consider seeking compensation from that sub-distributor in any event. On a prima facie basis, the tribunal does not see which contractual provisions or legal principle would compel B to take an action vis-à-vis the Chinese distributor, which action should normally be taken by A.

[11] "In this context, A relies on B's duty to mitigate its losses. Such duties are of no avail here in accordance with Art. 44 of the Swiss Code of Obligations, which governs as a result of a contractual choice of law, that duty is limited to actions which can be reasonably expected from a party.<sup>(5)</sup> Stepping into A's relationship with its Chinese distributor cannot be reasonably expected of B.

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[12] "Still in relation to mitigation, A argues that, contrary to a submission made by B, 'obtaining a duplicate or genuine [of the Registrar Certificate] is not only possible but ordinary proceedings' and that obtaining this type of document is best done through someone used to dealing with Chinese officials, adding that it has this experience and implying that B does not. If that is the case, then the arbitral tribunal does not understand why A itself has not sought or even offered to seek a duplicate or genuine. Whatever the reason, this fact also leads the arbitral tribunal to disagree with A on the issue of mitigation.

[13] "The tribunal does not either accept A's submission that the relief sought by B can only be granted after a close review of the merits, indeed, A does not dispute the termination as such. In particular, it does not seek specific performance of the Distributor Agreement. The parties' dispute hinges not upon the principle of the termination, but upon its cause and consequences. Thus, there is no issue that the contract will not continue to be performed. Hence, there is no need to review the merits to decide on the return of the certificates, as the Distributor Agreement provides for such return in the event of any termination, whatever its cause and consequences.

[14] "A objects that the Pricing Approval is not a separate document and, by implication, that it cannot be returned for this reason. Prima facie, at least, the document appearing as B's Exhibit 2 in the English translation ... seems to be a self-standing and separate document, not just an excerpt of a register. Admittedly, on its face, it is unclear whether it was issued to A or simply intended for internal use between administrative bodies in China.

[15] "Despite this uncertainty, the Document appears to fall within the definition of a 'Registrar' of Art. 1(5) of the Distributor Agreement, which in particular includes 'any official approval ... by the competent bodies ... regarding the Products, including applicable the reselling prices ... allowing the lawful marketing of the Products within the territory'. Indeed, the contents of the document suggests that it is an approval of the selling prices. It annexes a 'Table of prices for 48 types of imported medicines, including product X and orders that these prices be implemented.

Under the "Provisions Measures for Managing Prices of

Medicines” and other supplementary regulations a table of the present applicable tax inclusive at port prices wholesale prices and retail prices for 48 types of examined and approved imported medicines including product X has been printed and is distributed to you herewith. Please implement these prices accordingly.

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Therefore, the arbitral tribunal considers B's entitlement to the return of the Pricing Approval sufficient, evidenced under prima facie standards of review.”

### **2. Risk of Imminent and Irreparable Harm/Aggravation of the Dispute**

[16] “A further requirement for interim relief is the risk of imminent and irreparable harm or of aggravation of the dispute.<sup>(6)</sup> B has argued that as long as it does not dispose of the documents, it is incurring significant harm for it cannot commercialise the products with a different distributor. This situation impairs the shelf life of products already packaged for the PRC market and is detrimental to the product market profile and future sales opportunities are lost. On this basis, B contends that it cannot wait for the final award.

[17] “As stated above, A admits that B needs the documents to be able to commercialise its products, but it has argued that monetary loss is not irreparable harm as assuming that A were to be held liable for such loss, B would be able to recover it in the form of damages. Although strictly speaking, this view may be correct, the arbitral tribunal considers that it would be unreasonable to refuse the relief sought on those grounds. The tribunal has already explained that the parties must refrain from any conduct (whether act or inaction) which may aggravate the dispute, and that arbitrators sitting under the CC Rules have the power to issue decisions prohibiting such conduct.

[18] “Therefore, any non-marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief. Indeed, it would be foolish for the tribunal to wait for a foreseeable or at least plausibly foreseeable loss to occur, to then provide for its compensation in the form of damages (assuming that B is entitled to such damages, which is not the issue here), rather than to prevent the loss from occurring in the first place. Therefore, the fact that B may recover losses in the form of damages is no valid objection and does not preclude it from seeking provisional relief.”

### **3. Urgency**

[19] “A final requirement for interim relief under CC practice is that the request relates to a matter of urgency. It being understood that ‘urgency’ is broadly interpreted, the fact that a party's potential losses are likely to increase with the mere passing of time and that it would be unreasonable to expect that  page "72" party to wait for the final award suffices.<sup>(7)</sup> The considerations relating to the risk of irreparable harm apply equally to the requirement of urgency. B has made a plausible case that it is exposed to further economic harm if it does not recover the documents and that such harm may increase with the passing of time. Because the tribunal considers that this possible result should be avoided rather than remedied, the sooner action is taken the better.

[20] “The tribunal cannot follow A's argument that B had failed to take any appropriate action prior to filing the Application and that therefore, the urgency is not met. From a factual and chronological standpoint, the argument is wrong. B had made requests to A regarding the documents before and after A filed its Request for Arbitration and filed its Answer and Counterclaim. The time elapsed between the latest correspondence on this issue between the parties and B's Application is a matter of a few weeks at most. In fact, the last letter from counsel for B is dated ... three days prior to the filing of the Application. B can hardly be deemed to have forfeited its right to seek interim relief merely for having sought to resolve the issue directly with A.

[21] “As a consequence, B's request meets the requirements for interim relief under Art. 23(1) of the CC Rules and the arbitral tribunal will grant such relief.”

### **V. Counterapplication**

(...)

#### **1. Declaration Relating to Mitigation of Damages**

[22] “The arbitral tribunal does not on a prima facie basis and at this stage agree with A’s reasons in support of its statement that B has failed to mitigate its damages. That being said pursuant to the law governing the substance of the dispute and to generally recognised principles of international trade law *both* parties are in any event under a duty to mitigate damages. A declaration to that effect by the arbitral tribunal would thus have no impact beyond a mere restatement of a statutory duty. For these reasons the tribunal denies this particular prayer for relief.”

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## **2. Declaration That the Relief Sought Cannot Be Granted**

[23] “For the reasons given above at [22] and V the arbitral tribunal cannot follow A’s position and denies this particular prayer for relief.”

## **VI. Form of the Decision**

[24] “B has requested a decision in the form of an award mainly for the purpose of enhancing the prospects for enforcement in the PRC. Alternatively it has requested an order. A argues that the tribunal cannot render a decision in the form of an award without an in-depth review of the merits. Should the tribunal nevertheless do so it would prejudice the case and exceed the powers vested in it by Art. 23(1) CC Rules. Furthermore, A alleges that an award could not be enforced as a matter of practice and that Art. 35 of the ICC Rules<sup>(8)</sup> compels the arbitral tribunal to take this fact into consideration.

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## VIII. Award

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<sup>3</sup> "This requirement is found both in judicial and in arbitral practice. See for instance interim award rendered on 12 December 1996 in case no. 1694 of the Netherlands Arbitration Institute XX *Yearbook Commercial Arbitration* (1998) p. 97-105."

<sup>4</sup> "The term 'Registration' is defined at Art. 1(5) and undoubtedly applies to the Registration Certificate sought by B."

<sup>5</sup> "Brehm R. *Berner Kommentar Das Obligationenrecht Die Entstehung durch unerlaubte Handlungen Kommentar zu Art. 41-69 OR* (Bern 1998) note 50 re Art. 44 CO; Engel P. *Traité des obligations en droit suisse Dispositions générales du CO* 2d ed (Bern 1997) p. 721; Otniger K. Stark E. *Schweizerisches Haftpflichtrecht 1 Bd Allgemeiner Teil* (Zürich 1995) pp. 261-264 paras. 40-47 and references in particular p. 262 para. 41."

<sup>6</sup> "See for instance Schwartz *op cit* pp. 60-61 and references."

<sup>7</sup> "Schwartz *op cit* p. 60; Bond S. 'The Nature of Conservatory and Provisional Measures' in *Conservatory and Provisional Measures in International Arbitration* CC no. 159 (Paris 1993) pp. 8-20, 18-19."

<sup>8</sup> Art. 35 of the International Chamber of Commerce Rules of Arbitration 1998 reads

in all matters not expressly provided for in these Rules the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law

<sup>9</sup> "See 'Final Report on Interim and Partial Awards by a Working Party to the Commission on International Arbitration' reprinted in Craig W.L., Park W., Paulsson J. *International Chamber of Commerce Arbitration* loose leaf binder vol. 2, Appendix V pp. 3-4 (hereinafter 'Final Report'). The Working Party has recommended that interim relief be granted in the form of an order and that an award should be issued only if 'appropriate' however other than prospects for enforcement the 'Final Report' cites few decisive factors; see 'Final Report' pp. 8-10. See also Craig W.L., Park W., Paulsson J. *Annotated Guide to the 1998 ICC Arbitration Rules* (1998) p. 138 (hereinafter 1998); Deraans Y., Schwartz E. *Guide to the New ICC Rules of Arbitration* (1998) pp. 36-37, 275; Schwartz *op cit* p. 64."

<sup>10</sup> "Resort Condominiums International Inc v Bolwell Supreme

Court of Queensland 29 October 1993 quoted and commented by Pryles M 'Interlocutory Orders and Consent on Awards: the Case of Resort Condominiums v Bolwell' 10 Arbitration Int'l (1994) pp 385-394, 391-392; Craig Park Paulsson (1998) p 33; Craig W L Park W Paulsson J *International Chamber of Commerce Arbitration* 2d ed (1990) p 322 (hereinafter 1988); Fouchard Gallard Goldman [*Traité de l'arbitrage commercial international* (Paris, Léc 1996)] pp 751-752 para 1355-1357; see further definitions supplied by Wirth M 'Enforceability of a Foreign Security Award in Switzerland' in *The New York Convention of 1958 ASA Special Series no 9* pp 245-256, 252-255"

<sup>11</sup> "Braspetro Oil Services Company ('Brasoil') c/ The Management and Implementation of the Great Man made River Project ('GMRA') Cour d'appel de Paris 1 July 1999 14 Int'l Arb Report (Aug 1999 no 8) the Cour d'appel also took into account the fact that the decision contained reasons and that it was rendered in adversarial proceedings after careful examination of the parties' arguments"

<sup>12</sup> "Besson S *Arbitrage international et mesures provisoires étude de droit comparé* (Zürich 1998) pp 139-140; see also authorities quoted by Wirth *op cit* pp 251-252 (on an order to issue a security for the amount under dispute)"

<sup>13</sup> "See for instance Craig Park Paulsson (1988) pp 418-419; Fouchard Gallard Goldman *op cit* p 730 para 1318; Schwartz *op cit* p 63; van den Berg A J 'The Application of the New York Convention by the Courts' in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* CCA Congress Series no 9 (1999) pp 25-34, 29"

<sup>14</sup> "M de Bosséon [*Le droit français de l'arbitrage interne et international* (1990)] p 287"

<sup>15</sup> "Final Report p 8 Bond *op cit* p 9"

<sup>16</sup> "A decision may qualify as an 'award' within the meaning of the CC Rules but not under the New York Convention under the law of the seat of the arbitration or under the law of the place where it is to be enforced; it is thus the applicant's ultimate responsibility and risk to seek and obtain enforcement of an award granting interim relief"

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