

# Applying the Model Law's Standard for Interim Measures in International Arbitration

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*Commentators and practitioners regard Article 17A of the Model Law on International Commercial Arbitration as the international standard for interim measures in international arbitration. Practitioners apply Article 17A often, even when the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, and even in emergency arbitrations and in investment treaty arbitrations.*

*To apply Article 17A correctly, however, practitioners must look at Article 2A(1) of the Model Law, which orders practitioners applying any Article of the Model Law, including Article 17A, to follow several mandatory principles of construction. Specifically, Article 2A orders practitioners to have 'regard' to the 'international origin' of the Model Law, 'the need to promote uniformity in its application,' and 'the observance of good faith.'*

*Those principles of construction of Article 2A(1) have four specific and mandatory consequences on the application of the standard set forth in Article 17A, namely, that practitioners (1) must consider Article 17A's travaux préparatoires, and must apply Article 17A in a way that does not contradict those travaux préparatoires; (2) must consider, but are not bound to follow, the publicly-available decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it; (3) cannot construe Article 17A only under the canons of construction that they would apply to a domestic statute in the jurisdiction relevant to the case; and (4) must factor in equitable considerations.*

*This article helps practitioners with the first two of those four consequences. Specifically, to help practitioners apply the standard for interim measures set forth in Article 17A uniformly and correctly, i.e. in a way that complies with Article 2A's mandatory principles of construction, this article analyses the travaux préparatoires of Article 17A, the scholarly writings that have analysed that article, and the publicly available decisions by courts and arbitrators around the world that have applied it, including decisions issued by arbitrators acting for the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and excerpts of non-publicly available decisions issued by arbitrators acting for the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).*

*For the reader's convenience, this Article analyses the travaux préparatoires and applicable authorities separately for each of the following elements of Article 17A's standard: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of*

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*convenience; reasonable possibility of success on the merits; jurisdiction; and other elements and considerations.*

*That analysis results in several principles of construction relevant to each element of Article 17A's standard. The article ends with a chart – effectively a cheat sheet for practitioners – that lists those principles of construction for each element of the standard, and explains the rationale of those principles. It is the author's hope that this chart will help practitioners apply each element of Article 17A's standard correctly and uniformly.*

**Keywords:** Interim measures, Conservative measures, Model Law, Article 17A, Article 2A, UNCITRAL Rules, Article 26, Emergency arbitration, Preliminary orders, Standard for interim measures, Conditions for interim measures, Standard for emergency arbitration, Standard for preliminary orders, Uniformity

## 1 INTRODUCTION

In 2006, the United Nations Commission on International Trade Law (UNCITRAL) revised its Model Law on International Commercial Arbitration ('the Model Law') by adding, among others, Article 17A, which sets forth the standard that a party requesting interim measures in international arbitration must meet to obtain those measures.<sup>1</sup>

Commentators and practitioners regard Article 17A of the Model Law as the international standard for interim measures in international arbitration, and practitioners apply it often, even when the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, and even in emergency arbitrations and in investment treaty arbitrations. Given how relevant Article 17A is, it is imperative that practitioners apply it correctly. To do so, they must look at Article 2A(1) of the Model Law, which orders practitioners applying any article of the Model Law, including Article 17A, to follow several mandatory principles of construction. Specifically, Article 2A orders practitioners to have 'regard' to the 'international origin' of the Model Law, 'the need to promote uniformity in its application,' and 'the observance of good faith.'

Those principles of construction of Article 2A(1) have four specific and mandatory consequences for the application of Article 17A. Specifically, practitioners (1) must consider Article 17A's travaux préparatoires and apply Article 17A

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<sup>1</sup> Specifically, United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments* as adopted in 2006, 10 (2008), [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) (accessed 18 June 2019) (hereinafter 'Model Law') establishes that an applicant for interim measures 'shall satisfy the arbitral tribunal' that (1) it is 'likely' to suffer '[h]arm not adequately reparable by an award of damages' if the interim measure is not granted; (2) 'such harm substantially outweighs the harm ... likely to result to the party against whom the measure is directed if the measure is granted'; and (3) '[t]here is a reasonable possibility that the [applicant] will succeed on the merits of the claim.'

in a way that does not contradict those travaux préparatoires<sup>2</sup>; (2) must consider, but are not bound to follow, the publicly-available decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it<sup>3</sup>; (3) cannot construe Article 17A only under the canons of construction that they would apply to a domestic statute in the jurisdiction relevant to the case; and (4) must factor in equitable considerations.

Practitioners applying Article 17A's standard should have little difficulty following (3) and (4) above. Conversely, (1) and (2) above are harder to follow. That is, due to the time constraints associated with requests for interim measures, practitioners might not confirm if they are applying Article 17A's standard in a way that does not contradict its travaux préparatoires, and might not consider the decisions by courts and arbitrators around the world that have applied it, or the scholarly writings that have addressed it.

To aid with that, this article analyses the travaux préparatoires of Article 17A, the publicly available decisions by courts and arbitrators<sup>4</sup> around the world that have applied it,<sup>5</sup> and the scholarly writings that have analysed it. For the reader's convenience, this article analyses the following elements of Article 17A's standard separately: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of convenience; reasonable possibility of success on the merits; jurisdiction; and other elements and considerations.

That analysis draws, among others; the following conclusions for each element of Article 17A's standard<sup>6</sup>:

<sup>2</sup> The term travaux préparatoires refers to the documents that reflect the negotiation and drafting history of a statute or convention, in this case the Model Law.

<sup>3</sup> The burden of finding and presenting those decisions and scholarly writings lies with counsel, not the arbitrators. Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore*, International Arbitration Law Library, Volume 36, 43 (Kluwer Law International 2016).

<sup>4</sup> Specifically, this Article analyses publicly available decisions issued by arbitrators acting for the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) and excerpts of, or descriptions of, non-publicly available decisions issued by arbitrators acting for the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).

<sup>5</sup> This Article seeks to aid practitioners by covering the many scholarly writings and decisions that the author has located. But, it would be impossible for this Article to capture all scholarly writings that have analysed Art. 17A, and all the arbitral and court decisions that have applied it. Instead, practitioners should confirm whether there are additional writings or decisions supporting their case.

<sup>6</sup> This should help practitioners spend fewer resources arguing over how to construe Art. 17A's standard; practitioners dealing with interim measures often spend significant resources arguing over how to construe the applicable standard. See e.g. Andrea Carlevaris & Jose Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, 25(1) ICC Int'l Court of Arb. Bull. 20 (2014) (providing examples of cases where parties disputed the applicable standard for requests for interim measures by an emergency arbitrator); Johan Lundstedt, *SCC Practice: Emergency Arbitrator Decisions 17–18* (1 Jan. 2010–31 Dec. 2013), [https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator\\_final.pdf](https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf) (accessed 20 June 2019) (hereinafter 'SCC Practice Note 2010-2013') (Case No. EA 010/2012) (parties did not 'fully agree' on the applicable standard).

- *Burden of proof*: applicants must meet the standard (arbitrators have no discretion to issue the measures otherwise) but Article 17A does not establish a specific burden of proof.
- *Urgency*: urgency cannot be considered a separate element of the standard, but can be considered implicitly included as part of the element of harm, or satisfied when the relief requested cannot await a final award or the constitution of the tribunal.
- *Harm*: applicants need not prove that their harm is certain, but must prove – not only allege – that it is likely; the harm is not adequately reparable by an award of damages if respondent is unlikely to honour such award; a large harm is unnecessary, but a small harm may be insufficient, to obtain the interim measures; Article 17A covers (1) harm that is truly irreparable monetarily, and (2) harm that can be repaired monetarily through a final award but that would be ‘comparatively complicated to compensate’ through such award.
- *Balance of convenience*: irrelevant to the balance of convenience is any harm to the applicant that would remain equally likely if the interim measures are ordered or that would be adequately reparable by an award of damages; irrelevant to the balance of convenience is any harm to a party ‘affected by the measure’ that is not the party ‘against whom the measure is directed’; a party is more likely to prove that the balance of convenience tilts in its favour if it presents an undertaking; a respondent’s declaration that it will not infringe the rights at issue is relevant to the balance of convenience; the stronger the merits, the less the applicant must show on the balance of convenience; an applicant’s refusal to mitigate damages by accepting a unilateral imposition by respondent might not alter the balance of convenience.
- *Reasonable possibility of success and of jurisdiction*: the ‘reasonable possibility’ of success refers to the merits only of the underlying claim relevant to the application, not to the merits of the application for interim measures or of the entire dispute; implicit in Article 17A is a requirement to show a ‘reasonable possibility’ of jurisdiction but only over the claim relevant to the application; the ‘reasonable possibility of success’ is a low threshold that falls below a 50% chance of success and requires the applicant to show only slightly more than that its rights are plausible; an applicant can show a reasonable possibility of success even if its claim is based only on inferences; whether an applicant has shown a reasonable possibility of success depends on the stage of the proceeding and the information available at that time; a determination of reasonable possibility of success or jurisdiction does not preclude a subsequent award or procedural order to the contrary.

This article is structured as follows. It first presents the background and relevant applications of Article 17A (section 2), then the background and relevant applications of Article 2A (section 3), and then the travaux préparatoires of each element of Article 17A's standard, the decisions by courts and arbitrators around the world that have applied those elements, and the scholarly writings that have analysed them (section 4). The article ends with a chart that lists the principles of construction of each element of Article 17A's standard, which stem from Article 17A's travaux préparatoires and the authorities that have applied or analysed that article, and explains the rationale of those principles (section 5). Practitioners should apply those principles to ensure that they apply the standard correctly and uniformly.<sup>7</sup>

## 2 BACKGROUND AND SIGNIFICANT APPLICATIONS OF ARTICLE 17A OF THE MODEL LAW

The rules of most international arbitration institutions do not set forth the standard that an applicant must meet for obtaining interim measures,<sup>8</sup> and arbitration clauses rarely set forth that standard.<sup>9</sup>

To find the applicable standard, practitioners might look at the domestic laws relevant to their case, usually that of the seat of the arbitration (*lex arbitri*)<sup>10</sup> or, less

<sup>7</sup> See Gary B. Born, *International Commercial Arbitration* 2466 (2d ed. 2014) ('Art. 17A ... should be interpreted in light of international authority from other national courts and arbitral tribunals seated elsewhere ... to avoid the costs of a purely national approach to this issue and to encourage formation of international principles in this field'); Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 26 (4th ed. 2019) ('The enactment of ... the Model Law is ... only half the story: the true test ... is its application by the users and national courts').

<sup>8</sup> See e.g. 2017 ICC Rules, Art. 28(1) ('[T]he arbitral tribunal may ... order any interim or conservatory measure it deems appropriate'); 2014 ICDR Rules, Art. 24 (1) ('[T]he arbitral tribunal may order or award any interim or conservatory measures it deems necessary'); 2014 LCIA Rules, Art. 25.

<sup>9</sup> See Christopher Boog, *Chapter 18, Part III: Interim Measures in International Arbitration*, in *Arbitration in Switzerland: The Practitioner's Guide* 2543, 2551 (2d ed., Manuel Arroyo ed. 2018) ('[C]ases in which the parties have agreed on the prerequisites for ordering interim measures or the law determining such standards are outnumbered by cases in which there is no such agreement'); Born, *supra* n. 7, at 2467 (parties 'seldom' agree on a standard).

<sup>10</sup> See Julian Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Int'l Court Arb. Bull. 6 -7 (2000) (providing examples where arbitrators applied domestic law); John Beechey & Gareth Kenny, *How to Control the Impact of Time Running Between the Occurrence of the Damage and Its Full Compensation: Complementary and Alternative Remedies in Interim Relief Proceedings*, in *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Volume 5 Dossiers of the ICC Institute of World Business Law, 21 (Filip de Ly & Laurent Lévy eds, International Chamber of Commerce 2008); Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008*, in *International Chamber of Commerce, Interim, Conservatory and Emergency Measures in ICC Arbitration*, (Special Supplement 5) ICC IC Arb. Bull. 10 (2011) (hereinafter 'Yesilirmak 1999-2008'); Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* 359, ICC Publication No. 729 (Paris 2012).

frequently, the law that governs the parties' underlying contract (*lex causae*).<sup>11</sup> However, domestic laws on international arbitration can be obsolete, unclear, or simply unhelpful, so, rather than applying domestic law, international arbitrators handling requests for interim measures often prefer to apply a standard from an international source.<sup>12</sup>

Up until 2006, however, such an international standard was not codified, and international arbitrators would have to deduce it from arbitral awards and scholarly writings. This lack of a codified, clear standard gave some arbitrators pause. In January 2000, the UNCITRAL Secretariat reported that the lack of a clearly established international standard for interim measures 'may hinder the effective and efficient functioning of international commercial arbitration' because arbitrators might 'refrain from issuing' those measures, which could result in 'unnecessary loss or damage [to a party,] a party avoid[ing] enforcement of [an] award by [hiding] assets' or other 'undesirable consequences.'<sup>13</sup>

UNCITRAL sought to address this problem when, as part of its revisions issued in 2006 to the Model Law, it included Article 17A, which sets forth a standard for granting interim measures in international arbitration.<sup>14</sup> Specifically, Article 17A of the Model Law establishes that:

*[An applicant for interim measures] 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.<sup>15</sup>

<sup>11</sup> See Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 *Croat. Arb. Y.B.* 73, 81 (2016); see also International Chamber of Commerce, *ICC Commission Report Emergency Arbitrator Proceedings 16* (2019) (hereinafter 'ICC Report on EA') (providing examples where emergency arbitrators applied the contract law to decide the request for interim measures).

<sup>12</sup> In the words of UNCITRAL's Secretariat, domestic legislation is 'often particularly inappropriate for international' commercial arbitration. Model Law, Part Two, *supra* n. 1, at 24; David W. Rivkin, *Evaluating Provisional Measures Through the Lens of Efficiency and Justice*, in *International Arbitration Under Review: Essays in Honour of John Beechey* 4 (2015); Born, *supra* n. 7, at 2465.

<sup>13</sup> See Jan. 2000 Secretariat Note Possible Uniform Rules A/CN.9/WG.II/WP.108 (hereinafter 'Jan. 2000 Secretariat Note') in Howard M. Holtzmann, Joseph E. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 208 (2015).

<sup>14</sup> The idea of including a standard for interim measures received support from relevant players in the field of international arbitration. The ICC, e.g. explained that setting forth the standard applicable to requests for interim measures would help parties in formulating their applications and tribunals in deciding them. See Feb. 2004 Secretariat Note ICC PROPOSAL A/CN.9/WG.II/WP.129 in Holtzmann & Neuhaus, *supra* n. 13, at 320–321.

<sup>15</sup> See Model Law, Art. 17A. If the interim measure seeks to preserve evidence, these conditions apply 'only to the extent the arbitral tribunal considers appropriate.' *Ibid.*

Since it was issued in 2006, Article 17A has become highly relevant in international arbitration practice, with international arbitrators applying it in several scenarios, including the following five.

First, international arbitrators often apply Article 17A when a jurisdiction whose law is relevant to the request for interim measures has adopted it as domestic legislation.<sup>16</sup> Those jurisdictions include Australia, Bhutan, British Virgin Islands, Costa Rica, Florida (United States), Georgia, Hong Kong, Ireland, Kingdom of Bahrain, Mauritius, New Zealand, Rwanda, and Singapore. If the law of one of those jurisdictions is relevant, for example, because the arbitration is seated there, arbitrators may apply Article 17A's standard to decide the request for interim measures.

Second, international arbitrators often apply, or at least consult, Article 17A, even if the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, because they prefer to apply an international standard, rather than a domestic one,<sup>17</sup> and Article 17A is widely regarded as the internationally accepted standard for interim measures in international arbitration.<sup>18</sup> That said, not all arbitrators who choose to apply an international standard apply Article 17A; some prefer to apply standards from previous arbitral decisions.<sup>19</sup>

Third, precisely because it is considered an international standard, Article 17A is often applied, or at least consulted, in 'emergency' arbitrations, i.e. where a party seeks relief that cannot await the constitution of the arbitral tribunal,<sup>20</sup> although

<sup>16</sup> Arbitrators are less reluctant to apply domestic laws on request for interim measures when they mirror Art. 17A of the Model Law because such statutes do not suffer from the flaws of domestic statutes that take a parochial approach to international arbitration. See Fry, *supra* n. 10, at 359–360 (suggesting that arbitrators should look at Art. 17A when the relevant jurisdiction has adopted it as domestic law and explaining that generally interim measures fall under the law of the arbitration seat).

<sup>17</sup> See Born, *supra* n. 7, at 2464–2467; Lew, *supra* n. 10, at 7; Beechey & Kenny, *supra* n. 10, at 21.

<sup>18</sup> See e.g. Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration Rules*, s. III, Art. 26 [Interim Measures], in *UNCITRAL Arbitration* 218 (2017) (explaining that Arts 17 and 26 of the Model Law and UNCITRAL Rules, respectively, are 'in practice relied upon as ... general principles universally accepted, even in arbitrations under other rules, including in the ICSID system'); Jacob Grierson & Annet Van Hoof, *Arbitrating Under the 2012 ICC Rules* 160–161 (2012) (explaining that Art. 17A 'reflects the standard for the granting of interim relief applied by many national courts and arbitral tribunals'); Frederic Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 1(6) J. Disp. Res. 83, 89 (2012) (hereinafter 'Bachand, Court Intervention') (explaining that the Model Law has gained 'widespread acceptance globally').

<sup>19</sup> See e.g. Lew, *supra* n. 10, at 7; Beechey & Kenny, *supra* n. 10, at 21.

<sup>20</sup> See Anja Havedal Ipp, *SCC Practice Note Emergency Arbitrator Decisions Rendered 2015–2016* 6, 11, 13, <https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf> (accessed 27 June 2019) (hereinafter 'SCC Practice Note 2015–2016') (EA 2016/30, EA 2016/31, EA 2016/32, EA 2016/082, EA 2016/095); Lotta Knapp, *Emergency Arbitrator Decisions Rendered in 2014*, [https://sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014\\_final.pdf](https://sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf) (accessed 27 June 2019) (hereinafter 'SCC Practice Note 2014') (Case No. EA 2014/171) (analysing Art. 17A); Nathalie Voser & Christopher Boog, *ICC Emergency Arbitrator Proceedings: An Overview* 11, in *Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration*



emergency arbitrators adjust Article 17A's standard to account for the 'urgency' that cannot await the constitution of the tribunal.<sup>21</sup>

Fourth, arbitrators also apply Article 17A when deciding requests for preliminary orders, i.e. *ex parte* orders 'directing a party not to frustrate the purpose of the interim measure requested,'<sup>22</sup> because the Model Law establishes that the standard set forth in Article 17A also applies to preliminary orders.<sup>23</sup>

Fifth, arbitrators apply this same standard when deciding requests for interim measures in arbitrations conducted under rules that have reproduced Article 17A verbatim, like the UNCITRAL Rules,<sup>24</sup> or the rules of the Japan Commercial Arbitration Association<sup>25</sup> or the Hong Kong International Arbitration Centre.<sup>26</sup>

In light of the significant applications of Article 17A's standard, the correct application of that standard is of great importance in international arbitration practice. This, however, requires that practitioners follow Article 2A(1) of the Model Law, as explained next.

### 3 ARTICLE 2A(1) OF THE MODEL LAW HAS FOUR PRACTICAL CONSEQUENCES ON THE APPLICATION OF ARTICLE 17A

Article 2A(1) sets forth principles of construction that seek to promote uniformity and harmonization in the application of the Model Law. It mandates that when construing the Model Law, 'regard is to be had to' 'its international origin,' 'the

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(2011) (arguing that emergency arbitrators 'are likely to turn to Article 17A of the ... Model Law'); Sébastien Besson, *Anti-Suit Injunctions by ICC Emergency Arbitrators*, in *International Arbitration Under Review: Essays in Honour of John Beechey* 19 (2015) (arguing that arbitrators and emergency arbitrators should apply the same test for granting interim measures); ICC Report on EA, *supra* n. 11, at 23 ('EAs have shown a preference to avoid the application of domestic law and to have recourse to ... "international sources"').

<sup>21</sup> See SCC Practice Note 2015–2016 at 10 (Case No. EA 2016/067) (combining the standard under Art. 17A with an element of urgency that requires that the interim measure be issued before the arbitral tribunal is constituted); SCC Practice Note 2014 (Case No. EA 2014/171) (concluding that Art. 17A addresses interim measures in general, and that emergency arbitrator would focus on 'the urgency requirement especially').

<sup>22</sup> See 2006 Model Law, Art. 17B(1).

<sup>23</sup> See *ibid.* Art. 17B(3).

<sup>24</sup> See United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (as revised in 2010), rule 26.3, [www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf) (accessed 28 June 2019) (same standard as Art. 17A of the Model Law).

<sup>25</sup> See Japan Commercial Arbitration Association, *Commercial Arbitration Rules 2019, Rule 71.2*, [www.jcaa.or.jp/e/arbitration/docs/Commercial\\_Arbitration\\_Rules.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitration_Rules.pdf) (accessed 28 June 2019) (same standard as Art. 17A of the Model Law).

<sup>26</sup> See Hong Kong International Arbitration Centre, *2018 Administered Arbitration Rules, Rule 23.4*, [www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#23](http://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#23) (accessed 28 June 2019) (arbitrators may consider the same conditions listed in Art. 17A of the Model Law).



need to promote uniformity in its application,' and 'the observance of good faith.'<sup>27</sup>

### 3.1 BACKGROUND AND PURPOSE OF ARTICLE 2A(1) OF THE MODEL LAW

Article 2A(1) is identical to articles in other model laws, including Article 3 of the 1996 Law on Electronic Commerce, Article 8 of the 1997 Law on Cross Border Insolvency, Article 1 of the 2001 Law on Electronic Signatures, and Article 2 of the 2002 Law on International Commercial Conciliation.<sup>28</sup>

UNCITRAL has explained that the purpose of Article 2A(1) of the Model Law and the identical articles in those other model laws is to 'ensure uniformity in the interpretation' of the model laws,<sup>29</sup> i.e. to 'promot[e] a uniform understanding of those laws'<sup>30</sup> and 'limi[t] the extent to which [they are] interpreted only by reference to the concepts of local law.'<sup>31</sup> That is, Article 2A(1) of the Model Law seeks to have practitioners apply the Model Law as uniformly as possible because, as one commentator put it, 'at the end of the day,' 'mere uniformity in wording [in the Model Law] is useless' and 'only the way in which the law is applied is relevant

<sup>27</sup> While Art. 2(A)(1) establishes principles of construction of the Model Law, Art. 2A(2) deals with how to resolve issues not expressly covered by the Model Law: '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.' This article does not address Art. 2A(2).

<sup>28</sup> Those articles were inspired by, and are very similar to, Art. 7(1) of the 1980 Convention on Contracts for the International Sale of Goods (CISG). The differences between the articles in those model laws and the one in the CISG are minimal, as shown here: 'In the interpretation of this Convention [Law], regard is to be had to its international character [origin] and to the need to promote uniformity in its application and the observance of good faith in international trade.' Those differences are due to the nature of both instruments. While the CISG is a binding convention (and thus has an international 'character'), model laws are not binding until adopted as domestic law and only have an international 'origin.' See Reinmar Wolff, *Chapter I: The Arbitration Agreement and Arbitrability, On the Interpretation of Model-Law-Based Provisions – Is Art. 2a(1) of the UNCITRAL Model Law on International Commercial Arbitration 'Useful and Desirable' or Just Futile?*, in *Austrian Yearbook on International Arbitration 2014* 74–75 (Christian Klausegger et al. eds).

<sup>29</sup> See UNCITRAL, *Model Law on Electronic Commerce with Guide to Enactment 1996*, [www.uncitral.org/pdf/english/texts/electcom/V1504118\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf) (accessed 28 June 2019), para. 42; UNCITRAL, *Model Law on Electronic Signatures with Guide to Enactment 2001*, [www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf](http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf) (accessed 28 June 2019), para. 109; UNCITRAL, *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, [www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) (accessed 28 June 2019), para. 40 ('Art. 2 ... was inspired by Art. 7 of the [CISG], Art. 3 of the UNCITRAL Model Law on Electronic Commerce (1996), Art. 8 of the UNCITRAL Model Law on Cross-Border Insolvency (1997) and Art. 4 of the UNCITRAL Model Law on Electronic Signatures (2001)').

<sup>30</sup> See Model Law, Part Two, *supra* n. 1, at 24. In fact, UNCITRAL's *raison d'être* is to 'promote efficiency, consistency and coherence in the unification and harmonization of international trade law.' See also Lewis, *supra* n. 3, at 23 (citing United Nations' General Assembly Resolution 40/71).

<sup>31</sup> United Nations, *Report of UNCITRAL's Working Group on Electronic Data Interchange (EDI) on the Work of Its Twenty-Sixth Session*, para. 55, <https://undocs.org/en/A/CN.9/387> (accessed 28 June 2019).

for harmonization.<sup>32</sup> Put simply, Article 2A(1) seeks that the Model Law becomes ‘not simply ... a harmonized *legislative* framework [but] rather ... a harmonized *legal* framework.’<sup>33</sup>

### 3.2 FOUR PRACTICAL CONSEQUENCES OF ARTICLE 2A(1) ON THE APPLICATION OF ARTICLE 17A

The scholarly writings that analyse Article 2A(1) show that beyond its purpose of unification and harmonization, Article 2A(1) has four practical and mandatory consequences for the application of any Article of the Model Law, including Article 17A.<sup>34</sup> Addressed specifically to Article 17A, those four consequences are as follows.

First, to have ‘regard’ for the ‘international origin’ of Article 17A, practitioners must apply that article in a way consistent with its travaux préparatoires.<sup>35</sup> The travaux préparatoires show how the delegations that drafted the Model Law, which came from different countries and legal systems around the world, compromised on the language of Article 17A, from its first draft until its final text, and why they did so. The travaux préparatoires, put simply, truly show the ‘international origin’ of Article 17A,<sup>36</sup> and practitioners applying that Article cannot contradict them, i. e. must have ‘regard’ for those travaux préparatoires.<sup>37</sup> Indeed, courts around the world often turn to the travaux préparatoires when construing the Model Law.<sup>38</sup>

<sup>32</sup> See Wolff, *supra* n. 28, at 55.

<sup>33</sup> Frederic Bachand, *Judicial Internationalism and the Interpretation of the Model Law: Reflections on Some Aspects of Article 2A*, in *The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration* 231, 232, 238 (Frederic Bachand & Fabien Gelinat eds 2013) (hereinafter ‘Bachand, *Judicial Internationalism*’) (emphasis in original).

<sup>34</sup> Art. 2A’s language ‘regard is to be had’ makes clear that the consequences of Art. 2A, whatever they are, are mandatory. See Bachand, *Judicial Internationalism*, *supra* n. 33, at 232 (arguing that the words ‘regard is to be had’ in Art. 2A of the Revised Model Law ‘requir[e] to always take into consideration’ Art. 2A’s principles of construction).

<sup>35</sup> See Bachand, *Court Intervention*, *supra* n. 18, at 98 (arguing that the travaux préparatoires should be treated as more than a ‘merely secondary source’); Bachand, *Judicial Internationalism*, *supra* n. 33, at 249 (‘there is much to be said for not treating the Model Law’s travaux préparatoires as a merely secondary or subsidiary source’).

<sup>36</sup> See Lewis, *supra* n. 3, at 25 (‘The Travaux Préparatoires contain little about the need for uniformity but do contain a very large volume of subjective views of the protagonists in arriving at the words of each Article of the [Model Law]. The clear implication is that with the aid of the Travaux Préparatoires [practitioners] would ... arrive at proper or consistent interpretations of the [Model Law]’).

<sup>37</sup> The travaux préparatoires are so important that the UN General Assembly recommended that they be sent to the world’s governments together with the text of the Model Law. See Bachand, *Judicial Internationalism*, *supra* n. 33, at 249. But see Holtzmann & Neuhaus, *supra* n. 13, at 25 (arguing that the drafting history of the Model Law should be considered only if the drafting history is a permissible source of guidance of statutes in the jurisdiction that adopts the Model Law).

<sup>38</sup> See Bachand, *Court Intervention*, *supra* n. 18, at n. 50 (collecting cases that have done this). See also Bachand, *Judicial Internationalism*, *supra* n. 33, at 249.

Second, to have 'regard' for the 'need to promote uniformity in [the] application' of Article 17A, practitioners must consider the decisions by courts and arbitrators around the world that have applied that article,<sup>39</sup> and the scholarly writings on it.<sup>40</sup> These authorities are not binding,<sup>41</sup> but become more persuasive, and practitioners are more likely to follow them, the more repeated and consistent they are.<sup>42</sup>

Third, to have 'regard' for the 'international origin' of Article 17A and the need to 'promote uniformity in its application,' practitioners must avoid construing that article only under the same canons of construction that would apply to a domestic statute in the jurisdiction relevant to the case.<sup>43</sup> For example, if an arbitrator decides that the standard for interim measures in an international arbitration is dictated by the law of Hong Kong, as that is the seat of the arbitration, she would apply the Hong Kong statute that incorporated Article 17A as domestic legislation, but should avoid construing it exclusively as she would any other Hong Kong domestic statute.<sup>44</sup> As explained, she should also analyse the travaux préparatoires of Article 17A, the relevant decisions that have applied that article, and the relevant scholarly writings that have analysed it.

<sup>39</sup> See Lewis, *supra* n. 3, at 42–43. To aid practitioners with this, UNCITRAL continuously publishes court cases on its CLOUD platform. Unfortunately, this does not capture all cases issued on point, as some jurisdictions are better at reporting their cases than others; Binder, *supra* n. 7, at 27.

<sup>40</sup> See Wolff, *supra* n. 28, at 66 ('If uniformity is to be striven for, foreign decisions and legal literature must be taken into consideration'); Holtzmann & Neuhaus, *supra* n. 13, at 25 (Art. 2A(1) 'should be read to encourage [practitioners] to see how courts, commentators and arbitrators [sic] may have interpreted the provisions in question around the world'); Yesilirmak 1999–2008, *supra* n. 10, at 10 (explaining that arbitrators look at scholarly writings when determining the standard for interim measures).

<sup>41</sup> Unlike the travaux préparatoires, which practitioners must follow, these authorities are not binding on practitioners. See Binder, *supra* n. 7, at 18 (explaining that the travaux préparatoires are 'of greater importance to the general interpretation of the Model Law than the individual states' court decisions'); Wolff, *supra* n. 28, at 66 (this 'calls for consideration of foreign case law, but no more than that. It is obvious that foreign court decisions cannot serve as binding precedents'); Bachand, *Judicial Internationalism*, *supra* n. 33, at 241; Lewis, *supra* n. 3, at 42.

<sup>42</sup> A commentator analogizes this effect to the civil law doctrine of 'jurisprudence constante' under which 'non-binding precedents become more persuasive if they are consistently applied over time.' See Lewis, *supra* n. 3, at 44. See also Yesilirmak 1999–2008, *supra* n. 10, at 4 (explaining that previous arbitral decisions are not binding but are 'generally considered persuasive').

<sup>43</sup> See Bachand, *Judicial Internationalism*, *supra* n. 33, at 235–236 (explaining that the 'efficiency' of the international arbitration system depends 'to an important extent on that system being subjected as much as possible to international rather than domestic rules'); Wolff, *supra* n. 28, at 74.

<sup>44</sup> See Wolff, *supra* n. 28, at 65 ('the model-law-based law is to be treated as a self-contained body of law and to be construed from within itself rather than in the context of the surrounding non-model-law-based legal order'). See also UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 15, [www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf](http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf) (accessed 3 July 2019) ('Even prior to the adoption of Art. 2A, the international origin of the Model Law had provided a basis for a court in Hong Kong to be more liberal in adopting a broader interpretation of Art. 7 of the Model Law than it would otherwise have been under its domestic law') (citing *Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co. Ltd.*, High Court, Court of First Instance, Hong Kong, Aug. 1994).

Fourth, to have ‘regard’ for the ‘observance of good faith,’ practitioners applying Article 17A must factor in equitable considerations and seek to avoid decisions that are ‘inequitable’.<sup>45</sup> They must consider, for example, whether a party is acting in bad faith, or deploying tactics to delay the arbitration or subsequent enforcement proceedings.<sup>46</sup>

In sum, pursuant to Article 2A(1) of the Model Law, practitioners applying Article 17A (1) cannot apply it in a way inconsistent with its travaux préparatoires; (2) must consider, but are not bound to follow, the decisions by courts and arbitrators around the world that have applied that article and the scholarly writings on that article; (3) cannot construe that article exclusively under the canons of construction that they would apply to a domestic statute in the relevant jurisdiction; and (4) must factor in equitable considerations.

The following section addresses (1) and (2) above, i.e. the travaux préparatoires of Article 17A, the decisions by courts and arbitrators around the world that have applied it, and the scholarly writings that have addressed it.<sup>47</sup>

#### 4 ANALYSIS OF EACH ELEMENT OF ARTICLE 17A’S STANDARD THROUGH THE LENS OF ITS TRAVAUX PRÉPARATOIRES, DECISIONS BY COURTS AND ARBITRATORS THAT HAVE APPLIED IT, AND SCHOLARLY WRITINGS THAT HAVE ANALYSED IT

The standard for interim measures set forth in Article 17A of the Model Law includes the following elements: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of convenience; reasonable possibility of success on the merits; and jurisdiction.<sup>48</sup> This section describes:

(1) the travaux préparatoires of each of those elements of Article 17A. That is, the revisions that the different players at UNCITRAL, namely, the Commission, the delegations from

<sup>45</sup> See Lewis, *supra* n. 3, at 48 (explaining that leading commentary on Art. 7(1) of the CISG, on which Art. 2A(1) of the Revised Model Law is based, has concluded that having ‘regard’ for ‘the observance of good faith’ ‘equates to equitable results’). This is consistent with previous arbitral practice, too. See Ali Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Awards* 5, 1(11) ICC Bull. (2000) (hereinafter ‘Yesilirmak 2000’) (explaining that some arbitrators denied interim measures when applicants lacked ‘clean hands’).

<sup>46</sup> See Lewis, *supra* n. 3, at 47–48. This is also consistent with the commentary that when the request for interim measures seeks an anti-suit injunction, arbitrators should consider the ‘bad faith’ or ‘overall unconscionable conduct’ of the party that has ‘initiated the proceedings in breach of the arbitration agreement.’ See Besson, *supra* n. 20, at 13.

<sup>47</sup> This article does not address further the third and fourth consequences that Art. 2A(1) has on the application of Art. 17A, because those consequences are more case-specific.

<sup>48</sup> While neither Art. 17A nor its travaux préparatoires explicitly discuss jurisdiction, commentators largely agree that arbitrators must be satisfied of their jurisdiction before issuing interim measures, as explained at 4.6 *infra*.

the different countries that formed the Working Group on Arbitration (“Working Group”), and the Secretariat, made to each of those elements of Article 17A since the first draft of that article was presented in January 2002<sup>49</sup> until a final text was published in 2006<sup>50</sup>;

(2) the decisions by national courts and arbitrators in the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce (SCC) that have applied those elements of Article 17A<sup>51</sup>; and

(3) the scholarly writings that have addressed those elements.

#### 4.1 BURDEN OF PROOF

Article 17A establishes that the applicant for interim measures ‘shall satisfy the arbitral tribunal that’ he meets the standard for obtaining such measures.<sup>52</sup> The travaux préparatoires of Article 17A clarify two noteworthy issues regarding the burden of proof on an application for interim measures.

First, applicants for interim measures *must* meet the standard for interim measures, and arbitrators have no discretion to issue the measures otherwise.<sup>53</sup> The first draft of Article 17A stated that applicants ‘should furnish proof that’ they meet the standard for interim measures,<sup>54</sup> but the Working Group replaced ‘should furnish proof’ with ‘shall’ because it wanted a ‘stricter formulation’ that showed that applicants have the burden of proof.<sup>55</sup> Similarly, the Working Group rejected a suggestion to rephrase Article 17A as ‘the arbitral tribunal is satisfied that’ – rather than applicants ‘shall satisfy the arbitral tribunal that’ – because it wanted Article 17A to ‘clearly establish that’ applicants have ‘the *burden* of convincing the arbitra[tors]’ that they meet the standard.<sup>56</sup>

<sup>49</sup> See Jan. 2002 Secretariat Note Interim Measures A/CN.9/WG.II/WP.119 (30 Jan. 2002) (hereinafter ‘Jan. 2002 Secretariat Report’), in Holtzmann & Neuhaus, *supra* n. 13, at 224.

<sup>50</sup> Art. 17A had other numbers throughout the travaux préparatoires but, for the reader’s convenience, this article refers to them as previous versions of Art. 17A.

<sup>51</sup> Due to the confidential nature of most arbitration proceedings, there is a limited number of publicly available decisions applying Art. 17A. Moreover, in ICC and SCC decisions, all that is available are excerpts of decisions, or descriptions of the same.

<sup>52</sup> See Model Law, Art. 17A.

<sup>53</sup> Arbitrators have discretion only when the interim measure seeks to preserve evidence. See Model Law, Art. 17A(2).

<sup>54</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 235.

<sup>55</sup> See Apr. 2002 Working Group Report A/CN.9/508 (12 Apr. 2002) (hereinafter ‘Apr. 2002 Working Group Report’), in Holtzmann & Neuhaus, *supra* n. 13, at 238.

<sup>56</sup> See Dec. 2003 Working Group Report A/CN.9/545 (8 Dec. 2003) (hereinafter ‘Dec. 2003 Working Group Report’), in Holtzmann & Neuhaus, *supra* n. 13, at 283 (emphasis in original); 29 Jan. 2004 Secretariat Note Interim Measures A/CN.9/WG.II/WP.128 (29 Jan. 2004) (hereinafter ‘Jan. 2004 Secretariat Note’), in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this ‘establish[es] clearly that the burden of proof lies on the requesting party’).

Second, although Article 17A establishes that applicants have the burden of proof, it does not set forth a burden of proof. The burden of proof, instead, remains an issue determined by the law of the relevant jurisdiction.<sup>57</sup> Indeed, the first draft of Article 17A established that applicants ‘should furnish proof that’ they meet the standard for interim measures,<sup>58</sup> but the Working Group believed that ‘requiring “proof” might be excessively cumbersome in the context of interim measures,<sup>59</sup> and considered replacing ‘furnish proof’ with ‘establish,’ ‘demonstrate,’ or ‘show.’<sup>60</sup> The Working Group ultimately decided not to adopt any of those terms, because Article 17A ‘should not interfere with the various standards of proof that might be applied in different jurisdictions.’<sup>61</sup> Accordingly, the Working Group chose the more ‘neutral formulation’ ‘shall satisfy the arbitral tribunal.’<sup>62</sup> In some jurisdictions, arbitrators may be ‘satisfied’ when applicants have ‘more likely than not’ met the standard, while, in others, arbitrators may require less, or more.

The decisions by courts and arbitrators that have applied Article 17A, and the scholarly writings that have analysed it, do not raise any significant issues with respect to the burden of proof under Article 17A.

#### 4.2 URGENCY

Article 17A does not expressly list ‘urgency’ as an element of the standard for interim measures. The first draft of Article 17A included ‘an urgent need for the measure’ as a separate element of the standard,<sup>63</sup> but the Working Group deleted that from Article 17A, on the basis that urgency ‘should not be a general feature of interim measures ... but rather ... a specific requirement for granting an interim measure ex parte,’ i.e. a preliminary order.<sup>64</sup>

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<sup>57</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283; Jan. 2004 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this ‘reflects the Working Group’s decision to provide a neutral formulation of the standard of proof’); Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

<sup>58</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

<sup>59</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

<sup>60</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238. See also Nov. 2002 Working Group Report A/CN.9/523 (11 Nov. 2002) (hereinafter ‘Nov. 2002 Working Group Report’), in Holtzmann & Neuhaus, *supra* n. 13, at 257.

<sup>61</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

<sup>62</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283; see Jan. 2004 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 312 (this ‘reflects the Working Group’s decision to provide a neutral formulation of the standard of proof’).

<sup>63</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

<sup>64</sup> See Nov. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 257; see Apr. 2003 Secretariat Note Interim Measures A/CN.9/WG.II/WP.123 (3 Apr. 2003), in Holtzmann & Neuhaus, *supra* n. 13, at 271.

Consequently, practitioners applying Article 17A should not consider urgency to be a separate element of the standard for interim measures,<sup>65</sup> even though, traditionally, arbitration authorities have considered that it is.<sup>66</sup>

Some authorities suggest that the need for urgency is implicit in Article 17A's requirement that the applicant show that it is 'likely' to suffer 'harm' 'not adequately reparable by an award of damages,'<sup>67</sup> i.e. that the relief it seeks cannot await a final award<sup>68</sup> or, in emergency arbitrations, the constitution of the tribunal.<sup>69</sup> Nothing in Article 17A's travaux préparatoires contradicts these authorities and, for that reason, practitioners are free to follow them by determining that an applicant proves the urgency required to obtain interim measures under Article 17A when it demonstrates that the relief it seeks cannot await a final award or the constitution of the tribunal.

#### 4.3 'HARM NOT ADEQUATELY REPARABLE BY AN AWARD OF DAMAGES IS LIKELY TO RESULT IF THE MEASURE IS NOT ORDERED'

Article 17A establishes as an element of the standard for interim measures that 'harm not adequately reparable by an award of damages [be] likely to result' to the applicant 'if the measure is not ordered.'

Four points are clear from the evolution of this element through the travaux préparatoires and the non-binding authorities on point: (1) the Working Group set a threshold for the element of harm lower than it had originally considered, but applicants can still fail to meet that threshold; (2) whether the final award is likely to be enforced is relevant to the element of harm; (3) a large harm is unnecessary but a small harm might be insufficient; and (4) Article 17A covers both harm that

<sup>65</sup> This is so because, as explained before, pursuant to Art. 2A, practitioners cannot apply Art. 17A in a way inconsistent with its travaux préparatoires. See 3.2 *supra*.

<sup>66</sup> See ICC, *Interim Award in ICC Case 13194 (Extract)* 4, in *Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration* (denying interim measure in light of applicant's failure to prove urgency); Rivkin, *supra* n. 12, at 6–8; Yesilirmak 2000, *supra* n. 45, at 5. But see Boog, *supra* n. 9, at 2553 (arguing that urgency 'is not a separate, general requirement for granting interim measures in international arbitration and is not necessarily required in every case').

<sup>67</sup> See Born, *supra* n. 7, at 2475; Boog, *supra* n. 9, at 2553.

<sup>68</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 219 (applicant 'must show that the tribunal's intervention cannot await "the award by which the dispute is finally decided"'); Holtzmann & Neuhaus, *supra* n. 13, at 170; Born, *supra* n. 7, at 2475.

<sup>69</sup> See SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32) (emergency arbitrator analysed Art. 17A and 'rejected' an independent 'urgency test,' but held that the requirement of 'imminent risk of (further) harm not adequately reparable by an award of damages should be sufficient to meet the urgency test' (emphasis in original). See also ICC Report on EA, *supra* n. 11, at 13, 24 ('some EAs have taken the shortcut of equating "urgency" with not being able to "await the constitution" of the tribunal').



‘cannot be repaired’ and harm that is ‘comparatively complicated to compensate’ with an award of damages. An analysis of those four points now follows.

4.3[a] *The Working Group Lowered the Threshold from Its Original Proposal, but Some Applicants Still Fail to Meet It*

The first draft of Article 17A required the applicant to prove that ‘harm will result’ if the measure is not granted.<sup>70</sup> The Working Group lowered that threshold, by replacing ‘harm will result’ with harm being ‘likely to result,’ because ‘at the time an interim measure [is] sought, there [are] often insufficient facts to provide proof that, unless a particular action [is] taken or refrained from being taken, harm would inevitably result.’<sup>71</sup>

Even though the Working Group lowered the threshold, some applicants still fail to meet it. It is not enough for applicants simply to allege that harm is likely; they have to show it.<sup>72</sup> For example, a tribunal applying Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) rejected an application for interim measures in the form of security for costs when an applicant argued that (1) the claimant was in a precarious financial situation and would be unable to pay the applicant’s legal costs if ordered to do so by the tribunal, and (2) the claimant’s third party funders would not be liable for such costs. The tribunal denied the request because it concluded, in essence, that the applicant had not proven that its harm was ‘likely,’ as (1) the claimant’s ‘balance sheet [did] not sufficiently demonstrate that [it] will lack the means to pay a costs award’; and (2) the applicant failed to show a ‘sufficient causal link’ between the existence of third party funding and the claimant’s inability to pay a future award.<sup>73</sup>

Similarly, in an emergency arbitration, an applicant requested interim measures ‘prohibiting the respondent from transferring’ its shares in certain companies or from causing those companies to transfer their assets. The emergency arbitrator applied Article 17A and found the harm to the applicant not ‘likely,’ as ‘the evidence did not [show] that it was likely that the respondent was ... removing, or planning to remove, assets.’<sup>74</sup>

In sum, the travaux préparatoires show that the Working Group decided to lower the threshold for this element, by requiring applicants to prove only that

<sup>70</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

<sup>71</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 284.

<sup>72</sup> As explained by a leading commentator, ‘harm [that] remains in some way remote, avoidable, or contingent on future events’ is not enough. Georgios Petrochilos, *Interim Measures under the Revised UNCITRAL Arbitration Rules*, 28(4) ASA Bull. 878, 882 (2010).

<sup>73</sup> *Guaracachi America Inc. & Rurelec plc v. Plurinational State of Bolivia*, PCA Case No. 2011–17, Procedural Order No. 14 (2013), paras 4–8.

<sup>74</sup> See SCC Practice Note 2014 (Case No. 2014/171).

their harm is 'likely,' but relevant decisions show that some applicants still fail to meet this element. Tribunals expect applicants not simply to allege that harm to them is likely, but also to prove it.

#### 4.3[b] *Practitioners Should Consider Whether a Final Award Is Likely to be Enforced*

To decide whether the harm to the applicant would be 'adequately reparable by an award of damages,' practitioners should consider whether such award is likely to be enforced. Commentators agree that practitioners should consider this when dealing in general with interim measures<sup>75</sup> and at least one arbitrator considered this specifically when applying Article 17A.<sup>76</sup>

This is consistent with the travaux préparatoires, which show that (1) the UNCITRAL Commission decided to establish a standard for interim measures to avoid 'undesirable consequences' such as 'a party avoid[ing] enforcement of [an] award by [hiding] assets'<sup>77</sup>; and (2) the Working Group included the word 'adequately' (i.e. 'not adequately reparable by an award of damages') so that the element of harm in Article 17A is interpreted 'in a flexible manner requiring a balancing of the degree of harm suffered by' both parties.<sup>78</sup>

#### 4.3[c] *Large Harm Is Unnecessary but Small Harm Might Be Insufficient*

The travaux préparatoires of Article 17A show that the term 'harm not adequately reparable by an award of damages' refers in 'qualitative terms to the very nature of the harm' rather than in 'quantitative terms to the magnitude of damages.'<sup>79</sup> Consequently, to prove a 'harm not adequately reparable by an award of damages,' an applicant seeking interim measures need not prove that its harm is quantitatively large. Specifically, the travaux préparatoires show that the Working Group refused to phrase the element as 'substantial harm' because Article 17A does not have a 'quantitative approach' to the element of harm, or put differently it does not require harm that entails 'substantial damages.'<sup>80</sup>

<sup>75</sup> See Born, *supra* n. 7, at 2471. See also Chartered Institute of Arbitrators, *International Arbitrators Practice Guideline, Applications for Interim Measures* 7, [www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf](http://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf) (accessed 1 July 2019).

<sup>76</sup> See SCC Practice n. 2015–2016 at 11 (Case No. EA 2016/082) (explaining that the emergency arbitrator analysed the risk of unenforceability of an award).

<sup>77</sup> See Jan. 2000 Secretariat Note, *supra* n. 13, at 208.

<sup>78</sup> See Oct. 2005 Working Group Report A/CN.9/589 (12 Oct. 2005) (hereinafter 'Oct. 2005 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 395.

<sup>79</sup> See Apr. 2004 Working Group Report A/CN.9/547 (16 Apr. 2004) (hereinafter 'Apr. 2004 Working Group Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 329.

<sup>80</sup> See Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329. The Working Group also refused to phrase the element as 'significant degree of harm,' because that term 'might

A decision by an emergency arbitrator that applied Article 17A is consistent with this standard. Specifically, (1) a supplier threatened to supply less oil and gas unless the consumer accepted a price increase; (2) the consumer filed an emergency arbitration against the supplier; and (3) the supplier argued that the interim measures should be denied because the importer's sales of oil and gas were only 'a small fraction of [its] total sales.' The emergency arbitrator dismissed the supplier's argument and granted in part the consumer's request for interim measures. That is consistent with the conclusion that, to prove a 'harm not adequately reparable by an award of damages,' the applicant need not prove that its damage is of a large quantity.<sup>81</sup>

However, the quantity of the damages may matter when it is small. At least two decisions that applied Article 17A seem to have held so. First, a New Zealand court held that because the damages to the applicant were of 'a modest figure,' a difficulty in assessing those damages was not 'conclusive' that such damages cannot be 'adequately reparable by an award of damages.'<sup>82</sup> Second, an emergency arbitrator who considered Article 17A denied the interim measures because, among other reasons, the applicant's economic harm would be 'confined and discrete, and there [was] no suggestion that it may economically ruin the' applicant.<sup>83</sup>

At first glance, these decisions' conclusions that applicants will fail if their harm is small in quantity appear inconsistent with the travaux préparatoires' conclusions that applicants need not show that their harm is of a large quantity. However, they are not. They can be reconciled as follows: large harm is unnecessary but small harm might be insufficient.

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create uncertainties as to' when harm is 'sufficiently significant to justify' interim measures. See Jan. 2002 Secretariat Report, *ibid.* at 238.

<sup>81</sup> The arbitrator held that 'the balancing of the risk of doing injustice should [not] be done in relative terms or with regards to the relative risk aversion, since this would in principle mean that larger entities were to be treated under a different standard[.]' See SCC Practice Note 2015–2016 at 6–7 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

<sup>82</sup> *Safe Kids in Daily Supervision Ltd v. McNeill et al.*, High Court Auckland, CIV 2010-404-1696, Apr. 2010, Asher J. (hereinafter '*Safe Kids v. McNeill*'), paras 62–63, 68 ('it is often a reason for the grant of an interim injunction that the assessment of damages is difficult. Certainly the assessment of damage to goodwill would not be a precise exercise in this case. But ... that assessment is likely to be of a modest figure and I do not consider that difficulty to be in any way conclusive'). Since New Zealand adopted Art. 17A of the Model Law, its courts have decided applications for interim measures related to arbitration applying the same standard as arbitrators. *Ibid.*, para. 36; Terry Sissons, *Interim Measures* 1, [www.aminz.org.nz/Attachment?Action=Download&Attachment\\_id=49](http://www.aminz.org.nz/Attachment?Action=Download&Attachment_id=49) (accessed 1 July 2019) ('the powers of ... [c]ourt[s] to grant interim measures are the same as the powers of an arbitral tribunal under Article 17A').

<sup>83</sup> See SCC Practice Note 2015–2016 at 11–12 (Case No. EA 2016/082).

4.3[d] *Article 17A Covers Both Harm that 'Cannot be Repaired' and Harm that Is 'Comparatively Complicated to Compensate' with an Award of Damages*

The Working Group considered phrasing the element of harm as 'irreparable harm' but phrased it, instead, as 'harm not adequately reparable by an award of damages' because delegations in the Working Group understood irreparable harm to mean different things.<sup>84</sup>

For some delegations, the term 'irreparable harm' meant a 'truly irreparable damage such as the loss of a priceless work of art,'<sup>85</sup> and excluded 'any loss that might be cured by an award of damages.'<sup>86</sup> For them, adopting the term 'irreparable harm' would have reduced the availability of interim measures, and set 'too high a threshold,'<sup>87</sup> because 'most [harm can] be cured with monetary compensation.'<sup>88</sup> For other delegations, the term 'irreparable harm' was broader, and included harm that 'would be comparatively complicated to compensate' with an award of damages, although in theory they could be compensated.<sup>89</sup> Driving a party into insolvency, or causing it to lose a business opportunity or its reputation, are examples of this.<sup>90</sup>

To compromise, the Working Group adopted the term 'harm not adequately reparable by an award of damages,' which covers what both groups of delegations understood by irreparable harm, i.e. truly irreparable harm, as well as harm that would be comparatively complicated to compensate with an award of damages.<sup>91</sup> Thus, as leading commentators explain, the term 'harm not adequately reparable by an award of damages' covers two types of harm: (1) 'harm that is not economic in nature (e.g. pre-emptive parallel proceedings in the courts, or the destruction of records)'; and (2) 'harm which, though economic, is difficult to repair through an eventual award of damages (e.g. further aggravation of the dispute through

<sup>84</sup> See Marc J. Goldstein, *A Glance Into History for the Emergency Arbitrator*, 40 *Fordham Int. L.J.* 779, 790 (2017) (explaining that the term 'not adequately reparable by an award of damages' was 'a pushback against the common law concept of irreparable injury' and is an 'expansionary replacement for' it). But see Peter Sherwin & Douglas Campbell Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20(3) *Am. Rev. of Int'l L.* 317, 336–337 (2010) (arguing that under the Model Law's Art. 17A and the UNCITRAL Rules' Art. 26(3), an applicant must show 'irreparable harm').

<sup>85</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283.

<sup>86</sup> See Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329.

<sup>87</sup> See Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 329–330.

<sup>88</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 283.

<sup>89</sup> See Apr. 2004 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 328–329.

<sup>90</sup> See *ibid.*, at 329.

<sup>91</sup> Model Law, Art. 17A. See also 2004 Commission Report A/59/17 (9 July 2004), in Holtzmann & Neuhaus, *supra* n. 13, at 341 (explaining that the term 'harm not adequately reparable by an award of damages' 'addresse[s] the concerns that irreparable harm might present too high a threshold and ... more clearly establish[es] the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure').

economic measures that ruin the applicant's entire business, and make calculations of damages disproportionately difficult or even unreliable).<sup>92</sup>

In practice, arbitrators have correctly concluded that the term 'harm not adequately reparable by an award of damages' covers both types of harm, as demonstrated by the following decisions.

#### 4.3[d][i] Decisions Applying Article 17A to Harm that Could not be Compensated by a Monetary Award

Arbitrators have found that the term 'harm not adequately reparable by an award of damages' covers harm that a monetary award cannot compensate, which is consistent with Article 17A's travaux préparatoires. For example, in an ICSID arbitration, an applicant argued that the respondent state had launched criminal actions, sequestered corporate documents and intimidated witnesses to impair the applicant's access to evidence in the arbitration.<sup>93</sup> The tribunal held, in essence, that 'any harm caused to the integrity of the ... proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced' falls under Article 17A, because it 'could not be remedied by an award of damages.'<sup>94</sup>

Similarly, in another ICSID arbitration, the applicants argued that the respondent state had launched criminal and extradition proceedings that would effectively prevent the applicants from participating in the arbitration. The tribunal adopted Article 17A's requirement that the harm must be 'not adequately reparable by an award of damages' and concluded that the inability to participate in the arbitration could not be remedied by an award of damages.<sup>95</sup>

#### 4.3[d][ii] Decisions Applying Article 17A to Harm that Would be 'Comparatively Complicated to Compensate'

Arbitrators have also found that the term 'harm not adequately reparable by an award of damages' also covers harm that, although it could be compensated, would be 'comparatively complicated to compensate' with an award of damages, which is also consistent with Article 17A's travaux préparatoires.

<sup>92</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 222.

<sup>93</sup> See *Quiborax S.A., Non Metallic Minerals S.A., & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 2010), paras 22–48.

<sup>94</sup> *Ibid.*, paras 156–157.

<sup>95</sup> See *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 2016), paras 3.31–3.36. Conversely, emergency arbitrators have denied requests for interim measures when the applicant's damages 'could be made good by an award of damages.' See SCC Practice n. 2015–2016 at 11–12 (Case No. EA 2016/082); SCC Practice Note 2010–2013 at 6–7 (Case No. EA 139/2010) (analysing Art. 17A and denying interim measures).

For example, an ICSID tribunal and an emergency arbitrator referred to Article 17A's phrasing of harm 'not adequately reparable by an award of damages' as support for their holding that applicants for interim measures need not demonstrate that their harm is 'not remediable by,'<sup>96</sup> i.e. that it 'cannot be compensated through,'<sup>97</sup> an award of damages. Similarly, another emergency arbitrator found that Article 17A protected an applicant against the risk of losing his company shares because 'even if [he was compensated], this compensation may not reflect the shares' real value,'<sup>98</sup> and another ICSID tribunal held that the eventual destruction of the applicant's business would be 'not adequately reparable by an award of damages.'<sup>99</sup>

Leading commentators explain that Article 17A's concept of harm not 'adequately reparable by an award of damages' also captures 'the disruption to business relations and the waste resulting from' it.<sup>100</sup> Applying this logic, an emergency arbitrator analysed Article 17A and granted interim measures when a supplier threatened to supply less oil and gas unless the importer accepted a price increase.<sup>101</sup> These authorities are consistent with the travaux préparatoires' conclusion that Article 17A covers harm that would be comparatively complicated to compensate with an award of damages.

#### 4.4 BALANCE OF CONVENIENCE (I.E. THE 'SUBSTANTIALLY OUTWEIGH' REQUIREMENT)

Applicants for interim measures must also satisfy arbitrators that the 'balance of convenience' tips in their favour.<sup>102</sup> Two points are clear from the evolution of this element through the Travaux Préparatoires and the non-binding authorities on point: (1) any harm to the applicant that would remain equally likely even if the interim measure is ordered, or that would be adequately reparable by an award of damages, is irrelevant to the balance of convenience, and (2) any harm to other

<sup>96</sup> *Sergei Paushok, CJSC Golden East Co. & CJSC Vostokneftegaz Co. v. Mongolia*, Order on Interim Measures (Sept. 2008), paras 68–69.

<sup>97</sup> See ICC Report on EA, *supra* n. 11, at 26.

<sup>98</sup> See SCC Practice Note 2015–2016 at 13–14 (Case No. EA 2016/095).

<sup>99</sup> See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 2009) (hereinafter '*Burlington v. Ecuador P.O.1*'), para. 83.

<sup>100</sup> See e.g. Petrochilos, *supra* n. 72, at 883.

<sup>101</sup> See SCC Practice Note 2015–2016 at 5–7 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32). Conversely, an arbitrator's denial of interim measures because an award could repair the applicant's damages, '[d]espite the problems' the applicant 'may encounter in quantifying' those damages (see SCC Practice n. 2015–2016, at 10 (Case No. EA 2016/067)), may have been inconsistent with Art. 17A's travaux préparatoires that show that it covers harm that would be 'comparatively complicated' to compensate with an award of damages, i.e. harm whose calculation would be 'unreliable.' See Paulsson & Petrochilos, *supra* n. 18, at 222.

<sup>102</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

parties ‘affected by the measure’ is irrelevant to the balance of convenience. Those two points, and four practical applications of the balance of convenience, are explained below.

4.4[a] *Any Harm to the Applicant that Would Remain Equally Likely if the Interim Measure Is Granted, or that Would Be Adequately Reparable by an Award of Damages, Is Irrelevant to the Balance of Convenience*

Under Article 17A, applicants must satisfy the arbitrators that ‘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.’<sup>103</sup>

Early drafts of Article 17A used the words ‘*that* harm,’ but the final text uses the words ‘*such* harm.’<sup>104</sup> The addition of the word ‘*such*’ clarifies that the harm to the applicant that must outweigh the harm to the other side is the kind of harm specified in the preceding sentence of Article 17A. That is, the words ‘*such* harm’ refer to harm to the applicant that is ‘not adequately reparable by an award of damages’ and ‘likely to result if the measure is not ordered.’ Any harm other than ‘*such* harm’ is irrelevant for purpose of Article 17A’s balance of convenience. Put differently, when considering whether the applicant’s harm ‘substantially outweighs’ the harm to the other side, practitioners should not consider any harm that would be adequately reparable by an award of damages or that is likely to result even ‘if the measure is ... ordered.’<sup>105</sup>

4.4[b] *Harm to Other Parties ‘Affected by the Measure’ Is Irrelevant to the Balance of Convenience*

The Working Group considered phrasing Article 17A’s balance of convenience so that it would refer to the harm to a ‘party affected by the measure.’ Ultimately, it phrased it as referring, instead, to the harm to ‘the party against whom the measure is directed,’ because it believed that the term ‘party affected by the measure’ was ‘ambiguous’ ‘in view of the multiplicity of parties potentially affected by an interim measure.’<sup>106</sup> Consequently, for purposes of the balance

<sup>103</sup> See Model Law, Art. 17A (emphasis added).

<sup>104</sup> Compare Apr. 2002 Working Group Report in Holtzmann & Neuhaus, *supra* n. 13, at 239 with Nov. 2002 Working Group Report, *ibid.*, at 258 (emphasis added).

<sup>105</sup> This is consistent with the arbitral practice of denying interim measures that are not ‘capable of preventing the alleged harm.’ See Yesilirmak 2000, *supra* n. 45, at 5.

<sup>106</sup> See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 290.



of convenience under Article 17A, the harm to any 'party affected by the measure' who is not 'the party against whom the measure is directed,' is irrelevant.

In line with this, a New Zealand court held that arbitrators analysing Article 17A do not consider the effects that the interim measures would have on the 'public interest' or on 'innocent third parties'<sup>107</sup> (i.e. on parties 'affected by the measure' who are not 'the party against whom the measure is directed').

#### 4.4[c] *Four Practical Applications of the Balance of Convenience*

The travaux préparatoires show that there was a suggestion to delete the word 'substantially' so that Article 17A would refer only to 'harm to the applicant that substantially outweighs the harm.' The UNCITRAL Commission rejected this suggestion, however, because the word 'substantially' was 'consistent with existing standards in many judicial systems.'<sup>108</sup>

Some commentators explain this 'substantially outweigh' requirement as a test of 'proportionality.'<sup>109</sup> That is, practitioners must 'weigh the balance of inconvenience in the imposition of interim measures upon the parties'<sup>110</sup> or, as put by a New Zealand court that applied Article 17A, they must 'asses[s] the financial situation of both' parties and 'the practical effects [of] granting the' measure.<sup>111</sup>

Consequently, 'the greater the adverse effect of the requested interim measure on the respondent,' the harder it is to satisfy the balance of convenience.<sup>112</sup> At one end of the spectrum, arbitrators deny interim measures that would cause 'irreparable harm' to respondents.<sup>113</sup> At the other end, they grant interim measures that would cause harm to respondents that is 'limited'<sup>114</sup> or lesser.<sup>115</sup>

In practice, at least four consequences are clear from the decisions and scholarly writings that have analysed the balance of convenience element under Article 17A. These four consequences are consistent with Article 17A's travaux préparatoires, so practitioners are free to follow them.

First, undertakings and declarations are relevant to the balance of convenience. A New Zealand court applying Article 17A held that an applicant is more likely to

<sup>107</sup> See *Safe Kids v. McNeill*, *supra* n. 82, para. 36.

<sup>108</sup> See 2006 Commission Report A/61/17 (14 July 2006) (hereinafter '2006 Commission Report'), in Holtzmann & Neuhaus, *supra* n. 13, at 431.

<sup>109</sup> See Besson, *supra* n. 20, at 13.

<sup>110</sup> See Rivkin, *supra* n. 12, at 8.

<sup>111</sup> See *Safe Kids v. McNeill*, *supra* n. 82, para. 33.

<sup>112</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 220.

<sup>113</sup> See *Burlington v. Ecuador P.O.1*, *supra* n. 99, para. 81.

<sup>114</sup> See SCC Practice Note 2015–2016 at 14 (Case No. EA 2016/095).

<sup>115</sup> See *City Oriente Ltd. v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures (May 2008) (hereinafter '*City Oriente v. Ecuador*, Provisional Measures'), para. 78.

prove that its harm substantially outweighs the respondent's when it presents an 'adequate undertaking' to cover the damages that the respondent may suffer if the measure is granted now, but the applicant loses on the merits later.<sup>116</sup> The same could be said when the respondent (not the applicant) presents an 'adequate undertaking,' as the New Zealand court denied the interim measures 'on the basis of the undertakings' provided by the respondents.<sup>117</sup>

Similarly, some arbitrators have denied interim measures on the basis that the respondent provided an undertaking or simply a 'declaration' that it would 'not infringe the right' at issue.<sup>118</sup> Such a declaration, however, is effective only for as long as the respondent honours it, and interim measures can be issued as soon as the respondent reneges on it, as demonstrated by a Mauritius court that did so, applying the domestic statute that incorporated Article 17 of the Model Law.<sup>119</sup>

Second, the balance of convenience is harder to satisfy for affirmative injunctions (i.e. when the respondent is ordered to do, rather than to refrain from doing, something). At least one court has held that it is harder for an applicant to prove that Article 17A's balance of convenience tilts in its favour when the interim measure seeks an affirmative injunction.<sup>120</sup>

Third, the stronger the merits, the less the applicant's harm must 'substantially outweigh' the other side's harm. At least one arbitrator that applied Article 17A has held that, as 'a general rule,' 'the greater the chance that [applicants] will prevail on the merits, the less the balance of harm needs to weigh in [their] favor.'<sup>121</sup> Leading commentators seem to agree with this, explaining that 'all the necessary requirements [under Article 17A] operate "in the round" [i.e.] that a tribunal must be satisfied that they are met in the aggregate to a degree which justifies' interim measures.<sup>122</sup>

<sup>116</sup> *Safe Kids v. McNeill*, *supra* n. 82, para. 33.

<sup>117</sup> *Ibid.*, para. 71.

<sup>118</sup> See SCC Practice n. 2010–2013 at 18 (Case No. EA 010/2012) (no interim relief because of 'Respondent's express undertaking not to dispose of, or otherwise dissipate, move or diminish the value of the products in its possession or that of its agents until ... a final award'), 10 (Case No. EA 144/2010) (interim order was not necessary because respondent agreed to 'let the Claimant use the equipment in question'). See also *Yesilirmak 2000*, *supra* n. 45, at 5 ('an opposite party's "undertaking" or "declaration" not to infringe the right being defended may suffice to deny a request for a measure'). These arbitrators, however, were not applying Art. 17A.

<sup>119</sup> See Duncan Bagshaw & Iqbal Rajahbalee, *Chapter 9: Attitude of Mauritian Courts Towards Arbitration*, in *Rethinking the Role of African National Courts in Arbitration* 246 (Emilia Onyema ed. 2018) (describing *Barnwell v. ECP Africa* (2013) SCJ 327).

<sup>120</sup> See *Sissons*, *supra* n. 82, at 8–10 (summarizing *Solid Energy New Zealand Ltd. v. HWE Mining Pty. Ltd.*, High Court Hamilton, Aug. 2010, Andrews J.).

<sup>121</sup> See SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

<sup>122</sup> See e.g. *Paulsson & Petrochilos*, *supra* n. 18, at 219.

Fourth, at least one arbitrator has decided, when applying Article 17A, that an applicant's refusal to mitigate damages by accepting a unilateral imposition by respondent does not alter the balance of convenience. In other words, relevant to the balance of convenience is the harm to the applicant caused by respondent's actions, not the applicant's refusal to bend to respondent's will. Specifically, where a supplier threatened to supply less oil and gas unless the importer accepted a higher price, the importer filed an emergency arbitration; the supplier argued that the importer could mitigate its own harm by paying the price increase, but the arbitrator, analysing Article 17A, dismissed that argument.<sup>123</sup>

#### 4.5 'REASONABLE POSSIBILITY THAT THE [APPLICANT] WILL SUCCEED ON THE MERITS OF THE CLAIM'

Under Article 17A, the applicant must 'satisfy' the arbitrators that '[t]here is a reasonable possibility that [it] will succeed on the merits of the claim,' but the arbitrators' 'determination on this possibility shall not affect the[ir] discretion ... in making any subsequent determination.'<sup>124</sup> Three points are clear from the evolution of this element through the travaux préparatoires and the non-binding authorities on point.

##### 4.5[a] *Relevant Merits Are Those of the Claim Related to the Application*

The travaux préparatoires show that the 'reasonable possibility' of success refers to the *underlying* claim, not the 'claim' for interim measures, i.e. the application. The UNCITRAL Secretariat even added the words 'of the claim' after the word 'merit' 'to clarify that the merits to be considered relate to the main claim and not to the interim measure requested.'<sup>125</sup>

What is more, the applicant must have a 'reasonable possibility' of success on the merits of the claim relevant to the application, not the entire 'dispute' or 'underlying case.' While earlier drafts of Article 17A referred to the merits of the 'underlying case'<sup>126</sup> or the 'dispute,'<sup>127</sup> the final text refers to the merits of 'the claim' only. In

<sup>123</sup> See SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32) (dismissing respondent's argument that applicant 'could have mitigated the harm by paying the price requested by respondents').

<sup>124</sup> See Model Law, Art. 17A.

<sup>125</sup> See 5 Dec. 2005 Secretariat Note A/CN.9/WG.II/WP.141 (5 Dec. 2005) (hereinafter '5 Dec. 2005 Secretariat Note'), in Holtzmann & Neuhaus, *supra* n. 13, at 409–410 ('clarifying that what is being considered is the main claim of the dispute may limit unnecessary arguments as to whether there exists a reasonable possibility of success in respect of the granting of the interim measure').

<sup>126</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

<sup>127</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 237.

line with this, a commentator explains that when applicants seek interim measures in the form of an anti-suit injunction, ‘the claim’ on which they must prove a ‘reasonable possibility of success on the merits’ is that the other side breached the arbitration agreement by filing or threatening to file proceedings in a forum other than arbitration.<sup>128</sup> That is, those applicants do not need to prove a reasonable possibility of success on the merits of the entire ‘dispute’ or ‘underlying case.’

#### 4.5[b] *Burden of Proof on the Merits Is Low*

While an applicant must prove that its harm is ‘likely,’ it must prove only that success on the merits is ‘reasonabl[y] possib[le].’ Commentators, courts, and arbitrators agree that this is a low threshold. It ‘fall[s] well below a fifty per cent chance of success’<sup>129</sup> and requires the applicant to show ‘only a bit more’ than that its rights are ‘plausible,’<sup>130</sup> but definitely much less than the ‘more likely than not’ standard to be applied on the merits.<sup>131</sup> Indeed, the Working Group rejected suggestions to phrase the element as ‘likelihood’<sup>132</sup> or ‘substantial possibility’<sup>133</sup> of success on the merits, which would have set a higher threshold.<sup>134</sup>

Some commentators argue that this requires applicants to show ‘a prima facie’ case on the merits, i.e. ‘*fumus boni iuris*,’<sup>135</sup> and an arbitrator applying Article 17A even found that an applicant met this requirement because it presented a ‘prima facie case on the merits.’<sup>136</sup> The travaux préparatoires, however, show that the UNCITRAL Commission decided not to phrase this element as a ‘prima facie’ case on the merits, because ‘prima facie’ is ‘susceptible to differing interpretations.’<sup>137</sup>

<sup>128</sup> See Besson, *supra* n. 20, at 10.

<sup>129</sup> See Rivkin, *supra* n. 12, at 6.

<sup>130</sup> See *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Order on the Interim Measures Application of Pakistan dated 6 June 2011, para. 135 n. 210 (Sept. 2011) (holding in *dicta* that Art. 17A requires ‘the demonstration of something more than a plausible case’).

<sup>131</sup> See Rivkin, *supra* n. 12, at 8. See also Goldstein, *supra* n. 84, at 795 (explaining that a ‘reasonable possibility of success’ is a lower threshold than the ‘common law probability of success requirement’). A New Zealand court, in turn, understood this requirement under Art. 17A as requiring the applicant to present a ‘serious question to be tried.’ See *Safe Kids v. McNeill*, *supra* n. 82, para. 30.

<sup>132</sup> See Jan. 2002 Secretariat Report, in Holtzmann & Neuhaus, *supra* n. 13, at 234.

<sup>133</sup> See Apr. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 238.

<sup>134</sup> In fact, the Working Group rejected a proposition to replace ‘will succeed’ with ‘is likely to succeed’ because it concluded that this was ‘unnecessary,’ as the words “‘there is a reasonable possibility’” provided the required level of flexibility.’ See Dec. 2003 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 284.

<sup>135</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 218 (referring to this requirement as a prima facie case on the merits); Ch. 5. *Powers, Duties, and Jurisdiction of an Arbitral Tribunal*, in Nigel Blackaby et al., *Redfern and Hunter On International Arbitration* 315–316 (6th ed. 2015) (same); Besson, *supra* n. 20, at 10 (same); Boog, *supra* n. 9, at 2552 (same).

<sup>136</sup> See SCC Practice Note 2015–2016 at 6 (Case Nos. EA 2016/30, EA 2016/31, EA 2016/32).

<sup>137</sup> See 2006 Commission Report, in Holtzmann & Neuhaus, *supra* n. 13, at 431.

To determine whether the applicant has a reasonable possibility of success on its claim, arbitrators should assess whether, considering the stage of the proceeding at which the applicant filed its request, the applicant has presented enough evidence to support that claim. In the UNCITRAL Secretariat's words, the 'reasonable possibility of success on the merits of the claim will be assessed differently in view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings.'<sup>138</sup> For example, a New Zealand court that applied Article 17A held that because discovery had not yet occurred, it was 'understandable' that the applicant based its claim on inferences only, rather than on direct evidence, and found that the applicant had shown a reasonable possibility of success on the merits.<sup>139</sup>

Most applicants show a 'reasonable possibility of success on the merits' by showing 'a reasonable chance' that the respondent breached the applicable agreements.<sup>140</sup> Applicants can prove a reasonable possibility of success on their claims even if the respondents have 'credible' defenses against those claims.<sup>141</sup> However, applicants will fail to prove this element if the respondents' defenses are compelling, rather than just 'credible.'<sup>142</sup>

#### 4.5[c] *A Decision on Interim Measures Does Not Prejudge Any Future Determination*

Article 17A of the Model Law establishes that a decision on whether 'there is a reasonable possibility that the requesting party will succeed on the merits of the claim' 'shall not affect the discretion of the arbitral tribunal in making any subsequent determination.'<sup>143</sup>

The travaux préparatoires show that the purpose of this provision was that arbitrators would make 'a determination regarding the seriousness of the case

<sup>138</sup> See 5 Dec. 2005 Secretariat Note, in Holtzmann & Neuhaus, *supra* n. 13, at 410.

<sup>139</sup> *Safe Kids v. McNeill*, *supra* n. 82, paras 45–46. It does not follow that applicants who file requests for interim measures early on the case need to present no evidence to support their claim. Indeed, arbitrators have denied interim measures in those circumstances. See SCC Practice n. 2014 (Case No. EA 2014/171) (denying interim measures where 'no evidence ... suggest[ed] that the [respondent] was in the process of stripping the Companies of assets by illegitimate means').

<sup>140</sup> See SCC Practice Note 2015–2016 at 13–14 (Case No. EA 2016/095) (arbitrator analysed Art. 17A and held that 'there was a reasonable chance' that the respondent state breached the applicable BIT); SCC Practice Note 2015–2016 at 10 (Case No. EA 2016/067) (arbitrator analysed Art. 17A and held that at least one of applicant's arguments that the respondent breached the applicable contract 'had a reasonable possibility of success'); SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010) (applicant 'prima facie substantiated its objections to the Respondent's termination of the contract').

<sup>141</sup> *Safe Kids v. McNeill*, *supra* n. 82, para. 42.

<sup>142</sup> See e.g. SCC Practice Note 2015–2016 at 17 (Case No. EA 2016/150) (applicant had no 'reasonable possibility of success' on a claim that respondent had breached the applicable agreement, where the respondent seemed to have had the right to terminate the agreement due to the applicant's failure to pay royalties).

<sup>143</sup> See Model Law, Art. 17A.

without in any way prejudicing the findings to be made ... at a later stage,<sup>144</sup> and that by ‘subsequent determination’ Article 17A refers not only to awards but also to procedural orders.<sup>145</sup>

Despite the language of Article 17A, arbitrators may remain reluctant to grant interim measures if they could be seen as prejudging the merits of the claims or other final issues on the case, as demonstrated by a recent decision by a tribunal in the PCA. There, the respondent first filed a jurisdictional objection on the basis that the claimant was a shell company used by the real investor to improperly obtain protection under the applicable investment treaty,<sup>146</sup> and later filed a request for interim measures in the form of security for costs on the same grounds. The tribunal analysed Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) and denied the request, noting its reluctance to prejudge the merits of the outstanding jurisdictional objection.<sup>147</sup>

#### 4.6 ‘REASONABLE POSSIBILITY OF’ JURISDICTION

Article 17A does not state that arbitrators must be satisfied that they have jurisdiction before issuing interim measures, and the travaux préparatoires show no discussion on this.<sup>148</sup> Most commentators, however, agree that, before issuing interim measures, arbitrators must be satisfied of their jurisdiction, at least on a prima facie basis<sup>149</sup> and, in practice, arbitrators applying Article 17A analyse their jurisdiction.<sup>150</sup> A showing of jurisdiction is required because without jurisdiction, an applicant cannot show a reasonable possibility of success on the merits of its claims.<sup>151</sup> Several conclusions stemming from this are worth mentioning.

<sup>144</sup> See Nov. 2002 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 258.

<sup>145</sup> See Oct. 2005 Working Group Report, in Holtzmann & Neuhaus, *supra* n. 13, at 395.

<sup>146</sup> See *South American Silver Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2013–15, Procedural Order No. 10 (Jan. 2016) (hereinafter ‘*Silver v. Bolivia P.O.10*’), paras 53–55.

<sup>147</sup> See *ibid.*, paras 53–55.

<sup>148</sup> In practice, this is relevant when the party opposing the interim measure asserts that the arbitrator lacks jurisdiction because there is no arbitration agreement, the agreement is invalid, or the claim falls outside the scope of the arbitration clause.

<sup>149</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 219–220. See also Donald Francis Donovan, David W. Rivkin et al., *Chapter 7: Jurisdictional Findings on Provisional Measures Applications in International Arbitration*, in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 110–112 (Neil Kaplan & Michael J. Moser eds 2018); Rivkin, *supra* n. 12, at 5; Besson, *supra* n. 20, at 10; Beechey & Kenny, *supra* n. 10, at 21.

<sup>150</sup> See SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010).

<sup>151</sup> See e.g. Paulsson & Petrochilos, *supra* n. 18, at 218–219 (explaining that the requirement of a ‘reasonable possibility of success’ ‘encompasses “that the tribunal have both a reasonable possibility of possessing jurisdiction over the claim and a reasonable possibility that the substance of the claim is meritorious”’).

First, this refers to whether the arbitrator has jurisdiction to decide the merits, not to whether it has the ability to issue interim measures, which Article 17A presupposes.<sup>152</sup>

Second, the requirement is correctly phrased as a 'reasonable possibility' that the arbitrator has jurisdiction, rather than as a 'prima facie' showing of jurisdiction. As explained in section 4.5(b) *supra*, the travaux préparatoires show that the drafters decided to avoid phrasing the element of 'reasonable possibility of success on the merits' as 'prima facie' determination, to avoid confusion.<sup>153</sup>

Third, arbitrators must be satisfied that the applicant has a 'reasonable possibility of success on' its argument that the arbitrator has jurisdiction to decide the merits of the underlying claim relevant to the application, not the merits of the entire 'dispute' or 'underlying case.' As explained in section 4.5(a) *supra*, an applicant's obligation to prove a 'reasonable possibility of success on the merits' is limited only to the claims relevant to the application, so its burden of proof on jurisdiction must be limited to those claims too.

Fourth, the threshold for showing a 'reasonable possibility' of jurisdiction is low.<sup>154</sup> Applicants have proven that there is a reasonable possibility that arbitrators have jurisdiction simply by showing that the arbitration agreement at issue referred disputes to arbitration under the rules of the institution that appointed the arbitrator.<sup>155</sup> In cases that involved Bilateral Investment Treaties (BITs), applicants have simply shown that they 'appeared' to qualify as investors under those BITs and that those BITs' 'cooling-off periods' were inapplicable due to the 'futility' of the applicants' efforts to settle the dispute amicably.<sup>156</sup>

Fifth, a finding of 'reasonable possibility' of jurisdiction does not preclude a tribunal from later conducting a full jurisdictional analysis and concluding that it does not have jurisdiction,<sup>157</sup> because a finding that the applicant has a 'reasonable possibility of success on the merits' does not prejudice any subsequent determinations, as explained in section 4.5(c) *supra*.

<sup>152</sup> See Donovan & Rivkin, *supra* n. 149, at 108 (explaining that the requirement refers to a showing of jurisdiction 'over the underlying dispute').

<sup>153</sup> See 2006 Commission Report, in Holtzmann & Neuhaus, *supra* n. 13, at 431.

<sup>154</sup> Although this is a low threshold, the applicant's allegations on jurisdiction are not 'immune from attack' by the respondent who can show that 'there are key facts or legal principles that can be easily and definitively disproven.' Donovan & Rivkin, *supra* n. 149, at 117.

<sup>155</sup> See SCC Practice Note 2010–2013 at 7 (Case No. EA 139/2010).

<sup>156</sup> See SCC Practice Note 2015–2016 at 11–13 (Case Nos. EA 2016/082, EA 2016/095).

<sup>157</sup> See Donovan & Rivkin, *supra* n. 149, at 115.



#### 4.7 OTHER ELEMENTS AND CONSIDERATIONS NOT EXPRESSLY STATED IN ARTICLE 17A AND NOT COVERED BY ITS TRAVAUX PRÉPARATOIRES

Practitioners applying Article 17A's standard may encounter additional considerations not expressly covered by that Article and not debated within its travaux préparatoires, for example, whether Article 17A should be applied in a way that prevents aggravating the parties' dispute, or whether it should not be applied to grant the same relief sought in the main case.

Most commentators agree that, in general, interim measures should be granted to prevent aggravating the parties' dispute,<sup>158</sup> and arbitrators have granted interim measures on that basis.<sup>159</sup> Others have clarified that the no aggravation of the dispute theory 'is not available to protect against an increase of the amount in dispute.'<sup>160</sup> Practitioners are free to follow either of these authorities, because nothing in Article 17A's travaux préparatoires is inconsistent with them.

Similarly, commentators explain that the interim measures sought 'should not reflect the relief sought in the main case'<sup>161</sup> and, although Article 17A is silent on this, at least one tribunal that applied Article 17A seems to have followed this logic. As noted before, a tribunal applying Article 26(3) of the UNCITRAL Rules (identical to Article 17A of the Model Law) denied a respondent's request for interim measures in the form of security for costs which would have, in essence, granted the respondent the jurisdictional objection it had launched in the arbitration.<sup>162</sup>

<sup>158</sup> See Christian Aschauer, *Use of the ICC Emergency Arbitrator to Protect the Arbitral Proceedings* 10, 23(2) ICC Bull. (2012) ('it is beyond doubt that the arbitral tribunal has the power to order measures necessary to avoid an aggravation of the dispute'); Rivkin, *supra* n. 12, at 5 ('the ICJ has routinely made non-aggravation orders when granting provisional measures'); ICC Report on EA, *supra* n. 11, at 26 ('some EAs have acknowledged the "risk of aggravation of the dispute" as a factor to consider when exercising their discretion to grant emergency relief').

<sup>159</sup> See Carlevaris & Feris, *supra* n. 6, at 21 (providing example of arbitrator who granted the interim measures 'as the dispute would otherwise have worsened'). But see *City Oriente v. Ecuador*, Provisional Measures, *supra* n. 115, para. 60 (parties agree 'that there is no general, autonomous, abstract right to the non-aggravation of the dispute warranting, ipso jure, the passing of provisional measures').

<sup>160</sup> See Beechey & Kenny, *supra* n. 10, at 23. See also *City Oriente v. Ecuador*, Provisional Measures, *supra* n. 115, para. 60 ('given that Claimant would only be entitled to damages, the aggravation of such damages does not constitute grounds for ordering provisional measures').

<sup>161</sup> See Fry, *supra* n. 10, at 359. See also Final Award in ICC Case 14287, in *ICC Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration* 9 ('an interim measure must not anticipate a ruling in the case per se'); ICC Report on EA, *supra* n. 11, at 15 (explaining that in two cases emergency arbitrators denied interim measures because 'the specific relief requested was not interim or conservatory in nature, as the measure related to the merits'). In practice, however, sometimes 'both forms of relief are closely related,' such as when a shareholder seeks to prevent another shareholder from transferring its shares to a third party and giving that third party control of the company. See Fry, *supra* n. 10, at 359–360.

<sup>162</sup> See 4.5(c) *supra*; *Silver v. Bolivia P.O.10*, *supra* n. 146, paras 53–56; see also SCC Practice Note 2010–2013 at 8–9 (Case No. EA 144/2010) (dismissing request that the respondent deliver products because that would equate to 'a substitute for a judgment,' although there is no indication that this arbitrator considered Art. 17A).

5 APPLYING ARTICLE 17A'S STANDARD FOR ISSUING INTERIM MEASURES

As shown in this article, pursuant to Article 2A(1), any application of the standard for interim measures set forth in Article 17A of the Model Law must (1) be consistent with Article 17A's travaux préparatoires as described in section 4 *supra*, and (2) consider the decisions by courts and arbitrators around the world that have applied that Article and the scholarly writings that have analysed it, including those decisions and writings described in section 4 *supra*, and any others practitioners can find.

To aid practitioners with this, Table 1 lists the principles of construction applicable to each element of Article 17A's standard that stem from Article 17A's travaux préparatoires, the relevant decisions by courts and arbitrators that have applied it, and the scholarly writings that have analysed it.

*Table 1 Applying the Standard for Interim Measures Under Article 17A of the Model Law on International Commercial Arbitration*

Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration (Principles of construction of each element of the standard)		
	Principles of construction	Reasoning
<i>1. General principles of construction applicable to Article 17A</i>		
<i>Principles that cannot be contradicted</i>		
1.1	Article 17A's travaux préparatoires must be considered, and Article 17A cannot be applied in a way that contradicts those travaux préparatoires	Article 2A mandates that when applying Article 17A, 'regard is to be had to its international origin'
1.2	The decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it must be considered, but are not binding	Article 2A mandates that when applying Article 17A, 'regard is to be had' 'to the need to promote uniformity in [its] application'
1.3	Article 17A's standard cannot be construed solely under the canons of construction that would be applied to a domestic statute in the relevant jurisdiction	Article 2A mandates that when applying Article 17A, 'regard is to be had to its "international origin" and "the need to promote uniformity in [its] application"'

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Applying the standard for interim measures under Article 17A of the Model Law  
on International Commercial Arbitration  
*(Principles of construction of each element of the standard)*

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1.4	Equitable considerations must be factored in, like for example whether granting or denying the interim measures would reward a party that (1) is acting in bad faith, (2) delaying the proceedings, or (3) delaying enforcement of a future award	Article 2A mandates that when applying Article 17A, ‘regard is to be had’ to ‘the observance of good faith,’ i.e. equitable considerations
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*2. Burden of proof*

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*Principles that cannot be contradicted*

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2.1	If the applicant does not meet Article 17A’s standard, arbitrators have no discretion to issue interim measures, except when the measures seek to preserve evidence	Article 17A’s travaux préparatoires show that the Working Group chose the word ‘shall’ to obligate applicants to meet the standard
2.2	Article 17A’s standard does not establish what burden of proof applicants must meet; each jurisdiction determines that burden of proof	Article 17A’s travaux préparatoires show that the word ‘satisfy’ establishes a ‘neutral’ burden of proof, and that each jurisdiction sets the burden of proof

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*3. Urgency*

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*Principles that cannot be contradicted*

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3.1	Urgency is not a separate element of Article 17A’s standard	Article 17A’s travaux préparatoires show that urgency was intentionally eliminated as a separate element of the standard
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*Principles that must be considered but are not binding*

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3.2	The element of urgency is (1) implicitly included in the requirement of ‘harm not adequately reparable by an award of damages,’ (2) satisfied when the relief requested cannot await a final award, or (3) in emergency arbitrations, satisfied when the relief requested cannot await the constitution of the tribunal	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
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Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration  
*(Principles of construction of each element of the standard)*

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4. Harm to the applicant 'not adequately reparable by an award of damages'

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*Principles that cannot be contradicted*

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4.1	Applicants need not prove that harm 'will result' if the measure is not granted	Article 17A's travaux préparatoires show that the Working Group decided to lower the burden of proof from harm that 'will result' to harm that is 'likely'
4.2	Article 17A's concept of 'harm not adequately reparable by an award of damages' covers harm that is truly irreparable	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' covers truly irreparable harm, and list as an example the loss of an irreplaceable piece of art. Arbitrators have held, for example, that the loss of evidence or of the ability to participate in the arbitration are truly irreparable harm covered by Article 17A
4.3	Article 17A's concept of 'harm not adequately reparable by an award of damages' also covers harm that can be compensated by an award of damages, but that it would be 'comparatively complicated to compensate' through such award	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' also covers damages that would be 'comparatively complicated to compensate' by an award of damages, and list as an example losing a business opportunity, or forcing a party into insolvency. Arbitrators have found that this covers, for example, cases where the applicant would suffer a significant disruption of business relations or would go out of business altogether
4.4	To prove a harm 'not adequately reparable by an award of damages,' applicants need not prove that their harm is of large quantity	Article 17A's travaux préparatoires show that the term 'not adequately reparable by an award of damages' refers to the quality of the harm, not to its large quantity

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Applying the standard for interim measures under Article 17A of the Model Law  
on International Commercial Arbitration  
(Principles of construction of each element of the standard)

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*Principles that must be considered but are not binding*

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| 4.5 | Harm of small quantity might be insufficient. The application might fail if the quantity of the applicant's harm is too low, regardless of its quality | Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them                                |
| 4.6 | If the respondent is unlikely to honour a final award, the applicant's harm will 'not [be] adequately reparable by an award of damages'                | Numerous decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so |
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*5. Balance of convenience (the 'substantially outweigh' requirement)*

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*Principles that cannot be contradicted*

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| 5.1 | Irrelevant to the balance of convenience is any harm to the applicant that would not be avoided or mitigated by the interim measures                         | Article 17A's travaux préparatoires show that the word 'such' captures harm likely to occur if the interim measures are not granted  |
| 5.2 | Irrelevant to the balance of convenience is any harm to the applicant that can be 'adequately compensated by an award of damages'                            | Article 17A's travaux préparatoires show that the word 'such' captures harm not 'adequately compensated by an award of damages'  |
| 5.3 | Harm to parties who are 'affected by the measure,' but are not the party 'against whom the measure is directed,' is irrelevant to the balance of convenience | Article 17A's travaux préparatoires show that the relevant harm is only that caused to the party 'against whom the measure is directed' and not to any other party 'affected by the measure' |
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*Principles that must be considered but are not binding*

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| 5.4 | Parties who present an undertaking that would cover the damages the other side would suffer if the measures are granted/rejected are more likely to show that the balance of convenience tilts in their favour | Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them |
| 5.5 | A declaration by respondent that it will not infringe the applicant's rights at issue might help respondent show that  | Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider  |
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Applying the standard for interim measures under Article 17A of the Model Law  
on International Commercial Arbitration  
*(Principles of construction of each element of the standard)*

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	the balance of convenience does not tilt in the applicant's favour	those authorities but are not bound to follow them
5.6	If arbitrators deny the interim measures based on a declaration by the respondent not to infringe the rights at issue, and the respondent later reneges on that declaration, arbitrators may issue the measures	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.7	If the interim measures would cause the respondent 'limited' damages, the applicant is likely to show that the balance of convenience tilts in its favour	Numerous decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so
5.8	If the interim measures would cause the respondent 'irreparable harm,' respondent is likely to show that the balance of convenience tilts in its favour	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.9	It is harder for applicants to show that the balance of convenience tilts in their favour if they seek an affirmative injunction	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.10	The stronger the merits of the underlying claim relevant to the application for interim measures, the lower the applicant's burden of proof on the balance of convenience	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
5.11	A refusal by the applicant to accept a unilateral imposition by the respondent, which imposition would arguably mitigate the applicant's harm, is irrelevant to the balance of convenience	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them

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Applying the standard for interim measures under Article 17A of the Model Law  
on International Commercial Arbitration  
(Principles of construction of each element of the standard)

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*6. Reasonable possibility of success on the merits of the claim*

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*Principles that cannot be contradicted*

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6.1	Applicants need not prove a ‘reasonable possibility of success on the merits of the’ application for interim measures	Article 17A’s travaux préparatoires show that applicants must prove a reasonable possibility of success on the merits of the underlying claim, not the application for interim measures
6.2	Applicants need not prove a ‘reasonable possibility of success on the merits of the’ claims not relevant to the application for interim measures	Article 17A’s travaux préparatoires show that applicants must prove a reasonable possibility of success on the merits only of the underlying claim relevant to the application rather than of the entire ‘dispute’ or ‘underlying case’
6.3	A decision on interim measures does not prejudice a future determination on either an award on the merits or procedural orders	Article 17A’s travaux préparatoires show that under Article 17A a decision on interim measures does not prejudice future determinations in either awards or procedural orders
6.4	The determination of whether an applicant showed ‘a reasonable possibility of success on its claim’ will be influenced by (1) how early in the proceedings the applicant seeks the interim measures; and (2) how much information is available then	Article 17A’s travaux préparatoires show that the ‘reasonable possibility of success on the merits of the claim’ will be assessed differently in view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings’

*Principles that must be considered but are not binding*

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6.5	To show a ‘reasonable possibility of success on the merits,’ an applicant should show that the merits of its claim fall between ‘plausible’ and ‘more likely than not’	Numerous decisions and scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so
6.6	An applicant might show ‘a reasonable possibility of success on its claim’ even when the respondent presents ‘credible’ defenses	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them

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Applying the standard for interim measures under Article 17A of the Model Law  
on International Commercial Arbitration  
*(Principles of construction of each element of the standard)*

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6.7	An applicant might show 'a reasonable possibility of success on its claim' even if its claim is supported only on inferences, rather than direct evidence	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
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7. Jurisdiction

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*Principles that cannot be contradicted*

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7.1	Any jurisdictional requirement that exists under Article 17A does not refer to the ability of the arbitrator to issue interim measures	Article 17A presupposes the arbitrator's ability to issue interim measures
7.2	If, to get the interim measures, the applicant needs to show that the arbitrator has jurisdiction, the applicant likely needs to show only a 'reasonable possibility' of jurisdiction.	Numerous decisions and scholarly writings have concluded that as part of the 'reasonable possibility of success on the merits,' applicants must prove a reasonable possibility of jurisdiction. Pursuant to Article 2A, practitioners must consider those authorities, and are likely to follow them, but not bound to do so.
	In any event, the applicant would need to show a 'reasonable possibility' of jurisdiction only over the underlying claim relevant to the application rather than over the entire 'dispute or underlying case'	Yet, if practitioners follow those authorities, i.e. conclude that an applicant must make a showing of jurisdiction, they must limit the requirement to jurisdiction over the underlying claim relevant to the application, because Article 17A's travaux préparatoires show that practitioners must prove a reasonable possibility of success on the merits of that claim only
7.3	A finding of a 'reasonable possibility' of jurisdiction over the underlying	Article 17A's travaux préparatoires show that a decision on interim

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Applying the standard for interim measures under Article 17A of the Model Law on International Commercial Arbitration <i>(Principles of construction of each element of the standard)</i>		
	claim does not preclude a subsequent finding to the contrary	measures does not prevent future determinations to the contrary
<i>Principles that must be considered but are not binding</i>		
7.4	For purposes of interim measures, arbitrators might be satisfied of their jurisdiction simply when (1) the contract, or treaty, refers to arbitration under the rules of the institution that appointed the arbitrators; and (2) any pre-arbitration conditions seem inapplicable	Decisions and/or scholarly writings have concluded this. Pursuant to Article 2A, practitioners must consider those authorities but are not bound to follow them
<i>8. Other elements and considerations</i>		
<i>Principles that can be considered but are not binding</i>		
8.1	In general, interim measures might be granted to prevent aggravating the parties' dispute, but this does not apply 'to protect against an increase of the amount in dispute'	Article 17A is silent on this, and so are its travaux préparatoires. Practitioners are thus free to follow or disregard the authorities that have concluded this
8.2	In general, interim measures might be denied if they seek the same relief sought in the main case. (But this should not apply if both types of relief are closely related and cannot be untangled)	Article 17A is silent on this, and so are its travaux préparatoires. Practitioners are thus free to follow or disregard the authorities that have concluded this

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