

***A CRITICAL ANALYSIS OF ARBITRAL PROVISIONAL MEASURES***

***IN ENGLAND AND WALES***

**A Thesis Submitted for the Degree of Doctor of Philosophy in Law**

**by**

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## ABSTRACT

Arbitral provisional measures are of great importance in protecting the rights of the parties to an arbitration agreement. Arbitration as a dispute mechanism is becoming increasingly powerful due to the ability of tribunals and courts to grant and enforce provisional measures which make the final award meaningful. The importance of provisional measures has increased in recent years as more parties are seeking them,<sup>1</sup> and is likely to grow still more in the coming years.<sup>2</sup> This project examines the problems surrounding arbitral provisional measures in England and Wales; as such problems constitute a threat to current and future arbitration. The thesis aims to identify, analyse and offer solutions to those problems that impede arbitral proceedings.

This thesis initially examines the roots and the legislative development of the powers of arbitral tribunals to grant provisional measures and the role of the courts in arbitral proceedings in England. The examination highlights the roots of the problems and demonstrates how the approach towards provisional measures in England has shifted in due course from judicial dominance to arbitral competence, and how the role of the courts has become subsidiary.

Further, the analysis highlights the problem of arbitrators in the granting and enforcement of provisional measures across borders, due to the inadequacy of the current Arbitration Act 1996, which provides very limited power to tribunals under its S.38,39 and 48. Additionally, the research aims to demonstrate that arbitral tribunals should be given effective and actual authority to grant arbitral provisional measures in order to comply with the arbitration agreement (party autonomy).

Since no dispute mechanism can stand alone as an island, the courts should only become involved in support of the process – subject to the arbitral Acts that provide them with exclusive jurisdiction –where this is necessary in order to avoid conflicting decisions. However, the power of the courts to aid arbitration in granting such measures is limited by Council Regulation (EC) 44/2001 of the European Union, of which England is a member.

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<sup>1</sup>See Werbick RJ, 'Arbitral Measures: fact or fiction?' (2002-2003) *Dispute Resolution Journal* at 57-64.

<sup>2</sup> See Ferguson SM, 'Interim Measures of protection in international commercial arbitration: problems, proposed solutions and anticipated results', (2003) *Current International Trade Law Journal* 12:15.

In international arbitration, timely application and enforcement of interim measures have a substantial effect on the possibility of the enforcement of a final arbitration award, especially when issues relating to the protection of assets or evidence arise before or during the course of proceedings. Hence the purpose of this project is to provide a brief analysis of the international practice regarding the enforcement of provisional measures in international arbitration.

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## ***TABLE OF ABBREVIATIONS***

AAA	American Arbitration Association
AC	Appeal Court (Law Reports, House of Lords Appeal Cases)
AJC	American Journal of Comparative Law
AL ER	All England Law Reports
CA	Court of Appeal of England and Wales
CAS	Court of Arbitration for Sports
CCIG	(Swiss Rules)
CCP	Code of Civil Procedure
CIA	Chartered Institute of Arbitrators
CIArb	Chartered Institute of Arbitrators in England
Compromissoire	An arbitration Clause
CLJ	Cambridge Law Journal
CPR	Civil Procedure Rules
DAC	Departmental Advisory Committee on Arbitration Bill February 1996
EAA	English Arbitration Act 1996
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union

EWCA	England and Wales Court of Appeal
Ex parte	one side or part only
F.2d	The Federal Reporter Second Series
F.3d	The Federal Reporter Third Series
FAA	French Arbitration Association
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
Int'l.Ct.Arb.Bull.	International Court of Arbitration Bulletin
J.Int'l.Arb	Journal of International Arbitration
JBL	Journal of Business Law
KB	King's Bench Division
LCIA	London Court of International Arbitration
Lex arbitri	The Law governing arbitration
Lex contractus	law governing the contract
Lex pendens	A dispute or matter which is the subject of ongoing or pending litigation
LMAA	London Maritime Arbitrators Association
LQR	Law Quarterly Review
MR	Master of the Rolls



QB	Queen's Bench Division
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization
WLR	Weekly Law Report
YCA	Yearbook of Commercial Arbitration
ZCC	Zurich Chamber of Commerce

## **National Legislation( Statutes)**

American Arbitration Act (AAA),at 53,62, 64,66, 68,146

Arbitration Act 1889 at 25.

Arbitration Act 1934 at 26.

Arbitration Act 1950 at 30, 31, 34

Arbitration Act 1979 at 33,34,36,37.

Arbitration Act of Scotland 1996 at 224.

Australian Arbitration Act 2005 at 135, 132.

Belgian Code Civil 1999 at 217.

Belgian Code Civil 1999 at 217.

Civil Jurisdiction & Judgement Act 1982 (Interim Relief Order 1977) at 232, 111.

Civil Jurisdiction Act and Judgement Act 1980 at 192.

Civil Procedure Act 1833 at 22.

Common Law procedure Act 1854 at 22,25, 27, 26

Companies Act 1985 at 173.

English Arbitration Act 1996 at 47,220-225,127,135,125,55,94,74-78,92,126,162-165.

English Supreme Court Act 1981 at 153.

European Communities Act 1978 at 188.

French Civil Code, at 64.

German Arbitration Act 1998 at 76, 78,97, 155, 158.

Hong Kong Arbitration ( Amendment Ordinance 1997) at 158.

Human Rights Act 1988 at 129-130.

Ireland Arbitration Act 1998 at 127.

Italian Arbitration Act 1994 at 208, 155.

Japan Arbitration Act 1998 at 149.

Kenya Arbitration Act 1995 at 220, 223.

Lithuania Arbitration Act 1996 at 61, 180,161.

New Zealand Arbitration Act at 223.

Polish Arbitration Act 2005 at 77,135, 265,134.

Polish CPP 1996 at 177

Spanish Ley de Arbitrage 2003 at 223.

Supreme Court Act 1981 at 21,22, 121,113.

The Netherlands Arbitration Act 1986 at 218.

The Swiss Private International Law (PIL) Statute of 1987 at 64,66.149.

### **Arbitral Rules and Conventions:**

Brussels Regulation 2012/2015 at 236,232.

Brussels Regulation 42/2002 at 232.

Brussels Regulation 44/2001 at 98,189.

CAS Rules at 32, 132- 135.

Civil Procedure Rules 1998 at 156, 158.

Geneva Protocol & Geneva Convention 1927 at 6,22,24,80, 90.

ICC Rules at 64,54,59,67,137,122, 116, 105,150.

ICSID Rules at 4,5,53, 90, 165, 170,220.

LCIA Rules at 55, 53, 62, 66,68,90,61,170.

LMAA Rules of Gafta Arbitration at 129

New York Convention 1958 at 33,54,59,74, 57,71, 62,223, 225,228,34,94, 166,250,277.

UNICTRAL Model Law at 17, 41,49,56,62,74,78,92,90,95,  
123,137,154.133,130,129,123,120,109,225.257, 258,259,260.

WIPO at 149,155.

## **TABLE OF CASES AND AWARDS**

*A Committee v Banie and Partners* [1990] 52 BLR 42 Company Bros 95, F.Supp 436( S.D.N.Y) at 215.

*ABB Lummus Global v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 at 45, 80.

*Absalom Ltd v Great Western ( London) Garden Village Society Ltd* [1933] AC 592 at 29.

*Abuja International Hotel Ltd v Meridien SAS* [2012] EWHC 87 at 173.

*Adams v Cape Industries plc* [1990] Ch.433 at 93,216,219.

*AES UstKamengonogorshs Hydro Power Plant LLP v UStKamenogorsk Hydro Power Plant JSC* [2011] EWHCA Civ 647 at 168,171.

*Albatross S.S Co v Manning Bros*,95 F.Supp.459,463 (SDNY) 1951 at 225.

*Ali Shipping Corp v Shipyard Trogir* [1998] 1 ALL ER at 142.

*AMCO Asia Corp v Republic of Indonesia, ICSID Case No.ARB/81/1 (9 December 1983), X1 YB* 159, 161 (1986) at 121, 123, 249.

*American Cyanamid v Ethicon Ltd* [1975] AC 396 at 93.

*Angelic Grace* [1995] 1 Lloyd's Rep 87or [1991] 1 WLR 314 at 147,148,109,136,142.

*Antaios Compania Naviera SA v Salan Rederierna AB (The Antaios)* [1984] 3 WLR at 35, 36, 37 195.

*Anton Piller AG v Manufacturing Process* [1973] Ch. 55 at 168.

*Antonissen v Council and Commission* [1997] ECR 1-44 at 195.

*Assunzione, The*[1954] 1 ALL ER 278 at 82.

*Astra SA Insurance and Reinsurance Co v Drake Insurance* [2002] 2 Lloyd's Rep 68 at 50.

*Astrol Navegation v South land International* [1982] QB 124 at 250.

*AT&T Technologies Inc v Communication Workers of America CWA*, 475 U.S. 643 (1986) at 71.

*Babanaft International Co V Ba Bassatne* [1990] Ch.13 at 111.

*Banco de Concepcion v Manfra Tordella & Brooke* 70 Ad 2.d 840 at 140.

*Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 58,172 and 200 at 30,60,203.

*Bankers Trust v Jakarta* [1999] Lloyd's Rep 911 at 170,173.

*Behring International In v Iranian Air Force (1985) Case No. 382, Interim Award No.ITM 46-382-3* (22 Feb 1985) at 145.

*Belair LLC v Basel LLC* [2009] EWHC 725 (Comm) at 46,165.

*Benarn Denilauler v SNC Couchet* [1980] at 196,231,232,132,200,234.

*Bergessen v Muller* ( US No.54) Year Book Vol.1 IXP 487 at 225,227.

*Bishop v Bishop* [1640] 1 Chan 142 at 25.

*Biwater Gauff Ltd v United Republic of Tanzania Procedural Order No.1 ICSID ARB/05/22* at 104.

*Black Clawson International Ltd v PapierwerkeWaldhof Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 58,249.

*Borden Inc v Meiji Milk Products Co*, 919 F.2d 822 ( 2d Cir 1990) at 227,230.

*Braunstein v Accidental Death Insurance Co* [1861] 1 B & S 783 at 120

*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 201,249,121.

*British Airways v Lake Airways* [1985] AC 58 at 164.

*British Corporation Television Ltd v Granada Television Ltd* [1981] 417 Ch at 169.

*British Steel Corporation Corp v Granada Television Ltd* [1981] 417 ChD ( CA ) at 169.

*BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA (The Nema)* [1981] 2 Lloyd's Rep 239 at 35, 36.

*Bulfracht (Cyprus) Ltd v Boneset Co Ltd (MV Pamphilos)* [2002] EWHC 2292 at 72.

*C v D* [2007] EWHC 182 at 109,147,112.

*Caroline Power and Light Co. v Uranex, 451 F. Supp. 1044 ( N.D Cal.1977)* at 226, 162,230.

*Cartel Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 784 ( HC) at 168.

*CAS Succhi di Fruta SPA v Commission Case C-t-91* [1997] ECR 211 at 104.

*Ceskoslovenska Obchodnibanka As v Slovakia Republic ICSID Case No.3 Arb,97/4 ( 5 November 1998)* at 104,107.

*Cetelem SA v Roust Holdings* [2005] 2 Lloyd's Rep 294 at 110,113, 168.

*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and Others* [1993] AC 334 [1993] WLR 262 [1991] 1 ALL ER 664;[1991]1 Lloyd's Rep 291 at 50,52,58, 59,60, 67,70,117,118 164,211,252.254,256.

*Charles Construction Company v Derderian, 586 N.E.2d 992 (Mass 1992)* at 50, 66,141.

*China Metal products Import/ Export v Apex Digital Inc 155 F.Supp 2<sup>nd</sup> 1174( Cal 2001)* at 225.

*China Ocean Shipping Co ( Owners of the MV Fu Ninghai) v Whistler International Ltd Charters of MV Fu Ning Hai* [1999]HKCFI 693 at 168.

*Christopher Brown Ltd v Genossenschaft Oesterrischer Waldbesitzer* [1954] 1 QB at 54.

*Chrysalis* [1983] 1 Lloyd's Rep 503 at 35.

*Claxtone Engineering Ltd v Txm, deuz v Amaco* [2010] EWHC 2567 at 249,254.

*CMA v Hyundai* [2009] 1Lloyd's Rep 213 at 199.

*Comdel Commodities Ltd v Siporex Trade SA* [1990] 2 ALL ER 552 at 110.

*Commerce and Industry Insurance Company of Canada v Lloyds Underwriters* [2002] 1 Lloyd's Rep 219 at 169.

*Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 56.

*Compagnie Maritime Belge Transport NV v Commission Case T-24/93* [1993] ECR 11-543 at 103,106..

*Compagnie Tunisienne de Navigation SA v Compagnie D'Armament Maritime SA* [1971] AC 572 at 82.

*Consolidated Investment & Contracting Co v Saponaria* [1978] 3 ALL ER 988 at 31.

*Consolidated Shipping & Trading Corporation Ltd v Northern Sales Ltd (The Aspen Trader)* [1981] 1 Lloyd's Rep at 31.

*Consortium Ltd v Republic of Bulgaria ICSID Case No.ARB/03/24* at 121,123.

*Continental Bank v Aekos Continental Naviera SA* [1994] 1 WLR 588 at 111.

*Coope v Ateliers de la Motobecane SA*, 442 N.S 2d 1239 (S.D.N.Y 1982) at 89.

*Coppee-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, [1994]2 ALL ER 499 at 1, 31,36,124,25,139,200, 127,142,200.

*Corp. v Ohio Reinsurance Corp.* 935 F.2d at 67.

*Custom & Exercise v Ancor foods Ltd* [1991] 1WLR 1139 at 172,175.

*Czarnikow v Roth Schmidt & Co* [1911] 2 KB 478 at 28 and 29.

*Dalmia Dairy Industries Ltd v National Bank of Pakistan Ltd* [1978] 2 Lloyd's Rep 223 at 56,58,62.

*Darden v Yukus* [2001] 1 All ER (Comm) 70 at 67.

*David Taylor & Son v Barnet Trading Co* [1958] 1 WLR at 156.

*Deutsche Genossenschaftsbank v Brasserie du Pêcheur case C-148/84* [1985] ECR 1-1981 at 197,236.



*Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1990] 1 AC 295.

*Deutz AG v General Electric Company* 270 F.3d 144 ( 3rd Cir 2001) at 170.

*Doleman and Sons v Ossett Corporation* (1912) 3 K.B. 257 at 29, 27.

*Dongwoo Mann Hummel Co Ltd v Man Hummel GmbH* [2008] SDHC 67, [2008] 3 SLR 9 at 167,170.

*Dorring- Baker v Merett* [1991] 2 ALL ER 890 at 141.

*Dubai Islamic Bank v Paymentech Merchant Services Inc*[2001] 1 Lloyd's Rep 65 at 45.

*Dutch Building Companies v Commission Case T-29/92* [1992] ECR at 4.

*Eagle Star Insurance Co. Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 34, 159.

*Eastern Associated Corp v Mine Workers*, 531 US 57, 62 at 61.

*Eco Swiss China Time Ltd v Benetton International NV Case C-126/97* (1999) at 53.

*ED & F Man ( Sugar)Ltd v Haryanto* [1911] 1 Lloyd's Rep 249 at 216.

*Elektrim v Vivendi Universal* [2007] EWHC 571 at 156.

*Elf Aquitaine v NIOC Year Book Arb.*(1886) at 76.

*Ellerman Lines Ltd v Reed and Others* [1928] 2 KB 155 at 176,179.

*Emilio Augustine Maffezini v Kingdom of Spain, Procedural Order No.2 ICSID case No. Arb/97/7* (28 October 1999) at 94, 120.

*Erich Gasser GmbH v Misat* [2005] QB 1 at 189.

*Esso Australia Resources Ltd v Plowman* [1995] 2 ALL ER 890 at 140.

*F Ltd v M Ltd* [2009] EWHC 275 at 176.

*First Options of Chicago Inc v Kaplan* 514 US 938 (USA Ct) (1995) at 53,54, 64.

*Frantome Case*, ICC No.3896 ( 1982) at 121.

*Frontier International Shipping Corp v The Owens & All other* [2000]F.C 427 ( Federal Court of Canada) at 139.

*Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1999] XVII YB *Comm Arbn.* 289-304 at 79,80.

*Ghirados v Minister of Highways (BC)* 1996 DLR at 174.

*GmbH v Cargill France* [1992] 2 Lloyd's Rep 500 at 147.

*Green Tree Financial Corp v Bazzle* 539 US 444 (US Ct 2003) at 76.

*Halfdam Grieg & Co v Sterling Coal & Navigation Corp (The Leyland)* [1973] 2 All ER 1073 (CA) at 30.

*Halki v Sopex*[1997] 3 AL ER 833 at 77.

*Harbour Insurance Co. v Kansa General Insurance Co* [1992] 1 Lloyd's Rep at 79.

*Harris v Reynolds* [1845] 7 QB 69 at 25.

*Hassneh Insurance v Stuart J Mew* [1993] 2 Lloyd's Rep 243 at 98, 142.

*Hellas v Warico AG* [1978] 2 Lloyd's Rep 67 at 34.

*Heyman v Darwins Ltd* [1942] AC 356 at 56, 76, 52,79, 249.

*Hiscox v Dickson Manchester* [2004]ALL ER 521 at 249.

*Hoffman v Krieg* C-145/86 at 236,237.

*Holiday Inns SA v Morocco (ICSID Case No. ARB/72/1) (Decision unreported)* at 4.

*Holzman v Manhattan Bronx surface Transit operating Authority* 27 AD.2d 346 ( 1<sup>st</sup> Dept 2000) at 140.

*Hubco v Water and Power Development Authority (WAPD)* SC 841 at 70.

*Insuarance Co v Lloyds's Sundicate* [1995]1 Lloyd's Rep 271 at 142.

*International Components Corp v Klaiber* 54 AD,2d 550,358 N.Y ( 1<sup>st</sup> Dept 1976) at 140.

*International Growth Fund Ltd v OACT Mobile* [2007] Bermuda LR 43 (Bermuda CA)at 46.

*International Sea Tankers v Hempshire Shipping Co.Ltd* [1981] 2 Lloyd's Rep 308 at 35.

*Iran v Iran* [2000] 1 Lloyd's Rep 412 at 247.

*Iran v United States of America, Case A-15 ( 24 November 1986)* at 97.

*Italian Leather SPA Case C-80/00* at 236.

*Jet Holdings v Patel* [1990] 1QB 335 at 216.

*Jivraj v Hashwani* [2011] UKSC 40 at 51.

*John Emmot v Michael Wilson and Partners Ltd* [2009] EWHCH at 119, 120.

*JSC BTA Bank v Ablyazov* [2012] EWHC 1819 at 187.

*K/S Bani v Korea Ship Building and Engineering Corp* [1987] 2 Lloyd's Rep 445 at 78.

*Kastner v Jason and Others* [2004] EWHC 592 at 149, 256,253.

*Kill v Hollister* [1746] 1 Wils1 29, 24, 247,250.

*King v Thomas McKenna Ltd* [1991] All ER 53 at 31.

*Koneck v Commission Case C- 44/75* [1875] ECR 637 at 105, 246.

*Lake Airways v Sabena Belgian World Airline 73 Fsd 909* at 183.

*Libra Shipping & Trading Corporation Ltd v Northern Sales Ltd (The Aspen Trader)* [1981] 1  
Lloyd's Rep 273 at 31.

*Livingston v Ralli* [1855] 5 EL & BL 132 at 26.

*Lloyd v Gilbert* [1865] 6 QB 101 at 30.

*Lloyd v Wright* [1983] 1 QB 1065 at 36.

*London and Leeds Estate Ltd Paribus (No.2)* at 142.

*Maffezini v The Kingdom of Spain (Procedural Order No. 2, 28 October 1999)* at 100,97.

*Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 at 156,114.

*Marich Rich & Co AG v Societa Italian Impianti* C-190/89 at 214,218.

*Marvan & Bank Mellat v Hellinink* [1973] QB 291 at 30.

*Masri v Consolidated Contractors International Co SAL* [2008] EWHC 2492 at 196,195.

*Mavan v Ralli Bros* [1973] 1 WLR 468 at 156,197.

*Mavani v Ralli Bros* [1973] 1 WLR 468 at 156.

*Mayer Newman and Co Ltd v Alfereco Commodities Sa* [1990] 2 Lloyd's Rep 290 at 60.

*McCreary Tire and Rubber Co v CEAT SPA*, 501 F.2d 1038 (3rd Cir 1974) at 57, 119,253.

*Menisci Mahieux, Paris Court of Appeal* (13 December 1977), 106 at 79.

*Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 at 173.

*MietzIntership Yachting SneekBv* [1991] ECR 1-2277 at 194,236,197.

*Mitchell v Harris Engineering Co Ltd*[1967] 1 QB 703, [1967] WLR 447 at 26.

*Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473, US 614, 105 Ct 3346 (1985) at 53, 77.

*Mitsui Engineering & Shipping Co. Ltd v Easton Graham Rush* [2004] 2 SLR at 166,169.

*Mobil Oil Indonesia Inc v Asamera Oil (Indonesia) Ltd* (1977) 392 NYS 2d 614 at 252,94,95.

*Motorola Credit Corp v Uzan No.2* [2003] EWCA Civ 752 [2004] 1 WLR 113 at 165.

*Ms Alghanim Industries inc v Skanda International Insurance Corp*[2001] 2 ALL ER Comm 30 at 246.

*Mynmayaung Chi oo Co Ltd v Win Win Nu* [2003] SGHC 124 at 140.

*National Navigation v Endesa Generation SA* [2009] EWCA Civ 1397 at 191.

*Ninth Circuit in Pacific Reinsurance Management Corp v Ohio Reinsurance Corp* 935 F.2d at 217.

*Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] Bus LR 1289 at 157.

*Norjar v Hyundai Heavy Industries Co.Ltd* [1991] 1 Lloyd's Rep 260 at 78.

*Norse Atlas Company Ltd v London General Insurance* [1927] Lloyd's Rep 104 at 51.

*Norwich Pharmacy v Her Majesty's Commission for Customs & Excercise* [1974] AC 1322 at 168.

*OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA 710 at 109.

*Overseas Union Insurance Ltd v New Hampshire Insurance Ltd* [1991] ECR 1-1137 at 190.

*Owusu v Jackson* ECR1-1383 at 189.

*Oxford Health Plans LLC v John Ivan Sutter* [2013] 675 F. 3d 215 No. 12-135, (U.S. June 10, 2013) at 60,249.

*Pacific Reins mgt Corporation* F.2d 1019,1022-23 at 22.

*Pacific Reinsurance Management Corp v Ohio Reinsurance Corp*, 936 F.2d 1019 (9th cir 1999) at 13.

*Pena Copper Mines Ltd v Rio Tinto Co.Ltd* [1911] ALL ER Rep 209 at 109,147.

*Permasteelisa Japan KK v Bouyguesstroi* [2007] 3508 at 168,171.

*Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPR 73 at 189.

*Prima Paint Corp v Flood and Conklin Manufacturing Co* 388 US 395 (1967) at 79.

*Printing and Numerical Registering Co v Sampson* [1875] LR 19 Eq 462 at 46.

*Pt Prim International Development v Kempinski Hotel SA* [2011] 4 SLR 633 at 175.

*Qindao Ocean Shipping Co v Grace Shipping Establishment (The Xing Su Hai)* [1995] 2 Lloyd's Rep 15 at 172.

*Re- Arbitration union Stearliner & Wiener*[1917] 1KB 558 at 137.

*Re Q's Estate*[1999] 1 Lloyd's Rep 931 at 2.

*Regazzoni v Sethia* [1857] 2 Lloyd's Rep 289 at 58.

*Reichertkockler v Dresdner Bank* [1992] ECR 1-2149 at 191.

*Re-Olympia Oil & Cake Co & MacAndrew Moreland & Co* [1918] 2KB at 24.

*Republic of Kazakhstan v Istil Group* [2007] EWHC 2729 at 77.

*Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd*, [1995] Y.Com Arb at 224.

*Rew v Cox* [1995] *The Times*, 29 November at 32,34.

*Rich v Societ Italia Impiant* C-190/89 at 195.

*Rose-Lino Bev.Distribution v Coca-Cola Bottling Company*,749 F.2d 124,125 ( 2<sup>nd</sup> cir 1984) at 225  
167.

*Sabmiller Africa v East Africa Breweries Ltd* [2009] EWHC 2140 at 137.

*Sacheri v Robotto*, (1989) *Court of Cassation (Italy)* 7 June, no. 2765 at 110.

*Salter Refischel and Co v Mann and Cook* [1991] 2 KB 432 at 188.

*Sauer-Getriebe KG v White Hydraulics Inc*, 715 F.2d 348 (7th Cir 1083) at 177.

*Schibsby v Westenholz* [1870] LR 6 QB 155 at 65.

*Scott v Avery* (1843-1860) All ER 5 at 27, 246,250,247.

*Scott v Corporation of Liverpool* [1858] 3 De G & J 334 at 38.

*SNE v Joc Oil Case USSR Arbitral Award 1990* at 79.

*Soeximex SA v Agrocorp International Pte Ltd* [2011] EWHC 2748 at 176.

*Solo Kleinmotoren v Bosch Case C- 414/92* at 177.

*Southern Sea Navigation Ltd of Monrovia v Petroleos Mexicanos of Mexico City*, 606 F. Supp.692.694 ( S.D.N 1985) at 220.

*Southern Seas Nav Ltd v Petroleos Mexican city*,606 F.Supp.692 ( SDNY 1985) at 222.

*Sperry International Trade Inc v Government of Israel*, 532 F. Supp 901 (S.D.N.Y 1982).689 2d 301 (2nd Cir 1979) at 228.

*St Paul Dairy Industries NV v Unible Exser BVBA* [2005] ECR 1-4 67 at 193,196.

*Starlight Light shipping Company v Tai Ping Ins.Co* [2007] EWHC 1839 at 11.

*Stolt Nielsen v Animal Feeds International Corp* (2010) 130 S. Ct 1758, 1776 at 61.

*Strumpffabrik GmbH v Bentley Engineering Co. Ltd* [1962] 2 QB 587 at 158,159.

*Suleiman v Suleiman* [1983] 3 WLR 811 at 177.

*Swiss Bank Corporation v Navorossiy shipping* [1995] 1 Lloyd's Rep 2012 at 250.

*Tai Hing Cotton Mill ltd v Liu Chong Hing Bank Ltd* [1986] AC at 239.

*Tanzania Electric supply Co v independent Power Tanzania Ltd* [1999] 1WLR 3476 at 104.

*Telecinco v Commission Case T-191*, [1993] ECR 1409 at 104.

*Teradyne Inc v Mostek Corp*,797 , F.2d 4351 ( 1<sup>st</sup> Cir 1986) at 210.

*The Assuzione* [1954] 1ALL ER 278 at 82.

*The Karvo Peiratis* [1977] 2 Lloyd's Rep 344 at 32,349,30.

*The Oinoussian Virtue* [1981] 1 Lloyd's Rep 633 at 35,248.

*Thompson v Charnock* (1799) 8 Term Reports 139 at 25.

*TokiosTokeles v Ukraine* [2005] ICSID Procedure Order No. 3, ISCID Case No.Arb 02 at58.

*Turner v Grovit* [2002] 1 WLR 107 at 239,242.

*Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48 at 52.

*United States of America v Inkley* [1988] 3 WLR 304 at 220.

*United Steel workers of America v Warrior and Gulf Navigation Co* 363 US 574 ( 1960) at 55.

*United Technologies Int'l Inc, v Iran (1986) Case No. 114, Decision No. 53-114 (10 Dec 1986) at 114.*

*Vale Do Rio Doce Navegacao v Shanghai Bao Steel Ocean Shipping Co* [2000] EWHC 205 at 188.

*Van Uden Maritime BV v Kommanditgesellschaft* [1999] 2 WLR 181 at 98,211.

*Vynoir's Case* [1609] 8 Co Rep 81 at 25.

*Welex AG v Rosa Maritime Ltd (The Epilson Rosa)* [2003] EWCA 938 at 170.

*Wellington v Mackintosh* [1743] 2 568 at 24,248.

*West Minister Chemical & products Ltd v Eichololz & Loeser* [1954] 1 Lloyd's Rep 99 at 248,250.

*West Tankers v Allianz* [2007] UK HL 4 at 66,112.

*Westcare Investments Inc v Jugo import Holdings Co Ltd* [2000] QB 288 at 70.

*Wicketts and Sterndale v Brine Builders* [2001] CILL 1805 at 66, 120.

*Willcock v Pickfords Removals Ltd* [1979] 1 Lloyd's Rep 244 at 28,250.

*Wills-Knighton Medical Centre v Southern Builders Inc*,392.2d.505 (La.Ct.App.1980) at 57.

*Yasudda Fire & Marine Insurance Co of Europe Ltd v Continental Casualty Co*, 37 F.sd 345 (7th Cir 1994) at 217.



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# CHAPTER ONE

## 1 Introduction

Provisional measures play an important role in England and Wales,<sup>3</sup> and in many legal systems, in facilitating the traditional litigation process, as well as arbitration.<sup>4</sup> The role that provisional measures play in arbitration varies widely from country to country. There are three systems across the globe that provide provisional measures; namely, the court model, the free choice model and the court subsidiarity model. The first one is where the right to award provisional measures is reserved wholly for the arbitral tribunal;<sup>5</sup> the second model is where the right to award provisional measures is reserved wholly for the courts;<sup>6</sup> and the third is where both the arbitral tribunal and the courts hold these powers.<sup>7</sup> It should, however, be noted that in all three categories, the supremacy of the arbitral tribunal is more profound, and that the role of the courts is subsidiary. This thesis will consider the English Subsidiarity model, where provisional measures are first sought from the tribunal. This means that unless the parties give the arbitral tribunal such powers as to render the courts' role in interim proceedings clearly obsolete, then the courts should generally be in position to take on a role in respect of interim measures in international arbitration whose seat is in the United Kingdom. The United Kingdom approach to the interaction in arbitral provisional measures between the courts and arbitral tribunal itself is

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<sup>3</sup>Scotland is not a party to English Arbitration Act 1996 or rules on the grounds that it has an independent Scotland Arbitration Act 2010. Hence the title of the thesis suffices for clarification.

<sup>4</sup> See UNCITRAL, Working Group II (Arbitration and Conciliation), 36th Session, New York, 4-8 March 2002.

<sup>5</sup> See Article 26 of the UNCITRAL, which provides that at the request of a party to the arbitration procedure, the tribunal, "*may take interim measures it deems necessary in respect of the subject matter of the dispute*", thus giving the tribunal wide discretion. When a dispute occurs, its resolution is also complex and takes time; therefore, it is more than often essential to be able to take interim measures during the procedure itself. During such procedure, the contract is still effective. Therefore, the arbitrator designated to intervene in this tense atmosphere must act in order to preserve the effect of the contract.

<sup>6</sup> See EAA 1996, s. 44 (3), 44 (4) 44 (2), 44 (1) and 44 (5).

<sup>7</sup> See Mustill LJ, in *CoppeeLavalin v Ken-Ren Chemicals and Fertilizers Ltd* (in Liquidation in Kenya) where he said that "there is a plain fact, palatable or not, that it is only the courts possessing coercive powers which can rescue the arbitration if there is danger of foundering, and that the only court which can possess these powers is the municipal court of the individual state." Indeed this means that those who consider applying for provisional measures in arbitral proceedings should not only consider the rules of arbitration or arbitration agreement but also the *lex forum*, which would play a vital part if the need for the measures arises.

effectively a system of court subsidiarity such that the court is seen as the last resort.<sup>8</sup> Indeed the power to grant provisional measures is in the first place allocated to the tribunal, hence there is an obligation for the parties to opt in, and courts should take a back seat.<sup>9</sup>

The development of arbitral provisional measures has been influenced by trade practice but more so by parliament and by courts. The modern economy is distinguished by the phenomena of provisional measures central to forces of commercial transactions or maritime. It became increasingly clear that the position of arbitration in the middle nineteenth century in England was less than satisfactory. Indeed a survey was carried out to determine the working of the Arbitration Act 1996,<sup>10</sup> and to see whether, in light of the ten years' experience, any revisions to it might be usefully be proposed. The survey concluded that no amendment was desirable. The author does not agree with the results of the survey, on the grounds that the survey was not conducted on the efficacy of provisional measures in England but was a comparative analysis with other jurisdictions. In addition, its seventeen years since this survey was carried out before even rapid changes to European position on provisional measures were granted in England. The trends of commerce change within a little framework, and in order for provisional measures to be effective another survey needs to be carried out every ten years so as to promote efficacy.

Provisional measures are grants of temporary relief aimed at protecting parties' rights pending the final resolution of disputes. Provisional measures emanate from the contractual obligation of both parties to arbitration. Parties who go to arbitration expect the arbitral tribunal to execute its duties expeditiously and effectively, whereby all the provisional measures are given effective enforcement in order to make the mechanism of dispute resolution a meaningful one. The contracting parties are aware of the need to protect their contractual obligations, in litigation over civil matters. Indeed they choose arbitration convinced to that it is the dispute mechanism that is best suited to any disputes whether existing or future.

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<sup>8</sup> See English Arbitration Act 1996, s. 44 (1), which provides that “ *unless otherwise agreed by the parties, the court has for the purpose of and in relation to the proceedings the same powers for making orders about the matters listed below as it has for the purpose of and in relation to legal proceedings.* ”

<sup>9</sup> In *Re Q's Estate* it was held that even if the arbitration clause states that the arbitral tribunal is to have exclusive jurisdiction, this is not enough to exclude the courts' jurisdiction with regard to interim measures.

<sup>10</sup> See Bruce Harris, 'Report on the Arbitration Act 1996', *Arbitration International*, Vol.23 (Kluwer 2007), 437-460.



Many other legal jurisdictions recognize the procedural necessity of provisional measures as a complement to final awards, in the context of international arbitration. Provisional measures may be crucial due to the special risks involved in international disputes. Often the efficacy of the arbitration process as a whole depends on interim measures that may prevent the opposing parties from destroying or removing assets so as to render the final awards meaningless. Indeed, provisional measures are designed to minimise loss, damage or prejudice during the proceedings, or to facilitate the enforcement of awards. There have been many comments regarding the alleged ineffectiveness of the tribunal when it comes to enforcement of provisional measures, that have resulted in tremendous pressure from both the legal and business circles to reform the arbitration laws in regard to provisional measures, and this project aims to find solutions to this. A number of legal studies have been published and several research projects have been conducted in the field of arbitration, but no particular attention has been paid to English arbitral provisional measures. This research examines arbitral provisional measures that researchers on arbitration have not examined or discussed in their papers and articles, and thus the author attempts to base his assertion of originality of this research on his discussion in different chapters.

### **1.1 Initiation of arbitral proceedings (provisional measures)**

It is of great importance that the thesis demonstrates how arbitral proceedings are initiated, in order to be able to show how provisional measures are important in arbitral proceedings. It is paramount for one to know who initiates arbitral provisional measures and what the request for such measures should contain in order to be successful before the arbitral tribunal. The problem is that no clear set of standards has been advanced with regard to this contentious issue.

Arbitral provisional measures are generally initiated through a party request or sought by a party to the arbitration agreement.<sup>11</sup> Any circumstances in which provisional measures would be required but where no party makes a request, are difficult to conceive. This view that a request should be party-oriented is confirmed or adduced by the English Arbitration Act 1996,<sup>12</sup> and the ICC Rules.<sup>13</sup> The issue is that by parties seeking provisional measures from the tribunal, the

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<sup>11</sup>See EAA 1996 s. 39 (1).

<sup>12</sup> Ibid.

<sup>13</sup>ICC Arbitral Rules 1931.

tribunal acts as a facilitator to the proceedings in order to maintain the doctrine of party autonomy or to see that the parties perform their contractual obligations which are enshrined in the arbitration agreement.<sup>14</sup> Ali Yesilirmak in his book, “*Provisional Measures in International Commercial Arbitration*”, asserts that twenty-nine sets of rules surveyed confirm the view that a request should be party-oriented.<sup>15</sup> It should be noted that some international rules occasionally provide authority to the arbitral tribunal to grant provisional measures without party-oriented mechanism.<sup>16</sup> It should be noted that the UNCITRAL (United Nations Commission on International Trade Law) Model Law requires the claimant to make a request for any provisional measures in order to maintain the principle of party autonomy.<sup>17</sup> Indeed the English Arbitration Act 1996 has given effect to the Model Law in s 30 (c).<sup>18</sup>

Under the doctrine of party autonomy, the parties are free to seek provisional measures,<sup>19</sup> if they need them as a matter of arbitral agreement.<sup>20</sup> The main purpose of empowering the arbitral tribunal to grant such a request upon its own initiative in international commercial arbitration is perhaps to avoid aggravation of a dispute, and thus to enable the arbitral tribunal to proceed with the arbitration smoothly, effectively and efficiently.<sup>21</sup> As noted above, some rules do not deal with the issue of requests for a measure at all, so it would be safe to assume that in principle a party should request a measure, due to the doctrine of party autonomy. The author argues that if both parties make a joint request for the same measure, there is a strong incentive for the tribunal to comply with the request or grant that request as a matter of urgency.

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<sup>14</sup> See EAA 1996, s. 1 (a) which provides that the objective of the tribunal is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. See s 1 (b) which provides that the parties are free to agree on how their disputes are to be resolved.

<sup>15</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law International 2005) p167.

<sup>16</sup> See ICSID Article s 39 and 47. See Chartered Institute of Arbitration Rule 7 (9) and Statute of International Court of Justice Article 41.

<sup>17</sup> Model Law Article 17.

<sup>18</sup> S. 30 (C) provides that the tribunal may rule on any matters within its jurisdiction subject to party autonomy.

<sup>19</sup> *Ibid* s. 39.

<sup>20</sup> See Article 244 of the EC Treaty, and *Dutch Building Companies v Commission Case T-29/92* [1992] ECR.

<sup>21</sup> See *Holiday Inns SA and others v Morocco (ICSID Case No. ARB/72/1) (Decision unreported)*, and *Maffezini v The Kingdom of Spain* (Procedural Order No.2, 28 October 1999), extracts published in XXVII YCA 17 (2002), see decision of the tribunal 14 June 1993, 4 ICSID Rep p328.

### 1.1.1 The composition of a request

An arbitral request should contain or specify the rights to be preserved,<sup>22</sup> the measures requested and the circumstances that necessitate such measures.<sup>23</sup> One may argue that without a good cause no measure would probably be granted by the arbitral tribunal.<sup>24</sup> Where the request does not contain any of the above elements, the tribunal may undoubtedly require the relevant party to supply further information concerning the elements prior to making its decision. Under English Law such request needs to be in writing.<sup>25</sup> The request should be dealt with in a speedy manner as required in order to preserve the rights of the party.<sup>26</sup> There is no delay in request for an arbitral provisional measure since the arbitral tribunal has the ability to distinguish whether or not the request is flagrant. This thesis does not support the notion of Yesilirmak,<sup>27</sup> that the request should be made orally during the arbitral proceedings. If the request is made in such a manner it would be very difficult for the respondent to examine in it the proceedings. In addition, Yesilirmak does not take into account that arbitral requests are international and in order to protect this national status there is a need to for any request to be in writing and not in the process of the proceedings as this would delay the arbitral proceedings. Thus it is best to apply for such at the outset of the case.

### 1.1.2 Duration of a request for provisional measures

An arbitral jurisdiction has a temporary element. An arbitral tribunal is empowered to issue or grant provisional measures, after its formation, upon the commencement of proceedings or during the course of arbitral proceedings at any stage. The arbitral tribunal has, however, no power to grant provisional measures once it becomes “*functus officio*”.<sup>28</sup> An interim measure could be extended further to cover uncertainty during the time when a deadline expires for filing an action to set aside the final award.<sup>29</sup>

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<sup>22</sup> See ICSID Rules Article 39 (1) which provides guidance where the rules are silent.

<sup>23</sup> See ICJ Rules Article 66 (1).

<sup>24</sup> See Capani, Award 23 January 2002.

<sup>25</sup> See English Arbitration Act 1996.

<sup>26</sup> See ICSID Rule 39 (2), which provides that a request for provisional measures shall have priority. See the Court of Arbitration for Sports Arbitration Rules, Article 37; see also ECJ Rules Article 66 (2).

<sup>27</sup> Ali Yesilirmak, Provisional Measures In International Commercial Arbitration (2005) Kluwer Law International) 169.

<sup>28</sup> See *ibid* at 52.

<sup>29</sup> See ICSID Arbitral Rules, Rule 9 (4).

Provisional measures, as the term suggests, are intended to have only a provisional effect pending the final resolution of the dispute. They are not intended to have *ares judicata* effect. Such provisional measures may be revoked or finalised prior to or in the final award.

Thus the duration of a provisional measure has a temporary element. An arbitral tribunal is empowered to issue a measure, after its formation, upon the commencement of arbitral proceedings or during the course of its proceedings. The tribunal has no power at all to grant provisional measures once it becomes "*functus officio*".

The main effect of a provisional measure is possibly to extend further to cover uncertainty during the time when a deadline expires for filing an action to set aside the final award. It should be noted that the final award by the tribunal could contain a ruling reiterating the earlier provisional measure or amending or revoking such a measure. It should, however, be noted that even prior to the granting of a final award, under changed circumstances or in accordance with new facts, a need may arise to amend, modify or revoke the provisional measures previously granted.

In such circumstances, the form of the measures becomes the focal point for determining whether such revocation could be made. A number of arbitral tribunals do exercise their authority to revise or revoke their provisional measures.

Although courts and tribunals have tried to advance the prerequisites of commencing a request and to specify who and what requirements are needed for one to be granted a request,<sup>30</sup> the law is still ambiguous both domestically and internationally. Commentators on this topic-for example, Yasri, Gary Born, Hunter have not yet come up with a classic solution to this ambiguity in the law. The English Arbitration Act 1996,<sup>31</sup> which is classed as a beneficial turning point for arbitration in England, does not clearly and explicitly express who should initiate or commence a request, what conditions the tribunal should take into account in considering a request from the parties, and the duration of such request, given that each case is judged on its merit. Under the international arbitral rules, for example, the International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), the Court of Arbitration for Sports Rules (CAS Rules), the Swiss Rules

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<sup>30</sup> See Articles 4 and 6 of the Geneva Convention of 21 April 1961.

<sup>31</sup> See DAC Report February 1995.

(CCIG), and even UNCITRAL the current revision does not expressly provide solutions in regard to issues of a request for provisional measures. The English Arbitration should adopt a provision which sets or provides guidelines on what request should contain, in other words, the formality of whether it should be put in writing or presented orally during the proceedings. Since time is of the essence in commercial dealings and since provisional measures are temporary in nature, urgent reform is needed to clarify when a request should elapse after a party has sought provisional measures from the arbitral tribunal. When presenting the above problems of a request for a measure it is very important that the courts should be cautious, in order to maintain the doctrine of party autonomy. In regard to this contention it is true to assert that the arbitral proceedings will continue to be disturbed by the requests or delays may be unavoidable due to the time that the tribunal may take in reaching a conclusive decision as to whether a request should be taken into account.

## **1.2 The questions that this research aims to answer**

This research thesis aims to answer the following questions:

What procedures are to be observed and what conditions are required for granting arbitral provisional measures?

Does the arbitral tribunal process, as the best dispute mechanism in granting provisional measures, meet all the expectations of the parties or business expectations in international commerce today in granting all arbitral provisional measures?

Which measures can be considered as interim measures and as falling within relevant European law?

When does a national court have jurisdiction to grant measures within European member states?

How are interim measures that are enforced in a member state different from those in the state in which they have been granted?

To what extent does the doctrine of party autonomy provide arbitral tribunal jurisdiction to grant provisional measures?

Does the intervention of municipal courts support the arbitral proceedings?

To what extent can arbitral provisional measures be enforced in England and elsewhere?

To what extent does the current English Arbitration Act 1996 and its implementation provide a wide scope to the arbitral tribunal with regard to provisional measures?

### **1.3 Problem**

The thesis is a study of how the England and Wales, with exclusion of Scotland,<sup>32</sup> has become heavily focused upon maintaining the balance between courts and arbitral tribunals in granting provisional measures. This balance between courts and tribunals has led to conflicting decisions. The English Arbitration Act 1996 has or provides fewer powers and procedures in regard to provisional measures. The Report of the Departmental Advisory Committee on Arbitration,<sup>33</sup> which recommended that the courts should refrain from arbitral proceedings has not been implemented by the Arbitration Act. The other serious problem is that even if the provisional measures are granted by the tribunal, there is a lacuna in the law of arbitration, as it does not explicitly state how such measures can be enforced by the tribunal either domestically or internationally; and this has been hampered by the Brussels 1 Regulation. This thesis posits that the provisions in the Arbitration Act 1996, which encourages courts, to grant provisional measures should be focused on a reformed arbitral process, hence enabling the tribunal to grant provisional measures and enforce them.

### **1.4 Aims of the Thesis**

This thesis examines the early experiences under the 1996 Act which have borne out the stated principles of the DAC or where courts have continued their willingness to intervene in a manner which became associated with the English courts under earlier legislation. The work is not an attempt to develop a new theory but simply to analyse the approach of courts and tribunals in granting provisional measures, and whether there is a need for reform.

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<sup>32</sup> See Arbitration (Scotland) Act 2010.

<sup>33</sup> DAC Report, February 1995.

The purpose of the research is to promote awareness of some of the jurisdictional difficulties that cause tension between the courts and tribunals in granting provisional measures, and which if allowed to continue might seriously reduce the utility of international arbitration in settling disputes, and even jeopardise the future of the remarkable arbitral institution in England and elsewhere. The study aims to provide legislators with an opportunity of comparing their own system with other systems and to clarify any inadequacies in the Arbitration Act and Rules in England and Wales.

The thesis aims to examine the position of English provisional measures in respect of the Brussels 1 Regulation, in order to adduce how it hampers the granting and enforcement of arbitral provisional measures in England and within European member states.

The role of the courts in arbitral proceedings should be subsidiary, supporting the parties' wishes (party autonomy) of having their disputes resolved. The courts should only have supplementary, palliative and corrective powers.<sup>34</sup> Judicial involvement is not inconsistent with the interest of the parties, as the courts provide useful assistance, such as enforcing provisional measures, and granting measures out of arbitral jurisdiction (or example, freezing orders). The thesis is not an attempt to examine all the provisions of the Arbitration Act 1996; rather it explores those areas where arbitration may be called into question or may have to be subject to judicial intervention. Through an in-depth analysis of cases decided, arbitral provisional measures or interim measures will be considered. The issue is how to reconcile on the one hand, respecting the wishes of the parties to use a private system of dispute resolution, and on the other, the interests of the state in supervising that process.

### **1.5 The contribution of this study**

The research provides a general understanding of how provisional measures are perceived in England, as well as to investigate the inadequacy of the current trends of the provisional measures 'framework. The study is the first to critically address the role of courts and arbitral tribunals(subsidiary model) in granting provisional measures in England and Wales. The thesis, through examination of legislative developments, tries to remedy the legislative short-comings and mistakes and fills in the legal gaps.

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<sup>34</sup> This will be discussed in the chapter on the judicial involvement in arbitral proceedings.

The study tries to provide a clear position of provisional measures between courts and arbitrators, from both a legal and practical perspective, in order to open door for researchers and commentators of laws to contemplate and devise the nature of provisional measures. They can then identify the effects on the final awards before enforcement. By identifying the problems and offering solutions, the people who chose arbitration will be liberated from the uncertainties and problems they face when one seeks provisional measures from the two jurisdictions, since the tension that may arise is already provided by solutions in the thesis.

The research shows that according to party autonomy doctrine as the main source of arbitral tribunals, all provisional measures should be exclusively under the jurisdiction of the tribunal, with limited intervention of the courts for enforcement. This theory adduces that any recourse to courts breaches the main objective of parties to submit to arbitration. Indeed, this provides advice for the development of legislation consistent with party autonomy, which in turn leads to confidence in the parties and harmonizing the process. The willingness to interfere in the arbitral process by the courts as evidenced by s.9 and 30, public policy limitations and Brussels convention, sections 67 and 68 are still problematic. If the courts are going to achieve the stated principles of DAC and to continue to make London a leading arbitral centre, then courts will need to think through their approach on these matters, to avoid taking arbitration back to an earlier era of judicial intervention. The thesis demonstrated that arbitration is the vehicle to do away with a dispute between the parties as comprehensively and as quickly as possible. Therefore, once a dispute on the fulfilment of an agreement has led to the initiation of arbitral proceedings, the arbitrators should undertake their best effort to consider all disputes arising from that agreement in order to bring a solution enabling the parties to resume a normal relationship as their business requires.

## **1.6 Methodology**

In order to deal with the questions of research,<sup>35</sup> a doctrinal methodology<sup>36</sup> will be used.<sup>37</sup> The word “doctrinal” is derived from the Latin noun “*doctrina*” which means instructions,

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<sup>35</sup>Doctrinal methodology is specifically directed towards solving legal problems and normally includes: assembling relevant facts; identifying the legal issues; analysing those issues with a view to searching the law; reading background materials (for example: legal encyclopaedias, text books, law reform documents, policy papers, loose



knowledge or learning. Doctrinal research methodology is the systematic and ordered exposition of legal science.<sup>38</sup> Legal science is the exposition of legal doctrine in the works of juristic commentators,<sup>39</sup> or the allocation and analysis of primary documents (arbitral awards, cases, legislation) and secondly ones (text books, international conventions, arbitral rules, journals, government reports, seminars, law reform documents, policy documents and media reports) in order to establish the nature and parameters of the law.<sup>40</sup> Doctrinal research includes the intricate step of reading,<sup>41</sup> analysing and linking the new information to the known body of law;<sup>42</sup> in other words, it is centred on reading and analysing the primary sources of legal doctrine and secondly sources.<sup>43</sup>

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leaf services, and journal articles; and allocating primary sources, mainly legislation or delegated legislation and case law, which have all to be synthesised in context, before coming to a tentative conclusion.

<sup>36</sup> It should be noted that England is a Commonwealth country which established the doctrinal methodology, developed from the doctrine of precedent in the 19<sup>th</sup> and 20<sup>th</sup> century. It lies at the basis of common law and is the core legal research method. See declaratory Theory, Law as science; formalism, strict legalism, legal realism and ant formalism. See Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)', (2007) 74 (2) University of Chicago Law Review, 435,437.

<sup>37</sup> See Frederick Schauer cited in Baghoomians (2009) 31 (3) Sydney Law Review 499,499.

<sup>38</sup> Doctrinal research provides the exposition of rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future developments or recommends changes to any law rules found wanting.

<sup>39</sup> See Nigel Simmonds, 'The Decline of Judicial Reason: Doctrine and Theory in the Legal Order' (Manchester University Press, 1984) at 30.

<sup>40</sup> See Maggie Walter, *Social Research Methods* (2<sup>nd</sup> edn, Oxford University Press 2010) at 485. See Diana Hacker and Barbara Fister, *Research and Documentation Online*, <<http://www.dianhacker.com/resdoc/history.html>> accessed 17 March 2012.

<sup>41</sup> See Council of Australia Law Deans, CALD Statement on the Nature of Research (May and October 2005), <<http://cald.anu.edu.au/docs/cald%20statements.pdf>> accessed 17 March 2012.

<sup>42</sup> In other words, doctrinal research is two-part process of allocating the law or doctrine and then analysing the text. It has both qualitative and quantitative elements within it, where by it allocates the sources and synthesises the law and applies the law to the facts in a context that is subjective. It requires extensive knowledge, precise judgement, detailed description and the ability to achieve a high degree of analysis and critique. See Richard Posner, 'Conventionalism: The Key to Law and Autonomous Discipline' (1988) 38 University of Toronto Law Journal 333,345, quoted in Richard Schwartz, 'Internal and External Method in The Study of Law' (1992) 11 (3) Law and Philosophy 178, 185.

<sup>43</sup> See Christopher McCrudden, *Legal Research and Social Sciences* (2006 October) Law Quarterly Review 632,633, where he defines doctrine as a study of law using reason and logic and argument and the primacy of critical reasoning based around authoritative texts. See Oliver Wendell Holmes Jr, *The Common Law*, (Project Gutenberg 2000), at 210 <<http://www.gutenberg.org/dirs/etex00/cmnlw10.txt>>, accessed on 10 October 2013.

## 1.7 Previous studies

In addition, the thesis examines the views of commentators and the books of prominent writers: for example, Gary Born, who has addressed the issue of provisional measures partially. Ali Yasilirmak, a prominent scholar on provisional measures,<sup>44</sup> Redfern and Hunter,<sup>45</sup> who have addressed the topic of provisional measures in an international dimension, without focusing on England as central, Merkin on arbitration,<sup>46</sup> Eva Lein,<sup>47</sup> and Adrian Briggs<sup>48</sup> The present study is two-pronged, as every problem confronted is considered both from a theoretical point of view and a practical one. Within the theoretical point of view, there will be a trace of the various solutions proposed by writers.

## 1.8 Limitations of this research

There is no definition in international conventions such as the New York one<sup>49</sup> to show what provisional measures are. In addition, the English Arbitration Act 1996 does not explicitly provide a clear definition of them,<sup>50</sup> and in fact the provisions are too limited in scope for one to argue in favour of the arbitral tribunal, although sections 38 and 39 of the 1996 Act provide the arbitral power to grant provisional measures. Moreover, there are no clear guidelines to provide for the standards of granting provisional measures:<sup>51</sup> such standards are all developed from the municipal courts, which the tribunals do not want to intervene in, due to party autonomy.

Indeed, few books have been drafted on the topic of provisional measures. Most of the authors of arbitral books provide only a sentence in regard to provisional measures, apart from Yesilirmak,<sup>52</sup> who tries to explore the issue of provisional measures, but the irony is that his materials focus on provisional measures internationally with few references to UK standards on provisional measures. He does not address the scope of the provisions in the UK and the

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<sup>44</sup> See Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005).

<sup>45</sup> Alan Redfern and Martin Hunter, *International Commercial Arbitration* (3rd edn, Sweet & Maxwell 1999).

<sup>46</sup> English Arbitration Act 1996 (Informal 2009).

<sup>47</sup> See *The Brussels Regulation Reviews Proposal Uncovered* (British Institute Of International and Comparative Law 2011).

<sup>48</sup> See Adrian Briggs, *Civil Jurisdiction & Judgements* (5<sup>th</sup> edn, Lloyds Press 2009).

<sup>49</sup> See New York Convention 1958.

<sup>50</sup> See Robert Merkin, *Arbitration Act 1996* (4<sup>th</sup> edition Informal 2008) at 30; see also Flannery & Merkin, *Arbitration Act 1996* (5<sup>th</sup> edn, Routledge, to be published 2014) at 20.

<sup>51</sup> See Wendy, *Enforcement of Provisional Measures in Europe* (Oxford University Press 2009) at 130.

<sup>52</sup> See Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) at 4.

ambiguity in regard to the powers of arbitral tribunals to grant provisional measures, nor does he highlight, or take into account, the reality of arbitral proceedings in the UK; he only looks at the theoretical perspective and not the actual nature of provisional measures in the UK. Furthermore, he does not acknowledge the limitation of the scope of the Arbitration Act with reference to the European Court of Justice Rulings and the Brussels I Regulation.<sup>53</sup> In addition, given the nature of confidentiality in arbitral proceedings, there is a problem of accessing arbitral awards in regard to provisional measures.

There is an attempt in this research to limit its scope to arbitral provisional measures in England and Wales, although the role of the tribunal is too wide as a dispute mechanism. There is no consensus as to which category should be adopted; however, many experts have accepted the party autonomy as the best mechanism for provisional measures, with the support of the courts. The thesis aims to show how such co-operation promotes efficacy, but how at times there is a collision due to the two jurisdictions in a proceeding.

Many researchers have dealt with the enforcement of arbitral awards, but there is no previous study carried out on the topic “*A Critical Analysis of Provisional Measures in England and Wales.*” Hence this research will be a contribution to knowledge in the areas of provisional measures in arbitral proceedings.

Another limitation is the time frame in carrying out the research, which is subject to mitigating circumstances. The arbitration seminars I attended at the Institute of Comparative Law in London, and at the George Washington College of Law, were helpful; however, they were mostly conducted by barristers, solicitors, arbitrators and professors, and were too expensive for me, which at times impeded my attendance.

## **1.9 Definition**

Although provisional measures are widely known and enforceable in many legal jurisdictions,<sup>54</sup> there is no widely explicitly accepted definition<sup>55</sup> of the concept of provisional measures or that

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<sup>53</sup>44/2001.

<sup>54</sup> See Lawrence Collins, *Provisional Measures and protective Measures in International Litigation* (1992) at 9-23. See English Arbitration Act 1996 from the preamble and the DAC Bill of the Act 1995.

<sup>55</sup> See The Commission Communication of 26 November 1997 noted that ;there is no definition of protective measures in the current version of the current Brussels Convention. see Case C- 391/95 [1998] ECR I-7091 [1999] Int Lit Procedure.

of interim measures. In other words, there is no clear uniformity in respect of the concept of provisional measures in both public law and private international law. Furthermore, there is no definition of that concept or its scope found in international commercial arbitration. A provisional measure is, broadly speaking, a remedy that is aimed as safeguarding the rights of the parties to a dispute pending its final resolution.<sup>56</sup> The new UNCITRAL revised version of the Model Law (15 October 2010),<sup>57</sup> defines provisional measures as:

“ any temporary measure by which, at any time prior to the issuance of the award by which the disputes is finally decided, the arbitral tribunal orders a party, for example and without limitation to:

- (a) Maintain or restore the status quo pending the determination of the disputes;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause,(i)current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

The European Court of Justice in the case of *Reichert and Others v Dresdner Bank*,<sup>58</sup> defined provisional measures as a mechanism intended to preserve a factual or legal situation so as to safeguard rights.<sup>59</sup>

Provisional measures can be described as measures intended to maintain a legal or factual situation in order to safeguard rights an application for the recognition of which has been made to the court with jurisdiction as to the substance of the matter.<sup>60</sup>

The main objective of provisional measures in arbitral proceedings is that parties' rights are not damaged or affected due to the duration of the adjudication process.<sup>61</sup> In other words, the aim of

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<sup>56</sup>Under UNCITRAL Model Law Article 17 (2) (b) it includes even anti-suit injunctions, which are alien to many legal systems.

<sup>57</sup> See UNCITRAL Model Law 2006 Article 17.

<sup>58</sup> Case C261/90 [1992] ECR I-12149 para 34 see also *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation*, 936 F2d 1019 ( 9<sup>th</sup> Cir 1991); and Julian D M Lew, 'ICC Commission on International Arbitration' , (1988) 91 Int'l Arb Bull 37.

<sup>59</sup> 2010 Arbitration Rules,Article 26 (2).

<sup>60</sup> W. Kennett, *Enforcement of Judgements in Europe*, (Oxford University Press 1999) at 150.

provisional measures is to facilitate the effectiveness of the judicial or arbitral protection by providing provisional measures which complement the final award. The European Court of Justice (ECJ) defines provisional measures as those judicial measures that are characterized by efficiency and speed, and aimed at protecting the future enforcement of a judgment.<sup>62</sup> The fundamental basis of provisional measures is based upon the existence of the called “*fumus boni iuris*” (an apparent existence of the right), and by “*periculum in mora*” (the risk of imminent infringement of the right). It is under such that tribunals and courts should be able to grant provisional measures to avoid some anticipatory effects of the judgment. The author defines provisional measures as a restitution remedy to comply with the terms and procedures of parties’ arbitration agreement.

### **1.10 Terminology**

In international commercial arbitration, provisional measures are referred to as protective measures,<sup>63</sup> interim measures of protection,<sup>64</sup> interim relief,<sup>65</sup> or conservatory measures,<sup>66</sup> preliminary measures, preliminary injunctive measures, precautionary measures and holding measures,<sup>67</sup> or urgent measures.<sup>68</sup> The terms ‘provisional measures’ and ‘protective measures’ are not also defined by the Arbitration Act but they courts render there characteristics to define the terms.

### **1.11 Characteristics of arbitral provisional measures**

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<sup>61</sup> See Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press 2008) at 101.

<sup>62</sup> See G Cuniberti, *Les Mesures Conservatoires* (Paris 2000) at 26.

<sup>63</sup> The terms ‘provisional measures’ and ‘protective measures’ will be used interchangeably throughout this thesis.

<sup>64</sup> See Emmanuel Gaillard & John Savage (eds), *Fourchard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 1303.

<sup>65</sup> See UNCITRAL Article 26.

<sup>66</sup> See International Arbitration Rules 1996 of the Chamber of National and International Arbitration in Milan –Italy, Article 14.

<sup>67</sup> The term means the use of coercive powers by the courts to help arbitral proceeding where orders (for example attachment orders, freezing orders, disposing of property, production of documents, payment security on account) are not conservatory.

<sup>68</sup> See EAA 1996, s. 39.

It may not be very simple for one to list all the characteristics of provisional measures, and this is because of the difficulty that lies in the types of provisional measures. There are, however, certain essential characteristics of provisional measures that this thesis will address. The first characteristic is that applications for provisional measures and the existence of a dispute of which already or will be sought from the same or a different forum.<sup>69</sup> In other words, there has to be a dispute to be litigated. This means that provisional measures should only be available where final protection is sought. Indeed, such a characteristic implies that an interim measure can never become “*res iudicata*”, and that the effects are limited to the relief given in the main trial. In case law of the European Court of Justice, interim relief is considered to be an aspect of the right to effective judicial remedies and to a fair trial for the protection of freedoms and rights guaranteed by the European law.<sup>70</sup>

The second characteristic is that provisional measures are temporary in nature. The measure is subject to the tribunal’s final adjudication. A provisional measure is temporary and only needed for a specified limited duration,<sup>71</sup> until the final protection is granted or award. In other words, provisional measures preserve the parties’ right pending the final award. Provisional measures do not exceed the final relief, since they aim to complement which is ancillary to the final award. Thirdly, they are only granted where there is a real risk involving in waiting for the final award; in other words, where the property may be dissipated by the defendant or removed to a safe haven, which will render the final award meaningless and useless, since the property would have been sold by the defendant before the final award. For the tribunal or courts to grant such measures there must be a degree of urgency and the criteria of both the courts and the tribunal have to be fully satisfied in order for any measure sought by the party to be granted.<sup>72</sup>

Fourthly, provisional measures could be reviewed, modified or terminated prior to the final award or final determination of the dispute, where circumstances of the case or progress of the

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<sup>69</sup>Ibids.39 (3).

<sup>70</sup>See the judgment of the ECJ in relation to interim relief granted by national Judges, 19 June 1990, Case C-213/1989.

<sup>71</sup> See Bernardo Cremades, 'The Need for Conservatory and Preliminary Measures', (1999) 27 (5) Int'l Bus Law 226; also see Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration*(3<sup>rd</sup>edn, Oceana Publications 2000),460.

<sup>72</sup> See EAA 1996 s.38 (3), and s.39 (2).

arbitral proceedings demands. In addition, there will be no need for such provisional measures if the final decision on the merits satisfy all the interests of the parties in a dispute.

Provisional measures may be granted *ex parte*; in other words, where the defendant has not been served with the document. Although *ex parte* measures are acceptable in England they aren't permitted under the Brussels Regime among the signatory states.<sup>73</sup> It should, however, be noted that because of due process considerations, on the measures should be given following a previous *ex parte* decision.

Another characteristic is that arbitral provisional measures are not self-executing; in other words, they lack coercive power to enforce decisions, and in most cases courts play a passive role in order for such measures to be enforced. In addition, provisional measures are limited to parties to the arbitration agreement, and do not apply to third parties, such as banks, which find themselves in the middle of the disputes when attachment orders are being granted and enforced.

In **Chapter two** (historical legislative framework regarding provisional measures), the historical developments of tribunals and courts with regard to the power to grant provisional measures will be examined; such examination will go to the roots of some of the problems and uncertainties about arbitral provisional measures. The examination will enhance an understanding of some of the trends concerning arbitral provisional measures and show how the developments have shifted the “doctrine of rivalry” to mutual respect or the subsidiary position of courts to arbitral proceedings.

**Chapter three** examines the doctrine of party autonomy under the current English Arbitration Act 1996. Party autonomy, as evidenced in the arbitral agreement, is the essence of arbitration.<sup>74</sup>

The thesis will examine the theories advanced in support of this doctrine as the main source of arbitral power to grant provisional measures; namely, the doctrine of competence, which argues that since parties vest all the powers in the tribunal, they also have the power to rule on their

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<sup>73</sup> See Alan Redfern and Martin Hunter, 'Arbitration and the Courts, Interim Measures of protection – Is the Tide about to Turn?', (1995) 30 Texas Int'l Law Review, 71-79.

<sup>74</sup> See Peter Nygh *Autonomy in International Contracts* (Clarendon Press 1999) at 1.

jurisdiction.<sup>75</sup> This notion has been supported by international jurisdictions, arbitral rules and conventions, mainly the New York and UNCITRAL. Other theories are contractual theory, jurisdictional theory and separability theory.

With the enactment of the English Arbitration Act 1996,<sup>76</sup> containing a special section and provision with regard to the power of the tribunal to grant on all arbitral matters, was a landmark for arbitral jurisdiction. The doctrine of party autonomy established new era where the jurisdiction of the tribunal was given autonomy in all matters of current or future disputes.

The powers of the tribunal that provides jurisdiction are derived from the arbitration agreement, which confers powers on the tribunal to grant or rule on its jurisdiction.<sup>77</sup> The word jurisdiction means any issues subject to arbitration agreement. The principle of party autonomy in arbitral proceedings dictates such a conclusion. The tribunal is entrusted, for instance, with finally determining the parties' rights. It is because of the doctrine of party autonomy that one may argue that all provisional measures should be within arbitral jurisdiction. However, given the scope of party autonomy not all provisional measures are granted under the party autonomy doctrine. The tribunal is faced with some shortcomings; for example, the Brussels Regulation limits the scope of arbitral power of granting provisional measures. In this chapter, therefore, the author aims to offer solutions or suggest reforms in order to enhance arbitral provisional measures.

**Chapter four** focuses on the procedures and conditions for provisional measures. The determination of such standards is crucial to arbitral proceedings. Although the arbitral tribunal should be the best forum in granting or seeking provisional measures, there are strict conditions for a tribunal which affect its powers to grant provisional measures. Such conditions are more examined than litigation, hence a platform that sets the arbitral jurisdiction as the best dispute mechanism in settlement of any provisional measures. Such standards have been developed by case law or the courts in order to safeguard parties from serious injuries that may cause delays in

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<sup>75</sup>See A Redfern and M Hunter (eds) *International Commercial Arbitration* (2<sup>nd</sup> edn, Sweet & Maxwell 2004) at 146 paras 1-6.

<sup>76</sup>Arbitration Act 1996, s. 30.

<sup>77</sup>See Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 33-36.



the litigation process. Unless the tribunal sets such standards, its objectives of providing a final relief may be lost. Hence the parties may suffer greater damage or unnecessary costs. The thesis will examine both the negative and positive requirements of provisional measures.

In addition **Chapter five**, focuses on examination of the types of arbitral provisional measures. In addressing the question as to whether the arbitral tribunal can grant all provisional measures sought by the parties to the arbitration agreement, the thesis examines all provisional measures that can be granted by the tribunal as provided by section 38 and section 39 of the Arbitration Act 1996. The thesis in its examination will identify the problems of granting some provisional measures in arbitral proceedings and, with reference to other jurisdictions, will offer solutions in relation to the lacunae that have not been rectified by the arbitral laws in England,. The main types of provisional measures the thesis addresses, therefore, are: the preservation of the status quo, orders for specific performance of a contract obligations, orders for prohibiting aggravation of parties disputes, security for underlying claims, *ex parte* orders, security for payment, enforcement of confidentiality obligation, measure for later enforcement of award, and security for costs.

**Preservation of evidence provisional measures:** Indeed in all these above provisional measures, it is paramount that evidence is preserved, in order to avoid fading away due to modern technological advancement where a mouse can be used to transfer millions of useful data to the proceedings. If such evidence is not preserved, key witness statements or expert reports about proceedings might be required in order to establish the case that is to be adjudicated. The power to preserve evidence is entirely different from the power to inspect goods or collection of evidence. However, although there is a difference between the measures for preservation of evidence and collection of evidence, at times the tribunal grants them simultaneously.

**Preservation of status quo:** This form of provisional measure is aimed at the preservation of the status quo between the parties. In other words, it is a measure aimed at maintaining the contractual obligation between the two parties who entered into the arbitration agreement. Indeed it prohibits either party from terminating the agreed dispute resolution in settling disputes and it protects business status.

**Specific performance:** Like any contractual obligation in commerce. These measures facilitate performance of the agreed obligation by a party, and a failure may lead to damages or fines by the tribunal.

**Orders for aggravation of parties' disputes:** Such measures are aimed at preventing any action that would exacerbate the parties' disputes. Such orders are commonly used to maintain the reputation of a given industry or a company, where a person is prohibited from disclosing company secrets to any press or any form of media or competitor to wreck the reputation of the other company.

**Interim payment:** Such measures are direct payment to the client which may be subsequently revised on final judgments. It is a common remedy in many states. The main aim is to protect the moving party before any final arbitral proceedings to the disputes.

**Measures for later enforcement of an award:** In order to avoid assets being dissipated from the final judgment, such measures are granted in order not to put the claimant in appalling circumstances. Indeed the claimant may win but by that time all the assets have been dissipated, hence such measure aims not to leave the winning party empty-handed, with a pyrrhic victory, where all the assets to the proceedings have been lost, which commonly occurs in cases where the defendant has a joint account with other third parties.

**Chapter six** examines the role of the national courts in arbitral proceedings in the context of arbitral provisional measures. It is worth examining whether there is wide support for the role of municipal courts in arbitral proceedings. Furthermore, the thesis examines the theories that have been advanced with regard to the role and involvement of the courts in arbitral proceedings, mainly the concept of co-operation, freedom of choice approach, the principle of complimentary and subsidiary, and the doctrine of compatibility.

Stages of court involvement in arbitral proceedings will be critically examined, and the author aims to provide solutions where there is ambiguity in the law in relation to court involvement.

Finally, the thesis will discuss the role of the courts in arbitration and the disadvantages of court involvement in arbitral provisional measures.

The main problem in chapter six, is still the court involvement in arbitral proceedings, which was the main aim of the DAC,<sup>78</sup> to make the arbitral tribunal independent of its own jurisdiction. Interim measures are an interface between the arbitral tribunal and the courts,<sup>79</sup> which is both complex and ever changing, and is not the harmonious product of the agreement between the parties to an arbitration agreement. Interim measures in international arbitration involve the intersection of national law and arbitral power, and so a degree of conceptual uniformity is required if interim measures are to complement arbitral effectiveness, as they are designed to do. The interaction is brought about by the parties acting jointly. In such a context, arbitration is often said to be an alternative dispute resolution mechanism to litigation. Hence proceedings in courts which arise out of an arbitration agreement are to some extent seen as a disappointment of the intentions of the parties as disclosed in the arbitral proceedings. It should, however, be noted that excluding courts from arbitral proceedings is likely to damage the process and reputation of the arbitration system.

The fact that parties have chosen courts does not mean that their right to independence and impartiality has been waived. Since no man is an island, no dispute settlement can stand alone, and in this context the courts are called upon by the tribunal in order to support the process. The power of the courts to grant such measures or support the process is subject to arbitration tribunal permission.<sup>80</sup> Given that the tribunal lacks coercive powers, and cannot grant all provisional measures, courts provide such a service that enhances the arbitral proceedings. In addition, when someone seeks emergency provisional measures, they are unlikely to be successful in obtaining them at the commencement stage, since there is no constituted tribunal to handle the case, and the only alternative is to seek such remedies from the court in support of the arbitration process. Although the role of the courts is very important for the effectiveness of the arbitration, its jurisdiction is limited by the Brussels I Regulation.

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<sup>78</sup> DAC Report, Feb 1995 par 19.

<sup>79</sup> See EAA 1996, s. 44, 43, 66, 45 and Supreme Court Act 1981, s .37, which provide jurisdiction to courts to support arbitration.

<sup>80</sup> See Arbitration Act, s. 44 (5).

**Chapter seven** examines the enforcement of provisional measures. Arbitration is a voluntary submission to an arbitral tribunal, based on an agreement between parties. Thus, the enforcement of interim measures ordered by the tribunal first and foremost relies on the goodwill and voluntary compliance of the parties. Arbitral provisional measures have no coercive powers like municipal courts; however, they have a certain weight to their provisional awards. Parties to an arbitration agreement voluntarily abide by the provisional awards granted by the arbitral tribunals, and failure to comply means that the tribunal may impose negative sanctions against the recalcitrant party. In addition, the tribunal may impose penalties for late performance of the order or may grant damages and costs concerning some provisional measures; for example, measures related to the conduct of arbitration proceedings and measures granted to facilitate later enforcement. It should be noted, however, that given the nature of arbitration, the order may still not be complied with, and in some cases, a recalcitrant party might even sell the assets and hide in another venue.

Since the arbitrators' orders measures under s.39 mean that a final award is likely to be made, parties in practice usually comply with such orders to avoid any antagonism in the process. Indeed, arbitration depends on the co-operation of the users. In England, several enactments have been passed to support the enforcement; for example, the Arbitration Act 1996<sup>81</sup>, the Supreme Court Act 1981,<sup>82</sup> and the Civil Jurisdiction and Judgement Act 1982<sup>83</sup>. In addition, international conventions<sup>84</sup> and regulations<sup>85</sup> support the notion of the enforcement of provisional measures. Up to now there has still not been any clear and explicit convention or enactment internationally that provides an enforcement mechanism. The gravity of enforcement and how effective it would be to enhance it through enforcement will therefore be examined.

Chapter **eight** will present a holistic conclusion of the research and make recommendations from the study, with the aim of reforming the grant of provisional measures in England and their

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<sup>81</sup> Ibid s. 66.

<sup>82</sup> See Supreme Court Act 1981, s. 37.

<sup>83</sup> See s. 25 (1).

<sup>84</sup> See New York Convention 1958 Article II (3).

<sup>85</sup> See Brussels Regulation 44/2001.

enforcement across borders. Suggestions for future research and identification of the key contribution of the study will be included in this final chapter.

## **CHAPTER TWO**

### **2 The legal developments of provisional measures**

#### **2.1 Introduction**

It is important to examine how the historical legislative framework in arbitration law played such a pivotal role in empowering the tribunal with the jurisdiction to rule or grant provisional measures. London is leading hub for international commercial arbitration due to its pre-eminence as the centre for shipping, insurance, commodity and finance. Arbitration became ubiquitous in London, not least because of the volume of commercial transactions and, inevitably, disputes which occurred there.<sup>86</sup> Given that England is the mother of common law, offered a legal regime of lawyers to handle the provisional measures emanating from arbitration. Only a handful of laws dealt with the role of the courts with respect to provisional measures, as almost all arbitral proceedings were based on adversarial lines, instead of an inquisitorial approach, where arbitral tribunals could act within their competence.<sup>87</sup> The power to grant provisional measures was thus vested in municipal courts, even though the final protection of such rights was, by the arbitration agreement, sought from the tribunal. It was in the early 20<sup>th</sup> century that maritime and commercial disputes increased rapidly and thus triggered municipal courts to accept assistance from arbitral tribunals, as a mechanism necessary for effective international commercial disputes and effective distribution of justice.<sup>88</sup> Given the prominence of London as an international arbitration centre it was essential that laws developed to cater for those who chose the arbitration mechanism. Tweeddale and Tweeddale<sup>89</sup> express the developments of arbitration law in England as falling into six distinct periods. Common law governed arbitral proceedings until legislative provision was first enacted in the Statutes.9 and 10 Will3 of 1698. Then, further statutory provision was made in the Common Law Procedure Act

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<sup>86</sup> See Aleksander.

Goldstajn, 'Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects', in Peter Sarcevic (ed), *Essays on International Commercial Arbitration* (Graham & Trotman / Martinus Nijhoff Publishers 1989) at 46.

<sup>87</sup> See Civil Procedure Act 1833 and The Common Law Procedure Act 1854. See also s.16 of the Administration of Justice Act 1920.

<sup>88</sup> See Geneva Protocol of 1923 -27 and New York Convention 1958.

<sup>89</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford Press 2005) note 31 at 1.

1854 before the first specific Arbitration Act was enacted in 1889. The Arbitration Act was revised at various chronological intervals (1950, 1979) until the most recent, the Arbitration Act 1996.<sup>90</sup>

This chapter is of great importance as it discusses the historical legislative framework of provisional measures in England. It examines the roots of the problems and uncertainties about arbitral provisional measures. This examination will enhance an understanding of some of the trends concerning those measures and assist in shaping such trends. The author aims to provide some recommendations for reform in the law, since the Arbitration Act 1996, in order to make provisional measures more effective.

This chapter therefore addresses the question as to what extent the historical legal framework has shifted the power of the courts through the granting of provisional measures to arbitral tribunals (party autonomy). In order to address this question, the chapter will be divided into five sections:

Firstly, the Arbitration Act 1889; secondly, the Arbitration Act 1950; thirdly, the Arbitration Act 1979; fourthly, the UNCITRAL Model Law and finally, the Arbitration Act 1996.

## **2.2 Arbitration Act 1889 (the adversarial approach or Common Law)**

Arbitration has traditionally been the common way for dispute resolution in the United Kingdom ever since the first arbitration came in 1698.<sup>91</sup> The English merchants applied arbitration to settle their disputes according to customs and practice.<sup>92</sup> However, there were different concepts of provisional measures,<sup>93</sup> due to the case system.<sup>94</sup> The concepts were based on the historical

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<sup>90</sup> See Keren Tweeddale and Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Oxford University Press 1999) note 13 at 1.

<sup>91</sup> Some have viewed English law as being inherently superior to other legal systems due to the doctrine of *stare decisis*: for example, Lord Diplock's 1978 Alexander Lecture (45 *Arbitration* 10 at 21), as well as his speech at the House of Lords on 15 May 1978 (44 *Arbitration* 195 at 203). See also Lord Denning MR, where he said that "owing to arbitrations and cases which are stated for the opinion of the court, the commercial law of England is the commercial law of the world. Other countries do not have a procedure like ours by cases stated to get the points of law before their courts." (HL Deb 12 December 1978), 397 cc434-64.

<sup>92</sup> See s. 4 of the Arbitration Act 1889. Total autonomy of all arbitral proceedings was monopolised by the courts in England.

<sup>93</sup> See *Ibid* s. 2 and 28 which provides that it is limited to England alone.

<sup>94</sup> See Sir Frederick Pollock and Frederick William Maitland, *The History of English Law* 667 (2<sup>nd</sup> edn 1889).

proximity between the arbitral tribunals and municipal courts,<sup>95</sup> which was not a benevolent one.<sup>96</sup>

Later the Common Law Procedure Act 1854 improved the granting and enforcement of arbitral provisional measures.<sup>97</sup> The arbitration practice was then codified by the Arbitration Act 1889,<sup>98</sup> and a ‘statement of case’ was where the award or provisional measure was deemed to be made according to the law as supervised by the judicial courts. Arbitration laws were legally developed in a modern way in the 20th century through the 1934 Act, which aimed to improve the arbitration regime in the United Kingdom. The reasons for the attitude of the courts towards arbitration do not appear entirely clear, when one examines the decided cases, but these suggest that the relationship has not been a smooth one.

The first authority for this political bias was evident in the comments of Hardwicke in the case of *Wellington v Mackintosh*,<sup>99</sup> where he took the view that:

“persons might certainly have made such an agreement as would have ousted this court of jurisdiction, but the plea here goes both to the discovery and the relief; and if I was to allow the plea as to relief, I could not as to discovery, and then the court too must admit a discovery, in order to assist the arbitrators, which is not proper for the dignity of the court to do.”

This trend of an inferiority complex of municipal courts, that arbitral agreements should not oust such courts, continued in *Kill v Hollister*,<sup>100</sup> where the courts took the view that the agreement of

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<sup>95</sup> See Scruton LJ in *Re Olympia Oil & Cake Co & MacAndrew Moreland & Co* [1918] 2 KB at 771-778, where he said that judges have frequently expressed their reluctance to be invoked at all by a party to an arbitration agreement, and the jurisdiction of courts cannot be ousted by agreement by the parties.

<sup>96</sup> S. 4(1) of the Arbitration Act 1889 provided that the courts had discretion to act on grounds of vexatious and stay an action brought in defiance of arbitration agreement. There was a clear supremacy of the courts and there was no parallel in the English law of arbitration to what is known in French as “*amiable composition*,” under which the parties bind themselves to treat the arbitration award as conclusive, and are thereby debarred from resorting to the courts.

<sup>97</sup> See s. 2 and s28 of the Arbitration Act 1889, which provided the powers of the arbitrators in the schedule to the Act. This was implemented in section 8 of the Arbitration Act 1934, which provided that the court shall have “the power to making orders...as for it has for the purpose of and in relation of an action or matter...”

<sup>98</sup> The Council of the City of London set up a committee to draw up proposals for the establishment of a tribunal for domestic arbitration, in particular in transnational commercial disputes, on 5th April 1888, which was supported by the London Chamber of Commerce and Industry.

<sup>99</sup>[1743] 2 568.

<sup>100</sup>[1793] 2 Ves.Jun 129.



the parties cannot oust the court. In addition, in *Mitchell v Harris*,<sup>101</sup> it was held by the judge that:

“I have looked into many cases at law, where the subject matter of the reference became afterwards the subject of action; and it is not said in any, that a mere agreement to refer can take away the jurisdiction of any court in Westminster Hall. If an award had taken place, and was pleaded, it would be examined in a court of law; and also in a court of equity, if impeached upon an equitable matter.”<sup>102</sup>

The same procedure was evident in *Thompson v Charnock*, where Kenyon LJ said that:

“an agreement to refer all matters in difference to arbitration is not sufficient to oust the Court of Law or Equity of their jurisdiction.”

It should be noted that Lord Kenyon did not explicitly explain why this position had been adopted; rather, he treated the principle as being that an arbitration agreement could not oust the jurisdiction of the municipal courts, given the fact that his decision gave precedent in *Harris v Reynolds*.<sup>103</sup>

These quotations above may lead the author to suppose that the reasons why the courts were not so receptive to arbitration was purely based on public policy reasons and jealousy in order to protect the common law, and that it was against the spirit of both common law and equity that a party, by agreeing to refer a dispute to arbitration, deprived of the right to apply to a court of equity. The author argues that the reasons were entirely based on either judicial jealousy or public policy in the form of an attempt to safeguard the jurisdiction of the courts. It is important to note that an arbitration agreement was effective to the extent that an action could be brought for damages for breach of it,<sup>104</sup> and where an award was granted before the authority of the arbitral tribunal had been revoked, the award could be enforced.<sup>105</sup> The public policy argument

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<sup>101</sup>[1967] 2QB 703.

<sup>102</sup> Ibid.

<sup>103</sup>[1845] 7 QB 69.

<sup>104</sup> See *Vynior's case* (1609) 8 Co. Rep 81b.

<sup>105</sup> See *Bishop v Bishop* (1640) 1 Chan. Rep 142.

was brought to public attention by the comments of Campbell LJ in *Livingston v Ralli*,<sup>106</sup> where he said that:

“Legislature has recently in the Common Law Procedure Act 1854, S.11 made a provision that not all arbitration agreements shall be pleadable in bar, but that the court may stop the action. This shows the opinion of the legislature that such agreements are not contrary to public policy.”<sup>107</sup>

Indeed, Campbell LJ<sup>108</sup> reiterated this opinion again in *Scott v Avery*,<sup>109</sup> and similar views were expressed by Watson LJ, where he commented that:

“The rule that a reference to arbitrators not named cannot be enforced does not appear to me to rest on any essential consideration of public policy. Even if an opposite inference were deducible from the authorities by whom it was established, the rule has been so largely entrenched upon which it was originally based could now be regarded as of cardinal importance.”

It may be argued that the recognition of arbitration clauses was not total in *Scott v Avery*, and the rule in *Scott*<sup>110</sup> could not give effect to the intention of the parties to arbitrate unless the agreement was worded in a way that would suggest that an action may only be brought after an award has been issued. In such a situation, the court was free to apply the policy of the law and allow action notwithstanding the arbitration clause. According to *Scott v Avery*, the court could not give the intentions of the parties (party autonomy) to the arbitration agreement. This was evident in the judgement of the Lord Chancellor, Lord Cranston, who said that:

“if I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an

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<sup>106</sup>[1855] 5 EL & BL 132.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup>[1856] 5 HLC 811 at 1121.

<sup>110</sup> *ibid.*

agreement, that such a right should not be enforced through the medium of the ordinary tribunal. But if I covenant with A.B. that if I do or omit to do a certain act, then I will pay to him such sum as J.S. shall award [...] and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen.”<sup>111</sup>

*Scott* was followed in subsequent cases like *Scott v Corporation of Liverpool*,<sup>112</sup> and *Braunstein v Accidental Death Insurance Co*<sup>113</sup>. According to the cases like *Thompson & Mitchell*, there are no clear elements of public policy to wreck the arbitration agreement. There is no adduced evidence in the court judgement as to what public interest was supposed to have been threatened. The author wonders what, if there were no clear explicit reasons in relation to public interest, the reasons were for this hostility.

It may be submitted that the reasons were based on jealous grounds in order for municipal courts to guard their jurisdiction, which was perceived as threatened by the arbitral tribunal. Indeed this becomes evident when this thesis examines the approach of the courts towards arbitration proceedings; for example in *Vynoir's case*,<sup>114</sup> Cook LJ characterised the relationship of courts and arbitral tribunals as that of agent and principal, thus ensuring the revocability of the arbitration agreement at common law. The jealous attitude of the municipal courts in England was adduced by the comments of Campbell LJ in *Scott v Avery*,<sup>115</sup> where he said that:

“The doctrine of hostility to arbitration at common law originated in the context of the courts of ancient times for expansion of the jurisdiction of all of them being opposed to any thing that would altogether deprive anyone of their jurisdiction.”<sup>116</sup>

No subsequent decided cases have denied this approach. In fact, recent cases have approved such views; for example, Moulton LJ in *Doleman and Sons v Ossett Corporation*, said that:

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<sup>111</sup>*Scott v Avery* [1856] 5 HLC 811 at 1130.

<sup>112</sup> [1858] 3 De G & J 334 at 368 that “if parties to [an] agreement have provided for the settlement of any disputes which may arise upon the rights and liabilities growing out of the contract, by the arbitration either of persons mentioned in the agreement or to be appointed when the disputes arise, such a stipulation cannot be argued as an answer to either party who prefers to resort to the courts for determination of his rights, nor can it deprive the tribunals of the country of their jurisdiction, whatever remedy may be open to the party against whom proceedings are instituted for the breach of the agreement.”

<sup>113</sup> [1861] 1B & S 783. The Court approved the *Scott v Avery* approach at 797 and said that “the parties have used sufficient words to make the reference to arbitration a condition precedent”.

<sup>114</sup> [1609] 8 Co. Rep 81b.

<sup>115</sup> *Scott v Avery* at 853.

<sup>116</sup> *Ibid.*

“the courts will not allow their jurisdiction to be ousted as their jurisdiction is to hear and decide the matters of the action and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction.”<sup>117</sup>

In addition, Scrutton LJ in *Czarnikow v Roth Schmidt*, considered public policy as a platform where he said that:

“This is done in order that the courts may ensure the proper administration of the law by inferior tribunals. In my view to allow English citizens to agree to exclude this safe guard for the administration of the law is contrary to public policy. There must be no Alsatia in England where the King’s writ does not run.”<sup>118</sup>

The municipal courts, under the common law approach of development, felt that it was of great importance that the law was kept uniform so as to avoid arbitral tribunals from interpreting the law in different ways, and this was clearly expressed by Atkin LJ in *Czarnikow*, where he observed that:

“The policy of the law has given to the High Court large powers over inferior courts for the purpose of maintaining a uniform standard of justice and one uniform system of law.”<sup>119</sup>

It is demonstrably clear that the relationship between arbitral tribunals and judicial courts to grant provisional measures was not a benevolent one, as demonstrated by *Willcock v Pickfords Removals Ltd*, when he asserted that:

“one thing is clear in this branch of the law. An arbitrator cannot decide his own jurisdiction.”<sup>120</sup>

Hence it is clear that the courts were jealous of their jurisdiction,<sup>121</sup> and did not want their powers usurped by the arbitration tribunals.<sup>122</sup> In the bid to try and wreck arbitration

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<sup>117</sup> Ibid.

<sup>118</sup> [1922] 2 KB 478 at 488.

<sup>119</sup> Ibid at 491.

<sup>120</sup> Extract from Ian Menzies, “‘1996 and all that’, Arbitration Act Special Edition’ (1997) *Arbitration & Dispute Resolution Law Journal*, at 198.

jurisdiction,<sup>123</sup> in order to guard their jurisdiction, courts tried to argue on grounds of public policy to justify their attitudes. Arbitral tribunals were very inferior and they had no jurisdictional to rule on any matter, since all the powers were reserved to judicial courts. There was no party autonomy to parties at all,<sup>124</sup> since citizens could not make their own laws,<sup>125</sup> they had to rely upon the courts to be a vehicle for resolving their disputes, where the contract was interpreted according to the laws of contract, subject to damages awarded by the courts.

The author argues that public interest was a mechanism to deny arbitral tribunals the competence to grant provisional measures. The courts considered arbitral provisional measures to be within their jurisdiction.<sup>126</sup> The users of arbitral tribunal thus became victims with threats from the courts to intervene in arbitral tribunal jurisdiction. The government was slow to respond to remedy this negative perception by enacting arbitral laws that provided exclusive jurisdiction to arbitral tribunals. This hostility ignited a public outcry which ushered in arbitral enactments to ease the hostility and also to allow arbitral tribunals to grant provisional measures. It is probable that the advantages of arbitration had been to some extent under-estimated by lawyers and exaggerated by commercial people, hence these shortcomings led to the Arbitration Act 1950, in order to harmonize arbitration in England.

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<sup>121</sup> S. 13 (3) of 1889: the court has the power to remove the arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. See also s. 23 (1) which also extended powers of the tribunal under court jurisdiction. See also s 25.

<sup>122</sup> See Fletcher Moulton LJ in *Doleman & sons v Ossett Corporation* [1912] 3 KB 257 at 257-269. The court's unlimited power made the tribunal "*functus officio*".

<sup>123</sup> See the views expressed in *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592, where the court had powers to set the arbitral decisions aside, without consent of the tribunal. See also s 26.

<sup>124</sup> Ibid s. 8 (3) of Arbitration Act 1889: while the Act gave the powers to parties to appoint their own arbitrators according to the terms of their agreement, the Act gave the High Court in contrary to arbitration agreement, order the umpire of the proceedings. See s. 10 which gave the court power appoint arbitrators of the tribunal.

<sup>125</sup> See Bankers LJ in *Czarnikow v Roth Schmidt & Co.*, [1922] 2 KB 478 at 491, where he said that "among commercial men what are commonly called commercial arbitrators are undoubtedly and deservedly popular. That they will continue their present popularity entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or particular association. To release real and effective control over commercial arbitration is to allow the arbitrator, or Arbitration Tribunal, to be the law unto himself, or themselves, or to give them a free hand to decide according to a law or not according to law as he or they think, in other words to be outside the law."

<sup>126</sup> See Sir Patrick Devlin, 'The Relationship between Commercial Law and Commercial Practice' (1951) 14 MLR, 249,260.

### 2.3 The Arbitration Act 1950

The hostility of arbitral tribunals and courts continued,<sup>127</sup> and this was evident when one considers the special case procedure under section 21 of the 1950 Act. Under this procedure, either party to the arbitration agreement could apply to the arbitration tribunal to state a special case to the High Court for judicial opinion on some point of law arising in the course of arbitration. Where an application was made by one of the parties, the arbitrator had the discretion as to whether or not to state a special case. If he refused, a party could apply to the High Court for an order compelling the arbitrator to state a special case. The main purpose of the state procedure was to ensure that the law was applied correctly in arbitrations. However, the procedure became abused particularly after *Halfdam Grieg & Co v Sterling Coal & Corporation (The Leyland)*,<sup>128</sup> where the Court of Appeal ordered that the case be stated over the arbitral tribunal's objection, on the grounds that disputes under the arbitration agreement in London had been made under the assumption that the points of law could be referred to the judicial jurisdiction for determination. The circumstances in which an arbitrator could state a special case were laid down by Lord Denning MR.<sup>129</sup> This allowed a party to delay the arbitral proceedings, because the tribunal was required to spend time preparing the consultative question or alternative awards, and the courts had to set a hearing date with the possibility of an appeal from the High Court to the Court of Appeal. This meant that the party favoured by the arbitral award (or provisional measures), would in the meantime be denied the award. Thus the case stated procedure clearly had a major disadvantage as it delayed arbitral proceedings, and also increased the cost of the arbitral process. The parties were unable to exclude review under the case stated mechanism,<sup>130</sup> as this was deemed contrary to the doctrine of public policy.

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<sup>127</sup> See Kerr LJ in *Mavan & Bank Mellat v Helliniki* [1973] QB 291, where he cited s 12 of the Arbitration Act 1950 that provisional measures should only be granted by the judicial courts. See also *SACoppee Lavalin NV v Ken-Ren Fertilizers and Chemicals* [1994] 2 WLR 631.

<sup>128</sup> [1973] 2 ALL ER 1073.

<sup>129</sup> These include that the point of law should be real and substantial and such as to be an open and serious argument and appropriate for decision by a court of law. Secondly, the point of law should be clear and capable of being accurately stated as a point of law. Lastly, the point of law should be of such importance that the resolution of it is necessary for the proper determination of the case as a distinct from a side of little importance.

<sup>130</sup> See Kerr LJ, who recognised this problem in *The Karvo Peiratis* [1977] 2 Lloyd's Rep 344 at 349, where he commented that "there are nowadays many complaints that our special case procedure in commercial arbitration is being abused. Special cases used to be the exception, but they are becoming the rule and increasingly frequent as a means of delaying the speedy resolution of commercial disputes for which arbitrations are designed."

There were no special provisions, in the enactment that provided jurisdiction for the arbitral tribunal to grant provisional measures even where the arbitration agreement provided for this.<sup>131</sup> This attitude or perception was developed by the courts that saw arbitrators as not competent to grant provisional measures.<sup>132</sup> Parties to the arbitration agreement could only apply for a costs order from the arbitral tribunal, but with reference to a judge and subject to a long period of fourteen days.<sup>133</sup> This long duration provided a negative attitude or perception that arbitral tribunal could not grant provisional measures.<sup>134</sup> The fees of arbitrators were set and paid according to the Rules of the court as in litigation proceedings. The arbitral tribunals lacked an armory to enforce arbitral proceedings without the intervention of the case mechanism.<sup>135</sup>

Although both the arbitral tribunal and municipal courts in England operated an adversarial system of achieving justice, arbitrators used to take a back seat,<sup>136</sup> expecting municipal courts to come armed with a team of lawyers. This lack of balance restricted their competence to perform their duties; namely,<sup>137</sup> the granting of all provisional measures, due to mistrust and legal intervention. Under the Arbitration Act 1950, arbitrators were not allowed to order provisional measures. The power to grant such measures rested with the courts. For example, arbitral fees were paid according to the rules of court procedure, as in litigation proceedings, not under party autonomy which provides authority to the tribunal to rule on any arbitral dispute.<sup>138</sup> It should, however, be noted that part II of the Act introduced the commencement of arbitral proceedings and the enforcement of provisional measures under the Geneva Convention, which was superseded by the New York Convention 1958.

The courts developed a concept of procedural mishap, which allowed the requirement of misconduct. This was achieved by elevating remission from mere remedy for misconduct to a right available whenever something had gone wrong during proceedings.<sup>139</sup> It should, however,

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<sup>131</sup> See English Arbitration Act 1996, s.38 and 39.

<sup>132</sup> See Arbitration Act 1950, s. 12 (6) which provided that “the High Court shall have the power of making orders in respect of security for costs ( arbitration cases) as it has for the purpose of an action in the High Court.”

<sup>133</sup> See Arbitration Act 1950, s.26 (6).

<sup>134</sup> See *Consolidated Investment and Contracting Company v Saponaria* [1978] ALL ER 988.

<sup>135</sup> See s. 27 of the 1950 Act.

<sup>136</sup> See *Libra Shipping & Trading Corporation Ltd v Northern Sales Ltd (The Aspen Trader)* [1981] 1 Lloyd’s Rep 273. See also *Comdel Commodities Ltd v Siporex Trade SA* [1990] 2 ALL ER 552.

<sup>137</sup> See Nicholas Gould, International Business Conferences Summer School (August 2003).

<sup>138</sup> See Arbitration Act, s. 18 (4).

<sup>139</sup> See *King v Thomas McKenna Ltd* [1991] All ER 53.

be noted that arbitrators were for the first time allowed to grant provisional measures; namely, the ability to cross-examine a witness under oath, to register oaths and to award costs. Lord Lister, one of the major advocates of this development, argued for the independence of the arbitral tribunal and their ability to grant provisional relief.

The Arbitration Act 1950 incorporated an implied term into every arbitration agreement to the effect that where a reference was to two arbitrators, the two were obliged to appoint an umpire immediately following their own appointment.<sup>140</sup> The notorious deficiency of the statutory implied term was that it required the immediate appointment of an umpire in all circumstances, the problem being that if the two arbitrators never reached an agreement, the arbitral proceedings could not proceed. The power of the arbitral tribunal was still subject to the courts. This common law approach restricted the freedom of the arbitral tribunal to give free reasons,<sup>141</sup> and at the same time had a desirable effect of accentuating the rationality of the arbitral process.<sup>142</sup> Hence it is true to assert that the 1950 Arbitration Act was a scapegoat, as it was a mechanism that appeared to provide autonomy to the parties to solve their disputes in theory but in reality it provided no remedies as to the special case mechanism, where the dominance by the courts became the order of the day.<sup>143</sup> This can be demonstrated by one of the most controversial cases in this regard, *Coppee-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*, where an application was made to an English court for an order for security for costs, on the basis that Ken-Ren was an insolvent company, as provided by the International Chamber of Commerce Rules. Coppee-Lavalin argued that there was a residual power of the court to grant such provisional measures, although such power should be used in exceptional circumstances. The House of Lords held that it did have the power to order the respondent to provide security for costs and that there were exceptional circumstances justifying such a provisional order. In fact, this episode led to international commercial arbitration centres being established outside London,

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<sup>140</sup> See *Rew v Cox* [1995] *The Times*, 29 November.

<sup>141</sup> See s.4 and 22 of the Arbitration 1950 Act. They adduce court intervention in arbitral proceedings, which wrecked the doctrine of party autonomy to grant provisional measures.

<sup>142</sup> See Arbitration Act 1950, s.21, which enacted provisions going back to the Common Law Procedure Act 1854 repealed s.1 (1) of the Act. The special mechanism was popular with judges and to some extent with practitioners, rather than with businessman and arbitral organisations. Its main objective was to ensure that the arbitral tribunals apply the law of the land and not their own private notions of justice.

<sup>143</sup> See Arbitration Act 1950, s. 31 (2).



with many aggressively pursuing arbitration business. For example: “*The Netherlands, France, Sweden and the Far East tried to seize a share of the multi-billion pound industry.*”<sup>144</sup>

## **2.4 The Arbitration Act 1979**

Accordingly, the next major development in arbitral competence to order provisional measures was the Arbitration Act 1979 which reformed the 1950 Act. The 1979 Arbitration Act was an attempt to redress the disincentives, which were turning parties away from London. The motivation for reform was principally because of the concern over the relationship that existed between judicial courts and arbitral tribunal jurisprudence and the abuses to which the system lent itself.<sup>145</sup> The enormous scope for judicial review, the abuse of the special case procedure and the delay in referring disputes were all cause for concern.

Under the Act, appeals were to be heard exclusively on points of law with leave for appeal having to be sought beforehand.<sup>146</sup> Through a string of cases, however, the House of Lords had to temper the scope of the appeal process to ensure that it too was not abused. However, there were no explicit provisions on the power of the tribunal to grant provisional measures, and this resulted in a grey area in regard to the arbitral competence with regard to interim measures.

The Act derives from the recommendations of the Commercial Court Committee: the commercial judges made known their concerns about the defects in the prevailing law and how it might be corrected in both judicial and extrajudicial capacities. The main objective of the committee was to grant the arbitral tribunal authority to grant provisional measures such as final awards.<sup>147</sup> One of the particular forces was the 1978 Alexander Lecture entitled “*Case stated: its use and abuse*”, and delivered by Diplock LJ, outside the judicial arena, to the London arbitration group,<sup>148</sup> the joint committee of the London Court of Arbitration,<sup>149</sup> the Institute of

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<sup>144</sup> See Margaret Rutherford and John Sims, *Arbitration Act 1996: A Practical Guide* (FT Law & Tax 1996), note 28 at 6.

<sup>145</sup> See D Rhidian Thomas, ‘An Appraisal of the Arbitration Act 1979’ [1981] LMCLQ at 200.

<sup>146</sup> See Arbitration Act 1979, s. 1 (1).

<sup>147</sup> See the Commercial Court Committee Report, July 1978.

<sup>148</sup> An association of concerned British and American lawyers under the chairmanship of Mark Littman QC.

<sup>149</sup> Now the Chartered Institute of Arbitrators.

Arbitrators and the London Maritime Association.<sup>150</sup> The Report was published as a command paper. The government was quickly satisfied with the merits of the reformist case and the Bill was brought forward in the House of Lords, which in its later progress sped up through the parliamentary committee stages, and received the Royal Assent on 14<sup>th</sup> April 1979. In the first part of the Report, the Commercial Court subsumed its deliberations and recommendations under the title “*Judicial Supervision and Review of Arbitration Proceedings*”. The main concern was the judicial review of arbitral interim measures, subject to the case mechanism procedure provided by the Arbitration Act 1950.<sup>151</sup> The committee recommended further that at the time there existed “*without doubt considerable and justification abuse of the case procedure*”<sup>152</sup> Nevertheless, the 1979 Act received its share of disapproval: “some have criticised the 1979 Act for having been rushed through the legislative process with indecent haste; some say that it was ill-prepared, made in response to pressure from the international community”<sup>153</sup>

The Arbitration Act 1979 was a tremendous enforcement of arbitral laws,<sup>154</sup> whereby it tried to shift the balance between finality and legal accuracy towards finality,<sup>155</sup> and abolished both state procedures and the power of the High Court to remit an award on the grounds of errors of fact or law on the face of the award.<sup>156</sup> The historical and traditional posture of court intervention was restructured and rationalised,<sup>157</sup> where arbitral decisions were to a certain degree respected by the courts.<sup>158</sup> This was expressly demonstrated by rendering valid exclusion clauses in arbitral

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<sup>150</sup>Under the chairmanship of Clifford Clark.

<sup>151</sup>See EAA 1979 s. 21.

<sup>152</sup>See *Hellas v Warinco A.G* [1978] 2 Lloyd’s Rep at 67-80, where Mocatta LJ said that “it would be blind one’s eyes or unsuccessful parties at arbitration primarily for the purpose of delay.” See also the *Leyland* case [1973] QB 843, which adduces the structured judicial discretion to grant provisional measures under s. 21 of the Arbitration Act 1950.

<sup>153</sup> See Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*(FT Law & Tax 1996), note 28 at 6.

<sup>154</sup> See D. Rhidian Thomas, *The Law and Practice Relating to Appeals from Arbitral Proceedings* (Lloyd’s of London Press Ltd 1994) at 3.

<sup>155</sup>See *Eagle Star Insurance v Yuval Insurance* [1978] 1 Lloyd’s Rep 357, where it was held that the arbitral tribunal is not bound to comply with the strict rules of law or the courts in its arbitral proceedings. This indeed adduces that there is some degree of party autonomy to grant provisional measures.

<sup>156</sup> See s.1 (1) of the Arbitration Act 1979.

<sup>157</sup> The court could only grant leave where determination of the question of law substantially affected the rights of one or more of the parties, under s. 1 (4). In addition, parties were free to exclude the right of appeal if they wished, under s. 3 and 4 (1) (a) (c) in given circumstances.

<sup>158</sup> See Samuel Rosenbaum, ‘A Report on Commercial Arbitration in England’, Bulletin XII (American Judicature Society), at 31, who states that “a judge is handicapped in hearing a trade dispute by his lack of technical information; a commercial arbitrator knows instinctively what usages and course his particular business requires.”

agreements,<sup>159</sup> by virtue of which the risks of application to the courts and appeals from awards or provisional measures on question of law were excluded,<sup>160</sup> but limited to historical ethos.<sup>161</sup>

There was a major usage of arbitration, according to Mustill Boyd: about 10,000 arbitral references were instituted annually in England, but the number of disputes on point of error of law that reached the High Court by way of special case procedure was reduced to around 20-30 per annum.<sup>162</sup> However, although the Arbitration Act was seen as a deterrent to court intervention, difficulties between the courts and tribunals continued, as demonstrated in the judgement of Goff LJ in *The Oinoussian Virtue*,<sup>163</sup> when he took the view that he was unable to find:

“ anything in s.1 of the 1979 Act which indicated that in considering whether to give leave to appeal from an arbitrator’s award any limit should be placed upon what was the question of law involved except that its determination must be such that could substantially affect the rights of one or more parties.”<sup>164</sup>

The courts purposively interpreted the word “*substantial*” as granting leave of appeal.<sup>165</sup> This can be demonstrated by the application of *Oinoussian Virtue*,<sup>166</sup> by Goff LJ in *International Sea Tankers Inc v Hemisphere Shipping Co.Ltd.*<sup>167</sup> The House of Lords tried to address the problem in *B.T.P.*,<sup>168</sup> where Diplock LJ laid down guidelines for the granting of leave to appeal. These went through a range of circumstances from one-off clauses to standard terms where less strict criteria would apply and were reaffirmed in the *Antaios Compania Naviera SA v Salen*

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<sup>159</sup> See Rosenbaum, op.cit., where Cohen LJ says that “arbitration in England has made a quick progress and has achieved better results than other countries seems to be the common view of most non English observers, “at 30.

<sup>160</sup> See Michael Mustill, *Transnational Arbitration in English Law* (1979) 15-35.

<sup>161</sup> See *Chrysalis* [1983] 1 Lloyd’s Rep 503.

<sup>162</sup> See Mustill, *The Growth of Arbitration*, at 30 of the article which refers to the judgement of *Salter Refischel and Co v Mann and Cook* [1991] 2 KB 432.

<sup>163</sup> [1981] 1 Lloyd’s Rep 533.

<sup>164</sup> *Ibid* 538.

<sup>165</sup> See Lord Goff’s judgement in *Oinoussian* where he took the view that:” nothing in S.1 of the Arbitration Act 1979, which indicated that in considering whether to give leave to appeal from an arbitrator provisional measures should be placed upon what the question of law involved except that its determination must be such that could substantially affect the rights of one or more parts”.

<sup>166</sup> *Ibid*.

<sup>167</sup> [1981] 2 Lloyd’s Rep 308, where the Court considered in detail .1 (3) (b) and 1 (6).

<sup>168</sup> See *BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA(The Nema)* [1981] 2 Lloyd’s Rep 239.

*Rederierna AB (The Antaios)*.<sup>169</sup> Furthermore, the House of Lords did little to enhance the arbitral procedure; this was because it held that where one party had been guilty of inordinate delay the other party was under an obligation to keep the procedure moving.<sup>170</sup> The Court of Appeal and House of Lords rejected the argument that arbitrators had the power to dismiss a claim where there was reasonable delay by the claimant in pursuing his claim at first instance. This meant that a party to the arbitration agreement was put in a non-compromising situation, which was a more disadvantageous one than that of a party who went to municipal courts. This is because a claimant who delayed proceedings could have his claim struck out for want of prosecution. The race for power between the two jurisdictions was further evident in the comments of Dunn LJ in *Lloyd v Wright*,<sup>171</sup> where he asked: “Why on principle, should the arbitration and the action not proceed side by side?”, and went on to say that “the court has ample power to restrain further proceedings in the arbitration by an action and in these circumstances there can be no question of a race between arbitration and court proceedings, the court retains control thought.”<sup>172</sup>

Accordingly, the power of the tribunal to rule on its competence or to grant provisional measures or solve its disputes was somehow restrictive and hence the shortcomings were to be settled by further arbitration enactment, in order to harmonise arbitral proceedings. One of the greatest weaknesses to the 1979 Act is that it did not consider foreign jurisdiction, hence impeded international parties from considering arbitral tribunal proceedings. It should be noted that the mistrust and negative perceptions of the arbitral tribunals’ competence continued despite the legislative address of judicial jealousy and intervention. It should be noted that after the enactment of the 1979 Act, arbitral tribunals had a certain degree of competence to grant provisional measures, though such provisions were not clearly expressed in the Act. Arbitral decisions were no longer set aside by municipal courts, unless a specific question of law had been submitted. The Act therefore struck a balance between courts and tribunals in order to grant measures with less court intervention. Furthermore, the 1979 Act developed a distinction between the reference of a specific question of law and the reference of a question of material to

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<sup>169</sup>[1984] 3 WLR 592. See *The Nema* and *The Antaios*, at 248. See also D. Rhidian Thomas, *The Antaios: The Nema Guidelines Reconsidered* [1985] JBL 2000, Arbitration Appeals and charter party construction (1984) LMCLQ 547.

<sup>170</sup> See the decision of House of Lords in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909.

<sup>171</sup>[1983] 1 QB 1065.

<sup>172</sup>*Ibid* 1075.

the resolution of a dispute. The tribunal continued to make findings of facts and in consultation with the parties formulated the question of law. However, it was the municipal courts which expressed an opinion as to the correct answer to the question of law posed. The intervention of the municipal courts was demonstrated by the comments of Clive Schmitthoff, who said that:

“The special case procedure has been much criticised by international users of English arbitration because it makes it in practice impossible to give an arbitral tribunal final jurisdiction if a question of law arises. That may lead to delay, and lends itself to abuse; it may also add to the costs.”<sup>173</sup>

The 1979 Act provided an overriding impact to arbitrators, and this was achieved by keeping a check on the municipal courts’ intervention and procedure abuse; hence the powers of the courts to intervene in arbitral proceedings were no longer curious, but only subject to review of interim measures if an error of law appeared and subject to stringent conditions. The harmonisation efforts on the rule of law introduced the idea of a Model Law on arbitration, which was adopted by England to revise arbitration, and as a result the current system is largely regulated under the Arbitration Act 1996.

## **2.5 Arbitration Act 1996 Origin**

The enactment of the Arbitration Act 1996 was intended to be a departure from the traditional close supervision of the courts and to reinforce the principle of party autonomy. Lord Steyn commented on the historical relationship between courts and arbitration in England:

“the supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on questions of law and the power to remit.”<sup>174</sup>

He went on to confirm that:

“it is certainly more expensive than the supervisory jurisdiction contemplated by the Model Law.”<sup>175</sup>

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<sup>173</sup> See Clive M Schmitthoff, *Law Reform in England* (Steven & Sons 1965) at 30.

<sup>174</sup> See Lord Steyn, ‘England’s Response to UNCITRAL Model Law of Arbitration, (1994) 10 *Arbitration International* 1 at 10.

Mindful of the intricacies in the 1979 Act, and the fact that the UNCITRAL Model Law was gaining momentum, the legislators in England initiated the Departmental Advisory Committee on Arbitration (DAC) to consider whether the United Kingdom should adopt the UNCITRAL Model Law. Perhaps surprisingly, the DAC concluded that this Law should not be adopted in England. In June of that year, Mustill LJ, the chair of the committee, published a report which, although rejecting the Model Law, approved of its presentation and logic.<sup>176</sup> The Mustill Report pointed out that while there were a number of things in the Model Law which could be usefully to be adopted, it was not a complete code and in any event would have to be supplemented. The Report also outlined its reasons for the rejection of this Law in England as follows.

First, given that the Model Law provides only international commercial arbitration, the DAC noted in its report that the introduction of it in England would lead to a divorcing of arbitral regimes; domestic and international. Wilberforce LJ played a pivotal role in this enactment during the second reading of the Bill in the House of Lords when he explained the essence of the new law and the philosophy enshrined in it. He stated:

“I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law.[...] I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by the English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts”,<sup>177</sup>

the former being governed by the Arbitration Act and the latter by the Model Law.

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<sup>175</sup> Ibid.

<sup>176</sup> Department of Advisory Committee on Arbitration Law, A report (Mustill Report) on the UNCITRAL Model Law on International Commercial Arbitration, note 1.

<sup>177</sup> Hansard, Col 778, 18 January 1996.

Secondly, the whole adoption of the Model Law would remove the existing power of the English courts to correct errors of law. The consequences of that were thought to be unsatisfactory, as they would leave those aggrieved by an error in law without a sufficient remedy. The third concern of the DAC related to the existing law, legal framework and experience of lawyers and arbitrators in England. The DAC felt that the Model Law did not resemble a typical English statute, and as a result, those involved in arbitral procedures would be required to revise substantially their existing wealth of knowledge and established approach. The Report recommended that England should promulgate a new Arbitration Act to cater for the needs of modern commerce and reflect the spirit of the Model Law.<sup>178</sup> The DAC pointed out that the Model Law was most suited to those jurisdictions with no developed arbitration law or with a practically redundant corpus of arbitration law. England,<sup>179</sup> however, was not such a jurisdiction, given its developed law as well as its standing as a prominent hub of commerce.<sup>180</sup> The Model Law was regarded as skeletal and enacting it without substantial changes and additions would resurrect all the uncertainties that English law had grappled with and solved.<sup>181</sup> The Report concluded that:

“In these circumstances we recommend an intermediate solution in the shape of a new Act with a subject matter so selected as to make the essentials of at least the existing

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<sup>178</sup> The reasons for this approach are detailed in the Report and it serves no useful purpose to restate them here.

<sup>179</sup> See Karen Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2005), where Saville LJ seem to have characterised the problem of the DAC at the time: “Our law has built up over a very long time indeed. In the main the developments have come from cases, but in addition, from as early as 1698, parliament has passed legislation dealing with the law of arbitration. To a large degree this legislation has been reactive in nature, putting right perceived defects and deficiencies in the case law. Thus it is not easy for someone new to English arbitration to discover the law, which is spread around a hotchpotch of statutes and countless cases.”

<sup>180</sup> See for example, Australia’s International Arbitration Act 1979, connecting procedures for international arbitration, and covering all international commercial arbitration conducted in Australia unless otherwise agreed. That Act also adopted the Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention).

<sup>181</sup> The Mustill Report has been heavily criticised by Fraser P Davidson, ‘International Commercial Arbitration – The United Kingdom and UNCITRAL Model Law’ (1990) JBL 480-484 at 482, where Davidson took the view that at that point in time, contrary to the view of Mustill LJ, adopting the Model Law would introduce multiple regimes: the arbitration law in England was not homogenous as there were different methods of enforcing agreements to arbitrate and award depending on whether or not the arbitration was domestic or not in terms of s.1 of the 1979 Arbitration Act.

statutory law tolerable without calling for a lengthy period of planning and drafting, or prolonged parliamentary debate.”<sup>182</sup>

The consultation paper was published in 1994 together with the draft of the Arbitration Bill.<sup>183</sup> Despite the DAC report that the Model Law should not be adopted, the Arbitration Act expresses the spirit of the Model Law, and virtually every article of that Law is enshrined in the Arbitration Act 1996. It should be noted, therefore, that the origin of the Arbitration Act comes from the Model Law, as confirmed by the Consultative Paper on the Arbitration Bill.<sup>184</sup>

Whilst the problem of court intervention,<sup>185</sup> in arbitral proceedings and the attempt to promote party autonomy, it is submitted that there was a desire to keep London as the leading arbitral centre in the world,<sup>186</sup> though this was not addressed in the DAC Report.<sup>187</sup> The view that London is an international centre was echoed by Saville LJ, who said that:

“ I hope that those from abroad who read the Act will be persuaded that this jurisdiction is an ideal place to hold an international arbitration, since they can now understand what it is likely to entail, and can see that we have tried to reflect generally accepted international views on the proper conduct of the arbitration process. Only time will tell

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<sup>182</sup> See Consultative Paper on Arbitration Bill (July 1995) para 6.

<sup>183</sup> See Robert Merkin, *Arbitration Law (Loose-Leaf)* (Lloyd's of London Press) para 1.117: “The aims of the February bill included the production of legislation, which was more accessible in terms of language and scope of coverage secondly, the emphasis on party autonomy and in particular the ability of the parties to adopt different forms of procedure for determining their disputes; and lastly, the facilitation of the incorporation of standard form and institution arbitration rules into arbitration agreement.”

<sup>184</sup> Consultative Paper on an Arbitration Bill (July 1995) para 6, where “the DAC confirmed that its reasons for reflecting the whole adoption of the UNCITRAL Model Law remain valid. Wherever possible the structure, language and the spirit of the Model Law has been carried through into the draft.”

<sup>185</sup> See *Year Book of UNCITRAL Vol.1 1968-70* at 284, where it took the view that “greater uniformity among national arbitration laws would reduce the divergences and uncertainties from the references to national courts to be found in international instruments.” See UNCITRAL Documents General Assembly A/CN 9/2007.

<sup>186</sup> Arbitration is now a service industry that generates significant economic wealth through arbitral institutions; for example, the London Court of International Arbitration (LCIA) charges £1500 as a registration fee, with a registrar charging £150-350 per hour for administrative time, whilst the International Chamber of Commerce (ICC) charges \$2500. According to Chambers and Partners Solicitors 2002-2003, litigation partners in London charge as much as £550 per hour with an average charge of £450, whilst assistant solicitors charge as much as £355 per hour with an average charge of 265.

<sup>187</sup> See DAC Report para 109, where Mustill LJ stated that “we are satisfied that the requirements can be met, and within a time scale which would answer the needs of keeping English arbitration law up date and remaining in the vanguard of the various systems currently enjoying the preference of regular international users.”



whether we have succeeded in our objective to retain and enhance the reputation of this country as the leading place for the form of dispute resolution known as arbitration.”<sup>188</sup>

### **2.5.1 The Philosophy of the Model Law and its effect on the English Arbitration Act 1996**

Since the English Arbitration 1996 in many ways is similar to the Model Law,<sup>189</sup> it is worth examining the philosophy of the UNCITRAL Model Law. A Working Group on International Practices was established, which had the task of drafting the Model Law.<sup>190</sup> This Law went through five drafts and the Working Group adopted the final one.<sup>191</sup> The Working Group considered that the Model Law should be based on the principle of the freedom of the parties (party autonomy), and that the parties should be free to submit their disputes to arbitration and to provide for rules that would be in accordance with their specific needs. UNCITRAL adopted the Model Law on International Arbitration in 1985.<sup>192</sup> The first principle of the Model Law is the recognition of the freedom of the parties’ agreement, whether the reference is to standard institutional rules or adhoc arbitration. The parties’ are very much in control of how their disputes should be resolved, and not restricted by any peculiar local rules of procedure.<sup>193</sup> The second principle is to grant the arbitral tribunal substantial powers, and (failing agreements by the parties) wide procedure discretion. This is to ensure that arbitral proceedings are free from any local law restraints. Hence in the absence of the arbitration agreement the tribunal has jurisdiction or considerable autonomy.<sup>194</sup> The third principle of the UNCITRAL Model Law is that municipal courts should have a limited role to play in arbitral proceedings.<sup>195</sup> The Model Law expressly provides that no court “*shall*”<sup>196</sup> intervene in arbitral proceedings except where the

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<sup>188</sup> See Saville LJ, ‘The Arbitration Act 1996’, (1997) LMCLQ 502 at 517-518.

<sup>189</sup> Lee Anna Tucker, ‘Interim Measures under Revised UNCITRAL Arbitral Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty’, American University of Washington (2011 1 Arbitration Belief, Iss.1).

<sup>190</sup> See A/C 9/246 para 14.

<sup>191</sup> Ibid para 16-27.

<sup>192</sup> The first steps towards the Model Law dates back to 1981, when UNCITRAL decided to entrust the actual task of drafting the Model Law to its Working Group on International Practice.

<sup>193</sup> A/CN9/207.

<sup>194</sup> See UNCITRAL Model Law, Article 24 (1).

<sup>195</sup> Ibid.

<sup>196</sup> Ibid Article 5.

Model Law provides for support of the arbitral process.<sup>197</sup> Fourthly, the Model Law seeks to ensure that the fairness and due process of the system and municipal courts should only be involved during the post award stage.<sup>198</sup> Indeed, the main aim was to create a vehicle or restrict or limit any court intervention in arbitral process to promote the doctrine of party autonomy and promote a high degree of harmonisation.<sup>199</sup> It should be noted that the Model Law is not comprehensive: it is a very general piece of legislation and many issues have not been addressed; for example, it does not deal with issues such as the fees and costs of arbitration and the duties of arbitrators. The wording of the Model Law is extremely general and this is due to difficulties in drafting an instrument to be adopted by countries with different legal cultures and drafting techniques. Hence the words used are too general for it to appeal to a wide range of different legal cultures. As the adoption of the Model Law became increasingly widespread, however, the deficiencies in English arbitration law were exposed and calls for a systemic overhaul grew:

” London’s pre-eminence as a world arbitration centre began to be challenged. Foreign users were dissatisfied with such delays and high costs. They wanted less delay, less cost. They wanted their provisional measures or disputes to be resolved with certainty. The law was ripe for reform”<sup>200</sup>

Further, Rutherford and Sims stated that:

“ there was a strong feeling that our arbitral system should take account of the needs and wishes of the commercial and trading community.”<sup>201</sup>

## **2.5.2 The Structure of the Arbitration Act 1996**

The proposal for developing the English Arbitration Act 1996 was designed in a more friendly manner and language than had been customary hitherto, in order to reflect the provisions of the Model Law in simple English and with a logical format. The main aim was the appointing of arbitral tribunal or arbitrators, conduct of proceedings, and grant of provisional measures and awards. The Act was to be a remedy to the earlier enactments that impeded arbitral proceedings

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<sup>197</sup> Ibid Article 11 (3), 11 (4), 16 (3) and 34 (2).

<sup>198</sup> Ibid Article 18.

<sup>199</sup> See DAC Report 1996 at 138.

<sup>200</sup> See Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, (FT & Tax 1996) note 28 at 5.

<sup>201</sup> Ibid at 10.

under court intervention. It repealed entirely the Arbitration Acts of 1950 and 1979, and established the general principles on which arbitral proceedings should be adopted. Thus, the 1996 Arbitration Act defined the jurisprudence of Arbitration, which Lord Saville once described, stating that:

“we have highly developed rules and principles governing all aspects of arbitration, which is one of the reasons why this country has been and still is a world centre for arbitration.”<sup>202</sup>

The Act consolidated all earlier legislation, and, which is most important, included clear provisions to give the tribunals power to grant provisional measures. The Act was thus intended to be both a fresh start and the closest to a definitive code of arbitration law that has ever been enacted.<sup>203</sup> The structure is similar to the Model Law, and is divided into four chapters. The most important part of the project was the modification to party autonomy. This is demonstrated by section 34(1) which provides that matters of evidence and procedure are to be determined by the tribunal, although the parties themselves are free to agree on any or all matters themselves including provisional measures.<sup>204</sup> Secondly, section 4 (1) of the Act introduces Schedule 1, which indicates those provisions within the Act which are mandatory.<sup>205</sup> The tribunal has powers to grant provisional measures with the supervisory model support of the municipal courts where called upon.<sup>206</sup> The role of the courts was demonstrated by Wilberforce LJ, who said that:

“Other countries adopt different attitudes and so does the UNCITRAL Model Law. The difference between our country and others has been and is, I believe, quite a substantial deterrent to people sending arbitration here. After reading the debates and the various drafts that have been moving from one point to another point, I find that on the whole, although not going quite as far as I should personally like, it has moved very substantially in this direction. It has given the court assistance when the arbitrators cannot act in the

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<sup>202</sup> See Lord Justice Saville in Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28 at 26.

<sup>203</sup> See s. 1 of the EAA 1996.

<sup>204</sup> See Jonathan Hill, *Some Private International Law Aspects of the Arbitration Act 1996* (1997) at 275.

<sup>205</sup> *Ibid* Schedule 1.

<sup>206</sup> See EAA 1996s.44 (5), 39, 38.48, and 44.

way of enforcement or procedure steps or alternatively, in the direction of correcting very fundamental errors.”<sup>207</sup>

It should, however, be noted that the parties under party autonomy are free to exclude mandatory provisions, provided they do so in writing.<sup>208</sup> Mandatory provisions are designed to ensure that minimum standards are maintained in the conduct of arbitral proceedings and that municipal courts have the necessary power to provide assistance to the arbitration; for example, with regard to freezing orders or anti-suit injunctions,<sup>209</sup> or where the agreed appointment process fails.<sup>210</sup> The main principles of the Act are clearly expressed in Clause 1 of the DAC Report.<sup>211</sup>

The author does not agree with the powers of the court<sup>212</sup> to intervene, since the Model Law which was adopted provides that no courts *shall* intervene in arbitral proceedings. Indeed the main aim of the 1996 Act was to reduce judicial intrusion by the courts<sup>213</sup> and for the courts to respect party autonomy.<sup>214</sup> The DAC report stated that:

“ this reflects the basis of the Model law and indeed much of our own present law. An arbitration agreement is a consensual process. Firstly, the parties should be held to their agreements and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted.”<sup>215</sup>

This should also be adopted, so that no residual powers can be exercised by the municipal courts, since any intervention of the courts may wreck the doctrine of party autonomy. The other

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<sup>207</sup> DAC Report 1995.

<sup>208</sup> EAA 1996s.5.

<sup>209</sup> See Geoffrey Fisher, ‘Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an arbitration Agreement’, [2010] Bond Law Review 22 Iss.1 Art.1, <<http://epublications.bond.edu.au/blr/vol22/1>>, accessed on 19 January 2013.

<sup>210</sup> See EAA 1996 s. 12, where the court may be allowed to increase contractual duration.

<sup>211</sup> See Clause 1 para 18 of the DAC Report 1996, which provides that the tribunal should be fair in resolutions, and impartial without any unnecessary delay or expense. Further at para 19, the parties to arbitral proceedings are free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. Lastly under para 20 the municipal courts should not intervene except as provided by the Act.

<sup>212</sup> See CPR r 6.20.

<sup>213</sup> See DAC Report February Report, para 19-20.

<sup>214</sup> *Ibid* para 18.

<sup>215</sup> *Ibid*.

limitation is the scope of the Act; the Act is limited to only England and Wales.<sup>216</sup> Nevertheless, some provisions of Part 1 still apply if the seat of arbitration is not England; for example, section 2 (2), sections 9-11 dealing with stay of legal proceedings and section 66 dealing with enforcement, apply where the seat is not England. It may be argued that if legal proceedings have been brought in England in breach of an arbitration agreement in another country, the municipal courts of that other country may not have the power to restrain the English proceedings by an injunction or may feel unwilling to act in any way which may be thought to trespass on English sovereignty. In such circumstances there is a reason to permit and require the English municipal courts to intervene with their own remedies in aid and support of the arbitration agreement.<sup>217</sup> In addition, it would be absurd if arbitration resulted in an award and this could not be enforced against the assets in England. The power of the tribunal with regard to provisional measures<sup>218</sup> is also supported by international conventions and arbitral rules.<sup>219</sup> Thus the Act complies with Model law to a certain degree but not entirely.<sup>220</sup>

As mentioned earlier, the harmonisation efforts on the rule of law introduced the idea of the Model Law on arbitration, which was adopted by England to revise its legal systems, and as a result the current system is largely regulated by the Arbitration Act 1996.

One of the main limitations of the Act is that it does not provide a definition of arbitration or provisional measures, thereby inviting the courts to come with their judicial technicalities or case law to provide definitions. The absence of definitions under the Arbitration Act 1996, and even Model Law is problematic and is likely to become more so with the increasingly autonomous status that arbitration is gaining relative to litigation. It will therefore be important to determine

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<sup>216</sup> See EAA 1996 s. 3 which defines the seat of arbitration as the juridical seat of arbitration designated by the parties to the arbitration agreement or by any arbitral institution or a person vested with powers in that regard by the parties to the arbitration agreement. See *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24. See also *Dubai Islamic Bank v Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep 65.

<sup>217</sup> See *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPR 73 at 104.

<sup>218</sup> See EAA s. 39.

<sup>219</sup> See LCIA Rules 1998, Article 25; see ICC Rules Article 223, ICSID Rules 1998, Articles 39 and 47. See also s 34 (d) of EAA 1996 which was given effect by Longmore LJ in *GEC Alstom Metro Cammel Ltd v Firema Consortium* [1997] Unreported. See also Robert Merkin, *English Arbitration Act 1996* at 88.

<sup>220</sup> See Model Law, Article 19 (2) which confers on the tribunals the power to determine the admissibility and relevance of any evidence, similar to s. 1 of EAA 1996 and s.34 (2) which bestows on the tribunal the power to order measures for disclosure and interrogate during trial. This power historically resided in the courts until the EAA repealed earlier enactments.

those issues that are arbitrable in order to ensure that arbitrators are clear on the remit of their jurisdiction.

In addition, the power of the courts<sup>221</sup> is not restricted in practice and some of the court procedures are more rigid than the Model Law in other states,<sup>222</sup> as demonstrated by the DAC Report,<sup>223</sup> which stated that:

“nowadays the courts are much less inclined to intervention in arbitral process than used to be the case. The limitations of the right to appeal to the courts from awards brought into effect by the Arbitration Act 1996, and [the changes in] attitudes generally, have meant that courts only intervene in order to support rather than displace the arbitral process. We are in favour of this modern approach.”<sup>224</sup>

The author recommends that the power of the tribunal to issue provisional measures at both domestic and international level should firstly consider whether the parties have an arbitration agreement between them.<sup>225</sup> If so, then the arbitration agreement between the parties should have an opt-out clause if they wish to disregard the courts’ involvement,<sup>226</sup> in the granting of provisional measures. The irony is that even where an opt-out clause is inserted for the courts not to intervene in arbitral proceedings, the court have power outside the Arbitration Act; for example, under section 37 of the Supreme Court Act and Civil Procedure Rules.<sup>227</sup> The Tribunal should be given the power to examine the validity of the parties<sup>228</sup> agreement instead of the

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<sup>221</sup> See *Belair LLC v Basel LLC* [2009] EWHC 725 (Comm), where the court granted provisional measures under s. 44 of the EAA 1996 and emphasised that its intervention was for the protection of the status quo pending the constitution of the tribunal.

<sup>222</sup> See the Court of Bermuda in *IPO International Growth Fund Ltd v OACT Mobile* [2007] Bermuda LR 43 (Bermuda CA).

<sup>223</sup> DAC Report 1996.

<sup>224</sup> *Ibid.*

<sup>225</sup> Stavros Brekoulakis, *On Arbitrability - Persisting Misconceptions and New Areas of Concern*, in Loukas Mistellis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) at 39. Loukas states that a condition for the tribunal to assume jurisdiction over a particular dispute.

<sup>226</sup> See Stewart Shackleton, ‘Internationalization of English Arbitration Law’, *ICC International Court of Arbitration Bulletin* 11 (1) Spring (2000) 19-36.

<sup>227</sup> Julian Lew, ‘Achieving the Potential of Effective Arbitration’ [1999] 65 *Arbitration* 282 at 290, where he says that:

“It will always be a balancing act, and though it is undoubtedly important to determine the intent of the parties and listen to them and their lawyers, ultimately it must for the arbitrators to control the arbitral process. By doing so tribunals can increase the potential of effective determination of the issues between the parties.”

<sup>228</sup> The 1996 Act is based on party autonomy and an arbitration agreement is a contract usually attached to a commercial bargain. See George Jessel MR in *Printing and Numerical Registering Co v Sampsons* [1875] LR 19 Eq

courts doing so, and also to determine whether a measure is suitable for arbitration. The powers of the courts should be limited to section 66, sections 44 and 45 of the Arbitration Act 1996 in circumstances or urgency of evidence, making orders relating to property subject to proceedings of the sale of goods.

The author further argues that the English Arbitration Act 1996 freed commercial parties from the national constraints of procedural law, with the result that fundamental English rules no longer necessarily apply in arbitral proceedings in England.<sup>229</sup> The object of these reforms has been, of course, in the words of Lord Saville, to reflect generally accepted international views on the proper conduct of the arbitral process.<sup>230</sup> Apart from a few mandatory provisions, parties are free to exclude large parts of the Arbitration Act itself in order to adopt procedures with which they are more familiar, or which they believe are best suited to the particular circumstances of their dispute. Arbitrators likewise enjoy broad powers to fashion rules of procedure where the parties fail to agree.<sup>231</sup>

The tribunal is limited to the application of the law in arbitral proceedings.<sup>232</sup> It should however be noted that the Arbitration Act 1996, has not taken into account the main purpose of limiting the court intervention in arbitral process.<sup>233</sup> The doctrine of party autonomy is associated with the freedom to exclude local law or municipal courts, and is accordingly, incompatible with judicial review or intervention now expressed by English judges.<sup>234</sup> Security for costs is still a problematic; following sharp criticism of orders by English courts for security in international arbitral proceedings, the fact that one party has its central management and control outside English law is now a prohibited ground for granting such a relief. This accords with the spirit of

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462 at 465, where he said that “if there is one thing which more than public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with the freedom of the contract.”

<sup>229</sup> See EAA 1996, s 33 (1), which provides that “the tribunal may adopt procedures suitable to the circumstances of particular case, avoiding unnecessary delay or expense.”

<sup>230</sup> See Lord Saville, *The Arbitration Act 1996 and its Effect on International Arbitration in England* (unpublished paper 1996). See also *Arbitration International* 13 (4) LCIA (1997).

<sup>231</sup> See H Holtzman and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation 1989) 764-807. See also Martin Hunter, *Commercial Arbitration* (Sweet & Maxwell 1991) at 121.

<sup>232</sup> See EAA 1996, s. 46; see Stewart Shackleton, *The Applicable law in International Arbitration Under the New English Arbitration Act 1996*, (1997) *Journal of Court of International Arbitration (LCIA)* Vol.13 No.(4) ( 1997) at 389.

<sup>233</sup> See R Merkin, *Judicial Support Ant-suit Injunctions*(2009) *Arbitration Law Monthly*, 9 (2).

<sup>234</sup> EAA 1996, s 44 (5) and 66.

international law where no parties are foreign, despite the express ant-discrimination provisions, in the Act. The English municipal courts take into account one party's location outside England in granting orders for security in the context of arbitration-related litigation, even where the foreign party is found to have adequate assets and neither party has any link to England other than the decision to arbitrate in London. The extent and scope of the validity of the arbitration agreement should be determined by the tribunal, not the courts, as this impedes party autonomy. In addition, direct access to local courts during the initial stages of arbitration deprives English law of the benefits to be gained from doctrine and practice developed at the international level where experienced arbitrators have devised solutions to jurisdictional challenges that differ considerably in nature from those encountered by the English courts. This means, however, that there is a quagmire faced by litigants, as Thomas comments: "The challenge of maintaining the position of the city as a leading international financial centre is a real one; what role the legal system plays is difficult for lawyers to assess, but it is not insignificant."<sup>235</sup>

## **2.6 Conclusion**

This chapter examined the historical development of the legal framework for arbitration from 1889 to the current Arbitration Act 1996. The chapter examined the evolution of arbitral powers to grant provisional measures. It discussed the connotations of politics and jealousy surrounding arbitration and how the municipal courts dominated arbitral proceedings. The chapter investigated and analysed the legal framework, and addressed the question as to what extent the courts' jurisdiction in the granting of provisional measures shifted to arbitration competence. The chapter identified some of the problems and suggested solutions to issues that have not been resolved by the Arbitration Act 1996; one of them was to preclude the courts in arbitral proceedings, which is now manifested in the Arbitration Act 1996. Accordingly, the 1996 Act provides only one general power exercisable by the tribunal in granting provisional measures under section 39 (1), which provides that:

“ the parties are free to agree that the tribunal shall have the power to order on provisional basis any relief which it would have the power to grant in a final award.

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<sup>235</sup> Sir John Thomas, *The Courts of England and Wales, Commercial Education and the Changing Business of the City of London*, (2000) *Arbitration International* 16(2) at 141.



In addition, section 39 (2) provides only two measures a tribunal can as shown below:

- (a) A provisional order for the payment of money or the disposition of property as between the parties, or
- (b) An order to make an interim payment on account for costs of the arbitration.

It is expressly provided that the arbitral tribunal's power in granting provisional measures is limited, even if the tribunal use section 48 in trying to give remedies, under section 48 (3)-(4). It is not expressed in the enactment that section 48 was to allow the tribunal to order all provisional measures. The restriction for an arbitral tribunal to order only two particular types of measures seems out of date in comparison with the scope of the interim orders that can be granted by courts and even arbitral tribunals themselves according to the amendments made to the UNCITRAL Model Law<sup>236</sup> (originally adopted in 1985) in 2006. The lack of clarity and limited scope of arbitral power under the 1996 Arbitration calls for some reform in order to broaden that scope, in order to avoid the problem of earlier enactments with regard to arbitration competence to grant provisional measures.

The Arbitration Act is too restrictive, being limited to only England and Wales, and should be modernised to meet the demands of commerce internationally, especially in relation to issues of the granting and enforcement of provisional measures. The doctrine of party autonomy should be protected and all procedures with regard to the competence of arbitral proceedings and arbitration agreements should be left to the tribunal, since the parties chose arbitration in order to avoid the complexities of litigation and also to maintain the status quo. Since it was adopted on the recommendation of the DAC committee which was to adopt the Model Law, it would of great impetus of the current registration mirrored the Model Law Article 5, which provides that no court “*shall*” intervene in arbitral proceedings. In order to meet the demands of justice, the Convention on Human Rights needs to be addressed in a new reform in arbitration, so that ex parte orders are not seen as a violation of Article 6 of the Convention on Human Rights.

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<sup>236</sup> See UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law ( Interactive),1985,2006, <[http://www.unictal.org/pdf/English/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.unictal.org/pdf/English/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>, accessed 13 January 2010.

## CHAPTER THREE

### 3 Arbitrators' powers (The concept of party autonomy)

#### 3.1 Introduction

International commercial arbitration is primarily based upon the parties' consent and not surprisingly the arbitration agreement is considered by leading commentators to be the foundation stone of international arbitration.<sup>237</sup> This feature reinforces the contractual basis of arbitration and is reflected in the vast majority of international conventions,<sup>238</sup> national laws and institutional laws; therefore, party autonomy<sup>239</sup> is considered one of the most relevant principles in international arbitration.<sup>240</sup>

Party autonomy rule is based on the assumption that the parties to an arbitration agreement are knowledgeable and informed,<sup>241</sup> and that they use the doctrine responsibly.<sup>242</sup> As a matter of general principle, the expression "*unless otherwise agreed by the parties*" is a frequent occurrence in many arbitral enactments, conventions or arbitral rules,<sup>243</sup> that gives parties a great degree of autonomy, universally, as an acceptable principle.<sup>244</sup> The doctrine of party autonomy at times can be implied,<sup>245</sup> where disputes arise. Where there are no explicit powers (default

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<sup>237</sup> See Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) at 85.

<sup>238</sup> See Olene Perepelynska, Party Autonomy v Mandatory Rules in International Arbitration, <<http://www.sk.ua/en/publications/party-autonomy-vs-mandatory-rules-in-international...>>, accessed on 21 August 2013. See also Alan Redfern and Martin Hunter, with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, (4<sup>th</sup> edn Sweet & Maxwell 200) at 265.

<sup>239</sup> See DAC Report February 1996.

<sup>240</sup> See Born 1170-1172.

<sup>241</sup> See Tweeddale and Tweeddale, who refer to the autonomy of the arbitration agreement as being "*the cornerstone of the UNCITRAL Model Law.*"

<sup>242</sup> See *Channel Tunnel v Balfour Beatty Construction Ltd* [1993] AC 334 at 263.

<sup>243</sup> See Julian Lew, Loukas Mistelis and Stefan Kroll, *Cooperative International Commercial Arbitration* (Kluwer Law International, 2003) at 18. See also Jan Paulsson, 'International Commercial Arbitration', in John Tackaberry, Arthur Marriot QC and Ronald Bernstein, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4<sup>th</sup> edition, Sweet & Maxwell 2003) at 335.

<sup>244</sup> See Steel J in *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance* [2000] 2 Lloyd's Rep 68, where it was held by the court that the arbitral tribunal was better in order to hear evidence from two Romanian academics, due to party autonomy doctrine.

<sup>245</sup> See *Charles Construction v Deriderian*, 586 N.E 2d 992 (Mass.1992), where the Circuit Court held that an arbitral tribunal has implied authority to grant security for costs. See David Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran United States Claims Tribunal* (Berkeley Law UC 1986). See also Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Ocean Publications 2000), " The

powers) given to the arbitral tribunal to grant provisional measures,<sup>246</sup> it is submitted that such measures be granted on the basis of the implicit powers. This is common where the arbitral tribunal operates within a territorial boundary of which is marked by “*lex arbitri*”. It can be stated that arbitrators are generally empowered to grant provisional measures, as many laws of states provide this competence.<sup>247</sup> Implied powers are relied on mainly by a small number of arbitral tribunals in the international commercial arena.<sup>248</sup> It should be noted that such powers receive some criticism,<sup>249</sup> since implied powers are seen as a common law concept, and that lack of statutory foundation infringes the principle of legality.<sup>250</sup> However, such criticisms appear to be baseless, on the ground that when the parties confer authority to the tribunal to adjudicate disputes or interpret<sup>251</sup> the arbitration agreement, the tribunal has extensive authority under the party autonomy principle “*volunt partium facit*”.

This principle derives from the concept that the intent of the parties shall be respected and enforceable,<sup>252</sup> all arbitration,<sup>253</sup> party autonomy is the guiding principle in determining the procedure to be followed in any international commercial arbitration; indeed,<sup>254</sup> it sets a platform for the tribunal to grant provisional measures in most cases.<sup>255</sup> The lawyers acting on behalf of the parties exercise the rule of party autonomy.<sup>256</sup> The authority of the arbitration tribunal rests

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powers of the arbitrator to issue procedural orders including interim measures of protection, and the obligation of the parties’ to abide to such orders, ”.10(1) ICC Int’l Bull 65-66 ( 1999).

<sup>246</sup> See *Jivraj v Hashwani*[2011] UKSC 40, where it was held that arbitrators have the discretion to settle disputes based on the principle of implied party autonomy.

<sup>247</sup> See LCIA Rules, Article 25.1, which provides that unless the parties otherwise agree, the arbitral tribunal has the power to order the preservation of property relating to the subject matter of the arbitration.

<sup>248</sup> See European Convention, which provides a Uniform Law on Arbitration 1966, Article 4(2).

<sup>249</sup> See Yesilirmak, Provisional Measures in International Commercial Arbitration (2005 Kluwer Law International), at 54-59.

<sup>250</sup> See Mackinnon J in *Norse Atlas Insurance Company Ltd v London General Insurance Co Ltd* [1927] Lloyd's Rep 104 at 107, where it was practical for the arbitrators to determine issues for a business context under party autonomy.

<sup>251</sup> See Karrer/Less, Theory 99. The Principle of Effectiveness and Good Faith Assist in Interpreting the Arbitration Agreement. See also AAA Article 16, ICDR Article 11, ICC Rules Article 15, UNCITRAL Article 15, and WPO Article 38.

<sup>252</sup> *Ibid.* 81.

<sup>253</sup> See A Redfern and M Hunter, with N Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration (4<sup>th</sup> edn, Sweet and Maxwell 2004) at 265.

<sup>254</sup> See ICC Rules, Article 23(1); ACICA Rules, Article 28.1.

<sup>255</sup> See Redfern and Hunter, Law and Practice of International Commercial Arbitration (3<sup>rd</sup> edn, Sweet and Maxwell London 1999) at 247.

<sup>256</sup> See C Chatterjee, ‘The reality of the party autonomy rule in international arbitration’, (2003) Journal of International Arbitration 20(6)539-560.

on the agreement between the parties executed in accordance with the law.<sup>257</sup> Such agreement can take two forms: one that submits to arbitration (for already existing disputes) and the one that covers disputes that may arise in the future. The former is traditionally called a “*Compromis*” and the latter a “*clause compromissoire*”.<sup>258</sup> The parties may agree to arbitrate because they have a common interest in finding a relatively speedy, less adversarial and less public policy way of solving disputes.

The main purpose of this chapter is to adduce or establish that the party autonomy is considered to be the pillar of the arbitration system, in granting provisional measures.<sup>259</sup> Arbitration is a consensual process based on the principle of party autonomy,<sup>260</sup> whereby it owes its existence to the parties, and the tribunal can only grant provisional measures that the parties have referred to it.<sup>261</sup> It is a truism of arbitration law that arbitration is a creature of party choice.<sup>262</sup>

Actually, party autonomy is based on the law of contract; in other words, the parties to the arbitration agreement<sup>263</sup> are free to choose the applicable law,<sup>264</sup> the law governing arbitration, the place of arbitration (*lex arbitri*),<sup>265</sup> the law of the substance,<sup>266</sup> the composition of the tribunal,<sup>267</sup> and the arbitrability of a dispute.<sup>268</sup>

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<sup>257</sup> See Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell 1999) at 247, where they state that “party autonomy is the guiding principle in determining the procedure to be followed in international commercial arbitration. It is also a principle that has been endorsed not only in national laws but also by international institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition.”

<sup>258</sup> See Tibor Varady, John Barcelo and Arthur Von Mehren, *International Commercial Arbitration: A Transnational Perspective* (2<sup>nd</sup> edn, Thomas West 1998) at 84.

<sup>259</sup> See EAA s.30 (1).

<sup>260</sup> See *Heyman v Darwins Ltd* [1942] AC 356.

<sup>261</sup> See Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> edn, Sweet and Maxwell 1999) at 247.

<sup>262</sup> See Jonathan Blackman and Esti Tambay, *Class Action Arbitration Opinions Focus on Party Autonomy* (2013) *The New York Law Journal*, <<http://www.newyorklawjournal.com/pubArticleNy.jsp?id+120615607575>> accessed 21 August 2013.

<sup>263</sup> See Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books 1994) 30.

<sup>264</sup> See *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48. See also UNCITRAL Model Law Article 19; New York Convention, Article V (1) (d); EAA 1996 S.15 (1), 16 (1), 103 (2) (e); UNCITRAL Article 18 and Chukwumerije above, 78.

<sup>265</sup> The law of the place of arbitration. An English Judge defined “*lex arbitri*” as a body of rules which sets standards external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration.

<sup>266</sup> See Model Law, Article 28 (1). See also Chukwumerije, 108; UNCITRAL Rules, Article 35 (1); Redfern and Hunter, para 3.98.

<sup>267</sup> See Redfern and Hunter, paras 4.30, 4.77. See also Emilia Onyema, ‘Selection of Arbitration in International Commercial Arbitration’ (2005) *International Arbitration Law Review* 8(2) 45-54, at 46; ICC Rules, Article 8.3-8.4;

The doctrine of party autonomy in England in the general sense started to develop in the nineteenth century,<sup>269</sup> and was later adopted in the USA in the American case of *First Options*,<sup>270</sup> where the Supreme Court held that arbitration should be the place to settle disputes and to provide all remedies, due to the party autonomy principle. Party autonomy emanates from the ethos in which commercial arbitration systems developed and became established.<sup>271</sup> In the author's view, party autonomy is the bible of the whole process of arbitration; therefore, it should be respected by all the parties to arbitration.<sup>272</sup> However, with all its advantages, this autonomy is subject to some limitations, which this thesis will discuss.

The arbitral tribunal can only grant provisional measures subject to the principle of party autonomy. Indeed, the power of the tribunal to grant provisional measures is closely related to the question of jurisdiction to grant any provisional measures sought by the party to arbitration.<sup>273</sup> International commercial arbitration is primarily based upon the parties' consent and not surprisingly the arbitration agreement is considered by leading commentators as the foundation stone of international arbitration.<sup>274</sup> This feature reinforces the contractual basis of arbitration as mentioned in the vast majority of international conventions, national laws and institutional rules. Therefore, party autonomy is considered to be one of the most relevant principles in international commercial arbitration.<sup>275</sup> It should also be emphasised that the arbitral tribunals also depend not only on the parties' consent but also on the legal system that legitimates their authority and limits their jurisdictional power.<sup>276</sup> The proposition of conferring unlimited powers on the arbitral tribunal may not be attractive as some control is needed so as to

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ICDR Rules, Article 6. See also M. Scott Donahay, 'The Independency and Neutrality of Arbitrators' (1992) 9 J. Int'l Arb 31, 31.

<sup>268</sup> See *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 Ct 3346 (1985). See *Eco Swiss China Time Ltd v Benetton International NV Case C-126/97* (1999).

<sup>269</sup> See Dicey, Morris and Collins, *The Conflict of Laws* (14<sup>th</sup> edn with 4<sup>th</sup> suppl, Sweet & Maxwell 2010) paras 32-004.

<sup>270</sup> See *First Options of Chicago Inc v Kaplan* 514 US 938 (USA Ct)(1995).

<sup>271</sup> See Dr Husain Al-Baharma, 'International Commercial Arbitration in Changing World', (1994) Arab Law Quarterly, 9, 144.

<sup>272</sup> See EAA, s 1 (b). See also Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, where the Court of Appeal held that the English Court has no general supervisory powers over the conduct of arbitration that are more extensive than the powers conferred by the Arbitration Acts.

<sup>273</sup> See Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> edn, Kluwer Law International 2009) 1170-1172.

<sup>274</sup> See Nigel Blackaby and Constantine Part asides with Alan and Hunter, Redfern and Hunter on International Arbitration (5<sup>th</sup> edit, Oxford University Press, 2009), 85.

<sup>275</sup> See Emmanuel Gaillard and John Savage (eds), *Fourchard Gaillard and Goldman on International Commercial Arbitration* (1999, Kluwer International), 31.

<sup>276</sup> See Gary Born above at 1177-1180.

ensure that parties are not left without remedies should the arbitrators abuse the powers conferred on them. On the other hand, arbitrators should be as free as possible to grant provisional measures, without fear of being challenged by a party who may delay the proceedings where he realises that he has a weak case, so that the tribunal can sufficiently and effectively carry out its task.<sup>277</sup> This chapter aims to promote a conception under which the parties' consent is the guiding element in arbitral proceedings and therefore, limitations imposed by the law should be interpreted restrictively and taking into account the actual circumstances of the case.<sup>278</sup>

This chapter will address the question as to what extent the doctrine of party autonomy can determine the (jurisdiction) power of the arbitral tribunal to grant provisional measures.

In addressing the above set question this chapter is divided into the following sections:

Firstly, this chapter will discuss the source of jurisdiction and powers of the arbitral tribunal to grant provisional measures, stating with case law, which provides grounds for party autonomy as the main source of arbitral power. In addition, relevant provisions of the English Arbitration Act 1996, international arbitral rules and conventions (for example, the New York Convention), comments of some academic scholars in the field of arbitration and advanced theories will be discussed in support of this doctrine.

Secondly, the chapter examines the advantages of party autonomy to arbitral proceedings.

Thirdly, the chapter examines limitations to party autonomy in international arbitration procedures with regard to provisional measures.

Fourthly, the author aims to provide recommendations in regard to the doctrine of party autonomy in order to highlight arbitral proceedings as the best mechanism in settling commercial disputes.

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<sup>277</sup> See EAA1996 s.5 (3).

<sup>278</sup> See Geoffrey Beresford Hartwell, 'Arbitration and the Sovereign Power' (2000) 17 (2) *Journal of International Arbitration*, 11-18.

### 3.2 The sources enabling the arbitral tribunal to grant provisional measures

As briefly pointed out above, the consent to arbitrate is a pre-requisite of any international arbitral proceedings,<sup>279</sup> which is primarily based on the principle of party autonomy.<sup>280</sup> Accordingly the arbitration agreement is the main source of the jurisdiction and the power of the arbitral tribunal.<sup>281</sup> The parties may agree to limit the jurisdiction of the arbitral tribunal to certain subject matters, and in the same way they are free to choose to arbitrate instead of having recourse to the national courts.<sup>282</sup> However, they can only submit the dispute issues that are not central to public policy and that are arbitrable (in other words, capable of being resolved by arbitration).<sup>283</sup> Since the arbitration agreement is the main source of the jurisdiction and power of the tribunal, it is of great importance that arbitrators respect the limits of such agreement.

There is no clear explicitly expressed provision in the current EAA 1996,<sup>284</sup> or in international law and conventions on arbitration, that defines party autonomy. The definition has become a matter of theory rather than practice. However, scholars in the field of arbitration like Professor René David have defined party autonomy as:

“ a device whereby the settlement of a question, which is of interest for two or more persons is entrusted to one or more other persons the arbitrators or arbitrators who derive their power from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such agreement. ”<sup>285</sup>

In similar vein Albert Jan van den Berg defines party autonomy as:

“the resolution of a dispute between two or more parties by a third party person who derives his powers from the agreement of the parties, and whose decision is binding upon them.”

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<sup>279</sup> See EAA 1996 s.7, 8, 15, 30, 14, 4 (3) and 40

<sup>280</sup> See Emmanuel Gaillard and John Savage, *Fourchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 31.

<sup>281</sup> See Sigvard Jarvin, ‘The Sources and Limits of the arbitrator’s power’ in Julian Lew (edn), 50-72.

<sup>282</sup> See Mansfield LJ in *Robinson v Bland* [1865] 2Burr 1075, where he said “that the general rule established ex comitat and jure gentium is the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.....”

<sup>283</sup> See Mia Louse Livingstone, *Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact* (2008) 25 (5) *Journal of International Arbitration* 529, 532-534. See Article V (I) (b) and (2) (b) of the New York Convention. See Article 18 of UNCITRAL

<sup>284</sup> See EAA 1996 s. 39 (1), .39 (2) (a), .39 (4), .47 and s.48.

<sup>285</sup> See Lew J, *Applicable Law in International Commercial Arbitration* (New York: Ocean Sijhoff, 1978) 11.

In addition, Redfern and Hunter, who respect the doctrine of party autonomy, define it in the following terms:

“It is a principle that has been endorsed not only in national laws but also by international arbitral institutions and organisations.”<sup>286</sup>

Tweeddale & Tweeddale assert that:

“ the autonomy of the arbitration agreement is considered as being one of the cornerstones of the UNCITRAL Model Law.”<sup>287</sup>

One of the problems in English jurisprudence or arbitral proceedings is the lack of a clear definition of this term “party autonomy”. In order to avoid ambiguity in the application of this doctrine it is essential for the Arbitration Act 1996 to provide clarity on this. The author also recommends that international conventions like the Model Law, the New York Convention or the LCIA should adopt a clear procedure, in order to harmonise arbitration jurisdiction with regard to provisional measures. It may however, be argued that it was in order to provide a wide scope for party autonomy that the legislators did not limit its scope and application to arbitral disputes or provisional measures.

### **3.2.1 Case law and party autonomy**

Case law supports the notion that party autonomy is the cardinal element of arbitration,<sup>288</sup> and that the arbitral tribunal has the power to grant provisional measures due to the arbitration agreement or clauses in the agreement.<sup>289</sup> The doctrine of party autonomy was first brought to attention by municipal courts in American jurisdiction, in the famous case of *McCreary Tire*

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<sup>286</sup> See Redfern and Hunter, *Comparative Law of International Arbitration* at 315.

<sup>287</sup> Tweeddale & Tweeddale at 40.

<sup>288</sup> See Megaw LJ in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223 at 83, where he said that: “we see no reason why a matter of construction of the words used; the courts should try to cut down the width of the intended meaning. The meaning is to provide a wide scope to arbitral tribunal to rule on its jurisdiction...”

<sup>289</sup> See *Products Inc v Onus Shipping Co Ltd* Un Reported, where Wright LJ commented that “where there is an express statement by the parties of their intentions to select the law of the contract, it is difficult to see what qualifications are possible, provided the intentions expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.” See *Lloyd v Guilbert*, [1865] 6 B at 101 where Wiles LJ commented that “it is necessary to consider what the general law the parties intended that the transaction should be governed, or that rather to what general law it is just to presume that they have submitted themselves in the matter.” See George Jessel Mr in *Printing and Numerical Registering Co v Sampson* [1875] LQ 462.



*&Rubber Co v CEAT SPA*,<sup>290</sup> where a dispute arose which related to a breach of the exclusive distribution agreement subject to the arbitration agreement, between McCreary, a Pennsylvania corporation, and CEAT, an Italian Corporation, under the ICC Rules in Brussels (Belgium). McCreary attempted to frustrate the arbitration agreement and initiated a suit. The Court of Appeal for the Third Circuit in Philadelphia was called to rule on the compatibility of the pre-trial attachment (interim measures) under the New York Convention.<sup>291</sup> The Court referred the parties to arbitration rather than stay the trial of the action. The court in support of party autonomy saw that allowing a stay would bypass the agreed-upon method of settling disputes and such a bypass is prohibited by the New York Convention, if one party to the agreement objects to it. Further, the court held that the New York Convention forbids the Courts of the contracting states from entering a suit which violates an agreement to arbitrate.<sup>292</sup> The Court of Appeal provided that the obvious purpose of the enactment was to permit the removal of all cases falling within the terms of the treaty, in order to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement was held to be inconsistent with the purpose.

The ruling was better developed in England by the House of Lords in the famous *Channel Tunnel* case, where Lord Mustill critically analysed the doctrine of party autonomy in depth.<sup>293</sup> The main issues in the case were an agreement to refer future disputes to arbitration for settlement. The employer, the Channel Tunnel Group, contracted both French and English contractors who formed a consortium to build the tunnel between England and France, and by a later variation, to construct a cooling system. The contract provided for initial reference of disputes or differences, including disputes, to a panel of experts, and contained an arbitration clause providing for final settlement by ICC,<sup>294</sup> and arbitration in Brussels under clause 67 (1).<sup>295</sup> Later a dispute arose as to the amounts payable in respect of the work on the cooling system,

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<sup>290</sup>501 F.2d 1032 (3<sup>rd</sup> Cir 1974).

<sup>291</sup> See New York Convention Article II (3).

<sup>292</sup>*McCreary Tire* para 90-91.

<sup>293</sup>*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 334 HL.

<sup>294</sup> ICC Rules 8 (5) provides that before a file is transmitted to the arbitrator, and in exception circumstances even after, the parties shall be at liberty to apply to a competent court for interim measures, and they shall not by so doing be held to infringe the arbitration agreement to arbitrate or affect the arbitral powers. Indeed the party autonomy further controls the intervention of municipal courts in granting provisional measures or arbitral proceedings.

<sup>295</sup> Para 4 of the clause67 provided that “subject to certain provisions as to notice, all disputes or differences. Shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules....”

and by letter the defendants (contractor) threatened to suspend that work alleging that the claimants were in breach of contract. The contractors commenced proceedings in court under s 37 of the Supreme Court Act 1981; however the claimants sought an injunction under party autonomy and the arbitration agreement. The defendants' court proceedings were halted and a stay was granted in order to maintain the doctrine of party autonomy.

Mustill LJ, in examining the principle of party autonomy and the arbitration agreement, made a reference to *Black Clawson International Ltd*,<sup>296</sup> and said that this should be deemed a submission to arbitration, within the meaning of the Arbitration Act 1950. Mustill at para 453 said

“The only factor apparently pointing towards English law is the reference to the Arbitration Act 1950. Common sense suggests this provision cannot have been intended to apply the whole of the Arbitration Act 1950 as an arbitration which was from the outset designed to take abroad. For otherwise, the arbitrators would have been obliged to state a special case from Zurich arbitration to the English Court; and the latter court would have had the power to set aside or remit the award, and to make an interlocutory order for discovery, security for costs, interim preservation and so on, whilst at the same time recognise the absurdity of their choosing their English curial law for arbitration abroad.”<sup>297</sup>

Indeed Mustill LJ was at the point in *Channel Tunnel* reciting the submission of the Counsel, was considering the power of the parties in settling any disputes that arise, and that courts should not intervene unless the arbitration is null and void. His argument was supported by Stoughton LJ who suggested that:

“The validity of an arbitration agreement is governed by the law which the parties have chosen, and if none, by the law of the place where any award is made; ... that arbitral procedure is governed by the law which the parties have chosen.....”

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<sup>296</sup>*Black Clawson International Ltd v PapierwerkeWaldhoff Aschaffenburg A.G* [1981] 2 Lloyds Rep 446, para 453 where a contract by the parties was stayed by the Zurich Court in support of arbitration to promote party autonomy doctrine.

<sup>297</sup>See *Channel Tunnel v Balfour Beatty Construction Ltd* [1993] 2 WLR at 673, see also *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, where Goff LJ said that “it is of course true that English law will, as curial law apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law..”

Kerr LJ said in para 120 that:

“There is equally no reason in theory which precludes parties to agree that arbitration shall be held at a place or in country X. The limits and implications of such an agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where it has happened. This is not surprisingly when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the English law, which rests upon the territorial limited jurisdiction of our courts, an agreement to arbitrate for X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X.”

Indeed this quotation above precludes or limits intervention by the courts in arbitral proceedings, where the parties have submitted their disputes to arbitration; in other words, the tribunal has the privilege of granting provisional measures with wide discretion, where the parties have provided autonomy. This quotation was further advanced in Mustill and Boyd,<sup>298</sup> as follows:

“The English court would be highly unlikely to assume jurisdiction to intervene in the reference or to set aside or remit the award. Any attempt to exercise powers to appoint or to give ancillary relief, such as orders for inspection of property, would in fact present formidable difficulties of enforcement. Moreover the prospect of two courts exercising supervisory power over the same reference to the same time would appear unacceptable.”<sup>299</sup>

LJ Evans, one of the judges on the appeal, also advanced his judgment in support of party autonomy as the main source of the arbitral tribunal in any arbitral proceedings including interim or provisional measures, where he said that:

“a party to an arbitration clause was not entitled to disregard that arbitration procedure and bring an action at law merely because a preliminary step had not been taken; that to the panel there had not been a decision by or even a reference to the panel, there was a dispute between the parties with regard to the matter agreed to be referred, which could

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<sup>298</sup> See Mustill and Boyd, *Commercial Arbitration Companion* volume (2nd edition, LexisNexis, 2001) at 90-92.

<sup>299</sup> *Channel Tunnel* at 675.

be referred to arbitration, since it could be shown, readily and beyond doubt, that the defendant had no right to suspend.”<sup>300</sup>

The quotation above illustrates that if any party to an arbitration agreement commences any legal proceedings in municipal courts against any other party to the arbitration agreement in respect of any matter agreed to be referred, any party to proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay proceedings. The court has to be satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed,<sup>301</sup> in order to grant any provisional measures; for example, an interlocutory or any other injunction, under section 37 of the Supreme Court Act 1981. It should be emphasised that section 37 of the Supreme Court Act should not be exercised where the parties have agreed to arbitrate.

The *Channel Tunnel* ruling in support of party autonomy has been advanced in the recent ruling by Kagan J of the Supreme Court of the United States, in *Oxford Health Plans LLC v Sutter*, where the respondent (Sutter, a paediatrician), provided medical services to the claimant/petitioner (Oxford Health Plans) under a fee-for-services contract that required binding arbitration for contractual disputes. Several years later, Sutter filed a suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey Physicians under contract with Oxford. The complaint alleged that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreement and various state laws. The question was whether Oxford had exceeded their powers under the Federal Arbitration Act under s 9. Oxford moved to compel arbitration over Sutter’s claims, relying on the clause in the contract which provided that:

“No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.”<sup>302</sup>

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<sup>300</sup>Ibid at 656.

<sup>301</sup>See *Mayer Newman and Co Ltd v AlFerro Commodities S.A* [1990] 2 Lloyd’s Rep 290.

<sup>302</sup> See *Oxford Health Plans PLLC v John Ivan Sutter* (2013) para 15-16.

The court in support of the doctrine of party autonomy granted Oxford’s motion, thus referring the suit to arbitration. Kagan LJ reasoned that the clause sent to arbitration “the same universal class of disputes” that it barred the parties from bringing “as civil actions in court: the intent of the clause was to vest in the arbitration process everything that is prohibited from the court process.”<sup>303</sup>

Under USA jurisdiction,<sup>304</sup> it has been adduced in many cases that the courts are willing and will not allow any suit against arbitration agreement. Under AAA section 10 (a) (4), a person seeking provisional measures from the court bears a heavy burden, just showing that an arbitrator made an error or even serious error, because the parties bargained for arbitration construction of their agreement, and an arbitration decision stands regardless of the court’s view of its merits.<sup>305</sup>

### **3.2.2 Party autonomy under international arbitral rules and conventions**

The doctrine of party autonomy is given the utmost respect internationally under many arbitral rules and conventions. Given that England is a centre for international arbitration it is important to consider the most prominent arbitral rules and conventions, as will be discussed below.

The LCIA Rules provide that:

“The tribunal shall have the jurisdiction to rule on its jurisdiction including any objection to the initial or continuing existence, validity or effectiveness of the arbitration agreement.”<sup>306</sup>

Furthermore, the LCIA rules similarly state that:

“The arbitral tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

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<sup>303</sup> Ibid.

<sup>304</sup> See *Stolt-Nielsen SA v Animal Feeds Int’l Corp* 559 U.S 662, where a charter party contained an arbitration clause. Animal feeds brought a class action antitrust suit against the petitioners for price fixing, and the suit was consolidated with similar suits brought by other charterers, including one with the Second Circuit Court. The Court ruled at 671 that an arbitration clause or agreement stands as the basis for a contract due to party autonomy. The availability of class arbitration is a question the arbitrators should decide on in support of party autonomy doctrine.

<sup>305</sup> See *Eastern Associated Corp v Mine Workers*, 531 U.S 57, 62.

<sup>306</sup> LCIA Article 23.1.

(c) To order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have the power to grant in an award, including a provisional order for the payment of money or the disposition of property as between parties.<sup>307</sup>

The New York Convention provides that:

“The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being formed.”<sup>308</sup>

UNCITRAL Rules states that the tribunal may at a party’s request grant provisional measures.<sup>309</sup> In addition, in 2006, UNCITRAL decided to broaden Article 17 of the Model Law to read:

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

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

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

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

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<sup>307</sup> See LCIA Rules, Article 25. Available at <http://www.lcia-arbitration.com>, accessed 25 January 2010.

<sup>308</sup> New York Convention, Article 11(3).

<sup>309</sup> See UNCITRAL, Article 26.

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

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

The UNCITRAL Model Law Article 16 (1) sets out that:

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

Aron Broches has commented in respect of this provision under the Model Law:

“Separability of the arbitration clause is intended to have the effect that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concluded that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction.”<sup>310</sup>

Article 26 of the UNCITRAL Model Law is identical to Article 17 except for the absence of any reference to the agreement of the parties. Assuming the parties have not reached a contrary agreement, the arbitrator’s powers are extensive, covering all forms of property, including vessels and even shares. It should be noted that Article 17 in the 2006 version of changes to the Model Law has introduced a preliminary order procedure which allows for *ex parte* orders as one

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<sup>310</sup> Aron Broches, Commentary on the UNCITRAL Model Law, International Council for Commercial Arbitration Handbook on Commercial Arbitration ( Supplement 11 of January 1990) at 74 -75.

request alongside interim measures, thereby essentially directing the respondent not to frustrate the purpose of the interim measures.<sup>311</sup>

Article 28 of the Model Law provides that:

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

The Model Law in relation to party autonomy is supported by many countries; for example, the Hong Kong Ordinance, section 2 GB provides for arbitrators to have similar broad powers in domestic arbitration. The American Arbitration Rules provide that the arbitral tribunal has the power to take whatever interim measure<sup>312</sup> it deems necessary, including injunctive relief.<sup>313</sup> In France an arbitrator has the same power to arrange his own procedure any agreement by the parties. This establishes a ground for the tribunal to grant any provisional measures.<sup>314</sup> Swedish arbitral laws are subject to the principle of party autonomy as they provide that:

“Unless the parties have agreed otherwise, the parties may, at the request of a party, decide that, during the proceedings, the opposing party may undertake a certain interim measure to secure the claim which is to be adjudicated by the parties. The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure.”<sup>315</sup>

The quotations above clearly show that the doctrine of party autonomy is the main source for the arbitral tribunal to grant provisional measures or to settle any disputes in any arbitral proceedings. The tribunal only grants provisional measures with respect to parties’ agreement, when a dispute arises, and when there is clear evidence that if that provisional measure is not

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<sup>311</sup> See Article 17 B (2) of the Model Law, the arbitrator can grant one of these orders if prior disclosure of the request to the respondent risks frustrating the purpose of the measure. This is reflected in Article 21 of the ICDR Rules.

<sup>312</sup> See *First options of Chicago Inc v Kaplan* 514 US 938 943 ( US Cir 1995).

<sup>313</sup> See AAA Rules Article 21(1) and 27 (7).

<sup>314</sup> See French Commercial Code Article 1494 (2).

<sup>315</sup> Swedish Arbitration Act S.25 (4).



granted there is a substantial risk to the victim. It should be noted that in some cases the tribunal may decide to grant measures irrespective of the parties' agreement.

The ICC Rules (2012 version) give the arbitral tribunal wide discretion in ordering interim measures:

“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the tribunal may, at the request of a party, order any interim measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or an award, as the arbitral tribunal considers appropriate.”<sup>316</sup>

Article 6 (1) of the ICC Rules provides that:

“ where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.”

Furthermore, in terms similar to those adopted into the UNCITRAL rules, the ICC Rules provide that:

“unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement.”<sup>317</sup>

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<sup>316</sup> See Article 28 of the ICC Rules (2012 version).

<sup>317</sup> Ibid Article 6.4. see Article 23 of ICC available at [http://www.iccwbo.orgupladedfilescourt/arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.orgupladedfilescourt/arbitration/other/rules_arb_english.pdf), accessed 25/01/2010

The ICDR Rules of the American Arbitration Association (AAA)<sup>318</sup> give the arbitral tribunal a broad discretion to take whatever interim measures it deems necessary, “including the injunctive relief and measures for the protection or conservation of property”. This is manifested in the Australian Centre for International Commercial Arbitration (ACICA), where the tribunal is entitled to make an order to:

“Maintain the status quo or restore the status quo pending the determination of the dispute; ... take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm .. [and] preserve evidence that may be relevant and material to the resolution of the dispute.”

It should be noted that international arbitral rules and conventions and arbitral enactments are in support of party autonomy as the main source for granting provisional measures. It should however, be noted that in England, the power of the tribunal under party autonomy provided under section 39 of the EAA 1996,<sup>319</sup> is limited. Although section 39 limits the autonomy of the parties, section 30 of the Act provides unlimited powers for the tribunal to rule on its jurisdiction. This means that the English tribunal may use section 39 to grant provisional measures, subject to limitation of draconian freezing orders and anti-suit injunctions.<sup>320</sup>

### **3.2.3 Theories advanced in support of the doctrine of party autonomy**

Party autonomy establishes a contract between the disputing parties to an arbitration agreement. Since arbitration is a bilateral contract, one party to the arbitration agreement makes an offer with the legal intention to be bound (upon acceptance) by the other party. Upon acceptance of this offer to arbitrate existing or future disputes, the agreement to arbitrate comes into existence.<sup>321</sup> An arbitration agreement is owned by the parties just as a ship is owned by the ship

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<sup>318</sup> American Arbitration Association International Arbitration Rules ( interactive) <http://www.adr.org/sp.aspx?pid=33994>, accessed 25 Jan 2011.

<sup>319</sup> See English Arbitration Act ( interactive) available at <http://www.opsi.gov.uk/acts/acts1996/ukp-ga-19960023-en-1>, accessed on 25/02/2010. See Shafer JK, New solutions for interim measures of protection in international commercial arbitration English, Germany and Hong Kong law compared. Electronic Journal of Comparative Law (interactive) available at <http://www.ejcl.org/22/abs22-2.html>, accessed on 12/10/2010. See Germany's Code Civil Procedure available at <http://www.zpo.de>, accessed on 25 September 2010.

<sup>320</sup> See *West Tankers* [1993] UKHL.

<sup>321</sup> See Judge Seymour QC in *Wicketts and Sterndale v Brine Builders* [2001] CILL 1805. Where it was held that an arbitration tribunal grants provisional measures under the power to it by the agreement.

owners, in command of the captain (arbitrator), and subject to dismissal by the parties (disputants).<sup>322</sup>

Theories have been developed in support of the doctrine of party autonomy to adduce that the powers of the tribunal to grant provisional measures result from the parties 'acquiescence or the result of the will of the parties as expressed in the arbitration agreement; namely, contractual and jurisdictional theories.<sup>323</sup>

### 3.2.3.1 Contractual theory

The proponents of the contractual theory argue that party autonomy, as evidenced in the arbitral agreement, is the essence of arbitration.<sup>324</sup> Party autonomy is force of the arbitration<sup>325</sup> agreement, which has no state authorisation.<sup>326</sup> Since the arbitration agreement is created through the will and consent of people,<sup>327</sup> it provides authority to the arbitral tribunal to grant provisional measures. According to the contractual theory, an arbitrator is an agent of both parties, and therefore what is done by him has to be regarded as the will expressed by the parties.<sup>328</sup> The contractual theory is rooted in the arbitration agreement between the disputing parties and that the arbitrator draws his power from the same agreement and not from the public authority. The contractual theory basically provides that the state has nothing to do with arbitral proceedings conducted in its territory, since the formation of the tribunal and procedures is all done in accordance with the arbitral agreement between the disputing parties.<sup>329</sup>

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<sup>322</sup> See English Arbitration Act 1996 S.7 and 8.

<sup>323</sup> See *Charles Construction Co v Derderian* 586 N.E 2d 992.

<sup>324</sup> See Nygh Peter, autonomy in International Contracts, (Clarendon Press Oxford 1999) at 1.

<sup>325</sup> See New York Convention Article II (I), which provides that a *dispute must rise in respect of a defined legal relationship*"

<sup>326</sup> See *Mitsubishi Motors Corp v Sole Chrysler-plymouth, Inc* 473 US 614 (1985) at 433-38, where the court considered arbitration to be a contractual obligation based on the principle of party autonomy, and a failure to implement such contractual terms was a breach of contract by the Japanese Company.

<sup>327</sup> See UNCITRAL Article 26 ( 1) and (2).

<sup>328</sup> See David, Arbitration in International Trade (Deventer, The Netherlands: Kluwer Law & Taxation, (1985) at 139.

<sup>329</sup> See Donaldson Commercial Court Committee Report on Arbitration 1978 par 16, where he refused the autonomous contract actual nature of arbitration. See Megaw J in *Oriocia v Espaola de Segurors v Belfort MassEtc* [1962]2 Lloyd's Report 257. Where he commented that" the law of arbitrators in England must in general apply a fixed and recognisable system of law, which primarily and normally will be the law of England....."

It may be argued that parties exchange promises with the legal intention to be bound to the performance of those promises.<sup>330</sup> Thus, parties to arbitration perform under a contractual obligation that emanates from the principle of party autonomy. The whole arbitration process commences with the existence of the arbitration agreement, which confirms the contractual nature to arbitrate future disputes.<sup>331</sup> The disputing parties owe a duty of care to comply with the arbitral tribunal's decisions. The relationship between the parties is based on contract, and on the formation of this contract, cases relevant to provisional measures from various jurisdictions are concluded. The theory is based on the promise that it is the parties that decide to have their disputes resolved by arbitration, since arbitration is created by the will of the parties and they voluntarily agree to submit their disputes to arbitration.

The contractual theory is supported by many writers; for example, Francis Kellor said that:

“Arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such contract, nor does it give one party power to impose it on another. When such agreement is made part of the principal contract, the parties voluntarily forego established rights in favour of what they deem to be the greater advantage of arbitration.”<sup>332</sup>

Lord Diplock in *Bremer Vulkan v South India* stated that:

“The arbitration constitutes a self-contained contract collateral or ancillary to the ship building agreement itself.”<sup>333</sup>

Fourchard, Gillard and Goldman express the view that:

“A contract does necessarily exist between the parties and the arbitrators; the contract is bi-lateral and creates rights and obligations for both the arbitrators *and*

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<sup>330</sup> See *Channel Tunnel v Balfour* [1993] HL

<sup>331</sup> See *Fiona Trust Holding Corporation and Others v Privalov and Others* [2008] 1 Lloyds' Rep 254 at 256.

<sup>332</sup> See Francis Kellor, *Arbitration in Action*, quoted by Morris Stone in “A paradox in Theory of Commercial Arbitration,” (1966) 21 *Arbitral Journal*.

<sup>333</sup> [1981] 1 ALL ER para 289 at 297.

the parties. However, where arbitration is administered by an arbitral institution, the contractual relationship becomes triangular.<sup>334</sup>

Mustill and Boyd take a contrary view. They argue that:

“To proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the case of a massive reference, employing a professional arbitrator for substantial remuneration, we doubt whether a businessman would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such appointment is not like appointing an accountant or lawyer. Indeed it is not like anything else at all. We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and the party into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of arbitrator.”<sup>335</sup>

The English Courts, however, appear to disagree with Mustill and Boyd’s view. In at least two cases,<sup>336</sup> it has been found that the arbitrators become parties to the arbitration agreement itself. In *Compagnie Europeene de Cerelas SA*, Hobhouse J observed as follows:

“It is the arbitration contract that arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as matter of contract (subject as always to the various statutory provisions) bound by the terms of the arbitration contract.”<sup>337</sup>

Further Merlin and Felix assert that:

“[The] arbitrator upon accepting appointment becomes an agent of the disputing parties. The disputing parties as principals authorize the arbitrator to make provisional measures as a measure of settling disputes, since the interim measures contribute to the final award

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<sup>334</sup>Fourchard, Gaillard, Goldman, at 601-602.

<sup>335</sup>Mustill & Boyd, *Commercial Arbitration* (2<sup>nd</sup> edit 1989) at 223.

<sup>336</sup>See Mr Justice Phillips comments to *Boyd and Mustill v Hyundai Heavy Industries Co.Ltd* [1991] 1 Lloyd’s Rep 260. The text of the judgment of the Court of Appeal dates Feb 21 1991 is reported at [1991] 1 Lloyd’s Rep 524. The case went to the Court of Appeal but the contractual premise of the decision of the lower court was not rejected.

<sup>337</sup>[1986] 2 Lloyd’s Rep 301 at 306.

in arbitral proceedings. Such provisional measures are executed by the courts not as judgements but as an unexecuted contract between the disputing parties. The tribunal only decides what the parties could have done by the agreement; (the parties) give the tribunal a real mandate to decide in their place. The award is thus impregnated with contractual character, and according to the law, it appears to be the work of the parties it must have, like all agreements, lawful effect and must possess the authority of granting interim measures.”

The role of the courts should be only to enforce the obligation in the arbitration agreement and supplement the parties’ agreement and to provide a code of regulating the conduct of arbitration. However, national laws and courts in some cases regulate arbitral proceedings, and this conflicts with the party autonomy doctrine. Two well-known cases demonstrate the attitude of the courts,<sup>338</sup> in regard to party autonomy as the main source of arbitral power to grant provisional measures.<sup>339</sup> It may be argued that the contract theory is rooted in the arbitration agreement between the disputing parties and that the arbitrator draws his power from the same arbitration agreement and not from the public authority. Basically the state has nothing to do with the arbitral proceedings conducted in its territory, since the formation of the arbitral agreement or proceedings is all made in accordance with party autonomy.

Although the contractual theory is a cornerstone of arbitral power to grant provisional measures, in arbitral proceedings it is, however, subject to criticisms. First, the maximum freedom of contract is doubted even if it is accepted that the existence of arbitration is derived from the expressed intentions of the parties.<sup>340</sup> This principle of freedom that exists in most legal systems is restricted by states, as pointed out by Atiyah:

“Even before the acknowledgement of the perpetual economic warfare, limitations existed, and although merchants had been left to trade substantially free from economic regulations, that were only if they acted within the general protective framework of national legislation.”

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<sup>338</sup>See *Westacre Investments Inc v Jugoinport-SPdR Holdings Co Ltd and Others* [2000] QB 288, where it was confirmed that party autonomy is intervened by public policy to support arbitral proceedings.

<sup>339</sup>*Hubco v water and power Development Authority (WAPDA)* (2000), Vol. 16 p.439 where the Supreme Court of Pakistan granted an anti-arbitration injunction.

<sup>340</sup> See Mann, *The Theoretical Approach towards the law Governing Contracts between states and private persons.*X1 Rev Belge ( 1975) pp. 562-563.

From Atiyah's analysis, the author argues that the maximum scope of freedom of contract, in accordance to the contractual theory is therefore not clear and practical. Professor David explains that:

The reason why arbitration is considered as institution of the law of contract is probably not that such a view is regarded as having a sounder theoretical foundation, but that it is considered more likely to further the development of the practice of arbitration. If arbitration is classified within the domain of law of contract, then it is thought that the parties will enjoy a maximum freedom in the matter. Whether such a consequence actually occurs in the contractual thesis is not however clear.<sup>341</sup>

It is further submitted that an arbitrator is not an agent as the contractual theory states. The duty of an arbitrator, like that of a judge, is to give the parties a fair hearing and render a decision which may or may not be against both the parties. Conversely, an agent is bound to his principal. The agent, of course is prohibited from being a judge in his own cause, therefore he cannot empower his agent to do the same. Besides, an arbitrator is immune from liability to the parties' with respect to defaults committed by him in his capacity as arbitrator.<sup>342</sup> An agent, on the other hand, may be liable as principal for any default committed by him.<sup>343</sup>

The author argues that the above criticisms against the contractual theory in support of party autonomy need some critical analysis. The practicability of an arbitral tribunal is like that of a judge, since the arbitrator acts impartially in arbitral proceedings, a principle that any national court practises. The role of the arbitrator in a practical context is similar to that of an agent whereby he performs his duties under the doctrine of party autonomy which manifests the intentions of the parties. For the appointment of an arbitrator to be valid and binding on the respondent in a contract, a notional agency has to be implied into the relationship between the parties as it affects the appointment of the arbitrator. By the time the disputing parties conclude the arbitration agreement, each party to the arbitration agreement gives the other party a fictional power of attorney, or the other party agrees to the other party acting as its agent, for the purposes of appointing an arbitrator. The main purpose of this power of attorney or imputing of a notional

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<sup>341</sup> See David R. Arbitration in International Trade (1985) at 113.

<sup>342</sup> See Lew J, The Immunity of Arbitrators (London Press Ltd 1990) at 1-4.

<sup>343</sup> Under the principle of agency, an agent is liable for any injury resulting from negligence or non-execution of agency, or from an act done without or in excess of actual authority.

agency is to enable the arbitral tribunal to solve disputes or grant provisional measures to enhance the arbitral proceedings. It should be noted that in concluding an arbitral agreement,<sup>344</sup> each party agrees to perform it in their own interest and in the interest of the other party to the agreement, which manifests the party autonomy as the major source of arbitral jurisdiction to grant interim measures.

Further, the contractual theory represents the legal nature of the relationship between the disputing parties and the arbitrators.<sup>345</sup> The obligation and rights of the disputing parties and the arbitrators arise out of this contract between them. Any provisional measures granted by the arbitral tribunal are within the contractual obligation. The parties undertake to accept the arbitrators' awards having a contractual nature. The parties under the contractual theory agree to be bound by such awards, as Niboyet argues:

Arbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or judicial authorities but from the parties' agreement. The award is thus impregnated with a contractual character and according to the law, it appears to be the work of the parties,[so] it must have, as with all agreements, lawful effect, and it must possess the authority of a final judgement.<sup>346</sup>

Since the disputing parties delegate the power to grant interim measures to the tribunal under the terms of the arbitral agreement, and such terms cannot be derogated from without the consent of the parties, there is a duty of compliance with the decisions of the arbitral tribunal in a bona fide cooperation.<sup>347</sup>

### **3.2.3.2 Jurisdictional theory**

In 1965, Rubellin-Devichi formulated the judicial theory. Courts in most jurisdictions were still hostile to arbitration and fewer subject matters were held to be arbitral, while institution arbitration was beginning to spread. There was no clear demarcation between the arbitral tribunal

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<sup>344</sup> See New York Convention Article 2.

<sup>345</sup> See the decision of the USA Supreme Court in *At & Technologies Inc v Communication Workers of America*(475,Us at 547-649), where it was held that a tribunal has a contractual obligation to provide provisional measures.

<sup>346</sup> See Niboyet, *Traite*, Quoted in Lew at 55.

<sup>347</sup> See *BULFRACHT Cyprus Ltd v Boneset Co Ltd (M v Pamilos)* [2002] EWHC 2292.



and the judicial courts.<sup>348</sup> The jurisdictional theory highlights the dominance and control exercised by the sovereign state in regulating any arbitral proceedings conducted within its territorial jurisdiction through national laws.<sup>349</sup> The main theme of this theory is derived from the idea that every state is entitled to control any activities which take place within its territory, and that every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law.<sup>350</sup>

Jurisdictional theory is based on the premise that the arbitrator performs a judicial function as an alternative (through private) judge as permitted under national law or international convention (which the state has implemented) of the particular sovereign state. It thus emphasizes the fact international arbitration references cannot take place in a territorial vacuum, without the permission of the state, and must therefore be subject to the law of a particular state. This permission of the sovereign state covers matters such as the disputing parties to opt for arbitration over an arbitral subject matter and the procedure phase of the arbitral reference.

It has been argued that party autonomy according to this doctrine is derived from the state not the parties to the arbitral agreement. Hence the power is not similar but they almost perform the same function, thus the granting of provisional measures by the arbitral tribunal is impliedly or expressly provided by the state, since an award in the form of a provisional measure is comparable to the judgement rendered by the state in that it is not self-executing and if not voluntarily performed. The winning party has the authority to apply to the state for enforcement in the same way as an ordinary court judgement.<sup>351</sup>

It should be noted that some writers, like Hong Lin Yu, argue that jurisdictional theory just regulates the arbitral proceedings, which commence due to the will of the parties or to party autonomy. Hong Lin Yu, summarised the proposition of the jurisdictional theory as follows:

Although the jurisdictional theory does not dispute the idea that the arbitration has its origin in the parties' arbitration agreement, it maintains that the validity of the arbitration

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<sup>348</sup> See Y.Dezalay& B.G Garathy, *Transnational Legal order*, Chicago University Press 1996.

<sup>349</sup> See Emilia Onyema, *International Commercial Arbitration and Arbitrators' contract*, (Routledge) Research in International Commercial Law (2010) at 33-36.

<sup>350</sup> See Man F "Lex Facit Arbitral" in Sanders, *International Arbitration Liber Amicorum for Martin Domke* at 160

<sup>351</sup> See Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, New York; Ocean 1978 p.68.

agreement and arbitral procedures need to be regulated by national laws and the validity of an arbitral award is decided by the laws of the seat and the country where recognition and enforcement is sought.<sup>352</sup>

According to Hong's comments on the jurisdictional theory, one may argue that arbitral provisional measures are supported by the state where the seat of arbitration is set; and supported by the parties' freedom. In the modern practice of international arbitration, the issue of state control under jurisdictional theory, works in hand with conventions and bilateral treaties ratified and implemented, for example the Geneva protocol provides that;

“That arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and the law of the country in whose territory the arbitration takes place.

Although jurisdictional theory is well accepted by many states, it still has some shortcomings. The argument that the arbitral tribunal has the power like that of the judge is not true, since the arbitrator has the power to modify the arbitration agreement between the parties,<sup>353</sup> while a judge just applies the law and enforces the agreement. The reason why the arbitrator has such power is because of the party autonomy which is the main characteristic feature of arbitration proceedings. Hence the arbitrator's duty is to respect the freedom of the parties, by doing what the parties stipulate, rather than what is stipulated by government regulation.

Secondly, the provisional measure rendered is a provisional remedy by nature; it has no similarity to a court judgement. It is internationally recognised that national law is important in arbitration, where the parties seek assistance. The tribunal seeks support from the national courts where it lacks capacity; for example, to force third parties to give evidence in arbitral proceedings or the enforcement of arbitral provisional measures. The courts' control is fettered, in order to see the effectiveness of arbitral proceedings.

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<sup>352</sup> See Yu Hong, The Explore the Void- An Evolution of Arbitration Theories Part 1 International Arbitration Law Review Vol.7 p.435.

<sup>353</sup> See UNCITRAL Model Law Article 17 (d) which provides that an arbitrator can suspend an interim measure and modify it.

The Model Law liberalises the party autonomy doctrine as the major source of arbitral proceedings, not the state.<sup>354</sup> Hence it may be argued that jurisdictional theory is just a mechanism of assistance of party autonomy doctrine which sets the pivotal platform for any provisional measure in commercial proceedings.<sup>355</sup> It should further be pointed out that the jurisdictional theory, which provides that arbitrators rely on the law of the enforcing state, fails to account for the recent developments in commercial arbitration and the need to free arbitration from the shackles of the state and the grip of the judiciary. Since arbitration enactments, conventions and rules are international, there is a general consensus for loosening the grip of the state on arbitral proceedings. Indeed this was the main aim of the championing of the English Arbitration Act, in order to limit or to allow arbitral tribunals to rule on their jurisdiction on the basis of the party autonomy principle.<sup>356</sup>

Redfern and Hunter rightly conclude that international commercial arbitration is a hybrid, explaining that it begins as a private agreement between parties, and continues by way of private proceeding, in which the wishes of the parties are of great importance. Yet, as they point out, it ends with an award which has a binding legal effect, which, on an appropriate condition being met, the courts of most countries of the world will be prepared to recognise and enforce.<sup>357</sup> This approach gives a clear picture of the legal nature of arbitration and is appropriate for current practice in international commercial arbitration. With respect to the parties involved in arbitration, they still have the right to exercise their freedom as to what is in their best interest, and states do not feel that an arbitration is out of control as they still have the power to have the last word. The effectiveness of this theory depends on how the state strikes a balance between the state's power to control and the autonomy of the parties.<sup>358</sup>

### **3.2.3.3 The theory of Competence-Competence (Kompetenz-Kompetenz)**

The theory of competence-competence is taken from Germany legal terminology,<sup>359</sup> and means, according to the Federal Court of Germany, that parties to an arbitration agreement (party

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<sup>354</sup> See Polish Arbitration Act 2005 Article 1160-61.

<sup>355</sup> English Arbitration Act 1996, s. 30.

<sup>356</sup> See DAC Report, 196.

<sup>357</sup> Redfern and Hunter *International Commercial Arbitration*, 146, paras 1-16.

<sup>358</sup> See Polish Arbitration Act 2005 Article 1666.

<sup>359</sup> See Berger – Germany adopts the UNCITRAL Model Law, *Int'l Arb Rev* 122 (1988).

autonomy) may vest the arbitrators<sup>360</sup> with the power to rule in a binding way on the issues of their jurisdiction.<sup>361</sup> The essential features of the theory of competence-competence can be stated as follows: the arbitral tribunal has the power to rule on its jurisdiction<sup>362</sup> and to rule and decide on its competence.<sup>363</sup> The demands of convenience in arbitral proceedings are satisfied,<sup>364</sup> and the requirements of logic are asserted.<sup>365</sup> In order for the tribunal to grant provisional measures, under this theory, the tribunal has to prove that there is a rebuttable presumption that such jurisdiction was conferred by the will of the parties<sup>366</sup> (party autonomy) when they entered into an arbitration agreement.<sup>367</sup> There is a broad international consensus that arbitral tribunals have the competence to consider disputes concerning their own jurisdiction,<sup>368</sup> and exercise such competence to make provisional measures or awards.<sup>369</sup> As a practical matter,<sup>370</sup> tribunals routinely propose and make decisions concerning jurisdictional matters; for example, the granting of provisional measures.<sup>371</sup> Since the arbitration agreement is not impeached in these circumstances,<sup>372</sup> and because the arbitrators are only considering the merits of the parties' underlying contract, they are in the best position to grant provisional measures.<sup>373</sup> Indeed, when

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<sup>360</sup> See Model Law Article 16.

<sup>361</sup> See Germany arbitration act 1998, Part IV S.1040 which is defined to Model Law Article 16.

<sup>362</sup> See Fan Kun, *Arbitration in China*, (Hart, Oxford and Regon 2013) at 54.

<sup>363</sup> See EAA 1996 S.30, see *SNE v JOC OIL case USSR Arbitral Award* (1990), XVbk Comm Arb 31. where it was held that an arbitral tribunal cannot exceed the powers granted under party autonomy.

<sup>364</sup> See Gaillard and Savage, *Fourchard Gaillard Goldman on International Commercial Arbitration* at 406.

<sup>365</sup> See DAC Report on Arbitration Bill 1996, chaired by Lord Justice Saville at 138, where it was noted that the application of the *kompetenz-kompetenz* principle would prevent parties from delaying "a *valid arbitration proceeding indefinitely by making spurious challenges to its jurisdiction.*"

<sup>366</sup> See French Code Civil Procedure Article 1465 provides that Le tribunal arbitral est seul competent pour statuer sur les contestations relatives a son pouvoir jurisdictionnel.

<sup>367</sup> See *ELF Aquitaine v NIOC* reported in Yearbook Comm.Arb (1886) at 101-102, where the court held that "the rationale of the principle of arbitrators' competence over the competence is widely recognised to establish a system of law providing enterprises engaged in activities in other countries under contract with the government of that country or with institutions or company for independency of the tribunal..."

<sup>368</sup> See English Civil Procedure Rules 1988 R.62.8 (3), see AAA Article 15 and ICC Rules Article 6. see Robert Merkin, *English arbitration Act 1996* (3rd edit 2005) 43 & 190.

<sup>369</sup> See Jalil M, *Kompetenz: "Recent US and UK Development,"* 13 *Int Arb* No.4 December 1996 pp. 169-178.

<sup>370</sup> See William Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford University Press 2006) at 210.

<sup>371</sup> See *Fiona Trust & Holding Privalov* [2007] UK 40 at 35. The Court Cour de Cassation interpretation of Article 1466 of the Code Civil. See further Impex Societe, Cass 1er Chamber Civile 18 mai 1971, Rev. Arb 1972 at 2.

<sup>372</sup> See Steyn LJ, *England Response to UNCITRAL Model Law of Arbitration* (1994) 10 *Arbitration International* 1 at 1, where he said "Arbitrators are entitled, and indeed required to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word."

<sup>373</sup> See Emilia Onyema, *International Commercial Arbitration and the Arbitrators Contract*, (Routledge) 34, where he provides that jurisdiction powers are to be exercised by the arbitrators in arbitral proceedings and that most modern arbitral laws give the disputing parties and arbitrators a wide discretion over their conduct and procedure of the arbitral reference.

parties do explicitly incorporate an arbitration clause, in order to empower the arbitral tribunal to decide on issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intention to delegate such issues to the arbitral tribunal.

According to the theory of competence-competence the arbitral tribunal has the power to grant provisional measures within its competence to do so.<sup>374</sup> Under this theory the tribunal has the power to decide on its own jurisdiction without having to refer the question to the national courts<sup>375</sup> when a party challenges the jurisdiction,<sup>376</sup> on the basis that arbitrators are the judges in their own jurisdiction and have the right to rule on their own competence.<sup>377</sup> Therefore, if the validity of the agreement is valid, it is not proportionate to impeach arbitral jurisdictional powers, since party autonomy ousts the court's jurisdiction.<sup>378</sup>

Arbitrators are endowed with powers to decide on their jurisdiction,<sup>379</sup> and thus if the parties agree that the tribunal may deal with provisional measures in the same manner as with other legal matters arising in arbitration, then the courts will respect the contract and party autonomy of the parties,<sup>380</sup> provided that the arbitral tribunal exercises such powers in good faith. Indeed, if such is implemented, the interests of the parties are safeguarded. Since the arbitral tribunal can rule on any arbitral matter,<sup>381</sup> it is clear that it grants any provisional measures sought by the parties to the arbitral agreement in order to meet the realities of party autonomy.<sup>382</sup>

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<sup>374</sup>See *Heyman v Darwins Ltd* [1942] AC 356. See *Fiona Trust & Holding Privalov* [2007] UK 40 at 35, where the House of Lords and Court of Appeal unanimously agreed and emphasized the doctrine of competence in regard to provisional measures.

<sup>375</sup> See *Green Tree Financial Corp v Bazzle*, 539 US 444 (US Ct 2003) at 452-53. where the US Supreme Court considered that the arbitral tribunal should be the best jurisdiction to grant class arbitrations.

<sup>376</sup>See *Co Ltd v Gosport Marina* 2002 Unreported, where Richard Seymour QC held that it would be the tribunal to rule on his jurisdiction in support of party autonomy.

<sup>377</sup> See Germany Civil Procedure s.1031 (2) and s.1040.

<sup>378</sup> See Gary Born International Commercial Arbitration Vol.1 (2<sup>nd</sup> edn, Kluwer Law International 2009) 852, where he argues that all arbitral matters should be referred to arbitration tribunal.

<sup>379</sup> See *Suleiman v Suleiman* [1998] 3 WLR 811, where LJ Walker took the view that: accordingly seems to us the original agreement was a valid agreement, and that it was within the jurisdiction of the arbitrators to consider questions of illegality in so far as they might affect the rights of the parties."

<sup>380</sup>See Loukas and Julian in their book, "Pervasive Problems in International Arbitration" [2006] Kluwer International, state that since arbitrators are frequently drawn from the legal as well as business community, they are the best to grant provisional measures.p21.

<sup>381</sup>See *Mitsubishi Motors Corp v Sole Chrysler-Plymouth.INC* 473 US 614 (1985) at 473 & 617.

<sup>382</sup>English Arbitration Act 1996 S.30.

Allowing arbitral tribunals to rule on their jurisdiction is a clear manifestation that the arbitrators can also provide provisional measures in their jurisdiction.<sup>383</sup> This allows greater efficiency in that it prevents parties from evading their arbitral obligations by simply making frivolous challenges on the jurisdiction of the tribunal and thereby delaying the arbitral proceedings.<sup>384</sup> The competence-competence theory is widely recognised and supported as one of the theories that supports party autonomy as the main source of arbitral proceedings. Any doubt concerning the jurisdiction depends on the interpretation of the parties' agreement<sup>385</sup> which provides the tribunal to settle disputes.<sup>386</sup> It should be noted that the arbitral tribunal has the power to grant final awards, which is more powerful than that related to provisional measures, thus the granting of provisional measures in arbitral proceedings due to party autonomy is not a matter of contention. Any prevailing issues which deny party autonomy under the competence-competence theory might have an adverse effect on arbitral proceedings by opening the doors to delaying tactics and obstruction, and thus undermining the arbitration agreement. Furthermore, failure by the tribunal to grant provisional measures will be a contractual breach of an arbitration agreement and an impediment to international commercial disputes. The competence-competence theory is an implied term in arbitration agreement. For instance, by applying the officious bystander test, parties submit to arbitration in order to exclude any other dispute settlement mechanism, hence a failure will provide a loophole for the parties to repudiate their obligation.<sup>387</sup>

It should be noted that although international conventions,<sup>388</sup> national legislations,<sup>389</sup> and rules explicitly or implicitly recognise and give effect to the competence-competence doctrine, the New York convention does not deal with it, and nothing in the text of that convention either expressly requires or forbids application of the principle of competence-competence, or

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<sup>383</sup> See Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*; in 60 years of ICC-A Look at the future (ICC 1984) at 255-63.

<sup>384</sup> See *Republic of Kazakhstan v Istil Group* [2007] EWHC 2729.

<sup>385</sup> See Polish Arbitration Act 2005 Article 1180 on jurisdiction of the tribunal.

<sup>386</sup> See Statement of the Draft Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, Pre-publication Presented at Cologne Conference on March 3-4 2005 at 99.

<sup>387</sup> See *Fiona Trust & Holdings Corporation and Others v Pivalov and Others* [2007] UKHL 40.

<sup>388</sup> See European Convention Article V (3), allocates power to the tribunal to grant provisional measures under this doctrine. The European Convention has been adopted by the Swiss arbitration process to mean competence of the tribunal to grant awards and provisional measures.

<sup>389</sup> See EAA 1996 s.30, which provides that "unless otherwise agreed by the parties. The tribunal may rule on its own substantive jurisdiction....." See French New Code Civil Procedure Article 1495- 1466, which provides that if one of the parties challenges the jurisdiction of the tribunal or the scope of the arbitrators' jurisdiction, the tribunal shall rule on its jurisdiction. Indeed this is a classic support of party autonomy. See Germany adoption of Model Law Article 16 constituted under s.1032 of the Germany Arbitration Act 1998.

addresses the scope of the arbitral tribunal's jurisdiction under this doctrine. It should however, be noted that despite the absence of express language on competence, the New York Convention provides that arbitrators have competence to rule on their jurisdiction,<sup>390</sup> and this has been taken into account by UNCITRAL<sup>391</sup> and the Model Law. While allowing the arbitrators to rule on their jurisdiction by virtue of the competence doctrine, most national laws recognise that arbitrators are not the sole judges of their jurisdiction: any decision given by the tribunal as to its jurisdiction is subject to review by the courts. Hence the courts may be asked at both pre-award and post pre-award stages to deal with questions relating to the jurisdiction of the arbitration tribunal.<sup>392</sup>

#### **3.2.3.4 Doctrine of separability and provisional measures**

The principle of separability treats the arbitration clause as an autonomous<sup>393</sup> agreement that survives the invalidity or termination of the underlying contract,<sup>394</sup> and requires argument in jurisdiction challenges to be addressed to facts of law relevant only to the validity of the clause.<sup>395</sup> This principle allows the tribunal to render a valid award even if the underlying contract is invalid.<sup>396</sup> As the tribunal has the power to grant final awards which are more

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<sup>390</sup> See Article II (3), which recognizes both the arbitral tribunal to decide disputes under its jurisdiction.

<sup>391</sup> See UNCITRAL Model Law Article 8(2) and 16 (1), which expressly recognizes the arbitrators' authority to consider disputes concerning their jurisdiction.

<sup>392</sup> See Emmanuel Gaillard and YasBanifatemi, "Negative Effects of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International awards: The New York Convention in Practice* (London, Cameron May 2009).

<sup>393</sup> See Hunter par 2.91, see Adam Samuel, "Separability of Arbitration Clauses and Administration of Justice,"<sup>16</sup> available at <http://www.adamsamuel.com/pdfs/seprabi.pdf> accessed 12 March 2011.

<sup>394</sup> See EAA 1996 s.7, which provides that "unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether in writing or not in writing) shall not be regarded as invalid, on existence or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

<sup>395</sup> See Macmillan LJ in *Heyman v Darwins Ltd* [1942] AC 356, at 372 where he said." The arbitration clause survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement."

<sup>396</sup> The principle of separability was developed further in *Harbour Assurance Co v Kansa General International Insurance Co Ltd* [1993] QB 701, where Lord Hoffman LJ at 469 in the Court of Appeal confirmed that despite an underlying contract being void for illegality, an arbitration clause within that contract was separate and survived the voided contract. In other words an arbitration agreement retains the essential characteristics of any contract, meaning that the requirements of offer, acceptance, consideration, capacity and intention to create legal relations should exist in an arbitration agreement due to party autonomy. The separable clause derives its contractual nature from the (voided) underlying contract.

powerful than court decisions,<sup>397</sup> the granting of provisional measures in arbitral proceedings is not a matter of contention.<sup>398</sup> Thus the characteristics of an arbitration agreement are in one sense independent of the underlying contract and an arbitration agreement has the character of a separate agreement.<sup>399</sup> The doctrine of separability is now part of the universal consensus<sup>400</sup> among arbitration practitioners and most legal systems<sup>401</sup> of the world as well as international conventions or arbitral rules.<sup>402</sup>

The separability doctrine has been referred to under common law jurisdiction as meaning where the arbitral clause is “severable” from the parties’ related contract.<sup>403</sup> This is in contrast to civil states, which have often referred to the autonomy or independence of the arbitral clause, arguably reflecting a greater degree of separation between the arbitration agreement and the parties underlying contract. It may be argued that the term “separability” directs attention to the central role of the parties’ intentions, as a contractual matter, in forming a separate arbitration agreement.<sup>404</sup>

The separability principle affects the relationship between the arbitration clause and the underlying contract. Born describes this doctrine as having central significance in the granting of provisional measures in international commercial arbitration.<sup>405</sup> The author argues that the arbitration clause does provide the tribunal with the power to grant interim measures in a bid to

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<sup>397</sup> See decision of Hong Kong High Court in *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* (1992) XVII YB CommArbn 289-304. It held that the doctrine is broad enough to include those contracts which are subject to a challenge of initial invalidity.

<sup>398</sup> See Judge Stephen Schebel. *International Arbitration: Three Salient Problems*, (Cambridge Press 1987)

<sup>399</sup> See Aron Broche, *Commentary on the UNCITRAL Model Law, and International Council for commercial Arbitration* (Supplement 11 of January 1990) at 74-75., where he said that “separability of the arbitration clause is intended to have effect so that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concludes that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction.”

<sup>400</sup> See European Convention Article 1(2) (a).

<sup>401</sup> See Justice KornFodest in *Menisci v Mahieux, Paris Court of Appeal*, 13 December, 104 J Droit Int’l (Clunet) (1977) 106. See Mendina J for the Court of Appeal for the Second Circuit Court in *Robert Lawrence Co Inc v Devonshire Fabrics* 271 F.2d 402 (1959). See USA Supreme Court in *Prima Paint Corp v Flood and Canklin Manufacturing Co* 388 U.S 395 (1967) where it was held “that separability is one of the state’s laws.”, see Court of Appeal of the Seventh Circuit in *Sauer-Getriebe K.G v White Hydraulics INC* 715 F.2d 348 (7<sup>th</sup> Cir 1983).

<sup>402</sup> See Geneva Protocol and Geneva Convention 1927 Article IV (I).

<sup>403</sup> See Mr Justice Clarke in *ABB Lumus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd’s Rep 24.

<sup>404</sup> See Fraser Davidson, “The New Arbitration Act –A Model Law?” (1997) *Journal of Business Law* 101 at 117.

<sup>405</sup> See Born, *International Commercial Arbitration* (Kluwer International, 2009) 317-317, see Stewart Shackelton, *Annual Review of English Judicial Decision on Arbitration* 2002 6 (6) *International Arbitration Law Review* 92003), 220.



comply with the party autonomy principle<sup>406</sup> where the subject matter of the substantive contract is illegal (thus making the contract void) under the relevant states.<sup>407</sup> The separability doctrine can only be denied where the party who signed the arbitration agreement lacked the capacity to contract, and then clearly this incapacity affects the arbitration agreement contained therein.<sup>408</sup> The separability doctrine is a contractual obligation, whereby the granting of provisional measures is one of the terms of the contractual obligation under the arbitration agreement. The author submits that, in this respect, theoretical consistency is compromised in order to accommodate party autonomy.

### 3.2.4 Advantages of party autonomy

England and many modern other states have amended or drastically revised their arbitral laws in order to make their venues the best place for commercial disputes. The main element in this development is the role played by party autonomy, a doctrine which has made arbitration more attractive. It is a tool needed in international commerce to create a practical mechanism to settle disputes.<sup>409</sup>

An initial step, and one of the most vital in any arbitration, is the choice of appointment of the arbitrators who are to resolve the dispute. Parties are free to choose the persons whom they think are most suitable for their case. They can therefore choose either a lawyer or a non-lawyer, such as a businessperson to decide their rights and obligations. In addition, they also have the freedom to choose the number of arbitrators. The parties determine the method of appointment, whether an arbitrator or institutional arbitration. If they select the former, they usually agree

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<sup>406</sup>See UNCITRAL Model Law article 16 (1), which provides that “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that part, an arbitration clause forms part of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail “ipso jure” the invalidity of the arbitration clause”.

<sup>407</sup> See Aron Broches, Commentary on UNCITRAL Model Law, International Council for Commercial Arbitration Handbook on Commercial Arbitration (Supplement 11 January 1990) at 74-75, where he commented that “separability of the arbitration is intended to have the effect that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concluded that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction.”

<sup>408</sup> See Hong Kong Case *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* (1992) XVII YBKComm 289-304, where the High Court of Hong Kong held that the doctrine of separability is broad enough to include contracts which are subject to challenge of initial validity.

<sup>409</sup> See Jonathan Blackman and Tambay, Class Action Arbitration Opinion Focus on Party Autonomy, New York Journal, available at [http://newyorkjournal.com/pubarticle.jsp?id=1202625607575&Class\\_A...](http://newyorkjournal.com/pubarticle.jsp?id=1202625607575&Class_A...) Accessed on 21 August 2013.

upon a set of rules designed to govern the essential parts of the proceedings. On the other hand, they may agree to arbitration under the auspices of an arbitration institution, such as the ICC. In this case, they must incorporate the rules of such an institution into the agreement. Whatever the parties choose, therefore, the arbitrator shall respect and follow the same.

Under the principle of party autonomy, the parties are free to choose the place of the arbitration. They can choose it in advance or even after the dispute has already arisen. In practice, it is the norm to choose a neutral forum for the arbitration, and there are two factors that parties take into account in choosing a neutral authority: the geographical location and the legal environment. The choice of the place of arbitration is related to the psychological state of the parties. It is always unpleasant for a party to travel to their opponents' country to plead their case. The parties prefer to choose a neutral place for their arbitration. The location plays an important role in generating trust. The parties are more confident that no one will have an advantage over them in a neutral place of arbitration. Indeed, the party autonomy doctrine is certainly most in evidence when the arbitration is settled by documents only and when it is concerned with legal issues. That is when the matter is virtually to be decided by experts without the intervention of any lawyer. In fact, this offers a degree of psychological satisfaction to the parties that they may have chosen the best arbitrators, the form and forum of arbitration and the governing law. Party autonomy is at its fullest when the parties determine the forum and regime of institutional arbitration. This provides confidence that the arbitration will proceed according to their aspirations, although the nature of the proceedings in reality is not very different from that of municipal court proceedings.

Party autonomy reduces the court's interference. However, although parties to an arbitration agreement aim to avoid the jurisdiction of the national courts, this does not mean that arbitration operates exclusively from state courts. Accordingly, the state courts still tend to play a significant role in the arbitral process, and to a large extent, the effectiveness of arbitration depends on the role played by the court. Since arbitral tribunal lacks coercive powers, they do not have the power to order third parties to participate in the proceedings, or even to enforce any award made by them. The court enforces the arbitration agreement by denying any party to litigate a dispute they agreed to resolve by arbitration. With regard to provisional measures,<sup>410</sup> the courts assist by invoking measures which allow the attachment of assets or disposal of the subject matter of the

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<sup>410</sup>See *The Assunzione* [1954] 1 ALL ER 278.

action pending final determination. The party autonomy doctrine offers parties confidence that it is their arbitration and that it will be conducted in accordance with their plans, although there are limits to this expectation. The principle also allows parties to abandon arbitration at any stage, whether because of a challenge to the arbitrator as a result of contesting the arbitral proceedings or because of a compromise reached by the parties.<sup>411</sup>

### **3.2.5 Limitations of party autonomy**

Although the party autonomy principle accepts the view that parties are free to determine the proceedings, nevertheless, the freedom of the parties to agree on the rules of procedure is subject to necessary precaution in the interests of the fairness and equilibrium of the arbitration process. The DAC Report states that “*the parties should be free to agree how their disputes are solved, subject only to such safeguards as necessary in the public interest.*” Even though the parties can contract out of most of the provisions of the Arbitration Act 1996 under the principle of party autonomy, the mandatory provisions place limits on such freedom. As a result, the public interest and mandatory rules of the Act under s 4 (b) are the edge on the party autonomy principle under English law.

There is a potential conflict between the tribunal and the courts,<sup>412</sup> under the party autonomy doctrine. A situation could arise where parties have agreed a procedure, but then find it unsuitable. This raises a conflict between the mandatory powers of the tribunal under s 31 (b) of the Act and the power of the parties under section 33 (1). This may even be escalated by sections 40 (1) and (2) (a), which provide that parties, must comply with orders given by the tribunal. As arbitration is a consensual process, party autonomy should prevail where there is conflict between the parties and the arbitrators, and this argument is supported by the DAC.<sup>413</sup> It is worth considering how a tribunal might or should react in a situation in which the parties have agreed on a procedure that the tribunal sees as a breach of its duty under section 33 (1). If the parties have agreed before appointing the tribunal, the arbitrators should write to the parties expressing reservations about the procedure. If on the other hand the procedure is agreed after appointment of the tribunal, the tribunal may resign and the parties may have to pay the fees and expenses of

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<sup>411</sup> See *Compagnie Tunisienne de Navigation SA v Compagnie Armanent Maritime SA* [1971] AC 572.

<sup>412</sup> See EAA 1996 s. 33 (9) provides that it shall be for the tribunal to decide all procedural and evidential matters, subject to the rights of the parties to agree any matter.

<sup>413</sup> DAC Report 1996 Clause 33.

the arbitral tribunal. Moreover, the tribunal may refuse to follow the procedure agreed by the parties, who may then seek to remove the arbitrators.<sup>414</sup> In practice this is unlikely to succeed,<sup>415</sup> and parties will not strive to claim breach of duty in order to challenge the arbitral orders.<sup>416</sup> Since section 33 (1) is mandatory, any procedure to be adopted by the tribunal which falls short of the principles set out<sup>417</sup> is void.

The party autonomy assumes that the parties to arbitration have the autonomy to conduct their proceedings in the manner they prefer. This is not the case, however, where a claim is time-barred under the arbitration agreement: the claimant is required to seek the court's permission to extend the time for commencing arbitral proceedings, and Limitation Act. In addition, for the revocation of the arbitrator's authority, whereby the parties are free to agree to the circumstances in which an arbitrator's authority may be revoked, the removal of an arbitrator can only take place under a court order; in other words, in the latter situation, the party autonomy rule does not apply. The tribunal is also expected to comply with institutional regimes or rules, in so far as rule of procedure and evidential matters are concerned. It is up to the tribunal to decide, subject matter of course, to the right of the parties to agree on any matter. The phrase "the right of the parties" does not relate to the party autonomy rule. It is simply an opportunity offered to the parties to exercise their options, based on convenience, legal or otherwise. When an issue is referred to the court, the court has the power to take action as they deem fit in the circumstances of the case.

The Arbitration Act provides duties to the parties and tribunal. The Arbitration Act 1996 requires the tribunal to act fairly and impartially between the parties, and give each party a reasonable opportunity to present the case. In addition, the Act requires the tribunal to adopt the procedure appropriate to the circumstances of each individual case, and avoid unnecessary delay and expense in the resolution of the dispute. It should be emphasised that the Act refers to a party having a "reasonable opportunity" to present their case instead of a "full opportunity" as referred to in some jurisdictions. The word "reasonable" is possibly chosen deliberately to

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<sup>414</sup>EAA 1996 s.24.

<sup>415</sup> DAC Report February 1996 points out that s.33 (1) is drafted in the widest possible terms, so as to give maximum flexibility to the arbitral tribunal in the handling of their disputes, but the requirement of s.33 9 1) are the minimum conditions consistent with an arbitration procedure. This is clear from para 150, which provides that "... *The tribunal should approach and deal with its task, which is to do full justice to the parties.*"

<sup>416</sup>EAA 1996 s.33 and 68(2).

<sup>417</sup>Ibid S.33 (1).

underline the approach of the legislation. It should be noted that the English law has not followed the Model Law on authorisation of the tribunal under party autonomy to decide “*ex aequo et bono*” or as “*amiable compositeur*.”

Party autonomy is further limited on the grounds for removing an arbitrator. It is worth noting that a party to the arbitration who is aware of some irregularity during the arbitration proceeding will lose the right to challenge any subject matter. The Act also provides that the arbitrator has immunity from anything done or omitted in the discharge or purported discharge of their functions as arbitrator, unless proven to be in bad faith. Robert Merkin comments that the widely-drawn immunity clause in the Act provides flexibility and freedom to the arbitrator in handling disputes. The Act undermines the party autonomy when it excludes liability of the arbitrator for any failings in the discharge of its functions or a failure to comply with the arbitration agreement of party autonomy.

Party autonomy is limited under English law, as follows: the parties shall do things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes: complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or direction of the tribunal. The Arbitration Act 1996, provides that the tribunal may seek assistance where appropriate without delay on question of jurisdiction and law. Indeed this adduces that that party autonomy is too regulated in arbitral proceedings.

With regard to arbitration procedure, it is clearly evidential that the doctrine of party autonomy as the cornerstone is regulated. The Arbitration Act 1996 provides that, unless agreed otherwise, the arbitral tribunal has the freedom to decide on procedural and evidential matters on arbitration. The test must be whether the adoption of inquisitorial powers is conducive to the economic, expeditious and fair resolution of the dispute before the tribunal. The freedom of party autonomy is subject to limitation, under the above-mentioned section 33, which states that arbitrators must be fair and impartial and must give each party a reasonable opportunity to present their case. Otherwise it would prima facie constitute a serious irregularity and be subject to challenge. This means that courts have to determine such challenges, where the tribunal and party autonomy cannot handle the situation, since the Act provides for minimum interference by the national courts. The fact that parties choose arbitration under party autonomy rather than choosing the courts to solve their disputes must be respected. Although the English Arbitration

Act 1996 was enacted to end the historical hostility of court intervention in arbitral proceedings and to respect the principle of party autonomy, the wording of the Act shows there is still a reluctance to remove court powers in relation to arbitral proceedings, and it seems to be more conservative than the Model Law. For instance, the Model Law provides that “no court shall intervene”. Further, the procedural rules are not governed by the 1996 Act itself but by the English procedural rules (Civil Procedure Rules 1998 - CPR). This makes the arbitration under the Act somehow more complicated. It would be better to have one Act that handles arbitral proceedings.

Another important limitation is the choice of law by the parties. The parties’ freedom to agree on the arbitration regime of their choice and to choose the procedure to be followed is subject to some limitations. There are situations where it may be appropriate for the tribunal to select and apply a different law from that chosen by the parties. The effect of national mandatory rules is complicated. Mandatory rules limit the will of the parties and must be applied to certain situations. National courts usually apply their mandatory laws without regard to the will of the parties. In the event of any conflict between the party autonomy principle and the mandatory rules of jurisdiction, the latter prevail.

### **3.2.6 Reform of party autonomy**

Although the English Arbitration Act 1996 has improved the standard of arbitral proceedings internationally and made London the best venue, the author believes that there is still some need for reform with regard to the doctrine of party autonomy, and that such reform will enhance arbitral proceedings and restrict the court interventions.

Firstly, the scope of the section that provides the tribunal with the power to make provisional measures under the doctrine of party autonomy is too narrow: section 39 of the Arbitration Act 1996 provides that the tribunal can make a provisional order for the payment of money or disposition of property or an interim payment on account of the costs of the arbitration. The Act should be amended or should adopt the French law in relation to the arbitral jurisdiction to grant provisional measures. The tribunal’s scope of power can be interpreted by the courts as limited. This may become a ground for court interference, as the Act does not expressly provide all the

provisional measures. This therefore requires the court to provide attachment orders since the Act does not expressly provide for such provisional measures.

Secondly, the Arbitration Act 1996, s 1 (b) provides that:

“The parties should be free to agree how their disputes should be resolved, subject only to such safeguards as are necessary in the public interest.”

The Act does not, however, expressly provide a definition of “public interest”, and in the end it calls in the court to monopolise the arbitral proceedings under their mischief interpretation. The author recommends that the English Arbitration Act should eliminate the term “public interest” in the arbitral proceedings, as this affects the main purpose of choosing arbitration over litigation. The Arbitration Act 1996 should consider the application of the Model Law, which confers a broad power on the parties to agree the arbitral procedure. It should be noted that under section 1 (b) of the current Arbitration Act 1996, the courts are allowed to refuse recognition and enforcement of an arbitral provisional measure where it is against public policy. The author recommends the application of the New York Convention.

At the start of the tribunal there is no established tribunal to handle the dispute. This vacuum is provided by the courts. The author recommends that the arbitral tribunal should be established in a way that from the beginning is free from court intervention. Thus, the tribunal will be able to grant provisional measures in compliance with the party autonomy principle. It should, however, be noted that the recommendation should advocate the court’s role as a support, but not as one of intervention in the arbitral proceeding, since the role of the courts would then be a mechanism to wreck the main purpose of arbitral proceedings and the party autonomy doctrine. The author therefore recommends the adoption of the Model Law, which provides independence of the tribunal and the arbitrators. This will limit the application of section 44, which provides that:

the court has for the purpose of and in relation to arbitral proceedings the same power of making orders about the matters listed as it has for the purposes of and in relation to legal proceedings.

The parties should be able to draft their rules and procedures under the principle of party autonomy. The Act does not, however, make any express provisions for the parties to draft their terms and procedure in regard to their party autonomy. It is at times difficult to maintain the two legal systems, as they have procedural differences between the methods of proceedings. When judgements under court the new Civil Procedure Rules and arbitral proceedings under the 1996 Act are to be attained by documents only, then both of them become less time and money consuming. It is pertinent to point out that this rule proves an alternative to the parties to arbitration, though in reality it is not the parties who participate but their lawyers.

The author further recommends that parties, when drafting an arbitration agreement, should seek professional advice from experienced and knowledgeable experts in the forum's law or that of any enforcing state concerning any limitations to party autonomy, particularly that of public policy.

### **3.3 Conclusion**

This chapter examined the doctrine of party autonomy as the main source of jurisdiction for the tribunal. If one imagines international arbitral proceedings as a drama, the doctrine of party autonomy is the director of this drama. Normally, it is the director who chooses the actors, the scenarios and the other elements of the drama. Similarly, in the context of party autonomy, the parties can choose the applicable laws and the conduct of the arbitration process such as determining the composition of the arbitral tribunal, as well as the language and place of arbitration. In other words, this principle determines all the essential elements of the arbitration. Thus the party autonomy doctrine is the fundamental source or principle of arbitral proceedings. However, this chapter has demonstrated a further anomaly in English law, concerning the distinction between the powers of the tribunals and the parties. This creates a bizarre, especially when the parties are not willing to accept with the arbitrators.

The chapter demonstrated that arbitration owes its reputation to the principle of party autonomy, since the principle involves the granting of provisional measures. The principle promotes flexibility, since parties do not want their disputes to be through procedural formalities of litigation. Under the party autonomy doctrine, parties have the power to exclude the municipal



courts. It should, however, be noted that although parties under party autonomy can agree on everything about arbitration, nevertheless, in some circumstances, the choice of the parties does not make any sense without the support and supervision of the municipal courts. The author argues that the courts should not intervene in arbitral proceedings at any time, in order to comply with the Model Law,<sup>418</sup> which states that “in all matters governed by this law, no court shall intervene except where so provided in this law.”

The chapter examined the main rules – international arbitral rules, conventions, and arbitral enactments – and theories advanced in support of party autonomy. Furthermore, the chapter examined the advantages and shortcomings of the doctrine of party autonomy. The author does not support the public policy limitation to the doctrine of party autonomy, since an arbitral tribunal can refuse to grant any provisional measure or enforce it, during arbitral proceedings. For example: in an ICC case in Switzerland, an arbitral tribunal sitting in Switzerland denied that a claim for punitive damages was contrary to Swiss law. In addition, if the parties confer powers on the tribunal which are against the public policy of the seat of arbitration, these powers are not capable of being performed by the arbitrators.<sup>419</sup> It should, however, be noted that given the nature of commerce, which involves many contracts, it would not be proportionate for third parties to the arbitration agreement to be denied their right under the party autonomy doctrine. The most important consideration should be that arbitration is contractual in nature which has party autonomy at its centre. What the Judiciary and indeed the Arbitration Act 1996 should aim to achieve is a system that is internationally acceptable and this means final awards would only be paramount if provisional measures were given legal effect. At the moment the law is still ambiguous with regard to provisional measures under the party autonomy doctrine.

The parties cannot agree on anything that can affect the third parties directly.<sup>420</sup> For instance, a tribunal cannot compel third parties to attend a hearing as a witness, even if the parties to the contract have conferred such power to the tribunal; hence assistance is sought from the municipal courts. The courts’ role should only be restricted for the benefit of the arbitral proceedings and not as a jurisdiction to intervene; this can be demonstrated by an American case, *Mitsubishi v*

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<sup>418</sup> See Article 15.

<sup>419</sup> See Redfern and Hunter para 6.16

<sup>420</sup> Ibid 6.19

*Soler Chrysler Plymouth*,<sup>421</sup> where the United States Supreme Court allowed a dispute concerning a supposed violation of anti-trust laws to be settled by the arbitration tribunal. Reverting to jurisdiction and party autonomy doctrine, it is pertinent to point that this rule proves to be an alternative to parties going to arbitration, but in reality parties delegate their right to their appointed lawyers, and this goes against the sanctity of the doctrine of party autonomy, particularly when it is considered from the standpoint of how it originated. It may be argued that in reality the lawyers' autonomy rule has replaced the party autonomy rule, and this transformation is disturbing. It should however, be noted that party autonomy plays a vital role in the granting of provisional measures. Like any other doctrine or mechanism for settling disputes, party autonomy has some shortcomings, but these should not be used as an excuse to undermine its effectiveness as the main source of conferring jurisdiction on the tribunal to grant provisional measures. Any prevailing issues that denying the effectiveness of arbitral tribunal or party autonomy might have adverse effects, and hence open the doors to delaying tactics and obstruction, thus undermining the arbitration agreement.

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<sup>421</sup>(1985) 473 US 614.At 630 and 639.

## **CHAPTER FOUR**

### **4 Conditions & procedures for the granting of arbitral provisional measures**

#### **4.1 Introduction**

The arbitral tribunal should be the best forum for seeking provisional measures, given the fact that it derives its authority from the arbitration agreement (party autonomy). However, there are stringent conditions for the arbitral tribunal to use its powers to grant provisional measures. These strict conditions are more examined than litigation cases, hence they establish the arbitral jurisdiction as the best dispute mechanism for arbitral proceedings.<sup>422</sup> Under arbitral proceedings, for a tribunal to have the power to grant provisional measures, it has first to ascertain whether it has been given such power by the parties to make an order on provisional relief. Indeed, after the tribunal has been constituted, it then sets the prerequisites or standards and procedures for granting provisional measures.<sup>423</sup> This approach of determining the standards and procedures facilitates the predictability and consistency of arbitral proceedings; and hence makes arbitral proceedings more effective and efficient.<sup>424</sup> The main objective of such standards and procedures, as mentioned earlier, is generally to preserve the status quo, facilitate enforcement of future or present awards and to facilitate arbitral proceedings.<sup>425</sup>

Although many enactments and rules are silent on the issue of arbitral standards and procedures for the grant of provisional measures,<sup>426</sup> arbitrators have or are given broad powers and a wide scope of discretion in establishing arbitral principles.<sup>427</sup> It should further be noted that there is little precedent in international commercial arbitration and that each case is judged on its merits.<sup>428</sup>

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<sup>422</sup> See Yasrimark Ali, *Provisional Measures in International Commercial Arbitration*, (2006) Kluwer International at 84-86.

<sup>423</sup> See Arbitration Act 1996 s.34, which provides the tribunal with the authority to set procedural and evidential matters.

<sup>424</sup> See LCIA Article 25 (1).

<sup>425</sup> See Article 39 of ICSID.

<sup>426</sup> See Ian Black Shaw/Roberts, *The Court of Arbitration for Sport 1984-2004* (Cambridge University Press) at 227-229.

<sup>427</sup> See English Arbitration Act s.33 (1) LCIA Article 14, WIPO Article 38, UNCITRAL Article 15 (1), ICC Rules Article 11 and see Hunter Par1-129 (Citing adaptability is a principle of arbitration).

<sup>428</sup> See Jan den Berg, *The art of Arbitration Awards* (Kluwer 1982) at 223-332.

Contemporary litigation and arbitration in developed legal systems is accompanied by procedural safeguards and the opportunities for all parties to be heard. One inevitable consequence of these procedures is delay in the ultimate resolution of the parties' disputes, and in turn, this delay can prejudice one party, sometimes causing irreparable harm; for example, the dissipation of assets, destruction of evidence, loss of market value and interference with customer relations. These sorts of damage can be exacerbated where one party deliberately seeks to create delays in dispute procedures in order to exert pressure on its adversary. Given the foregoing, arbitral tribunals with help of the courts have developed standards and procedures for granting immediate provisional measures in order to safeguard parties from serious injuries that would cause delays in the arbitration process.<sup>429</sup> Thus, unless the arbitral tribunal sets procedures or standards for the granting of provisional measures its objective of providing final relief may be lost and meaningless, and the parties may suffer considerable damage or unnecessary costs.

In determining the standards, it is incumbent upon the arbitral tribunal to take into account the temporary nature of provisional measures. The standards need to be pragmatic in order to suit the practical needs of arbitral proceedings in international commerce. The tribunal looks at case law, arbitral rules, and awards, and at times makes a comparative appraisal of international arbitral rules and conducts an analysis of arbitral awards and case law as a yardstick for determining the procedures and standards for provisional measures. The irony with regard to international comparative analysis is the nature of arbitral awards, which are confidential; hence access to some court records is impeded, in relation to providing examples and references on this point.

The thesis in this chapter addresses the question as to whether the arbitral tribunal has the authority to determine arbitral procedures and standards in order to grant provisional measures. In addressing the above question, the chapter will be divided into five sections, dealing with the following points:

Firstly, the authority of the tribunal to determine the standards and procedures; secondly, the negative conditions for granting provisional measures; thirdly, the positive requirements; fourthly, the advantages of provisional measures; and fifthly, the relationship between the courts and the arbitral tribunal in granting provisional measures.

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<sup>429</sup>See Arbitration Act 1996s. 44 95).

## 4.2 Authority to determine procedures and conditions by tribunal

The English Arbitration Act 1996 provides that

“it shall be for the tribunal to decide procedural and evidential matters, subject to the right of the parties to agree to any matter.”<sup>430</sup>

The above section adduces that in all arbitral proceedings the tribunal applies relatively straightforward procedures to request provisional measures. This has been advanced in the case of *Mobil Oil Indonesia Inc v Asamera Oil (Indonesia) Ltd*,<sup>431</sup> where the Supreme Court held that:

“it is for the arbitral tribunal to set the standards for provisional measures as parties intend to refer to the rules.”

Furthermore, the UNCITRAL Model Law confirms the authority of the tribunal to set conditions as to when a measure is to be granted.<sup>432</sup> Preliminarily, the procedures applied by an arbitral tribunal will be determined, or at least heavily influenced, by contractual obligations agreed by the parties to the arbitration agreement.<sup>433</sup> In certain circumstances, parties may agree that provisional measures or injunctive relief orders may be granted upon the claimant making certain showings.<sup>434</sup> This is common to intellectual property contracts, which often contain provisions expressly authorising provisional measures.<sup>435</sup> It should further be noted that arbitral institutions have not provided clear meaningful standards for the granting of interim relief.<sup>436</sup> Most institutions provide that an arbitral tribunal may grant such provisional relief as it “deems necessary or appropriate”.<sup>437</sup>

The author argues that such formulations confirm the wide powers or broad authority to grant provisional measures, but do not establish the standards or procedures for when that actual

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<sup>430</sup> See EAA 1996 s.34 (1) and (2).

<sup>431</sup> See 392 NYS 2d 614 (1977).

<sup>432</sup> See UNCITRAL Model Law Article 17A (1) and Article 26 (2) (b), all give authority to the arbitral tribunal to set the grounds when deciding whether to make an order or not.

<sup>433</sup> Ibid.

<sup>434</sup> See Model Law article 17 A and 17 92) of the Pre-2006 UNCITRAL model version.

<sup>435</sup> See Gary Born, *International Commercial Arbitration and Forum Selection Agreements: Drafting and enforcing* (2nd edition 2006) p91-92.

<sup>436</sup> See UNCITRAL Article 17 A of 2006.

<sup>437</sup> UNCITRAL Article 26 (1), ICC Article 23, WIPO Article 46, ICDR Article 46, LCIA Article 25(1) (a).

authority should be recognised. The arbitral tribunal is left with power to apply legal standards when granting any provisional measure.<sup>438</sup> It should further be noted that most institutions dealing with arbitral provisional measures in the commercial context consider the following as the agreed standards, namely: (1) serious or irreparable harm to the claimant; (2) urgency of the matter;<sup>439</sup> (3) no prejudgement of the merits; while some arbitral tribunals also require the claimant to adduce a prima facie case on the merits.

The author further argues that the lack of clarity in relation to standards for granting provisional measures was left to the arbitral tribunal to resolve, because it was not easy to foresee the types of solutions that might be required. A clear set of standards would impede party autonomy as the tribunal would not be able to adapt to the prevailing commercial circumstances, since commerce changes according to economic trends of supply and demand.

In granting any provisional measure, the arbitral tribunal can in principle take guidance from arbitral case law, and the comparative analysis of arbitral conventions and rules. The examination of both academic views and arbitral institutions demonstrates that there are general requirements, both positive and negative, that the arbitral tribunal needs to take into consideration before granting a provisional measure. The tribunal will not deny any party who requests a provisional measure, because a refusal will potentially infringe the party's rights (party autonomy).<sup>440</sup>

In practice, an arbitral tribunal will consider the nature of the provisional measure that are requested and the relative injury to be suffered by each party, in deciding whether to grant a measure or not. Provisional measures, for example; preserving status quo or performance of a contract, the claimant need to prove or to show urgency, harm and prima facie case, however, provisional measures for example; preservation of evidence, confidentiality, security for costs do not require the same showings.<sup>441</sup> It may be argued that such lacunae provides the arbitral

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<sup>438</sup>See *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316.

<sup>439</sup>Arbitration generally tends to apply the urgency requirement in a less strict way than courts. In practice, tribunals may grant interim measures notwithstanding the fact that the urgency has not been established properly or even alleged. By way of illustration Article 14 (2) of the CAs Arbitral Rules for sports, does not list urgency among the conditions for interim measures. A defence of lack of jurisdiction raised by one party does not prevent the tribunal from making an order, once the file has been transmitted to it provided it is prima facie. See Berger, *International Economic Arbitration*, The Hague 1993 at 335-336.

<sup>440</sup> See s. 39 (4) of the English Arbitration Act 1996.

<sup>441</sup> *Ibid* s. 38 (3).

tribunal to grant provisional measures under the probability principle or greater likelihood or the material risk or harm if the measure is not granted.

### **4.3 Negative requirements of granting arbitral provisional measures**

The negative requirements are requirements that are provided by the tribunal: where firstly, the tribunal does not need to examine the success or the merit of the case. Secondly, the tribunal may not grant or refrain from granting such a measure in the form of a provisional measure. Thirdly, the tribunal under negative requirements may refuse to grant any measure sought by the party where there is evidence that such order may not be complied with by a party. Fourthly, the tribunal may not grant the measure where it is clear that the order will not prevent the harm suffered by the party seeking the order. Fifthly, the order may not be granted where it is found to be too remote in regard to the case in question, or moot. Lastly, as the doctrine of equity provides that whoever comes to the court must come with clean hands, the tribunal will not grant any measures where there is some ambiguity, that is to say fraud or duress, theft or misrepresentation by a party.

#### **4.3.1 The request should not necessitate examination of merits of the case**

Where there is clear evidence that the merits of the case require examination, the arbitral tribunal may refrain or not refrain from issuing the interim relief requested by the claimant. This applies on the condition that there is no prejudice to the outcome of the case in question. The tribunal has to take the substance of a case in dispute for the establishment of a prima facie jurisdiction.<sup>442</sup>

The arbitral tribunal is to see that justice prevails but not to promote any infringement of parties' rights;<sup>443</sup> as infringement breaches the arbitral doctrine of impartiality.<sup>444</sup> Provisional measures must not prejudge the merits of the parties' underlying dispute.<sup>445</sup> However, it is not precisely

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<sup>442</sup> See ICC first Interim Award 5835 of 1988, extracts published in 8 (1) ICC Int'l Ct Bull 67 (1997).

<sup>443</sup> Arbitration Act 1996 s.1 (a).

<sup>444</sup> See Mode Law Article 34 (2) (a)-(b), New York Convention Article V (1) (d) and V (2) (b), which provides that in any case the provisional relief should not prejudice the decision of the substance.

<sup>445</sup> See *Emilo Augustin Maffezini v Kingdom of Spain*, Procedural Order No.2, ICSID Case No. Arb/97/7 (28 October 1999).

clear what this requirement means: for instance, does it argue against the arbitral tribunal making a decision that may prejudice or bias its final decision on the merits, or does it argue against the arbitral tribunal granting the same order that is requested on the merits? The author argues that there is no need for any provisional measure to be subject to prejudging the merits, because provisional measures are subject to alteration and revocation at any stage in the final award, hence the outcome of a provisional measure should not as a technical matter prejudice or predetermine the final award.<sup>446</sup>

There are circumstances where the arbitral tribunal has refused to grant the provisional measures requested, for example in the ICC case 6632, where both parties to an arbitration agreement applied for an order for security for costs. However, the tribunal declined the application, stating:

The arbitral tribunal considers that, in the present stage of its information, it cannot, without pre-judging the issues relating to the merits of the case, determine whether the contract was validly terminated or not and whether the property was legally or illegally seized by the respondent.<sup>447</sup>

The arbitral tribunal when dealing with any provisional measure in relation to not prejudging the merits, must take care to ensure that that it does not, in considering any request, partially close its mind to one party's submission or deny one party the opportunity to be heard in subsequent proceedings, on the grounds that the same relief sought as final relief may ordinarily be issued on a provisional basis.

#### **4.3.2 No granting of final relief**

An arbitral tribunal will not grant a decision on the merits under the guise of a provisional measure. This means that the tribunal will not order any provisional measure if it happens that

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<sup>446</sup>See Lew, Commentary of Interim and Conservatory Measures in ICC Arbitration Cases, II (1) ICC Ct. Bull 23, 27 (2000).

<sup>447</sup> See Order of 199 in AAA Case No. 507181-0014299 (unpublished), where a dispute arose from a distribution agreement and the claimant requested from the tribunal enjoin, on an interim basis, the respondent objection to the preliminary injunctive relief which was that it had never been party to the agreement. The fact that this claim was also the essence of the respondents' defence, the tribunal refrained from dealing with the substance of the case. ICC Partial award 8113 of 1995, extracts published in 11 (1) ICC Int' l Ct Arb Bull 65-69 (2000), the arbitral tribunal denied the request for interim relief as the request by the claimant implied a pre-judgement of the dispute.



the relief sought is not convincing.<sup>448</sup> An arbitral provisional measure may not operate to grant the final relief sought for preserving the provisional nature of the provisional measure. This can be demonstrated in the case of *Behring International Inc v Iranian Air Force*,<sup>449</sup> where the dispute arose out of a contract for the servicing of helicopter components owned by the respondents. Upon the claimant's request for reimbursement of the storage costs for preservation of the goods, the Iran – US Claims Tribunal, by taking into account the fact that one of the claims submitted by the claimant was for storage charges, refused the request by ruling that it appeared that the request for the provisional measure was, in that respect, identical to one of the claimant's claims on the merits. Under such circumstances, to grant this request would have amounted to a provisional judgment on one of the claimant's claims.

However, the tribunal could not convince the claimant to store the goods in a modern portion of the warehouse, in order to avoid any further deterioration of the goods, and it therefore held:

“Since a transfer within the claimant's own warehouse has not been made possible, the Tribunal sees no alternative to transferring the goods to a warehouse selected by the respondents. In the circumstances of this case, it would be impractical for this warehouse to be selected by and subject to the discretion of the tribunal. Certain goods may require special maintenance or special handling or repackaging, for which the tribunal cannot assume responsibility.”<sup>450</sup>

### **4.3.3 The tribunal may not grant measures due to doctrine of equity**

This is an international maximum adopted by the doctrine of equity in England that, when one needs justice or when one goes to any legal institution one must go with clean hands.<sup>451</sup> In this case, the claimant concluded a distribution contract with the respondent, whereby the respondent was granted the exclusive right to sell touch screen computers. The parties also signed a non-competition clause, in which the respondent undertook not to compete. The claimant alleged that the respondent breached their contract, and as a consequence, terminated the contract. The

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<sup>448</sup> See Interim Award ICC Case No. 8786, 11 (1) ICC Ct. Bull 81 (2000), where the arbitral tribunal rejected the application of an order where the defendant failed to be sufficient or convince the tribunal. See ICC Rules Article 8 (5).

<sup>449</sup> See (1985), Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985) or *United Technologies Int'l v Iran* (1986), Case No. 114, Decision No. 53-114 (10 Dec 1986).

<sup>450</sup> See Case No 382, Interim and Interlocutory Award No. ITM/ITL 52-382 (21 June 1985).

<sup>451</sup> See ICC Partial Award 7972 (1997) unpublished.

claimant then filed a request for arbitration. The claimant also applied for an injunctive relief in order to stop the responding manufacturer from distributing and selling the claimant's products. The arbitral tribunal considered the time essence and found out that the ground of the claim requested was time barred. The arbitral tribunal held that:

“The decision whether or not to grant an injunction lies in the discretion of the tribunal from which it is sought or requested. Generally, a tribunal will not grant an injunction where it is found that the petitioner does not have clean hands.”<sup>452</sup>

The Arbitral tribunal went on further and held that:

“We have found that the (claimant) discovered... manufacture and sale of (the products by the respondent) in 1991. The Claimant sat on this knowledge for more than two years before, on 28 April 1993; it invoked the (respondent) breach and sent a notice of termination of the distribution agreement. In the meantime, (the claimant) actively sought and obtained, in May, an additional investment of \$5000,000 by (the respondent) in the claimant's business. In such circumstances, we determine that the claimant cannot now be heard to say that it is entitled to an injunction to enjoin the (respondent) henceforth from manufacturing, distributing and selling (the claimant's) products.”<sup>453</sup>

#### **4.3.4 The measure must be capable of preventing the alleged harm**

In considering when to make any provisional measure, the arbitral tribunal has to balance this with the objective of the measure. If that measure is not going to provide a remedy for the victim to the arbitration agreement there is no need for such request to be granted.

The provisional measures are designed to safeguard, on an interim basis, the right in question; or in other words, to avoid any harm to that right. Thus they should, at least on the face of it, be capable of serving this purpose.<sup>454</sup> In addition the measure requested must not be moot, for example in *Iran v United States*,<sup>455</sup> where the claimant requested the tribunal to prevent the public

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<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> See Yasril on Provisional Measures.

<sup>455</sup> *Iran v United States of America*, Case A-15 (24 November 1986).

sale of nuclear fuel allegedly belonging to it. In fact the fuel had already been sold before the tribunal was able to consider the case; thus the tribunal held that the request had become moot.

#### **4.3.5 The measure must be capable of being carried out**

The arbitral tribunal at all times must ensure that order requested will be put into effect. This concern partly relates to the duty of arbitrators, according to certain arbitral rules, to take into account the enforceability of the award they render.<sup>456</sup> If, however, the arbitral tribunal does not consider the future of the order, there maybe a wastage of valuable time and delay of arbitral proceedings, where it is not likely that the order requested is capable of being carried out. For instance, in an ICC case,<sup>457</sup> upon the revocation of the licences concerning mineral rights by the state H, the claimant applied for an injunction. The main objective of the application was to prevent the state H from making any disposition of the mineral rights in any party of the territory covered by the relevant licences. The arbitral tribunal never ruled on the order requested until its final award. The tribunal at the final award held that one of the reasons as to why it did not rule or make the order was because it could not have monitored any order made.<sup>458</sup>

#### **4.3.6 There must be adequate damages**

When the tribunal is considering granting any provisional measure, especially that of preserving the status quo, where there is a likelihood of potentially or actually prejudicing the counter party's rights, in such circumstances, an arbitral tribunal should request from the applicant adequate security for damages. Indeed this is a common practice even in judicial courts when granting any provisional remedy.<sup>459</sup> The main reason for requesting security for damages is to obtain a form of an undertaking whereby the successful moving party undertakes to indemnify the adversary, should the measure prove to be unjustified.<sup>460</sup> The other fact is that provisional measures are based on a summary review of the facts and law, and such review would affect the prima facie establishment of the case, and most important, the outcome of the case or review

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<sup>456</sup> See ICC Rules Article 35.

<sup>457</sup> ICC Case 7210 of 1994, published in ii (1) ICC Int'l Ct Arb Bull 49-52 (2000).

<sup>458</sup> See ICC Case 5835, where the tribunal, in refusing a request, took the issue of enforceability of that provisional measure into consideration.

<sup>459</sup> See Brussels Convention Article 24, which provides that payment is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim. Payment is guaranteed where security for damages is obtained see *Van Uden Africa Line v Kommanditgesellschaft*, Case C-391/95. (1998) ECR I-7131 par22. See *Hans Herman Mietz v Internship yachting SneekBv*, case C-99/96, (1999) ECR I- 2314 par 42.

<sup>460</sup> ICC Interim award 5835 of 1988 published in 8 (1) ICC Int'l Ct Arb. Bull 67 (1997).

changes at the end of the adjudication. The purpose of the security is to cover to any actual loss and potential damages to the adverse party. In practice there are quite a few cases where security for damages was dealt with.<sup>461</sup>

#### **4.3.7 An undertaking**

An arbitral tribunal may refuse to grant a provisional measure if there is an undertaking or declaration in good faith by the party against whom such measure is sought that it does not intend to infringe the right in question. Apparently, it is within the discretion of the tribunal to accept the undertaking, subject to the terms of the tribunal. In deciding to accept the declaration, the circumstances of the case and previous actions of the arbitrating parties need to be taken into consideration. The arbitral tribunal has the power not to consider other requirements of granting any order requested.<sup>462</sup> In Case 67692,<sup>463</sup> a dispute arose from the agreement according to which the claimant was entitled to the use of the respondent's software, which related to the prediction of movements in financial instruments. The claimant requested an injunction, in order to prevent dissemination of its technology and data by the respondent, pending the final award. The respondent, countering the claimant's arguments, claimed that the claimant's technology was not in possession. There was an initiative taken by the respondent or an undertaking not to use the technology during the course of arbitration. It was prima facie established from the outset that there was not sufficient likelihood that the respondent would use the technology. Indeed, the arbitral tribunal on the balance of probability declined the request on the grounds that it was a waste of time and that if it was not granted the claimant would not suffer any substantial harm.

#### **4.4 Positive requirements**

The positive requirement element is sometimes referred to as the necessity doctrine for the granting of provisional measures. Indeed the conditions set under this criteria are almost the same as those for the municipal courts when dealing with civil proceedings in the commercial arena.

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<sup>461</sup> See ICC case 7544, where the arbitral tribunal ruled that; "the tribunal is faced with the delicate task of weighing up the probability as whether, after the claims and counter claims have been fully argued before it, the net result will be in favour of the claimant. As the latter alleges, or in favour if defendant....in order to cover the risk that the final decision might not be consistent with the decision reached in this award..... the order to the defendant to pay the amount is to guarantee....."

<sup>462</sup> See ICC Case 7592.

<sup>463</sup> Unreported.

In other words, the tribunal has to be satisfied beyond reasonable doubt that there is an imminent or serious danger to the applicant's right and that the tribunal needs to take urgent action to remedy the danger. There are no clearly expressed positive requirements set by any law of any country of jurisdiction, and so the tribunals have established four conditions of granting a request under positive requirement, according to the merits of the case. Firstly, the tribunal has to have jurisdiction to rule on its jurisdiction or to hear the case, in order to grant a provisional measure. Secondly, there must be a prima facie case in order for such a measure to be granted. Thirdly, as stated above, the request needs to be one of urgency due the harm caused to the applicant. Fourthly, the request should be serious or there should be a substantial link and the applicant should have to prove the substantial prejudice element if the measure sought is not granted. Lastly, the degree of proportionality is crucial, given that the tribunal has to show that justice is being done and also to see that its uses its power perfectly in gaining legitimate justice in all proceedings of the case in question.

#### **4.4.1 Irreparable or serious harm**

The arbitral tribunals frequently require that the party seeking provisional measures should demonstrate that it may suffer either irreparable or serious injury<sup>464</sup> unless those provisional measures are granted.<sup>465</sup> In other words, the arbitral tribunal will only order provisional measures if the requesting party has substantiated the threat of not easily reparable prejudice.<sup>466</sup> Some authorities argue that irreparable harm is required for a grant of provisional measure, in the case of *TokiosTokeles v Ukraine*,<sup>467</sup> where it was held that a provisional measure is necessary where the actions of a party are capable of causing or threatening irreparable prejudice to the rights invoked. In contrast, other authorities appear to require only serious or substantial harm to be shown, without requiring that the injury be irreparable in the literal sense.<sup>468</sup>

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<sup>464</sup> English Arbitration Act 1996, s. 41 (3) (a)&(b).

<sup>465</sup> See Gary Born, *International Commercial Arbitration* Vol.111981.

<sup>466</sup> See ICC case No. 8786, 11 (1) ICC Ct.Bull 81, 83-84 (2000). *Islamic Republic of Iran v USA*, Decision No. 116-A15 (18 May 1993).

<sup>467</sup> See ICSID Procedure Order No.3, ISCID Case No. ARB.02/18 January 2005, at <http://icsid.worldbank.org> accessed 21 Jan 2012.

<sup>468</sup> See UNCITRAL Model Law, 2006 Revision of Article 17 (1) (a).

Most commentaries and decisions gloss over the potentially substantial difference between the risks of irreparable and serious damage.<sup>469</sup> The author argues that it is obviously difficult to demonstrate truly irreparable harm that cannot be compensated by pecuniary or monetary damages in a final award. In practice, the irreparable harm requirement would limit provisional measures principally to cases where one party was effectively insolvent or where enforcement of a final award would be impossible. Most of the arbitral decisions which state that the damage must be irreparable, do not appear to apply this formula in its literal form, but instead require that there must be a material risk of serious damage to the claimant. The arbitral tribunal in most cases will consider the extent to which the claimant will suffer serious injury, the extent to which it is just or fair on the victim that the burden or risk of loss during the arbitral proceedings, the extent to which such injury is compensable in a final award and the likelihood of success of each of the parties on the merits of its case, and the relative hardship to each of the parties if a provisional measure requested is not granted.

The arbitral tribunal in many cases is likely to issue provisional measures in order to protect or minimise damage resulting from commercial dealings, for example where there is a prima facie claim that appears to cause injury as a consequence of steps. For instance, the respondent is planning to transfer a disputed property or sell it outside the ordinary course of business and the respondent does not appear to suffer material harm from the granting of a provisional measure. The grant of such provisional measures is commercially viable as it makes the enforcement of the final award more simple which would otherwise be too difficult. This is common where intellectual property shares in a company may be frustrated by the disposition of the respondent, hence disposing of the subject matter or removing assets from the business whose ownership is in dispute frustrates contractual obligation. In such circumstances, arbitral tribunals are likely to consider the conduct of a party under balancing interests or balancing hardships in order to issue the provisional measure.<sup>470</sup>

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<sup>469</sup> See With, *Interim or Preventative Measures in Support of International Arbitration in Switzerland*. 18 ASA Bull.31, 37-8 (2000) (“the detriment resulting if no relief is granted will not easily be remedied exposure to irreparable harm?”)

<sup>470</sup> See UNCITRAL Model Law 2006 Article 17.

#### 4.4.2 Prima facie case or probability of success on merits

Some tribunals and commentators have held that the party requesting provisional measures must demonstrate a prima facie case on the merits of its claim or a probability of prevailing on its claim.<sup>471</sup> The arbitral tribunal needs to be satisfied that the moving party has a reasonable probability of success in a case. In other words, the claim or request must not be frivolous or vexatious.<sup>472</sup>

Other commentators argue that:

The present arbitral tribunal is not a referee jurisdiction, but a jurisdiction of the seized of provisional measures. The powers of the merits of ruling provisionally are not limited like those of the referee judge and serious dispute does not prevent a broader appreciation, although on a provisional basis, of the respective arguments of the parties.<sup>473</sup>

At the same time, some commentators have refused to consider whether one party or both parties have stated a prima facie case, sometimes saying that this conflicts with the requirement that a provisional measure should not prejudice the merits of the arbitral tribunal's judge.<sup>474</sup>

In the author's view, the arbitral tribunal should at all times consider the prima facie strength of the parties' respective claims and defences, in deciding whether to grant a provisional measure or not. It should be noted that the prima facie case requirement does not prejudice the merits of the case; it is a purely provisional assessment based upon incomplete submissions and evidence, without preclusive effects.

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<sup>471</sup> See K. Lenaerts and D. Arts, *Procedural Law of the European Union*, Sweet & Maxwell, 1999, p. 299.

<sup>472</sup> UNCITRAL Article 17 A (1) (b).

<sup>473</sup> See ICC Arbitral Practice, 11 (1) ICC Ct. Bull. 31, 34 (2000). See D. Caron, L. Caplan & M. Pellonpää, and The UNCITRAL Arbitration Rules: A Commentary 537 (2006) (“*a party who is clearly without merit should not be granted a request for interim measures.*”)

<sup>474</sup> See Lew, *Comparative International Commercial Arbitration* (2003) pp. 23-26. Where he said “to avoid any appearance of pre-judgement, arbitrators are invariably reluctant to express their views on the merits before they have considered at least a significant amount of the evidence presented by the parties. For this reason the merits of the case rarely play any direct role in the determination of whether or not to grant a provisional measure requested.” See Yesilirmak, *Interim and Conservatory Measure in ICC Arbitral Practice*, 11 (1) ICC Ct. Bull. 31 (2000). ICSID Convention: A Commentary Article 47, (2000) tribunals must strike a careful balance between the urgency of a request for provisional measure and the need not to prejudice the merits of the case.

Moreover, it is very important for the arbitral tribunal to assess the existence of a prima facie case in order to make a rational commercial decision regarding any provisional measure requested by any party. For example, if a claimant licensee has failed to establish a prima facie case of wrong termination of a licence agreement, while the respondent licensor has presented a comprehensive defence as to why it was contractually entitled to terminate, then an arbitral tribunal before granting any order should be hesitant to order the respondent licensor to permit the use of the licensed property and to supply updates and similar assistance on a provisional basis during the pendency of the arbitration proceedings. In such cases the claimant needs to adduce an urgent risk of grave and irreparable damage in order for the arbitral tribunal to grant that measure requested.

Furthermore, in circumstances where a party seeking interim relief has made a credible case, but has not shown stronger case of serious harm, during the arbitral tribunal proceedings, then consideration of the merits of the case appears both sensible and appropriate given the circumstances of that very case in question. It would be better for interim measures arising during the arbitration proceedings to be allocated pending a final award in the arbitration that will determine the parties' rights, because a failure would be irrational and unjust. This is because the tribunal's final determination is not known, and any determination by the tribunal is partial, based on partial submission. In practice, the examination of the substance of a case for prima facie is commonly limited.<sup>475</sup>

#### **4.4.3 The need for urgency**

Urgency is an essential requirement for the arbitral tribunal to grant any provisional measures requested by a party.<sup>476</sup> The degree of necessity adduces urgency for the arbitral tribunal to act as a deterrent to that effect.<sup>477</sup> In other words, the tribunal will be coerced to grant the provisional measure in order to safeguard the right in question before the final award is rendered.<sup>478</sup>

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<sup>475</sup> See ICC Interim award 9301 of 1997. ICC Final award 5804 of 1989, published in 4(2) ICC Int'l Ct Arb Bull 76 (1993), where a prima facie issue was recognised by the tribunal.

<sup>476</sup> See *Compagnie Maritime Belge Transport NV v Commission*, Case T-24/93 R, [1993] ECR II-543 Par 32-35.

<sup>477</sup> See ICC case No.8786. Note the requirement that the party seeking the interim relief demonstrates that the need for a measure is urgent.

<sup>478</sup> See Gary Born *Cases & Materials*, (Aspen Publishers 2011) at 833.



In such circumstances, if the tribunal was to wait for the final award,<sup>479</sup> then the commercial users would refrain from coming to arbitration.<sup>480</sup> But it is of paramount importance that the tribunal needs to be persuaded that the immediate action is necessary in order to prevent irreparable damage to the claimant and in all circumstances there is some establishment of a case.<sup>481</sup> However, the UNCITRAL Model Law revised in 2006 omits any reference to urgency for the arbitral tribunal to grant provisional measures.<sup>482</sup>

The urgency requirement is closely related to the serious harm requirement;<sup>483</sup> just as relief prior to a final award is generally not ordered, save to prevent serious damage from occurring during the course of the proceedings, so pre-award relief is generally not ordered until such time as it is necessary to prevent such serious harm from taking place.<sup>484</sup> If the possibility of such damage remains contingent, arbitral tribunals should not intrude into the parties' relations. However, under international practice, the arbitral tribunal may grant provisional measures if any of the requirements are satisfactory to their mandate.<sup>485</sup> It should further be noted that in most cases urgency is not interpreted in its literally mechanical form but given a purposive scope, in order to take a realistic commercial view of the likelihood if such a measure is declined by the tribunal.<sup>486</sup>

#### 4.4.4 Proportionality principle

When considering granting any provisional measure, an arbitral tribunal also has to take into consideration the gravity of granting a provisional measure requested by any of the parties to the

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<sup>479</sup>See *CAS. Succhi di Fruta SPA v Commission* Case T-191/96, [1997] ECR 211. See *Bayer v Commission*, Case T-41/96, [1996] ECR 381.

<sup>480</sup> See Yesrilmark, *Interim and Conservatory Measures in ICC Arbitral Practice*, 11 (1) ICC Ct Bull 31, 34 (2000) (“*need for urgent or prompt relief*”).

<sup>481</sup> See Born Vol.11.

<sup>482</sup> See UNCITRAL Model Law Article 17 2006 Revisions.

<sup>483</sup> See *Telecino v Commission*, Case T-191/93 R, [1993] ECR II-1409.

<sup>484</sup> *Ibid.*

<sup>485</sup> See *BiwaterGauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No.1, ICSID Case No. ARB/05/22 (31 March 2006) p76., at <http://icsid.worldbank.org> (“the degree of urgency which is required may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.”)

<sup>486</sup> See *Tanzania Electricity Supply Co v Independent Power Tanzania Ltd*, ICSID Case No. ARB/98/8 (20 December 1999), 1999 WLR 34765678 at para 18, (declining to find urgency where the claimant failed to provide supporting evidence where the threatened harm may take place or at least do so in the foreseeable future.) see *Ceskoslovenska Obchodnibanka as v Slovakia republic*, Procedural Order No.3 ICSID Case No. ARB, 97/4 (5 November 1998) para 2, at <http://icsid.worldbank.org>; refusing to impose a provisional measure because the Tribunal had no reason to assume that the threatened harm might take place.

arbitration agreement.<sup>487</sup> The tribunal, when achieving its legitimate objective, has to weigh the decision of the outcome to the victim, if it is proportionate given all the circumstances of the case. In other words, the arbitral tribunal ought to take into account the effect of any interim measures for granting it, on the arbitration parties' rights to a certain extent.<sup>488</sup> It should be noted that the injury suffered must not be out of proportion to the advantage which the claimant hopes to derive.<sup>489</sup> The arbitral tribunal in all cases should carefully examine the allocation of risk between the parties at the signing of the contract, by looking into the terms of the contract, if there silent by making a purposive interpretation to achieving legitimate objectives.

#### 4.4.5 Jurisdiction

It is very important to note that for the arbitral tribunal to grant provisional measures,<sup>490</sup> it has to have the jurisdiction for the particular order being requested.<sup>491</sup> Some commentators argue that the tribunal has to establish its jurisdiction before it grants provisional measures.<sup>492</sup> In most practical cases, the arbitral tribunal is able to issue provisional measures notwithstanding the existence of any jurisdictional challenge and also notwithstanding the fact that the tribunal has not ruled on this challenge. It is therefore important to note that the arbitral tribunal as a practical matter is not incapacitated from granting provisional measures which are central to a fair resolution of the parties' dispute, because of jurisdictional challenge.<sup>493</sup>

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<sup>487</sup>See *Konecke v Commission*, Case 44/75 R,[1975] ECR 637 Para 4.

<sup>488</sup> The tribunal, in balancing up the hardships and in its examination, appears to consider the extent to which the claimant will suffer serious injury during the arbitral process, the extent to which such injury appears to compensable in the final award and the extent to which it is just or fair that the burden or risk of loss during the arbitral proceedings, and the likelihood of success and the likely hardship to each of the parties if the provisional measures is not granted. See D. Born International Commercial Arbitration (2009) pp. 1983-85.

<sup>489</sup> See Berger, International Economic Arbitration 336-37, See MAT Cied'Electricite de Sofia et de Bulgarie (*Belgium v Bulgaria*) (1922) 2 TAM 924,926-27 ( arguing that the "*possible injury must not be out of proportion with the advantage which the claimant hopes to derive from them.*")

<sup>490</sup>See the summarised Review of the Case Law of the Republic of Lithuania Applying Legal Norms of International Private Law No. A2-14 approved by the ruling No. 28 of the Supreme Court of Lithuania of 21 December 2000. See Lithuanian Court of Appeal of 29 April 2004, Civil Case No. 2-249/2004: ruling of the Lithuanian Court of Appeal of 9 June case No. 2-225/2005.

<sup>491</sup> See s.30 of 1996 Act.

<sup>492</sup> See Lew.Mistelis&S. Kroll, Comparative International Commercial Arbitration (2003) p23-68. See Partial award ICC Case No.8113, (1) ICC Ct. Bull.65.69 (2000), see D. Caron.L.Caplan&M.Pellonpaa, The UNCITRA Arbitration Rules: A Commentary 535 (2006) "whether an arbitration tribunal must satisfy itself that it has jurisdiction over the subject matter of the dispute before deciding to order interim measures is a question which has generated considerable legal writing and caused practical problems for various international courts and tribunals."

<sup>493</sup> See D. Caron &Pellonpaa, The UNCITRAL Arbitration Rules: A commentary 536-37 ( 2006), ("although the tribunal may not order interim measures in the absence of jurisdiction over the merits of the case, considerations of

Arbitral tribunals have not infrequently ordered provisional relief notwithstanding the existence of an unresolved jurisdiction challenge. One commentary states:

The well settled position in international adjudication...[is] that an international tribunal may decide on provisional measures prior to establishing its jurisdiction over the dispute if it appears that there is a prima facie case, a basis for asserting such jurisdiction.<sup>494</sup>

It may be argued that in practice, where the arbitral tribunal concludes that a jurisdictional challenge is well grounded, and it lacks actual authority to grant provisional measures it will not grant any provisional relief. However, the arbitral tribunal's provisional measures are entitled to the same force as its direction regarding the conduct of the arbitration. In other words, the arbitral tribunal will establish or will have to determine its jurisdiction in that case in question in order to grant provisional measures. Assuming that the general criteria for granting provisional measures are satisfied, the tribunal has a substantial discretion in selecting and ordering appropriate provisional measures.<sup>495</sup> As the standards of granting provisional measures continue to develop, therefore, the arbitral tribunal's discretion need to be established as a legal right.<sup>496</sup>

#### **4.4.6 Advantages of arbitral provisional measures**

Provisional measures play a vital role in commercial proceedings; indeed, without such measures the whole arbitral process becomes meaningless and arbitral tribunals would be unable to come to final awards, and even if they did so, it would be useless to a victorious party to find that the assets pertaining to the proceedings have been dissipated by the respondent in another jurisdiction or have been sold or hidden. This would render the award unenforceable and also useless, and lead to additional costs in search of the hidden assets.

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urgency dictated that prima facie showing of jurisdiction is sufficient at the stage that interim measures are requested).”

<sup>494</sup> See Ibrahim Shihata & Antonio Parra, 'The Experience of the International Centre For Settlement of Investment Disputes'(1999) 14 ICSID Rev. For Inv. L.J 299,326. See also ICSID Case No. ARB/02/18 (1 July 2003) at 6. The ICJ in regard to the issue of jurisdiction has affirmed that the applicant only requires the prima facie requirement to afford a basis on which the jurisdiction of the court might be found.

<sup>495</sup> See Yaslirmak, Interim and Conservatory Measures in ICC Arbitral Practice, (11) (1) ICC Ct, Bull31,33 (2000).

<sup>496</sup> See D, Caron; The UNCITRAL Arbitration Rules: A Commentary 536 (2006) (“The Rules provide that interim measures should be necessary-not just desirable or recommendable.”)

Given the international image of provisional measures and the support of the courts – for example, in England a breach of the measures can lead to contempt of court under s 37 of the Supreme Court Act 1981 –there effect has an adverse effect on the parties and also they are internationally recognised by arbitral rules and conventions.<sup>497</sup> There are several reasons that support the view that provisional measures should be granted by the arbitral forum. Parties submit to arbitration to settle their problems because any kind of alternative procedures like the courts could wreck the agreed mechanism. The most important reason for provisional measures to be granted by the arbitral tribunal is utmost respect for the sanctity of the contract, the agreement to arbitrate. When parties choose arbitration to resolve a dispute their primary aim is simply to reach a resolution of whatever dispute they may have before arbitrators and to avoid resorting to any other forum. The forum that parties seek to avoid is a court and such aim should be respected. Respecting that aim is a reflection of the principle of party autonomy. The resort to a court may undermine the arbitral agreement.

Respecting the risk allocation agreed between the contracting parties at the time the contract was entered into also supports arbitral jurisdiction. Indeed, the chosen arbitral forum is an important element in the allocation of risks between contracting parties. At the time of entering into a contract, a party may have the intention not to take the risk of dealing with the vagaries of the laws of foreign court practice. Arbitration is a depoliticised forum that does not harbour potential biases towards nationals of the domestic court's jurisdiction.

If the resolution of a final remedy in regard of a dispute is entrusted to arbitrators, the same trust should logically be shown to the arbitral domain in determining a provisional remedy concerning the same dispute. Arbitrators are generally in a better position than judicial authorities to identify whether a request for provisional measures is being used as a dilatory tactic, or as an offensive or abusive weapon or whether there is a genuine need. This is because the arbitral tribunals are far more acquainted with the facts of the dispute than judicial authorities., as arbitrators follow the case from the outset to the end.

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<sup>497</sup> See Gary Born International Commercial Arbitration; see Hartley, Interim Measures under the Brussels jurisdiction and Judgements Convention (1999).

An interim remedy from the court aims at delaying arbitral proceedings. The application to a court for a provisional remedy may be used as a measure or a tactical-oppressive weapon to delay the arbitral tribunal proceedings. The request to the court may also distract the opponents' efforts and involve finance. In many cases, the references to courts is a tactical decision to gain advantage over the adversary; for example a party may apply to its own national court, which may be receptive of an interim measure request. The grant of the request may further impact on the decision of the arbitral tribunal. Arbitrators are in a better situation than the national courts to determine whether a request for provisional measures is made for any tactical purposes.

The fact that many of the arbitrators are experts in their area of competence suggests that they are the best equipped and that the arbitral tribunal is the best forum in the circumstances, to deal with the case in a speedier manner than judicial authorities, who have no mechanism of confidentiality as that attached to the arbitral tribunal. Most of the cases in courts are within the public domain; consequently the decisions of the courts in any provisional manner are not confidential. The arbitrators have the power to deny any tactical measure if they find that it will be in the public domain.

Arbitration generally, has a less disruptive effect, in comparison to litigation, on the parties' overall commercial proximity. It should be noted that appointing an arbitrator-expert gives the disputing parties the assurance that the arbitrator understands the technicalities involved in the particular transaction. It is generally acknowledged that arbitrator-experts add to the wealth of knowledge available to the arbitral tribunal. Hence carrying a dispute away from the arbitral domain for an interim measure may have an inflammatory effect on the adjudication process and consequently on that relationship. It should, however, be noted that in some few cases arbitration may be costly due to the lack of co-operation of the parties or due to the urgency of the case in question. However this is minimal when compared to litigation cases.

The arbitral tribunal has no power to grant an anti-suit injunction which may lead to parallel proceedings. The term 'injunction' refers to asking a person to do or refrain from doing something. In broad sense, many arbitral decisions are injunctions. Experience demonstrates that

arbitrators grant a variety of injunctions.<sup>498</sup> The English courts have traditionally exercised the power to enjoin foreign litigation which is brought in violation of an arbitration agreement.<sup>499</sup>

Under English law, injunctions may ordinarily be granted against the prosecution of foreign litigation if it is established that the forum has sufficient interest in or connection with the matter in question.<sup>500</sup> Many English decisions have affirmed the existence of this power in emphatic terms.<sup>501</sup> The fact the mechanism of anti-suit injunction originates from common law systems in no way means that the disruption of the arbitration process is an ambush. Despite the many debates, the English powers to issue an anti-suit injunction as a provisional measure has not diminished.<sup>502</sup> The notion is that in issuing such an injunction, arbitrators are making use of the powers exclusively vested in them by national courts.<sup>503</sup>

This echoes past debates over the power of the arbitrators to award punitive damages. Such power is rooted in well recognized principles of international arbitration law, namely the jurisdiction of the arbitrators to sanction all breaches of the arbitration agreement and the arbitrators' power to grant any appropriate measure either to avoid aggravation of the dispute or to ensure the effectiveness of their future award. In some cases in which both statutory provisions were applied (s 37 of the 1981 Arbitration Act and s 44 of the 1996 Act) were applied in order to grant a freezing order, it appears that s 44(3) of the Arbitration Act 1996 was applied

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<sup>498</sup> For example, transfer of goods to another place, sale of goods or the stay of sale, supply of goods, establishing an escrow account to hold proceeds of letter of credit.

<sup>499</sup> *Pena Copper Mines Ltd v Rio Tinto Co. Ltd* (1911-13) All ER Rep 209.

<sup>500</sup> See generally, Emmanuel Gaillard, John Savage, *International Commercial Arbitration*, (Kluwer Law International 1999) para 388.

<sup>501</sup> See the judgement in *Aggeliki Charis Compania maritime v Pagnan 9 (The Angelic Grace)* [1995] Lloyd's Rep, the judge said "in my judgement there is no good reason for diffidence in granting an injunction to restrain foreign proceedings brought in violation of an arbitration agreement. See *Starlight Shipping Co. v TaiPingIns.Co* [2007] EWHC 1839, *C v D* [2007] EWHC 1541, *Elektrim v Vivendi universal SA* [2007] EWHC 571, *XI Ins. Co v Owens Corning* [2002] 2 Lloyd's Rep, *GmbH v Cargill France* [1997] 2 Lloyd's Rep 500, *Aeakos Campania Naviera SA* [1994] 1 Lloyd's Rep 505, *West Tankers v Allianz* [2007] UKHL 4, *Van Uden case C- 391/95*, which was strongly supported by Lord Hoffman which provides a strong basis for the legality of an anti-suit injunction to enforce an arbitration agreement as it is intended to protect parties' choices to have disputes settled by arbitration, when arbitration is the subject matter.

<sup>502</sup> See *West tankers v Allianz* [UKHL] 4, Emmanuel Gaillard, *The Misuse of Anti-suit Injunction*, New York Journal August 2002

<sup>503</sup> See UNCITRAL Article 17, further the Report of Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna 3-7 October 2005), which recognised the arbitrators' power to issue an anti-suit injunction in order to protect the integrity of the arbitral process against the parties' obstructive tactics. This provides another indication of the general acceptance that anti-suit injunctions may be issued by arbitrators.

as a type of jurisdiction test as to whether the court had jurisdiction to consider the granting of freezing orders. Clarification is required as to whether this is the correct test. The courts have provided a purposive approach<sup>504</sup> in this matter of considering s 44 of the Act 1996 and it is suggested that the courts should only provide such relief after consultation with the arbitral tribunal.

An arbitrator is not required to possess any special professional or technical qualification to accept an appointment to act since the arbitral guild does not qualify as a professional in most jurisdictions. However, the disputing parties are at liberty to indicate whatever professional or technical qualifications or experience the persons to be appointed as arbitrators in their dispute should or must possess. This is in exercise of their powers of party autonomy and such a requirement become part of the contractual terms in the arbitrator's contract. However, some member states, such as Italy, require arbitrators to be lawyers. The wisdom in such provisions may be gathered from the Italian case of *Sacheri v Robotto*,<sup>505</sup> where the arbitrators were all technical men. They decided the dispute and contracted a lawyer to draft their decision into an award. The Corte di Cassazione (Court of Cassation) held that the award was invalid for not being made by the arbitrators themselves. This decision highlights the importance of having a lawyer as a member of the arbitral tribunal. In the UK, whenever a problem raises the arbitral tribunal calls in the courts for assistance. Furthermore, under English law, if an arbitrator has to have some special qualification in order to be appointed, then in the event of a failure to adduce his qualification, his award will be void for lack of jurisdiction.

#### **4.5 Limitations on arbitral tribunal's power to issue provisional measures**

Although most developed jurisdictions now recognize the power of the arbitral tribunal to grant provisional measures, there are several significant limitations to this power. Such limitations or shortcomings arise in part from the inherent nature of the arbitration process, which is a contractual mechanism between particular parties, and which requires the constitution of a

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<sup>504</sup> See *Cetelem SA v Roust Limited* [2005] EWCA Civ 618, where the Court of Appeal said "the relationship between the powers of the court under s.37 of the 1981 Act and s.44 of the 1996 Act will at some stage require detailed consideration because there is a tension (to put it no higher) between the apparently wide powers conferred on the court by s.37 and the much narrower powers conferred on the court by s.44 that the resolution must wait for another date."

<sup>505</sup> *Sacheri v Robotto* (1989) Court of Cassation (Italy) 7 June, no. 2765.

tribunal for each dispute that arises; these limitations arise mainly from the terms of some of the arbitral agreements. The most common limitations that hinder the progress of arbitral proceedings are as follows:

1) The arbitral tribunal lacks the power to grant provisional measures against third parties; for example, freezing orders. This provisional measure developed<sup>506</sup> as a form of recourse against foreign-based defendants with assets within the UK, and consequently the early authorities assumed that the order was not available against England-based defendants. In the same vein, an early judicial guideline for granting the order required claimants to establish the existence of a risk of the removal of the assets from the jurisdiction. The Supreme Court Act<sup>507</sup> provides that the injunction<sup>508</sup> may be granted to prevent a defendant from removing the assets from the jurisdiction or otherwise dealing with them.<sup>509</sup> Section 37 of the Act provides the basis of jurisdiction for granting freezing orders in all cases where it appears to the court to be just and convenient to do so. The Court of Appeal held<sup>510</sup> that the wording of section 37 did not restrict the scope, geographical or otherwise.<sup>511</sup> The Civil Procedure Rules<sup>512</sup> further provide currently that the injunction may be granted in relation to assets whether located within the jurisdiction or not.

2) An arbitral tribunal's powers are virtually limited to only the parties to the arbitration agreement. As a consequence, an arbitrator generally orders provisional measures only against the parties to the agreement. The arbitration tribunal has no power to order any attachment or preservation of property orders held by a third party to the arbitration agreement.

This limitation is evident in some arbitration legislation, including the UNCITRAL Model Law, which authorises an arbitral tribunal to order any party to take such interim measures of protection as may be deemed necessary. This is made explicit by the Belgian Judicial Code, which provides that an arbitral tribunal may order any provisional measures with the exception of attachment orders. This adduces that the arbitral tribunal's authority is limited to the parties to

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<sup>506</sup> See *Mareva Campania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

<sup>507</sup> See English Supreme Court Act 1981 S. 37 (3).

<sup>508</sup> Ibid S.44 (2) (e).

<sup>509</sup> See *Masri v Consolidated Contractors Co SAL* [2008] EWHC 2492.

<sup>510</sup> *Babanaft International Co. v Bassatne* [1990] Ch.13.

<sup>511</sup> See Supreme Court Act 1981 S. 37 (1).

<sup>512</sup> CPR 25.1 (f).



the arbitration. Despite the foregoing, an arbitral tribunal would have the power to order a party to take steps vis-a-vis third parties in order to prevent specified actions. For example, a corporate entity could be ordered to direct its subsidiary to take some steps. Such orders test the limitations of the arbitral powers, but in appropriate cases, where there is a necessity to accomplish justice, the arbitral tribunal should be prepared to issue them.

3) The arbitral tribunal lacks the power to grant provisional measures until it is constituted. This is implied by the arbitration legislation which limits the power of the arbitral tribunal to grant provisional measures. It should be noted that although self-evident, this limitation of not being able to grant such measures until it is constituted can have substantial practical importance. The most critical time for seeking provisional measures is often at the outset of the parties' dispute. One party may seek to dispose of disputed property or evidence, to alter the contractual or commercial status quo or to take other steps to pre-empt or position itself for the arbitration. The absence of any arbitral tribunal to which requests for provisional measures may be directed in the initial weeks or months of a dispute may effectively prevent the arbitral tribunal from granting meaningful provisional measures. The absence of a tribunal at the pre-formation stage may lead the parties to resort to the courts. This will automatically affect the principle of party autonomy. An invitation of the court by a party, is mistrust to arbitration proceedings and a waiver of the arbitral agreement.

4) Specialised institutional arbitration rules for expedited provisional measures: some arbitral institutions have adopted specialised rules that seek to provide a non-judicial mechanism for obtaining urgently needed provisional measures at the outset of the arbitral proceedings. The ICC Rules for a Pre-Arbitral referee procedure are the leading example of such efforts. These rules have, however, rarely been used in practice. This is because the parties to the arbitral agreement must agree in writing to the use of the specialized procedure, and given the realities of litigation, this cannot often be expected to occur after a dispute has arisen. At an earlier stage, when the underlying contract and arbitration agreement are negotiated, parties have not generally been sufficiently focused on the procedural intricacies of future disputes to make provisional measures for specialised issues.

With the modern approach to arbitral proceedings by some countries like the Netherlands with its Arbitration Institute's current Arbitration Rules, and the revised version of the ICDR Rules,

provide that in case of urgency, a sole arbitrator should be appointed to resolve provisional measures prior to the constitution of the arbitral tribunal. The best adopted approach to obtain tribunal-ordered provisional measures has been adopted in the LCIA Rules which provide for expedited constitution of the arbitral tribunal in appropriate cases, thereby enabling the tribunal to be formed and be in a position to consider requests for provisional measures in a matter of days. Although not directly addressing the need for rapid mechanism for tribunal-ordered provisional measures, this appointment procedure is a sensible and practical means for making tribunal-ordered provisional measures a realistic possibility in many disputes.

5) Limitation to the subject matter of dispute: arbitration legislation also sometimes limits the scope of the arbitral tribunal's power to grant provisional measures. That was arguably true under the original 1985 UNCITRAL Model Law text, which granted the arbitral tribunal the power to issue provisional measures which they consider necessary in respect of the subject matter of the dispute. It is sometimes said that this language limits the arbitral authority in its granting of provisional measures, and there is general support for this conclusion in the Model Law's drafting history, as the language is ambiguous and inconsistent with the Model Law's objectives. It should be noted that the requirement that provisional measures be issued in respect of the subject matter of the dispute ought not to limit a tribunal's power to particular items whose ownership is in dispute. Instead, Article 17 of the Model Law can readily be interpreted as extending to the preservation of the contractual relationship for licensing intellectual property; where the parties disputes concerns the continued existence of their contractual relationship, then provisional measures preserving all aspects of that relationship are properly regarded as being in respect of the subject matter of the dispute. The same analysis can be extended to the preservation of assets sufficient to satisfy a party's claim; such relief is properly considered as being in respect of the subject matter of the parties' dispute, because it is necessary in order that such dispute can be resolved fairly.

#### **4.6 Conclusion**

Provisional measures assist in facilitating the effectiveness of arbitration in providing an effective means for the interim protection of rights at the pre-formation stage. Indeed, there is a growing recognition of provisional measures. The standards and principles for the granting of arbitral provisional measures are the cornerstone of interim measures in any arbitral proceedings.

These standards provide arbitral efficacy, by making it predictable and consistent, hence adducing the fact that the best forum for arbitral provisional measures is the arbitral tribunal. However, despite the role played by such standards there is still a lacuna in the scope and the application, as there appear to be no clear rules in their application, by the arbitral tribunal, which causes a problem, and in the process hinders the efficacy of arbitration. The author argues that since provisional measures are given upon request by a party, the request should at least contain the relevant rights for which protection is being sought, the kind of measure sought and the circumstances that necessitate the order being requested by a party.

The English Arbitration Act 1996 should add another provision in the Annex of s 39 which provides a wider scope to the tribunal to grant provisional measures. Indeed this would explicitly provide guidance to the tribunal when determining the standards of granting provisional measures and also halt the reference to courts to provide guidance in given cases. The UNCITRAL Model law should also provide a revision and add a provision in regard to the conditions of provision measures, the initiation of such proceedings and how long the tribunal should hold or allow a given measure given to their temporary nature.

There is a manifestation of party autonomy to arbitral standards, whereby the applicant generally makes the request for the measure, due to the principle of party autonomy.<sup>513</sup> The arbitral tribunal may in rare cases, in the absence of such a request, grant provisional measures where evidence adduced will aggravate the dispute.

When parties enter into an arbitration agreement which is widely phrased, they usually intend to require that all their disputes (provisional measures) to be settled under the arbitral contract. This may be an implied term or clause in the contract; for instance, applying the officious bystander test, where the parties submit to arbitration to exclude disputes over the validity of the agreement, thus the separability principle gives effect to the will of the parties. Simply by denying that the main contract is valid, one party can deprive the arbitrator of the competence to rule upon that allegation, and this provides a loophole for the parties to repudiate their obligation to arbitrate, hence making the arbitral process cumbersome and meaningless.

It is a common phenomenon nowadays that parties to arbitration expressly empower the arbitral

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<sup>513</sup> See Chapter 4.

tribunal to grant provisional measures, on the grounds that the arbitration agreement is a separate contract and that the arbitral tribunal has jurisdiction to rule on any dispute in their domain. The two doctrines of Separability and of Competence-Kompetenz are often called the cornerstones of international arbitration as they are both derived from the arbitral agreement, which provides the arbitrators with the tools for granting provisional measures, as they work hand in glove to maximize the effectiveness of arbitration as a means of resolving international disputes and minimising the temptation of delay tactics. Although there may be some theoretical problems in arbitral proceedings, in practice the tribunal limits such problems in order to enhance the process. However, given the nature of provisional measures, the scope of the tribunal may be limited to granting all the requests sought by the party to the arbitral process, where there is no clear prima facie case, or when it has no jurisdiction to the case.

## CHAPTER FIVE

### 5 Types of arbitral provisional measures in support of arbitral proceedings

#### 5.1 Introduction

The question of whether or not an arbitral tribunal has the authority to grant provisional<sup>514</sup> measures must be determined under the “*lex arbitri*”. However, the types of measures that may be ordered in a specific case is a different question which is governed by either the relevant procedure rules or the “*lex causae*”, depending on which interim measures are involved.<sup>515</sup>

As regards the prerequisites for granting provisional measures, there is no typically strict defined law of what arbitral tribunal can order,<sup>516</sup> except that it will order all or any provisional measures that it considers necessary in connection with the subject matter of the dispute. It has wide discretion in making its decision.<sup>517</sup> According to many arbitral rules,<sup>518</sup> the tribunal is given this wide scope of discretion to grant provisional measures,<sup>519</sup> since the efficacy of the arbitration process as a whole depends on the interim measures that may prevent adverse parties from destroying or removing assets so as to render a final award meaningless.<sup>520</sup> Such measures are granted to minimize loss or damage or prejudice during proceedings in order to facilitate the enforcement of the final awards.<sup>521</sup>

The English Arbitration Act,<sup>522</sup> subject to party autonomy, provides a number of powers to arbitrators to order on a provisional basis any relief sought by the parties to the arbitration agreement.<sup>523</sup> The standards discussed above for granting provisional measures should be

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<sup>514</sup> See UNCITRAL Rules Article 26, ICC Rules 2012 Article 28, LCIA Article 25, Swiss Law on Private International Law Articles 176 and 183. See EAA S.38 (4) and 25 (5).

<sup>515</sup> See Brussels Regulation, Article 31.

<sup>516</sup> See ICC Arbitral Rules, Article 20(5).

<sup>517</sup> Arbitration is the vehicle to do away with a dispute between the parties as comprehensively and quickly as possible. Therefore, once a dispute on the fulfilment of an agreement has led to the initiation of arbitral proceedings, the arbitrators shall under take their best effort to consider all disputes arising in that agreement in order to bring them to a solution enabling the parties to resume a normal relationship as their business requires.

<sup>518</sup> See The Republic of Lithuania Law on Commerce Arbitration; Office official Gazette ,1996 No. 39-961. 2001 No. 28-89:2008, No. 87-3463.

<sup>519</sup> See Article 28 of the Arbitration Rules of 1993 of the Bulgarian Chamber of Commerce, UNCITRAL Article 26.

<sup>520</sup> See Werbicki R.J Arbitral Interim Measures: Fact or fiction? *Dispute Resolution Journal* 2002-2003 at 57-64.

<sup>521</sup> See Gary Born, *International Commercial Arbitration; Commentary and Materials* 920 ( 2<sup>nd</sup> edit 2001) at 920.

<sup>522</sup> See s. 39 , and s. 34-38 of Arbitration Act 1996.

<sup>523</sup> *Ibid* s.38 which provides general powers exercisable by the arbitral tribunal.

considered in the context of each of the specific types of provisional measures. The English subsidiary model provides less novelty power to the arbitral tribunal to grant all provisional measures. This is enshrined in several provisions of the Arbitration Act 1996, but mainly in s 39, which provides that:

“The parties are free to agree that the tribunal shall have the power to order on a provisional basis any relief which it would have power to grant in a final award.”

In addition, section 39 (2) (a) and (b) provides the types of provisional measures that a tribunal can grant; for instance, making provision for payment of money or disposition of property as between the parties or an order for interim payment on account for the costs of the arbitration. The power to grant such provisional measures; for example, orders for security for costs, as provided under section 38 (4) of the English Arbitration Act 1996, entitles the arbitral tribunal, on the request of any party, to order interim measures of protection unless the parties have expressly agreed in writing to the contrary. This is further evident in section 38 (3), (4) and (6).<sup>524</sup>In addition, section 38 provides that the arbitrators will automatically have certain specific powers unless the parties have expressly agreed to the contrary. Moreover, even if there has been no such express agreement it is possible that some institutions or other arbitral rules may overlap or conflict with it under section 48. The powers granted to the arbitrators by this section are discretionary in nature, and it should be noted that arbitrators are not bound by the provisions of the Civil Procedure Rules or case law concerning how or when a court will exercise similar powers.

In addition, in the famous case of *Channel Tunnel v Balfour and Others*,<sup>525</sup> it was held that the court did have the power to grant anti-suit injunctions but it did stay proceedings in support of the arbitration agreement. It should be noted that the genesis of *Channel Tunnel* was not to adduce the power of arbitral tribunal to grant provisional measures; it was more concerned with the arbitration agreement. Lord Mustill, in his judgement, asked the following questions:

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<sup>524</sup> See Sutton Kendal and Grill, (1997) at 257. The powers further extend to s. 48 which deals with the remedies an arbitrator can grant in an award and which s.39 (1) makes available upon party agreement on a provisional basis.

<sup>525</sup>See *Channel Tunnel Group v Balfour Beatty Ltd* [1993] AC.

Should the actions by the appellants against the respondents be stayed?<sup>526</sup> [...] Is there in fact any dispute between the parties with regard to the subject matter of the action? [...] Does the court have the power to grant an injunction to prevent the respondents from ceasing work under an agreement dated 13 August 1986 (“the construction contract”?)”

It was against such a background that the court stayed proceedings and refused to grant an interlocutory injunction under section 37 (1) of the Supreme Court Act 1981 which provides that:

“ The High Court may order or grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

In addition, the court argued that those who make agreements for the resolution of disputes must show good resolution for departing from them.<sup>527</sup> It was clearly expressed that it was not for the courts to enact law which parliament did not provide to intervene in other jurisdictions and grant interim injunctions under a law which is not English. Any injunction would be contrary both to the general tenor of the construction and the spirit of arbitration.<sup>528</sup> There are no clearly expressed cases in practice where the courts have given the tribunals authority to grant provisional measures when such cases are brought to the attention of the courts; however, where there is a breach of arbitration agreement under the subsidiary model it provides support.

Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd*<sup>529</sup> held that the English courts had no general supervisory power over the conduct of arbitration more extensive than the powers conferred by the parties.

Historically, there were significant limits on the powers of the arbitral tribunal to grant provisional measures, and even those limited powers were reluctantly exercised. However, with the development of government enactments, international arbitral rules and conventions, many of the historical arbitral obstacles in regard to the tribunal’s power to grant provisional measures

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<sup>526</sup>Channel Tunnel, para 343.

<sup>527</sup>Ibid para 357.

<sup>528</sup>Ibid para 368.

<sup>529</sup>[1981] AC 909.

have been removed.<sup>530</sup> Both in practice and analytically, the type of provisional measure that is at issue can significantly affect the type of provisional relief. In principle, the forms of provisional relief available in international commercial arbitration are very broad,<sup>531</sup> as they extend to any measures which serve to preserve or protect one of the parties' rights, the arbitral tribunal's jurisdiction or the subject matter pending the ultimate resolution of the dispute.<sup>532</sup> It should be noted that the tribunal will not be able to grant any measures beyond its jurisdiction;<sup>533</sup> for example, the arbitral tribunal cannot grant freezing orders, or attachment orders, in cases of urgency.

In a survey carried out in 2002 of the international arbitrators by the Global Centre for Dispute Resolution Research, 64 respondents identified 50 separate arbitral cases in which interim measures were sought either to restrain or to stay an activity, order specific performance, or provide for security for costs.<sup>534</sup> These figures were found to be consistent with earlier reports by the United Nations Commission on International Trade Law (UNCITRAL), which indicate that parties are seeking interim measures in an increasing number of cases.<sup>535</sup> Indeed the availability of arbitral provisional measures is not a subject that can safely be ignored.

This chapter examines the question as to whether the arbitral tribunal can grant all arbitral provisional measures.

In addressing the above set question, this chapter will examine all the types of arbitral provisional measures in order to identify some of the problems the tribunal may face in granting some provisional measures. The chapter will provide solutions to identified problems in order to enhance the effectiveness of arbitral provisional measures.

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<sup>530</sup> See Chapter 11.

<sup>531</sup> See *McCreary Tire & Rubber Co v Seat SPA*, 501 F.2d 1032, See *Channel Tunnel Group v Balfour Beatty* [1993] AC 334 (HL), *International AB v Alliance Concrete Singapore Pte Ltd* [2008] 5 LRC 187 (Singapore CA)

<sup>532</sup> See UNCITRAL Model Law, 2006 revision Art (2), which provides that "an interim measure is any temporary measure, whether in the form of an award by which the dispute is finally decided, the arbitral tribunal orders to: maintain or restore the status quo pending the determination of the dispute, take an action that would prevent, or refrain from, taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself. Provide a means of preserving the assets out of which a subsequent award may be satisfied or preserve evidence that may be relevant and material to the resolution of the dispute." See UNCITRAL Model Law Article 26 (1).

<sup>533</sup> See *Emmott v Michael Maritime & Partners Ltd No.2* [2009] 1 Lloyd's Rep 233, see *Pacific Maritime(Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371.

<sup>534</sup> See Mark Appel, *Emergency and Interim Relief in International Arbitration*, ADR Currents Vol.7 No.1 (March-May 2002) p1.

<sup>535</sup> See Report of the United Nations Secretary General, *Settlement of Commercial Disputes*, A/CN.9/WG.II/WP.108 (Jan 2000) at 104.



The chapter examines 1) orders for preservation of status quo; 2) orders for specific performance of contractual obligation; 3) orders for prohibiting aggravation of parties' dispute; 4) orders requiring security for underlying claims; orders for arbitral costs; 6) ex parte orders; 7) security for payment orders; 8) enforcement of confidential obligations; 9) measures for late enforcement of award; 10) security for costs orders;<sup>536</sup> 11) forms of provisional measures (order or award); 12) measures for later enforcement of an award; 13) emergency provisional measures; 14) injunctions and anti-suit injunctions.

## 5.2 Orders for preservation of status quo

One common form of provisional measure is an order for preserving the status quo<sup>537</sup> between the parties or alternatively, preserving specified contractual or legal relations.<sup>538</sup> This form of provisional measure is referred to in the UNCITRAL Model Law;<sup>539</sup> for example, a party may be ordered not to take certain steps terminating an agreement, disclosing trade secrets,<sup>540</sup> calling a letter of credit or using disputed intellectual property pending a decision on the merits.<sup>541</sup> Such measures ensure the effective enforcement of the award, including measures to preserve goods such as their deposit with a third person, the sale of perishable goods, the opening of a banker's credit, the use of machinery or works, the posting of a security deposit for any foreseeable damages.

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<sup>536</sup>See *Wicketts v Brine Builders* [2001] CILL 1805, where the court held that the wording of costs in s.38 is an ambivalent terminology and raises a problem.

<sup>537</sup> See Young M: Duperym. C, Interim Measures to Prevent Irreparable harm: what Can be done by The Arbitral Tribunal/Swiss Arbitration Association (interactive) available at <http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf>, accessed 13 Jan 2010. See Branson C. Interim Measures of Protection in Changing International Commercial Arbitration world Croatian Arbitration Yearbook 2002 at 9-10.

<sup>538</sup> See *Emilio Augustin Maffezini v Kingdom of Spain*, Procedural Order No.2, ICSID case No. ARB/97/7.

<sup>539</sup> See UNCITRAL Article 17 (2) (a).

<sup>540</sup> See Patricia Shaughnessy, Arbitrator power to Preserve Status Quo early, Presentation for the Vienna Arbitration ( 25 Jan 2013), Stockholm University.

<sup>541</sup>See Award ICC case No. 3896, XY>B Comm. Arb. 47 (1985) ("the best solution, in the arbitral tribunal's opinion, would involve the maintenance, in so far as possible, of the status quo ante" that is the situation when the terms of reference Nos. 1 and 2 were signed."), see Final Award in ICC Case No. 7895 (party ordered to refrain from selling the other part's products), 11 (1) ICC Ct. Bull 64 65 (2000); Final Award in ICC Case No.9324 ( party ordered to reimburse the amount of letter of credit if it were called), in Lew, Commentary on Interim and Conservatory Measures in ICC Arbitration cases, 11 (1) ICC Ct Bull.23 29 (2000) alternatively the arbitral tribunal may order the parties generally not to take steps that alter the contractual status quo. See UNCITRAL Model Law 2006 Revision, Article 17 (2) (1) ( "maintain or restore the status quo pending the determination of the dispute." An example of such relief described as follows: "an example of an existing right would be an interest in a piece of property, the owner of which is in dispute. A provisional measure could be ordered to require that the property not to be sold or alienated before the final award of the arbitral tribunal."

Orders preserving the status quo are often cited as the prime examples of appropriate interim measures, in international arbitration.<sup>542</sup> It may be argued that the orders of preservation of status quo are more apparent where the business is at stake and may be damaged through unilateral action.<sup>543</sup> The main objective of such an order is to preserve the status quo until the final decision on the merits is rendered.<sup>544</sup> Such measures can further be used to protect one party from harm during the arbitral proceedings or to preserve the tribunal's jurisdiction. In other words, they limit any factual changes that may impede the enforceability of the eventual award or to prevent a party from serious harm arising during the proceedings.<sup>545</sup>

The author argues that appropriate analysis is not to attach decisive importance to the state of affairs at the time of the request for a provisional measure, but to take into account the relative injury that is likely to be suffered by both parties, respectively during the arbitral proceedings, as well as the prima facie claims and defences on the part of each party. Where one party has a strong prima facie case on the merits and faces serious injury, the arbitral tribunal should be prepared to order the restoration of the status quo, as doing so accomplishes justice between the parties.

### **5.3 Orders requiring specific performance of contractual obligations**

Arbitral tribunal sometimes order what common law practitioners refer to as “specific performance”, requiring a party to perform his contractual obligations.<sup>546</sup> A party may be ordered to continue to perform his contractual obligation; for example, shipping products,<sup>547</sup> or providing

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<sup>542</sup> See Procedural Order in ICC Arbitration No. 12 (1989), 12 ASA Bull.142 (1994). See *Consortium Ltd v Republic of Bulgaria order*, ICSID Case No.ARB/03/24p38, available at <http://worldbank.org> ( “provisional measures appropriate” to preserve the status quo”. See C.Scheuer, *The ICSID Convention: A Commentary* Article 47 78-80 (2001).

<sup>543</sup> See Morek R, *Interim Measures in Arbitration Law and Practice In Central Europe; The need for further harmonization. Interim Measures in International Commercial Arbitration*, (Antwerp - Apeldoorn: Maklu publishers 2007) at 77.

<sup>544</sup> See Swartz in *Conservatory and Provisional Measures in International Arbitration Ninth Joint Colloquium on International Arbitration No.6 1992*, Paris ICCHQ.

<sup>545</sup> See *Amco Asia Corp v Republic of Indonesia, Decision on Request for Provisional Measures*, ICSID Case No.Arb/81/1/9 (9 December 1983), XIY.B Comm. Arb 159,159-160 (1986), see Interim Award in ICC case No. 8879, 11 (1) ICC Ct.Bull.84.89 (2000).

<sup>546</sup> See LCIA Rules Article 25 (1) (c), Interim award in ICC No. 8894, 11 (1) ICC Ct Bull 94,97-98 (2000)

<sup>547</sup> See *Framtome Case, ICC No.3896*, 1982, J.D.I at 914, where a dispute was submitted to the arbitral tribunal. The case concerned a construction contract. The arbitrators considered that they could intervene with the performance of the bank guarantees but they added that the validity of these bank guarantees fell within their competence. They pointed out that they were competent to deal not only with the main contract but also with the second agreement, the guarantee.

intellectual property in order to ensure the claimant's enjoyment of his rights.<sup>548</sup> Indeed, such measures stabilise the legal relations between the parties throughout the proceedings, including requiring continued observance of contractual obligations, protecting of trade secrets and proprietary information.

One commentator describes such measures as:

interim specific performance of the contract as when, for example, in a dispute relating to the termination of the charter party, the court prohibits or stops any use of the vessel not in accordance with the charter.<sup>549</sup>

In exercising this authority by the arbitral tribunal, the ICC tribunal ordered that:

“it is essential, until the final award on all the claims and counter claims, that the contractual provisions agreed between the parties keep producing all their effects.”<sup>550</sup>

The author argues that given the private nature of arbitration, the arbitral tribunal may not be able to effect such a measure, on the grounds that the rules of civil procedure or law of obligation does not always apply in arbitral proceedings. A party may refuse to comply with such an order granted by the tribunal. The author recommends that the English Arbitration Act 1996 should specifically provide a clause that all provisional measures have the same effect as any other civil or commercial contract, whereby a party which breaches an essential term of the contract can be ordered to pay damages or to comply with an order for specific performance of the contract. In addition, the agreement should also entail contractual obligation (infringement clauses), where parties can agree in the contract that interim measures will be granted by the courts. Such measures should be specific in order and should be used where the tribunal lacks prerogative, and the only solution is to submit to the exequatur of a national judge. The conditions for granting such measures must be fulfilled, and must be expressed in the agreement;

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<sup>548</sup>See EAA1996s.48 (5) (b), which provides that an arbitral tribunal has the power, like the court, to order a specific performance of a contract other than a contract relating to land. This clearly elucidates the arbitral as the actual authority to grant such orders, which is a remedy to enhance arbitral proceedings.

<sup>549</sup> See Raymond who concluded that; if it was justified by the protection of the interests in issue, the arbitrator may even order the provisional performance of the parties' obligation until the matter has been decided....”C.Reymond, *Le droit de l'arbitrage interne et international en Suisse* Article 183 9 1989) at7. See ICSID decision of 1972, 12 ASA Bull. 148, 152 (1994), “inviting parties to abstain from all measures incompatible with the maintenance of the contract and to assure that measures already taken in the future have no effect contrary to the maintenance.”

<sup>550</sup> See the partial Award in the ICC case, in Schwartz, *The Practices and Experience of the ICC court, in Conservatory and Provisional Measures in International arbitration* 45, 61-62 (1993).

for example, a contract for the sale of shares contains provisions on due diligence, the date room accompanied by a confidential clause. Hence in the case of any infringement the arbitral tribunal can grant interim awards within ten days after the submission of the request to arbitrator. It is also possible to see that each party has the possibility to exchange written memorials on this demand; for instance, three days after the communication of the submission: the plaintiff one day, the defendant one day, and the hearing can take place thereafter.

#### **5.4 Orders for prohibiting aggravation of parties' dispute**

The main objective of such orders is to prevent or prohibit any action that would aggravate or exacerbate the parties' dispute.<sup>551</sup> Such orders may be directed towards forbidding public statements obstructing or interfering with contractual obligations.<sup>552</sup> There is a tendency by the tribunal to construe the aggravation order as an urgent order to prevent irreparable harm or to avoid aggravation of the dispute that is the subject matter of the arbitration.

The principle that the arbitral tribunal may take steps to prohibit aggravation of a dispute is well established, from the order of one arbitral tribunal, where it was decided that:

Provisional measures may be ordered not only in order to prevent irreparable damage but also to avoid aggravation of the dispute submitted to arbitration.<sup>553</sup>

In practice, the arbitral tribunals have not frequently granted orders forbidding aggravation of the parties' dispute. For example; in the case of *AMCO v Indonesia*, the arbitral tribunal referred to such an order as:

“[A] good and fair practical rule, according to which both parties to a legal dispute should refrain from doing anything that could exacerbate the same, thus rendering its solution possibly more difficult.”<sup>554</sup>

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<sup>551</sup> See UNCITRAL Model Law Article 17 (2) (b) of the 2006 Revision.

<sup>552</sup> See UNCITRAL Article 26 (3) (b)

<sup>553</sup> See ICC case NO.73888. see the Award in ICC Case No. 3896, XY.B Comm. Arb.47 (1985) (“the tribunal considers that either exists, undeniably, the risk of the dispute before it becomes aggravated or magnified, and that the parties should, in the same spirit of goodwill that they have already demonstrated in signing the terms of the reference, refrain from any action likely to widen or aggravate the dispute, or to complicate the task of the tribunal or with more difficulty, the observance of the final award.”),

<sup>554</sup> See *Amco Asia Corporation v Republic of Indonesia*, Decision on Request of Provisional Measures, ICSID Case No. ARB/81/1 (9 December 1983), X1 YB 159, 161 (1986).

## 5.5 Arbitral costs orders

The phrase “*costs of arbitration*” is something of a term of art in the Arbitration Act 1996. The phrase is defined in s 59 to refer to the arbitrators *fees and expenses* or any institutional fees, expenses, legal or other costs incurred by the parties during the arbitral proceedings. This is payment to the court in the form of cash or a bond by an appellant to secure the payment of costs in case the appellant does not prevail. Such an order covers all the costs of the arbitral tribunal proceedings; for example, the tribunal seating costs, and travelling costs for arbitrators.<sup>555</sup> Such measures assist the applicant; for example, in the event a party is suspected to have financial difficulties from which recovery will be unlikely.

There are two differences between the two provisional measures powers relating to costs. First, the s 38 (3) power is to order a claimant to provide security for costs; the s 39 (2) (b) power is to order an actual interim payment on account of the costs of arbitration. It should be noted that the power to order provision of security for costs is an opt-out power; the parties may exclude it by agreement, but even in its absence the tribunal has powers.<sup>556</sup> The power to order an interim payment on account of costs is, however, an opt-in power; the tribunal only has that power if the parties have agreed that it may make such orders.<sup>557</sup>

The arbitral power to grant provisional measures for costs has various forms: firstly, an order to provide security for the costs of the arbitration, a power set up in s 38 (3); and secondly, an order to make payment on account for the costs of the arbitration, a power set out in s 39 (2) (b). Given the nature of tribunals compared to municipal courts such costs should be avoided,<sup>558</sup> since contracting parties normally accept risks when they enter into an arbitration agreement, as in all commercial transactions risks are part of business and international trade. It should, however, be noted that the arbitral tribunal has the power to grant such orders under appropriate business circumstances.<sup>559</sup>

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<sup>555</sup> See Article 9 of the European Convention on the Establishment of 1955 signed in Paris on 13 December 1955. See Black’s Law Dictionary, (6th edit, St Paul Minnesota: West Publishing 1990) at 1357.

<sup>556</sup> See EAA 1996 s.38 (2).

<sup>557</sup> Ibid s.39 (4).

<sup>558</sup> See *Coppee-Lavlin v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 Ac 38.

<sup>559</sup> The Power to grant such costs emanates from party autonomy as provided under s.38 (3) of the EAA 1996. See S.7 (2) of the Ireland Arbitration Act 1998. See Craig, Park & Paulsson’s Annotated Guide to the 1998 ICC Arbitration Rules With Commentary (Ocean Publications, 1998) at 139.

### 5.5.1 An order to provide security for costs

This is payment to the court in the form of cash or a bond by an appellant to secure the payment of costs in case the person does not prevail. It is to protect the adverse party by facilitating the recovery of any damages caused by the interim measures, if such measures are ultimately found to be unjustified in the final decision only apparent if the interim measures are capable of causing damage and if the amount of the required security does not exceed the maximum possible loss that could be sustained by the adverse party. The financial position of the requesting party is irrelevant for the purpose of fixing the amount of security.<sup>560</sup>

Such an order covers all costs of arbitral tribunal proceedings for example; tribunal seating costs, travelling costs for arbitrators.<sup>561</sup> Given the nature of tribunals compared to municipal courts such costs should be avoided,<sup>562</sup> since contracting parties' normally accepts risks when they enter into an arbitration agreement. It should be noted that in all commercial transactions, risks are part of business and international trade. It should however, also be noted that arbitral tribunal has the power to grant such orders under appropriate business circumstances.<sup>563</sup>

Most institutions rules contain specific rules about the deposit of security for costs. Thus for example, in the ICC Rules, Articles 31 and 30 make specific provisions for security for costs. In absence of such specific rules,<sup>564</sup> S.38 (3) gives the arbitrators the power to order a claimant to provide security for costs. Given the decision at first instance by Judge Seymour QC in *Wicketts and Sterndale v Brine Builders*, it is clear that this power ought to be exercised with very considerable caution:<sup>565</sup>

- (a) the power is best exercised on the application by the respondent rather than by the tribunal of its own motion;

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<sup>560</sup> See Arbitral Award of 25<sup>th</sup> September 1997 in (2001) ASA Bull 745, see Arbitral Award 21<sup>st</sup> December 1998 in (1999) ASA Bull.59.

<sup>561</sup> See Article 9 of the European Convention on Establishment of 1955 signed in Paris on 13 December 1955. See Black's Law Dictionary, (6th edit, St Paul Minnesota: West Publishing 1990) at 1357.

<sup>562</sup> See *Coppee-Lavlin v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 Ac 38.

<sup>563</sup> The Power to grant such costs emanates from party autonomy as provided under s.38 (3) of the EAA 1996. See s.7 (2) of the Ireland Arbitration Act 1998. See Craig, Park & Paulsson's Annotated Guide to the 1998 ICC Arbitration Rules with Commentary (Ocean Publications 1998) 139.

<sup>564</sup> See EAA s.39 (2) (b).

<sup>565</sup> [2001] CILL 1805.

- (b) the tribunal ought to require and assess evidence showing that there are serious grounds for doubting whether the claimant's assets within accessible jurisdictions are sufficient to cover an eventual costs order;
- (c) the amount required in security ought to be proportionate;
- (d) such amount should not be sought exclusively to guarantee payment of the tribunal's fees;
- (e) above all, an order cannot be based on the ground that the claimant is outside the jurisdiction.<sup>566</sup>

Subject to all, an order cannot be based on the ground that the claimant is outside the jurisdiction.<sup>567</sup> The arbitral tribunal may make peremptory orders setting a time limit for compliance,<sup>568</sup> and the tribunal may then, if the claimant fails to provide security, make an award dismissing the claim. It should be noted that s 39 has hardly ever been litigated, and one likely reason for this is that most institutions agreed to by arbitration parties will contain specific rules about the deposit for security for costs.<sup>569</sup> The author argues that although most often the respondent requests an order requiring the adverse party to furnish security for costs to be incurred in the arbitral proceedings, including parties' legal fees or other expenses under English Law, such request should only be ordered where there is a real risk of non-recovery by the other party. However, the extent of risk required varies from one decision to another. Indeed, security for costs should only be granted in very few exceptional circumstances, where the risk is clearly documented that the assets of a party would not cover a future award of costs; for the voluntary liquidation of a party during arbitration proceedings is a risk inherent to international trade and only manoeuvres contrary to good faith could justify an order for security for costs.

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<sup>566</sup>EAA 1996 s. 38 (3) (b).

<sup>567</sup> Ibid s.38 (3) ( b).

<sup>568</sup>Ibid s.41 (5).

<sup>569</sup> See LMAA Rule 18 of the Gafta Arbitration Rules, ICC Articles 30 and 31.

### 5.5.2 An order to make an interim payment on account of costs

This sort of order is designed to ensure that a party's claim is well founded and not rendered nugatory<sup>570</sup> because of deterioration in the financial condition of its counter-party or the deliberate diversion of assets.<sup>571</sup> So long as there are reasonable grounds for believing that a party's financial condition will deteriorate during the course of the arbitral proceedings, thereby putting its ability to satisfy the final award into jeopardy,<sup>572</sup> a tribunal is justified in ordering security.

The arbitral tribunal power is contained in s 39 (2) (b) of the 1996 Act, which refers to an order to make "an interim payment on account of the costs of the arbitration." It would appear, at any rate from the bland wording, that this section provides arbitrators with the power, if agreed to by the parties,<sup>573</sup> to order a party to make an actual payment on account of costs. Four observations may be made here, subject to the caveat that this new power has not been the subject of litigation and to the observation that the DAC Report<sup>574</sup> is somewhat laconic on this power. It should be recalled that the phrase "the costs of arbitration",<sup>575</sup> must be taken to include legal costs,<sup>576</sup> and given the fact that these costs may come to considerable amounts, it is not likely that, if parties have agreed to grant arbitral tribunal powers listed in s 39, that their party may well make an application for the exercise of this power for interim payment.

Although the English Arbitration Act 1996 refers to an order under a section heading the "power to make provisional awards",<sup>577</sup> the ambivalent terminology raises a problem. For a decision to direct an interim payment on account of costs an "award", it needs to be issued in the appropriate form,<sup>578</sup> in which case it is subject to an application for correction,<sup>579</sup> challenge<sup>580</sup> and appeal.<sup>581</sup>

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<sup>570</sup>See Arbitration Act 1996 s. (2) (b), which grants the arbitral tribunal wide powers to grant orders of interim payment on account of the costs of the arbitration. The tribunal powers are further evidenced in s.39 (3) which, provides that the arbitral tribunal's final award will consider the order for costs.

<sup>571</sup>Ibids.38 (4).

<sup>572</sup>It should be noted that LCIA Article 25(1) for legal costs not the EAA1996.

<sup>573</sup>EAA 1996 s .39 (4).

<sup>574</sup>SEE DAC Report Feb 1995.

<sup>575</sup>EAA 1996s.39 (2) (b).

<sup>576</sup>Ibid s.52.

<sup>577</sup>Ibid s.39 (2) (b).

<sup>578</sup>Ibids.52.

<sup>579</sup>Ibid s.57.

<sup>580</sup>Ibid s.68.

<sup>581</sup>Ibid s.69.



The author argues that section 39 and the last sentence of s 39 (4) would seem to point in the latter direction, (that this an order not an award), and the question that then arises is why would the final award, on the merits or as to costs, need to take account of any such order? Moreover, the last line of section 39 seems to leave awards on different issues to quite another section.<sup>582</sup> It is incumbent on the tribunal to take into account the parties' respective cases and not to order security more liberally with regard to claims that appear well grounded.<sup>583</sup> It is of great importance that section 39 (2) (b) is taken to envisage a payment of an interim sum to the other party, given that orders for security, which would normally be lodged in an escrow account or with an agreed third party are specifically provided for.<sup>584</sup> The order must appear that it is not only ordered against the claimant, but against the respondent; there is no limitation.<sup>585</sup>

## **5.6 Orders for disposition of property**

The arbitral tribunal's power to make such orders is provided firstly, in s 38 (2), which speaks of "directions in relation to any property" for a number of stipulated purposes; and secondly, s 39 (2) (a) refers to "a provisional order for payment of money or the disposition of property as between parties."

### **5.6.1 Orders for disposition of property**

The arbitral tribunal's power to make such orders is envisaged in s 38 (4), which provides directions in relation to any property and the detention of property by a party. The first question that arises is whether this section is drawn in wide enough terms to allow the arbitral tribunal to make a direction ordering party A to dispose of property to party B.

Indeed, looking at the wording in section 38 (2), it is clear that the tribunal can grant such orders in arbitral proceedings, even in the absence of a specific agreement by the parties: the arbitral tribunal has the authority to order party A to make over property to B, an order attractive to B where A's assets raise doubts as to enforcement.

The author argues that a sensible reading of sections 38 and 39 together would, however, appear to lead in the opposite direction (that the disposition of property is a matter exclusively provided

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<sup>582</sup>EAA 1996s.47.

<sup>583</sup>Gary Born, *International Commercial Arbitration Vol. I* (2009) at 2002

<sup>584</sup> See EAA 1996s.38 (3).

<sup>585</sup>Ibid .

for by section39 and not in section38). A brief look at section38 (4) makes it clear that that its purpose is to preserve evidence. In addition, it provides among other things inspection, preservation and sample. The purpose of section39 (2) in regard to disposition of property is clearly geared to the preservation of assets rather than evidence. The provisional remedy here has an altogether different tenor and purpose and is one of which ought to require the express agreement of the parties, as required by section 39 but not by section 38.

## 5.7 Ex parte orders

Ex parte orders are orders<sup>586</sup> granted without notification of the respondent by the tribunal,<sup>587</sup> in order to avoid damage<sup>588</sup> or dissipation of property or assets crucial to the arbitral proceedings.<sup>589</sup>

The question is whether arbitrators should be able to grant interim measures on an ex parte basis without notice or hearing from the party against whom the order is sought. This is a contentious issue and has led to vigorous debate among UNCITRAL drafters.<sup>590</sup> The proponents argue that interim measures become worthless if not ordered ex parte because otherwise the indispensable requirements to ensure their effectiveness – the elements of surprise and rapidity – are lost. On the other hand, the main argument against giving the arbitral tribunal the power to order such measures ex parte is the risk of inadmissibility, and that they should be ordered after hearing the parties.<sup>591</sup>

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<sup>586</sup> See CAS Rules Article 32 limits the request for ex parte orders.

<sup>587</sup> See Croatian Law on Arbitration Article 17 (2) which provides that “*the parties shall have a right to respond to claims and allegations of their adversary.*” Arbitrators’ ex parte orders are held admissible in Croatia. The Rules of International Arbitration of the Permanent Court at the Croatian Chamber of Commerce (Zagreb Rules) provide that interim measures shall normally be after hearing from the other party, except if the applicant demonstrates that an ex parte issuance is necessary to ensure that the measure is effective. In such cases, the applicant discloses all relevant information and submits a statement that he will cover any damages caused by the lack of proper disclosure under Article 26 (1) Zagreb Rules 2002.

<sup>588</sup> According to UNCITRAL Model Law, the Preliminary order is essentially the same as interim measures, with exception? of ex parte orders, in order to prevent possible negative actions from the responding party in case he/she knows in advance that interim measures will be granted (for example; hides assets, destroys evidence etc).

<sup>589</sup> See Professor R Merkin, Arbitration Law Monthly, December 2008/ January 2009 Vol.9 No.1

<sup>590</sup> See H Van Houtte, Ten reasons Against the Proposal for Ex parte Interim measures of Protection in Arbitration International (2004) No.2 (1) at 85.

<sup>591</sup> See Austrian Law 2005 S. 593 910 CPC

Provisional measures are usually granted through inter party proceedings;<sup>592</sup> both the applicant and the respondent are heard in adversarial proceedings. An arbitral tribunal may actually convene and hear parties on a request for provisional measures.<sup>593</sup> Alternatively, in cases where the convening tribunal cannot be waited because the arbitration parties and arbitrators are from different countries, the parties may be heard by telephone.<sup>594</sup> The parties' will is to seek protection of their rights,<sup>595</sup> including ex parte measures from the arbitral tribunal.<sup>596</sup> Many commentators conclude that ex parte provision relief is beyond the jurisdiction of the tribunal.<sup>597</sup> This argument is subject to debate on the basis that arbitrators are subject to the doctrine of impartiality and the separability clause<sup>598</sup> in their proceedings, which provide autonomy in all the proceedings.

This type of measure is not common. However, it is used where there is a serious damage through a single action by its counter party; for example, calling a letter of credit, transferring needed security to third parties, or destroying critical evidence. The argument that the tribunal composition arises when a case arises, and that the courts are better equipped with such measures due to their composition is biased against the tribunal in granting ex part provisional measures. This argument is manifestly a challenge to the jurisdiction of the tribunal. The UNCITRAL Model Law provides that the arbitral tribunal has the power to grant ex parte provisional orders.<sup>599</sup>

Indeed this position was highlighted by the UNCITAL working group in New York, when the question arose as to whether arbitrators should be authorised in a draft revision of Article 17 of the Model Law to grant interim measures on an ex parte basis. In the debate, the majority of the delegations were in favour of the arbitral tribunal granting ex parte provisional measures. The

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<sup>592</sup> A failure with an ex parte order is a breach under the New York Convention and enforceable under Article V (1) (b) and XI11 (c).

<sup>593</sup> LCIA Article 22.

<sup>594</sup> See UNCITRAL Article 15 (1).

<sup>595</sup> Ibid s.17 (B) (2), provides that a tribunal may grant a preliminary order (ex parte orders) provided that it considers the party against whom it is directed and risks frustrating the purpose of the measure. Furthermore, article 17 (B) (4) provides that such a request or preliminary order expires after twenty days from the date on which it was granted.

<sup>596</sup> Gary Born, *International Commercial Arbitration*, Vol. II (2009) at 2018.

<sup>597</sup> The argument is that this has no coercive effect and that this is not enforceable.

<sup>598</sup> See Hunter at 344.

<sup>599</sup> See UNCITRAL Model Law 2006 Revision Article 17 B and 17 C, which provides that ex parte orders may be issued where the arbitrators conclude that prior to the disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

issue of the tribunal *ex parte* was first placed before the working group by the UNCITRAL Secretariat at the session, and explained why there may be a need for *ex parte* orders by the tribunal. The Secretariat argued that

Such measures may be appropriate where an element of surprise is necessary;( that is to say), where it is possible that the affected party may try to pre-empt the measure by taking action to make the measure moot or enforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued.<sup>600</sup>

In this quotation above, the Secretariat gave the most prominent example of an interim measure that could require an element of surprise; namely, preservation of assets to ensure the effectiveness of the final award or to preserve disputed goods before they are sold or moved beyond the tribunal's jurisdiction or the need to preserve crucial evidence. The Secretariat was in favour of the view that the courts should not interfere with the conditions or procedures under which an arbitral tribunal should be able to grant *ex parte* provisional measures.

On the other hand, the main argument against giving the arbitrators the power to grant *ex parte* measures is the risk of abuse. The measures may be so severe and damaging that payment required of the applicant party will turn out to be insufficient. Indeed, one of the scholars of this topic, Hans Van Houtte argues that *ex parte* measures should be sought from the courts.<sup>601</sup> He advances his point on different legal systems; for example, under Australian law, *ex parte* measures are inadmissible, and are ordered after hearing the parties.<sup>602</sup> Another advanced argument is that most legislation worldwide makes no mention of *ex parte* orders from the arbitral tribunal. What most tribunals do provide is that parties shall be treated equally to present their case.<sup>603</sup> Indeed, even the English Arbitration Act 1996, which is seen as the champion of arbitration, precludes *ex parte* orders to be made by arbitral tribunals instead of by courts.

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<sup>600</sup> See UNCITRAL Working Session 2002 in draft revision of Article 17 Model Law.

<sup>601</sup> See Maklu Publishers Association for International Arbitration (2007), comments of Hans Van Houtte on at62.

<sup>602</sup> See s.593 (1) CPC Australian Law 2005.

<sup>603</sup> See Model Law Article 18.

The author affirms that there is no clear explicit provision in the current Arbitration Act 1996 that provides this authority at all. The Arbitration enactment needs to adopt the Poland model,<sup>604</sup> whereby the parties can insert a clause in their arbitration (*exequatur*), whereby it can be enforceable directly by the tribunal. It may further be argued that the courts are better in such situations than arbitration as over time they have developed powers to freeze bank accounts, to appoint liquidators or issue injunctions, to preserve the interest of justice.<sup>605</sup> If they allow arbitrators to handle such a climate, the ultimate purpose of legal proceedings will be frustrated by evidence or assets disappearing or by the people taking the law into their own hands. The courts conduct a better cross examination in regard to ex parte measures than the arbitral tribunal; for example, the court has to be satisfied that if the measure is not granted, this will result in harm that cannot adequately be compensated by damages; secondly, that this harm must substantially outweigh any harm that will be caused to the party against whom the measure is directed; thirdly, that there is a reasonable possibility that the requesting party will ultimately prevail on the merits, to obtain an ex parte measures; and lastly, the court has to be satisfied that it is necessary to proceed with the ex parte order to ensure that the purposes of the measure are not frustrated before it is granted.

This project raises some contention with Ali Yesilirmak in his book “Provisional Measures in International Commercial Law,”<sup>606</sup> where he supports measures to be available in tribunal proceedings than courts. As he does not take into account that the arbitrators are not prepared until a crisis arises, so in case of any urgency to avoid the transfer of funds by the time the tribunal is set the funds or property have disappeared, the court assistance provide a better mechanism. It should, however, be noted that the tribunal can grant urgent matters since it has the same powers as the court.<sup>607</sup> The only limitation is that granting such orders will be contrary to the principle of impartiality, which provides that both parties should have the chances of

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<sup>604</sup> See Polish Arbitration Act 2005 Article 1181 (2) CCP.

<sup>605</sup> See *Denilauler v SNC Couchet* Case C-125/79, [1980] ECR 1553, where the Court of Justice ruled that the respect of the rights of the defence dictates that the measure ordered on the claimant’s unilateral application, without notice to the defendant, cannot benefit the automatic recognition provided for in title II of the Brussels I Regulation. According to the Court in para 17 of the judgement, the condition imposed by Chapter III of the Brussels Convention in case of provisional measures, the party to whom the measure is against or has been summoned, has to appear in order to be enforced.

<sup>606</sup> (Kluwer 2005) 221.

<sup>607</sup> See s 48 which provides that an arbitrator can grant remedies subject to s 39 (1).

access to justice as enshrined in the Human Rights Convention.<sup>608</sup> In this respect the author argues that ex parte orders are not proportionate in achieving their legitimate objective, since such orders are granted in the absence of the other party to defend his case. However, England can adopt Article 37 of the ICDR Rules 2006, which deals with ex parte applications for relief, where the application for emergency relief includes a statement certifying that all parties have been notified in writing or explaining the steps that were taken to notify the parties of the application for such a relief.<sup>609</sup>

### **5.7.1 UNCITRAL support of arbitral ex parte measures**

Despite such clear lacunae in the law, the UNCITRAL Model Law report,<sup>610</sup> in its spring session 2001,<sup>611</sup> gave reasons in favour of the arbitral ex parte measures as follows:

Firstly, a moving party may not yet have retained counsel acquainted with the facts of the case and thus can evaluate an urgent request for an interim measure more efficiently than the court confronting the dispute for the first time.<sup>612</sup>

Secondly, the moving party may not speak the language of the relevant courts and thus can more rapidly put forward a substantive case in favour of the interim relief before the tribunal.

Thirdly, there may be legal barriers to seeking ex parte orders in the courts of the relevant jurisdiction where interim measures should have effect. These legal barriers are illustrated by the so-called McCreay doctrine that is followed by some courts and which holds that an arbitration agreement pre-empts the courts' jurisdiction even to grant provisional measures.

The moving party may be more confident in the speed and expertise and especially the impartiality of the tribunal than in the relevant national courts where most of the cases are subject to corruption due to political reasons. It would be appropriate for UNCITRAL to say that

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<sup>608</sup> Article 6 of the European Convention on Human Rights.

<sup>609</sup> Rule 37 requires notice of the following: firstly the nature of the emergency sought, secondly the reasons why relief is required on an ex parte order is required in emergency, and lastly, reasons the applicant believes it is entitled to ex parte measures.

<sup>610</sup> Model Law 2006 Article 17B.

<sup>611</sup> See Lee Anna Tucker, Interim Measures Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty, International Commercial Arbitration Brief Vol. No.1 (2011) at 15-23.

<sup>612</sup> See annex 1 to The Report of the Working Group On Arbitration and Reconciliation On the Work of Its Forty-Fourth Session ( New York, 23-27 January 2006, Revised Legislative Provisions on Interim Measures and Preliminary Orders.

parties should go to the courts to seek interim relief.<sup>613</sup>

### **5.7.2 Objections advanced against arbitral ex parte provisional measures**

The first objection that has been raised and answered is the argument that allowing arbitrators to issue ex parte measures somehow violates the basic principles of due process. The fundamental flaw in this argument is that due process is an essential principle in almost every legal system, yet the courts in most of those systems have themselves developed a practice of granting ex parte relief in certain circumstances. Courts have viewed their ex parte orders as fully consistent with due process for two fundamental reasons;

The first one is fairness. It is recognised that in certain circumstances fairness requires that certain evidence be preserved or that certain goods be kept within the courts' jurisdiction, or that certain assets necessary to a final judgement be maintained, and that comports with due process is that such a procedure is confined with a structure of substantial safe guards that are, in fact very similar to the safeguards that are similar to the Model Law, Article 17.

The second argument against arbitral tribunal exercising ex parte authority is that this may lead to prejudicing the merits of the dispute. This of course is an objection that can be and has been raised with respect to all interim measures precisely to forestall the risk of prejudgement. For example, the present draft revised Article 17 provides that the tribunal need only to be satisfied that "there is a reasonable possibility that the requesting party will succeed on the merits before issuing any interim measure."

The author thinks therefore that the working group reduced the danger that the tribunal that grants provisional measures would somehow bind itself to a prejudgement of the merits. Accordingly, those who invoke the argument against ex parte measures must be objecting to something slightly different; namely, the risk that a party may abuse the ex parte proceedings by presenting a false impression of the dispute in order to obtain ex parte measures is actually greater if parties seek that measure from the courts rather than from the tribunals. Indeed this is

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<sup>613</sup> See The Report on UNCITRAL Working Group on Arbitration on the work of its fortieth session (New York 23-27 February 2004) AC/CN9/54. The report by the delegation provided a full array of safeguards that are necessary to prevent any abuse of ex parte provisional measures. The Report proposed that a party seeking an ex parte order would be permitted to apply to the arbitral tribunal for particular relief on an ex parte basis. Instead of acting on the request at that point, the tribunal would forward the application to another party and at the same time, it could order that party to preserve the status quo pending an the inter parties determination whether to grant the relief.

true for three reasons: firstly, to the extent that any party of the case has already been presented to the arbitral tribunal at the time of the ex parte relief requested, the tribunal is likely to have a better understanding of the background to the request and should therefore be less likely to be misled by a one-sided presentation of the request. Secondly, where if a party abuses the ex parte order by providing inaccurate information to the court and if the court subsequently learns of the misrepresentation, the worst that could happen is damages if such a measure is rescinded. By contrast, if the requesting party similarly abuses the ex parte process before an arbitral tribunal and the tribunal subsequently learns of the deception, the requesting party will have to live with a wary or hostile tribunal for the rest of the arbitral proceedings.<sup>614</sup>

The third objection to the creating of an arbitral ex parte authority is that, since the parties have to go court in order to enforce such orders, there is no harm in requesting them from the court in the first place. This argument is not persuasive because practitioners know from experience that the vast majority of interim measures granted by the arbitral tribunal are adhered to by the parties subject to those measures, without any need for court enforcement. Thus, it is entirely possible that a party seeking a tribunal ex parte measure will be contented with obtaining such measure without taking the second step of seeking court enforcement. As the thesis has already shown some of the reasons why parties may prefer tribunals to national courts, including concerns about the partiality of certain national courts, there may be much greater scope for courts to display their partiality when viewing a request for ex parte measures rather than simply deciding whether to enforce a measure already granted by a tribunal. In sum, the fact that some parties may wish to seek court enforcement of an interim measure does not in author's view justify a policy prohibiting parties from seeking provisional measures from arbitral tribunals.

Granting arbitrators ex parte authority is that it is inconsistent with the consensual nature of the arbitral process.<sup>615</sup> Some arbitrators say that they would feel uncomfortable awarding any relief to one party without hearing from the other party, because the arbitral tribunal derives its authority solely from the consent of the parties in the arbitration.<sup>616</sup> This argument has

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<sup>614</sup> See UNCITRAL pursuant to proposed paragraph 7 (g) of the draft revised Article 17, whereby a party seeking ex parte measures will be obliged to inform the tribunal of all the relevant information,(including information that may not favour the request) whereas in normal courts there will be no such obligation. It seems likely that these combined factors will inhibit the abuse of the ex parte process more effectively in arbitration than in courts.

<sup>615</sup> See Brussels I Regulation 44/2001.

<sup>616</sup> See EAA s.30 and s.38.



prompted two rebuttals: firstly, it has been pointed out that, in at least the larger sense, an arbitrator acting *ex parte* will not be acting without the actual consent of both parties, since those parties usually have consented to that law either by choosing it to govern their agreement or by choosing a site of arbitration within the jurisdiction of that law and pursuant to that law, and thus both parties will have equal access to the *ex parte* mechanism. Secondly, and much more fundamentally, an arbitrator who refuses to act at the request of one party even for a short period of time before hearing from both parties may, in the author's view, be acting against the spirit of arbitration in a much more basic sense. In most cases, it is an essential principle of arbitration that the parties seek to achieve a fair and effective decision and resolution of their dispute. Indeed, a refusal to grant *ex parte* provisional measures can, in some instances, defeat those essential objectives. One can imagine that a tribunal that refuses to consider *ex parte* provisional measures may, at some point, be forced to tell a party something like the following, during arbitral proceedings:

I am sorry to tell the claimant this but any amount the tribunal may grant you in its ultimate award in this case will not be worth the paper it is written on because your opponent quickly hid his assets as soon as it received notice that you were seeking an interim measure to prevent that. But you must understand that even though you had demonstrated that you would be irreparable harmed without the measure and that the harm would outweigh the harm of the measure to your opponent, and that you offered to put up potential security, and would be fully liable if this provision were wrongly granted, I could not enter an application for an *ex parte* provisional measure because this would destroy the atmosphere of trust that is a fundamental pillar to arbitration proceedings.<sup>617</sup>

Indeed from the proposed quotation above, it would not be proportionate or consistent with the principles of an arbitral tribunal to place the tribunal in such an unwelcome position of having to deliver such a speech.<sup>618</sup> It should however, be noted that when the UNCITRAL Working Group

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<sup>617</sup> Author's own suggestion.

<sup>618</sup> In granting provisional measures, the tribunal should make sure that any *ex parte* order granted is communicated and recorded to the respondent later, prior to the inter parties hearing. The tribunal, in promoting natural justice, should clearly and explicitly indicate all the reasoning for granting such a measure in the context of the dispute. Indeed the doctrine of party autonomy suggests that the hearing be granted whenever requested by any party to arbitration. The tribunal is encouraged to consider Article 15 (2) of the ICC. Since the ethos of the tribunal emanates

Report was put forward by the International Chamber of Commerce (ICC) in advance of ex parte measures being granted by the tribunal, the ICC objected in favour of the courts. The ICC objection was based on its experience of 13,000 arbitral awards over the previous 80 years.<sup>619</sup> The ICC argued that in all the arbitral awards conducted or administered no party had ever sought ex parte relief from the arbitral tribunal and none had ever been granted. This would be a surprise to parties that have not sought ex parte orders under the ICC Rules,<sup>620</sup> which are widely understood.<sup>621</sup> The ICC proposed that a tribunal receiving a request for interim measures could, before hearing from the party against whom the measure is directed,<sup>622</sup> order that party to preserve the status quo. The ICC further proposes that the tribunal's action for an order should only take place when the other party has been notified and measure has received notice<sup>623</sup>.

The author argues that although the ICC has not conducted any explicit research on the topic of ex parte measures,<sup>624</sup> its proposal can be seen as a viable solution to the problems the working Group<sup>625</sup> tried to address during its four years of conducting and debating ex parte reforms.<sup>626</sup> The author recommends that although the tribunal has wide powers<sup>627</sup> in regard to the granting of provisional measures, unless arbitral laws in England or member states are amended, the tribunal is not in the best position to grant ex parte measures, In addition if such are granted, the courts

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from the party autonomy, the ex parte contravenes with this doctrine as adduced in EAA s.38, and s.39. The author suggests that under extreme circumstances, such measures should not be granted by the tribunal, because the security costs would rarely cover the potential damage or where the subsequent amendment or withdrawal would not be sufficient to restore the status quo.

<sup>619</sup> See US. Position paper to UNCITRAL Re Ex parte Interim Measures (September 2004). A Summary of the position of the US Delegation at the Meeting of the UNCITRAL Working Group New York February 23-27, 2004.

<sup>620</sup> See ICC Arbitral Rules 1998 Article 23 (3) and Article 15 (4) which provides that all parties shall be entitled to be present at the hearing. Indeed this approves that the ICC Arbitral rules against the ex parte measures per se.

<sup>621</sup> Presently, most legislation worldwide, even the English Arbitration Act 1996, does not mention the availability of ex parte orders from the arbitral tribunals. What most tribunals do provide is that parties should be given and treated equally to present their case or given the full opportunity to present their case, which is mostly supported by UNCITRAL Model Law Article 18. Many countries in the European Union are against arbitral ex parte orders for example; Croatia Arbitration law article 17 92) which states that parties shall have their right to respond to claims and allegations of the adversary in order to be enforced. Since arbitral provisional measures are given without the other party being informed, the European directive on enforcement will not allow such a measure to be enforced. Hence, the ex parte measure without disclosure will be meaningless within the European member states.

<sup>622</sup> See ICC Final Award 8893 of 1997 9 (Unpublished).

<sup>623</sup> Ibid.

<sup>624</sup> See *Re Arbitration Union Stearlineriez & Wiener* [1917] 1KB 558, where the court held that the arbitrators' powers are limited to order security for costs, and emphasised that it has limitations.

<sup>625</sup> See ICC Rules Article 15 (2) which provides that "at any stage of the proceedings each party is given a full opportunity of presenting his case." See. s.30, 39 and 38 of EAA 1996,

<sup>626</sup> See UNCITRAL Report 2004 AC/CN 9/54.

<sup>627</sup> See UNCITRAL Article 26 (1) which provides that "the tribunal may grant the interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming subject-matter of the dispute or the sale of perishable goods."

will not enforce<sup>628</sup> them as they are contrary to the principles of natural justice and the Human Rights Acts, which are key factors in any due process.

### **5.8 Security for payment orders**

This is a kind of advance payment designed to guarantee the payment<sup>629</sup> or the enforcement of an award where the applicant proves to be right on the merits of the case in dispute.<sup>630</sup> This sort of order is designed to ensure that a party's substantive claim is well founded and not rendered nugatory because of the deterioration in the financial condition of its counter party by diversion of assets. Where it is clear that the applicant may suffer harm, for instance in the ICC case,<sup>631</sup> the tribunal may grant security for payment. In that case, where the applicant requested to attach the assets of the respondent, the tribunal ordered the respondent to refrain from disposing of the assets, since the power to attach assets would not be within the domain of the tribunal.

The power to grant such order generally arises from the purposive interpretation of the arbitration agreement.<sup>632</sup> For the tribunal to grant such a measure the party has to demonstrate that it is highly likely to be of urgency,<sup>633</sup> or that the award may not be enforced if granted or that the claimant may not comply with the award that would be in his favour and that there are fewer chances to effect it or enforce it.<sup>634</sup> The problem that may be faced is that those arbitration tribunals do not provide attachment orders which prevent a third party from transferring disputed property.<sup>635</sup> The tribunal in England and Wales<sup>636</sup> has the power to grant such orders.<sup>637</sup> In

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<sup>628</sup> See Brussels I Regulation Title III, see ECJ ruling in *Danilauler v SNC CouchetFreres*, Case C-125/79 [1980] ECR 1553, where it was held that ex parte measures under the Enforcement Directive will not be enforced. Such measures have a cross board effect, whereby they cease to have effect, upon the request of the defendant, if the applicant does not institute proceedings to a decision on the merits within a determined time.

<sup>629</sup> See UNCITRAL Model Law Article 17D which allows the tribunal to require, from a party requesting an interim measure, appropriate security when the party seeks a preliminary order, unless the tribunal decides that the security would be inappropriate.

<sup>630</sup> See Yesilirmak, *Provisional Measures in International Commercial Law* (Kluwer 2005) at 213

<sup>631</sup> See ICC Interim Conservatory Award 10021 (1999) Unpublished.

<sup>632</sup> Although the arbitration agreement may be interpreted to give authority in regard to security for costs, many arbitral rules have not explicitly given effect to this notion, for example; Article 25 (1) (a) of the LCIA. See Interim Award No.1694 (21 Dec 1996), extracts printed in XXIII YCA 97 (1998). See ICC Partial award 8115 (1995) extracts published in 11 (1) ICC Int'l Ct Arb Bull 65 (2000). See Supreme Court Ruling in the state of Massachusetts (USA) in *Charles Construction Co. V Derderian*, 586 NE 2d 1125 (3d Cir. 1972), where it was held that the power of the tribunal to grant security for costs is silent.

<sup>633</sup> See ICC Interim Conservatory Award 10021 (1999) Unpublished, where the tribunal refused to grant security for a payment order on the grounds that the applicant had failed to sufficiently substantiate the existence of reparable prejudice and that there was no urgency.

<sup>634</sup> See ICC Interim award 8786 of 1996, extracts, published in 11 91) int'l Ct Arb Bull 81-84 (2000).

<sup>635</sup> See ICC Rules Articles 30 & 31.

order for such an order to be rendered, the moving party has to demonstrate that it is highly likely that the award, if it were rendered in its favour, would not be enforced.

In some states this is referred to as “*cautiojudicatumsvlvi*”,<sup>638</sup> the duty of an alien claimant to provide security for the costs of its defendant.<sup>639</sup> The power is derived from the Arbitration Act.<sup>640</sup> The main objective is to cover the likely amounts that would be awarded to the counterparty<sup>641</sup> in the event that it prevailed in the arbitration tribunal and was entitled to recover its legal costs.<sup>642</sup> This provisional measure is only provided by the English arbitral tribunals<sup>643</sup> or Commonwealth countries as in most states it is not available.<sup>644</sup>

The tribunal in such a case<sup>645</sup> will have to consider the financial state of the party from whom security is requested,<sup>646</sup> the extent to which third parties are funding the costs and the likely consequences in enforcing the award.<sup>647</sup> The English courts<sup>648</sup> will only entertain such application for costs in very limited circumstances.<sup>649</sup> However, many states are in favour of national courts ordering such a remedy.<sup>650</sup>

## 5.9 Enforcement of confidentiality obligations

*The question is to what extent is the confidential order enforced in arbitral proceedings?*

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<sup>636</sup> See LCIA Article 25 (1) a, and EAA 1996s. 44 and 43.

<sup>637</sup> English Arbitration Act 1996 s.39 (2) (b).

<sup>638</sup> Yaslimark, Provisional Measures in International Commercial Law at 216.

<sup>639</sup> Arbitration Act 1996 s.38(3) Tribunal (not the courts) can order security for costs;

<sup>640</sup> See English Arbitration Act 1996, s.42 which provides that a court can only make such orders if it is satisfied that the person to whom the tribunal's order was directed has had sufficient time to comply.

<sup>641</sup> Arbitration Act 1996 S.41 Extension of a tribunal's powers.

<sup>642</sup> Ibid s.59-65.

<sup>643</sup> LCIA article 25 (2) provides security for legal costs or other costs of any party.

<sup>644</sup> See the model law Article 17 which does not grant the arbitral tribunal authority to order security for costs

<sup>645</sup> See *Ken Ren* [1994] 2 WLR 631. This extended the power of the tribunal to grant security for costs under s.38 of the English Arbitration Act 1996.

Blackaby, Paratasides and Hunter,<sup>646</sup> on International Arbitration (5<sup>th</sup> Edition 2009) Oxford University Press at 324.

<sup>647</sup> See *Copper v Lavalin Sa v Ken –RenChem and Fertilizers Ltd* [1994] 2 ALL ER 449.

<sup>648</sup> See the power of courts provided under s.42, 44 and 45.

<sup>649</sup> See s. 44 (5) of the English Arbitration Act 1996.

<sup>650</sup> *Frontier International Shipping Corp v The Owners and All Others, interested in the ship Tavors* [200] F.C 427 (Federal Court of Canada).

As opposed to litigation, arbitration proceedings have always been considered to be private in nature. Indeed this has always been touted as one of its advantages. However, does the nature of arbitration translate into an obligation of confidentiality that binds the parties to the arbitration agreement? The answer to this question has a significant impact, only on whether documents used in one arbitration can later be disclosed in subsequent proceedings whether arbitral or litigious in nature, but also on the attractiveness of arbitration to potential disputants.<sup>651</sup>

Under the English case law, courts have taken positive views on the matter in the leading authority of *Dollington Baker v Merrett*,<sup>652</sup> where it was held that parties within arbitration agreement or proceedings were under an implied obligation to keep the proceedings and documents arising from confidential. However, the Australian view in the Australian High Court in *Esso Australia Resources Ltd v Plowman*,<sup>653</sup> was centrally opposite, as the court held that parties are not owed a duty of care for confidential information or documents to the proceedings. It should be noted that the Australian view has been critiqued in common wealth states and is not followed by many states, for example; Singapore,<sup>654</sup> one of the leading centres for arbitral disputes has adopted the English model.

It is not uncommon for commercial agreements to include confidentiality provisions, aimed at safe guarding one or both parties' commercial, financial, or other confidence. In practice, arbitration agreements and national laws impose confidentiality obligations on parties with regard to the materials produced in arbitration. Damages are seldom a satisfactory remedy for breach of confidentiality obligations, because of the difficulty in establishing causation and directness. It is therefore appropriate, and generally necessary, for tribunals to issue provisional measures ordering confidentiality.

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<sup>651</sup> See case of *Banco de Concepcion v Manfra, Tordella & Brooke* 70 AD. 2d 840 ( 1<sup>st</sup>Dept 197), see *International Components Corp v Klaiber* 54 AD.2d 550,387 N.Y s.2d 253 ( 1<sup>st</sup>Dept 1976), where the appellate Division declined to require disclosure in aid of arbitration where the party seeking the disclosure had alleged that fraud was involved in the making of the underlying contract. This decision follows those cases that direct the question of fraudulent inducement which may be covered by arbitration. See *Holzman v Manhattan Bronx Surface Transit Operating Authority* 27 AD.2d 346, 347 (1st Dept 2000).

<sup>652</sup>[1991] 2 ALL ER 890.

<sup>653</sup>[1995] 128 ALR 391.

<sup>654</sup>See *Mynmayaung Chi Oo Co Ltd v Win Win Nu* [2003] SGHC 124.

### 5.9.1 A Critical analysis of the English approach on the confidentiality interim order

The traditional starting point in considering the English position is the Court of Appeal's decision on *Dolling-Baker v Merrett*.<sup>655</sup> In that case, the plaintiff had applied for the specific discovery, production and inspection of various documents in the defendants' possession. Specifically, it wanted certain witness statements, transcripts of witness testimony and the arbitral award that arose from an earlier arbitration that the defendants had been involved in. The Court of Appeal held that parties to arbitration were under an implied obligation not to use or disclose, without the consent of the other party or with leave of court, all such documents. It further held that this implied obligation arose from the private nature of the arbitration. It was satisfied that despite the implied obligation, disclosure and inspection were necessary for the fair disposal of the action, so that consideration had to prevail. It should be highlighted that the Court of Appeal applied a two-stage test. First, there was the preliminary question of whether there was in fact some form of obligation on arbitral parties not to disclose (confidentiality orders) arbitral documents. It was found that there was indeed such a confidential obligation. Secondly, in examining the confidential provisional measure, the court applied the usual test for determining the question of discovery of specific documents where it was necessary for the fair disposal of the action.

Since the Court of Appeal ruling in support of the confidentiality, it has given precedent to many cases, for example; *Hassneh Insurance Co of Israeli v Steuart Jew*,<sup>656</sup> where the English High Court considered the confidential obligation. The court examined the duty of secrecy owed by the bank to his customers and expectations to that duty and noted that a similar qualification must be implied as a matter of business efficacy in the duty of confidence arising under the arbitration agreement.

The irony in regard to this ruling is that the court held that if there were conflicting interests,<sup>657</sup> between the tribunal and the courts in regard to the order of confidentiality, it was for the courts to solve such conflicts. One may argue that the arbitral tribunal may not be the best way to handle confidential provisional measures given that the courts have such powers, and no clear

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<sup>655</sup>[1991] 2 ALL ER 890.

<sup>656</sup>[1993] 2 Lloyd's Rep 243.

<sup>657</sup> See Re Application of Busch [2001] WLR 191.

explicit clause that adduces such power within the English Arbitration Act 1996.<sup>658</sup> Indeed the ruling of the case above has been applied in progressive cases.<sup>659</sup>

### 5.10 Measures for later enforcement of award

There may be a need to avoid the dissipation of assets whereby the final judgment or award could be satisfied. This type of measure is apparently aimed at not leaving the winning party empty-handed with pyrrhic victory, where all assets of the losing party were flown away. Examples in this category include; orders not to move assets or the subject matter of the dispute out of a jurisdiction; orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third party; orders to a party or parties to provide security or a guarantee for costs of arbitration or orders for all or part of the amount claimed from the party.<sup>660</sup> Due to the nature of the rules, as a structural framework for parties agreeing to arbitration instead of legislative regime, the working Group agreed in its earlier meeting that the provisions of Model Law Chapter IVA regarding enforcement of arbitral awards would not be included in the revised Arbitral Rules.<sup>661</sup> The difficulty in enforcing this order is that no clear provisions, in the English Arbitral Rules under LCIA or the English Arbitration Act 1996 address this scenario.

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<sup>658</sup> It should be noted that any court involvement in arbitral proceedings wrecks arbitration party autonomy, it should, however, be noted that no dispute mechanism can stand alone as an island. In order for arbitral confidentiality provisional measures to be enforced, there is a need for the courts, otherwise at times, the tribunal may not be able to grant such measures, even if a granted problem of enforcement may arise.

<sup>659</sup> See *Insurance Co v Lloyd's Sublicate*[1995] 1 Lloyd's Rep 271, where the Court accepted the test for confidentiality of an arbitral award established in *Hassneh Insurance Co of Isreal v Mew*[1993]2 Lloyd's Rep 243. See *London and Leeds estate Ltd Paribus Ltd (No.2)*, where an expert witness in the previous arbitration was also a witness in the current arbitration and one of the arbitral parties wanted earlier proof to challenge the expert on various statements made in the current arbitration that were inconsistent with those made by him in the various arbitrations. This held that parties in arbitration owed each other a duty of confidentiality. It also accepted that an expert witness owed a duty to the party instructing him to keep the evidence confidential from previous arbitration. From the case, the duty of keeping a confidential obligation was extended beyond of the early cases. It should be noted that in order to enhance the confidential provisional measures, both the tribunal and courts need to work together given the complexity of the documents or the arbitral awards. See *Highwater mark: Ali Shipping Corp v shipyard Trogir*[1989] 2 ALL ER 136 or [1991] WLR 314.

<sup>660</sup> Ali Yesilirmak, Provisional Measures in International Commercial Arbitration.

<sup>661</sup> See UNCITRAL Report of Working Group (Arbitration and Reconciliation) on the Work of its forty-fifth session, delivered to the General Assembly, U.N. Doc.A/CN.9/614 (October 5, 2006) (2006 Working Group Report) Agreeing that the new version of Rules should be revised in light of Chapter IV of the Model Law at 104-05.

It should be noted that while the Model Law contains detailed provisions relating to the recognition and enforcement of provisional measures,<sup>662</sup> the international arbitral rules are still silent. Model Law enforcement provisions require national courts to recognise arbitral interim measures as well as specifying grounds for refusing recognition,<sup>663</sup> and are outside the scope of any arbitral tribunal's powers. Likewise, no independent agreement to abide by the decisions of an arbitral tribunal could dictate the scope of the national courts' powers to issue interim measures concurrently, this is a matter solely within the purview of domestic legislatures.<sup>664</sup> Most of the arbitral enforcement orders granted by the tribunal are not adversely affected because of the rules which independent parties agree to abide by and could never encompass such measures. It is very unfortunate that few states have amended Model law by passing parallel legislature, to affect the powers of courts and tribunal.

### **5.11 Form of provisional measures: order or award**

Assuming that an arbitral tribunal concludes that provisional measures are appropriate, questions arise as to what form such measures should take. In practice, provisional measures can be granted as either an award or an order. Additionally, a tribunal can invite or recommend that parties comply with specific directions. A tribunal has the discretion in deciding upon the form of its provisional measure, although that discretion must be guided by the objectives of achieving the ends aimed at by the provisional measures. An order can be granted more promptly than an award. Provisional measures issued in the form of an interim award may enjoy greater enforceability in national courts, as compared to an order. There is no reason why a tribunal may not take this course, particularly when there are concerns regarding compliance with its provisional measures. The arbitral tribunal, before granting such measures, should ordinarily be addressed to the parties in mandatory, not optional terms, as an order or direction, rather than a recommendation.<sup>665</sup>

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<sup>662</sup> See Model Law 2006 Article 17 (1). Article 17 (H).

<sup>663</sup> Ibid.

<sup>664</sup> Ibid See Art 17 (J) confirming that the national courts have the same powers to issue interim measures in relation to arbitral proceedings as they have in relation to their own domestic proceedings.

<sup>665</sup> See Interim award in ICC case No.8879, D. Caron, *The UNCITRAL Arbitration Rules' A Commentary* 541 (2006).



## 5.12 Measures concerning preservation of evidence

Preservation of evidence<sup>666</sup> on an interim basis is generally sought where there is a risk that the evidence will be harmed or destroyed,<sup>667</sup> if an urgent measure is not taken.<sup>668</sup> The main purpose is to facilitate arbitration proceedings,<sup>669</sup> whereby the evidence that would otherwise be unavailable at a later stage of the proceedings is preserved.<sup>670</sup> The arbitral power to preserve evidence is recognized under all arbitration rules and governing laws containing provisions on provisional measures. It is necessary to have sufficient evidence to bring a valid claim against the defendant and sufficient assets against which a judgment can be enforced. Arbitration laws may grant specific powers to national courts to support arbitration through the granting of interim injunctions to preserve evidence,<sup>671</sup> for example, the English Arbitration Act grants the courts, in cases of urgency, the same powers to order the preservation of evidence or preservation of property in arbitration as in court proceedings. The key issue is the need to protect the rights which would be the subject of the tribunal.<sup>672</sup> It should be noted the powers of the judicial courts is an aid to support arbitral proceedings, but not in the context that the arbitral tribunal cannot grant such orders.

## 5.13 Measures for later enforcement of award

There may be a need to avoid the dissipation of assets for which the final judgment or award could be satisfied. This type of measure is apparently aimed at not leaving the winning party empty-handed with pyrrhic victory, where all assets of the losing party were flown away. Examples of this category include; orders not to move assets or the subject matter of the dispute of a jurisdiction; orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third party; orders to a party or parties to provide security or a guarantee for costs of arbitration or orders for all or part of the amount claimed from the party.<sup>673</sup>

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<sup>666</sup> Arbitration Act 1996s.38(6).

<sup>667</sup> Ibid. s.34 (2) (d)-(h).

<sup>668</sup> Ibid. s.38 (4) and 39 (2).

<sup>669</sup> Ibid s.38 (5) directs the party or witness to be examined on oath.

<sup>670</sup> See ICC Rules 23 (2) and LCIA 25(3).

<sup>671</sup> Arbitration Act 1996 Act S.9. ands. 32 (4).

<sup>672</sup> Ibid s.43 provides that a party to the arbitral tribunal can use the usual court proceedings to secure attendance of a witness. The Act further provides or empowers the English courts to make such orders that it needs for the purpose of preserving evidence or assets.

<sup>673</sup> Ali Yesilirmak, Provisional Measures in International Commercial Arbitration at 87.

## 5.14 Emergency provisional measure

The emergency arbitral tribunal is normally given broad powers in conducting proceedings in order to facilitate a smooth and rapid resolution of the case.<sup>674</sup> This is because in any commercial dealing time is of the essence. Under the doctrine of competence-competence, this expressly provides that the referee deals with challenges to its jurisdiction.<sup>675</sup> All emergency arbitral provisional measure rules aim at providing a speedy mechanism for obtaining a provisional measure.<sup>676</sup> An arbitrator, in such circumstances, is selected from the permanent members of the committee. The party of an arbitration agreement, supporting documents or arguments can apply for a provisional measure to the permanent committee before the formation of the tribunal. The failure to abide by the decision may lead to the non-complying parties' responsibility for the damages and costs of those interim measures. It should be noted that where the arbitral tribunal is unable to grant provisional measures, the court is the only forum to seek such measures. The arbitral tribunal has a long history of granting interim measures under rules and major institutions.<sup>677</sup> But what if one desperately needs interim measures before the tribunal is constituted? Situations that cry out for instant relief might include the following; firstly, a current strategic partner has announced that it is leaving a long-running commercial relationship for a competitor and the other party is concerned about the use of proprietary information obtained by the departing partner. Secondly, a company has refused to make a critical contract progress payment, putting a fast track project at risk and lastly, a state or controlled entity has taken steps that require either abandonment or forfeiture of a private investor's holdings. The inability to provide urgent measures, before a tribunal is set to trigger doubt, of whether the tribunal has the ability to grant emergency provisional measures, without the support of municipal courts.

However, in the author's view, a request by a party to court or channelling a party to court is a breach of the original arbitration agreement or parties' intention to refer commercial disputes to arbitration, a neutral party-determined authority. In other words, a provisional measure from a court infringes the parties' initial will of neutrality opted out. Indeed, it may be further argued that this is an open invitation to abuse of the doctrine of confidentiality and a waiver of the rights

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<sup>674</sup> See ICC Pre-Arbitral Procedure Article 2(3).

<sup>675</sup> See *Behring Int, Inc v Iranian Air force Interim Award* No. ITM 46-382-3 (22 Feb 1998).

<sup>676</sup> See Netherlands Arbitration Rules (NAI) Article 47.

<sup>677</sup> See ICDR International Arbitration rules article 21, ICC Rules of Arbitration Article 25 and LCIA article 25.

to arbitrate. The courts will only be supportive(subdiarity model)<sup>678</sup> where the arbitral has given reference to the dispute,<sup>679</sup> for example; where the request to a court is made prior to an application for an emergency provisional measure to any arbitration institution, the court seizes the case. The logic in such a dilemma is to avoid a duplication of fora and unwanted contradictions between the decisions of the judicial court and the tribunal. In some circumstances, where the request is made to judicial courts after the commencement of the arbitral proceedings, an emergency arbitrator has the power in principle, to retain his emergency powers and his decision.<sup>680</sup> The author further recommends that English arbitrators should set emergency arbitrators to handle urgent cases before the composition of the tribunal has been established, or challenged by a recalcitrant party, as a case in the USA, where the AAA,<sup>681</sup> developed option rules for emergency protection. The International Chamber of Commerce Rules have developed rules for *Pre-Arbitral Referee Procedure*.<sup>682</sup> These options allow a party to request the appointment of a special arbitrator or referee by an administrator.<sup>683</sup> Once assigned, the special arbitrator will hear the party's request for an interim measure and decide whether to grant the measure prior to the formation of the tribunal. A different approach has been adopted in the statute of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry,<sup>684</sup> where the president of the Court himself may, at the request of a party, determine the amount and form of security for the claim. It should be noted that, at times, the court involvement prior to the constitution of the tribunal, will not be seen as a waiver of the right to arbitrate and may undermine the parties' forum for the resolution of disputes or infringe the confidentiality doctrine, hence an open invitation for the abuse of the system. Therefore, in order to increase the effectiveness of arbitration during the early stages of the arbitral proceedings, several major permanent international arbitration institutions provided the possibility of obtaining interim measures prior to the constitution of an arbitral tribunal with

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<sup>678</sup> See Netherlands Code Civil Procedure Article 1022(2), Japanese Arbitration Act Article 14, and Swiss Arbitration Act Article 183 (2).

<sup>679</sup> See English Arbitration Act 1996 s.44 (5), which provides that the "court shall grant relief only if or to the extent that the arbitral tribunal and any arbitral institution or person vested by the parties with power....."

<sup>680</sup> See ICC Pre-award referee Procedure Article 2 (4). WIPO Article 111 (a), ECA Article 12 (3).

<sup>681</sup> See American Arbitration Association, Optional Rules for a Pre-arbitral Referee Procedure, available at <http://www.adr.org> accessed on 10 June 2013.

<sup>682</sup> See International Chamber of Commerce, Rules for a Pre- Arbitral Referee Procedure available at [www.iccbo.org](http://www.iccbo.org), accessed 20 December 2012.

<sup>683</sup> See ICDR Rules Article 37

<sup>684</sup> Article 5.

the help of the emergency arbitrator specifically appointed for that purpose.<sup>685</sup> Despite the fact that such efforts to keep as much power decision-making as possible under the aegis of the arbitral tribunal are positive, the author strongly doubts the use of the possible inclusion of “emergency arbitrator” rules into the English Arbitration Act 1996. Emergency arbitral rules would be of great value in strengthening the institute of arbitration in England if implemented.

### **5.15 Injunction orders**

The word injunction means a temporary order to refrain from doing something, within the arbitral context where an applicant seeks an order, to stop the respondent from selling, engaging, hiding, or disposing of property to another jurisdiction or within the same jurisdiction pending the final award, and this type of injunction is referred to as *Mareva injunctions* or *freezing orders*. In some circumstances, injunctions may be an order stopping another party from commencing proceedings to another jurisdiction if such proceedings had already commenced in England or when a party commences proceedings to municipal courts in breach of the agreed dispute resolution mechanism, in fear of palliative conflicting decisions, which is termed as an “*anti-suit injunction*”.

In this subsection, the thesis examines the two main forms of injunction, and the question is whether the arbitral tribunal can grant such arbitral measures effectively or whether the arbitral tribunal has the actual authority to deliver on these two types of arbitral provisional measures.

#### **5.15.1 Anti-suit Injunctions**

In England and Wales there is no explicit law or arbitral rules that provide authority to arbitrators to grant anti-suit injunctions or to stay proceedings, pending the decision of the arbitral tribunal. Such orders are granted by the courts as a supportive model to enhance arbitral proceedings. Indeed, English courts have traditionally exercised the power to enjoin foreign litigation which is brought in violation of an arbitration agreement.<sup>686</sup> Under English law, injunctions may ordinarily be granted against the prosecution of a foreign litigation if it is established that the forum has sufficient interest in or connection with the matter in question.<sup>687</sup> Many English decisions have affirmed the existence of this power in emphatic

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<sup>685</sup> See ICC Rules Article 29.

<sup>686</sup> *Pena Copper Mines Ltd v Rio Tinto Co. Ltd* (1911-13) All ER Rep 209.

<sup>687</sup> See Emmanuel Gaillard, *Anti-suit Injunction issued by Arbitrators*, 2006 at 244

terms.<sup>688</sup> The fact that the mechanism of an anti-suit injunction originates from common law systems in no way means that the disruption of the arbitration process is an ambush. One of the biggest powers in support of arbitration during proceedings is the granting of anti-suit injunctions by English courts in order to halt any proceedings in a foreign state, in violation of the arbitration agreement, which was inaugurated Millet LJ in *Angelic Grace*.<sup>689</sup> Despite many debates, the English power to issue an anti-suit as a provisional measure have not diminished.<sup>690</sup> The notion is that in issuing anti-suit injunctions, arbitrators are making use of the powers exclusively vested in them by national courts. This echoes past debates over the power of the arbitrators to ward punitive damages. Such power is rooted in the well-recognised principles of international arbitration law, namely the jurisdiction of the arbitrators to sanction all breaches of the arbitration agreement and the arbitrators' power to any appropriate measure either to avoid aggravation of the dispute or to ensure the effectiveness of their future award. The UNCITRAL Working Group on Arbitration and Conciliation stated in its report that there were reservations expressed about including clause (b) Part 2 of Article 17 into the amendments of the UNCITRAL Model Law, given that such injunctions were unknown and that there was no uniformity in practice relating thereto. As well as this, it was said that anti-suit injunctions did not always have the provisional nature of interim measures.<sup>691</sup> Nonetheless, the working Group decided,<sup>692</sup> that a party can bypass domestic an anti-suit injunction and simply apply for an anti-suit injunction from the arbitral tribunal, and such an order would be enforceable in another

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<sup>688</sup> See the judgement in *Aggeliki Charis Compania maritime v Pagnan (The Angelic Grace)* [1995] Lloyd's Rep, the judge said "in my judgement there is no good reason for diffidence in granting an injunction to restrain foreign proceedings brought in violation of an arbitration agreement. See *Starlight Shipping Co. v TaiPing Ins.Co* [2007] EWHC 1839, *C v D* [2007] EWHC 1541, *Elektrim v Vivendi universal SA* [2007] EWHC 571, XI Ins. *Co v Owens corning*[2002] 2 Lloyd's Rep, *GmbH v Cargill France* [1997] 2 Lloyd's Rep 500, *Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, *West Tankers v Allianz* [2007] UKHL 4, *Van Uden case C- 391/95*, which was strongly supported by Lord Hoffman as it provides a strong basis for the legality of the anti-suit injunction to enforce an arbitration agreement as it is intended to protect parties' choices to have disputes settled by arbitration, arbitration is the subject matter.

<sup>689</sup> See *Aggeliki Compania SPA v Pagana (The Angelic Grace)* [1995] 1 Lloyd's Rep 500.

<sup>690</sup> See *West tankers v Allianz* [UKHL] 4, Emmanuel Gaillard, *The Misuse of Anti-suit Injunction*, New York Journal August 2002.

<sup>691</sup> See Report of the Working Group II ( Arbitration and Conciliation) on the Work of its Forty-Fourth Session (interactive) at [http://www.uncitral.org/uncitral/en/commission/working\\_group/2Arbitration.html=report=of=the=uncitral=working\\_group](http://www.uncitral.org/uncitral/en/commission/working_group/2Arbitration.html=report=of=the=uncitral=working_group), accessed 20 Jan 2010.

<sup>692</sup> The working Group included Clause (b) into Part 2 of Article 17 and the UNCITRAL adopted it.

country under UNCITRAL Model Law.<sup>693</sup> In England, the success of this provision is still debatable, thus many anti-suit injunctions are sought from courts.

### 5.15.2 Freezing orders

*The question that commonly arises is do arbitrators have the power to grant freezing orders?*

This provisional measure developed<sup>694</sup> as a form of recourse against foreign based defendants with assets within the UK and consequently the early authorities assumed that the order was not available against English based defendants. In the same vein, an early judicial guideline for the granting of the order required claimants to establish a risk of the removal of assets from jurisdiction. The power of arbitral power to order freezing orders has been debatable and many jurisdictions are in favour of municipal courts,<sup>695</sup> on the grounds that arbitral tribunal has no coercive power to grant them or that they do not bind third parties. It should, however, be noted that an arbitral tribunal has implied authority to grant such measures.<sup>696</sup>

The question of whether the arbitral tribunal can grant freezing orders was brought to attention by Rix LJ in the famous case of *Kastner v Jason*.<sup>697</sup> In this case, two partners, Mr Ernest Kastner and Mr Marc Jason, agreed to refer their disputes to arbitration under Jewish law subject to the English Arbitration Act 1996. Mr Kastner invested in Marc Jason's business, and later sought to recover his investment in arbitration before the Beth Din (Jewish arbitration tribunal or the Federation of Synagogues, a court of Jewish law). The parties agreed to comply with the orders of the tribunal or comply with any sanctions of the tribunal where an order was not complied with. In due process, Kastner complained that his investment in Jason's business was procured by fraud in 2001, the Beth Din made an award in Mr Jason's favour, on the basis that fraud had been established.

The arbitral tribunal granted a freezing order against Jackson, refraining him from selling his house in Helmsdale Gardens until he received permission from the Beth Din. On application by

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<sup>693</sup> See UNCITRAL Model Law Article 17 H and 17 I

<sup>694</sup> See *Mareva Campania Naviera SA v International Bulcarriers SA* [1975] 2 Lloyd's Rep 509

<sup>695</sup> Model Law 2006 Article 17 J. See FAA S.8, Model Law 1985 Articles 17 and 9.

<sup>696</sup> See EAA s.48, which states that parties are free to agree on the powers exercisable by the tribunal as regards remedies. s.48 (3) provides that a tribunal can make a declaration as to any matter to be determined in the proceedings. The most important section in regard to the authority of the tribunal to order freezing orders, is manifested in s.48 (5) (a) which provides that the arbitral tribunal has the same powers as the courts to order or refrain from doing anything.

<sup>697</sup> *Kastner v Jason* [2005] 1 Lloyd's Rep 397 at para 14-19.

Kastner on 27 February 2002 and pursuant to the powers invested in the tribunal by virtue of the Arbitration Act 1996,<sup>698</sup> it ordered Jason from taking any steps altering the status quo regarding ownership of the property until permission was granted. Later, he made an application of caution on the land registry to protect his interest in the property with the permission of the tribunal. Indeed, the respondent Jason agreed in March to comply with the arbitral order. However, on 11 April 2002, in flagrant breach of the direction of the agreement, Jason entered into a contract of sale and completed the contract of sale of the property to Mr and Mrs Sherman and decamped to the USA. Mr Sherman's solicitor (Brian of fame? Millar) inexplicably failed, when he carried out his Land Registry search, to read the caution. In negligence of the caution, and with the constructive notice, Sherman proceeded to complete the purchase on 20 May 2002. They paid the full purchase price and Mr Jason executed the transferred his interest to them. Sherman financed the purchase in part with an HSBC mortgage. The balance was paid after two prior mortgages were discharged. The tribunal, after finding fraud on the property and profits of sale, awarded quantified damages payable to Kastner to the sum of £237,224.50.<sup>699</sup> The purchasers in regard of this property found later that their property could not be registered. They commenced proceedings against Mr Kastner on the grounds that they were not party to the arbitration agreement as third parties.<sup>700</sup>

The Court of Appeal explicitly declined to make any final determination of this question and the central planks of the debate would seem to be of the following;

- (a) Section 39 (2) (a) envisages an order for the disposition of property "as between the parties." And this might appear to exclude the making of freezing orders under s.39, despite an agreement opting into s.39.
- (b) On the other hand, the powers listed at s.39 (2) are mainly given by way of example; this includes the only limitations to s.39 which are (I) that parties have conferred the powers

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<sup>698</sup>EAA 1996s.48.

<sup>699</sup>Para 10.

<sup>700</sup> See Mustill & Boyd, Commercial Arbitration, 2001 Companion p. 330, See Gee Commercial Injunction, 5<sup>th</sup> edit 2004 at para 6.045/047., See Russell on Arbitration 22<sup>nd</sup> edit 2003 at para 6-130, see Harris, Planterose & Tecks, The Arbitration Act 1996, 2<sup>nd</sup> edn 200 para 48E.

to the tribunal,<sup>701</sup> and that the provisional orders given under this section might be given in a final award.<sup>702</sup>

## 5.16 Reform

As a matter of urgency, the English Arbitration Act 1996 needs to be amended to address the issue of emergency provisional measures. The fact that s.45 of the Act provides some assistance by reference to courts is not a better solution.<sup>703</sup> Equally when scanning the remedies requested by claimants in their submission, it is common or garden to be asked to award damages, interest and costs. However, if other remedies are perhaps requested for example; declarations, specific performance or injunctions, it is common that such measures are associated with the courts. The Arbitration Act 1996 deals with provisional measures relatively briefly in only three sections,<sup>704</sup> which are too brief and ambivalent, contrary to Model Law Article 17 which provides that;

“Unless otherwise agreed by the parties, the tribunal may at the request of a party to such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security with such measure.”

From the above quotation, it is very clear that the Model Law is more openly textured than the current EAA 1996, and has no list of powers, such as is contained in the two EAA sections (38 and 39). This indeed raises a question: is our list of arbitral power to grant provisional measures exhaustive? The power under Article 17 can only be exercised at the request of a party; no such trigger is mentioned in our sections which immediately raise the question of whether the arbitral tribunal acting under 1996 Act under s.38 and 39, can grant all provisional measures? s.39 and s.38 only explicitly deal with three matters; the costs of the arbitration, and orders regarding property and remedies. None of the three sections specifically deals with anti-suit injunctions or

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<sup>701</sup>EAA 1996s.39 (4).

<sup>702</sup>Ibid s.39 (1).

<sup>703</sup> The fact that s.44(5) states that “a court shall grant interim relief only if or to extend the arbitration tribunal...” is a manifestation of lack of power by the tribunal in England under its jurisdiction to provide emergency provisional measures. The UK courts should refrain from such intervening emergency measures like the USA courts, since arbitration precludes courts intervention.

<sup>704</sup> EAA s.38, which is unhelpful, entitled the General Powers of the tribunal and s.39 to somewhat inaccurately entitled power to make provisional measures and s.48 entitled remedies.



freezing orders. s.48 is open to arbitral tribunal to grant remedies, and the list is not exhaustive, hence presumably leaving it to the substantive law applicable to dictate which remedies can be granted.

The author recommends that in order for the arbitral proceedings to run smoothly, parties need to expressly provide in their agreement to obtain an emergency measure or to contractually create their own emergency rules under party autonomy. In addition, the English arbitral rules and laws should create a standing panel approach. This is practised by international arbitral rules,<sup>705</sup> and mainly in Italy which provides a mechanism for the arbitral handling of emergency measures under Italian arbitral rules. The Italian Rules provide or set a permanent committee mechanism that deals with any emergency provisional measures.<sup>706</sup> The English arbitration court should further adopt the Pre-Arbitration Referee Procedure of the ICC,<sup>707</sup> or WIPO Draft Emergency Rules,<sup>708</sup> which provides that an emergency arbitrator shall conduct the procedure in such a manner as the emergency arbitrators considers appropriate under the doctrine of competence-competence.

Given the supervisory support of the judicial courts,<sup>709</sup> the arbitral tribunal's lack of coercive powers to order freezing orders and anti-suit injunctions should not be denied the opportunity to grant provisional measures, since those that it fails to enforce, it has a mutual relationship with the courts, to help where it has some short-comings.

Further, the English Arbitration Act should adopt the German Model,<sup>710</sup> which provides all powers exclusive to the arbitral tribunal to all commercial matters emanating out of the

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<sup>705</sup> See ICC Article 12 (1) of the Arbitration Rules of the Arbitration Court of the Economic Chamber of the Czech Republic, where the president is allowed to take on emergency provisional measures. Any breach is a contempt of Court under Article 12 ( 2). The International Commercial Arbitration Court at the Chamber of Commerce and the Industry of Russia, Article s. 1 (6), The Rules for the Resolution of Disputes during the Olympics games of the Court of Arbitration for Sports, Article 14. WIPO, Article 16.

<sup>706</sup> See the Italian Rules of International Arbitration 1994 Article 2. The committee is appointed for three years, he has the same power as the tribunal under Article 19(1). Any failure to comply may lead to damages and costs of those interim measure proceedings as a breach of contract.

<sup>707</sup> ICC Pre-Arbitral Procedure Referee Article 5 (3).

<sup>708</sup> Ibid Article X

<sup>709</sup> UNCITRAL Rules Article 26 and ICC Rules 28(2).

<sup>710</sup> See Berger,(1998) "The Implementation of the UNCITRAL Model Law in Germany" Mealey's International Arbitration Report,13 (1) pp. 38-54.

arbitration agreement.<sup>711</sup> Indeed this adduces that English law on freezing orders needs more changes if England is to be a better venue for arbitration and enforcement. The law in this case is not straight forward, and should provide a remedy especially to third parties. Although the tribunal has a wide scope of power, under s.39(1), it does not confer powers to the tribunal to make freezing orders, even when the parties do give such powers to the tribunal as the case above.<sup>712</sup>

The Report on the Arbitration Bill,<sup>713</sup> which provides Mareva injunctions only to be judicial instruments, is misleading and many arbitrators are unhappy with such powers. It would be desirable to give the arbitral tribunal power to make provisional orders where the parties have so agreed. The expert reports should be a key factor in regard to provisional remedies, and the expert report should be given consideration in cases of enforcement. If the law is not changed the role of the provisional measures will be irrelevant since at the time of the final award, the subject matter of the dispute will already be disposed and the defendant can even have a safe haven in another country.

The author argues that although the tribunal has autonomy to grant any measures, its authority is limited, and on such a basis, it is paramount that courts are seen as hosts in arbitral proceedings, not as a disruption mechanism. The Supreme Court Act<sup>714</sup> provides that the injunction may be granted to prevent a defendant from removing from the jurisdiction or otherwise dealing with the assets.<sup>715</sup> s.37 provides the basis of the jurisdiction for granting freezing orders in all cases as it appears to the court to be just and convenient to do so. The Court of Appeal held<sup>716</sup> that the wording of sub section 3 did not restrict the scope, geographical or otherwise.<sup>717</sup> Civil Procedure Rules<sup>718</sup> currently further provide that the injunctions may be granted in relation to assets whether located within the jurisdiction or not. Indeed, it would be disproportionate to deny such a chance

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<sup>711</sup> See Germany's Code Civil Procedure (CCP) 1998 s.1033, s.916, s.1945, s.1041 (2), and Article 103 of the German Constitution.

<sup>712</sup> Ibid s.38 (1).

<sup>713</sup> See DAC the Arbitration Bill Feb 1996 Para 39 at 201-203.

<sup>714</sup> See English Supreme Court Act 1981 s. 37 (3)

<sup>715</sup> See *Masri v Consolidated Contractors Co SAL* [2008] EWHC 2492.

<sup>716</sup> *Babanaft International Co. v Bassatne* [1990] Ch.13.

<sup>717</sup> See Ibid s. 37 (1).

<sup>718</sup> CPR 25.1 (f).

to parties in pretext of party autonomy,<sup>719</sup> which is toothless and meaningless in regard to this type of provisional remedy.

### **5.17 Conclusion**

Provisional measures assist in facilitating the effectiveness of arbitration in providing an effective means for the interim protection of rights at the pre-formation stage. Indeed, there is a growing recognition of provisional measures. When parties enter into an arbitration agreement which is a wide phrase, they usually intend to require that all their disputes (provisional measures) be settled under the arbitral contract. This may be an implied term or clause in the contract, for instance, applying the officious bystander test, where the parties submit to arbitration to exclude disputes over the validity of the agreement, thus the separability principle gives effect to the will of the parties. Simply by denying the parties that the main contract is valid, one party can deprive the arbitrator of competence to rule upon that allegation, so this provides a loophole for the parties to repudiate their obligation to arbitrate. With respect to the injunctions, all injunctions have the capacity to be abused and used as a vehicle for mischief making. If an injunction fails to reach its target, it will not be respected by another court and could be a source of a second litigation front, which the parties no doubt would have wished to avoid. There also exists the possibility that one injunction may lead to a battle of injunctions. Under competence-competence, the tribunal can handle such problems to avoid abusive anti-arbitration injunctions.

It is a common phenomenon nowadays that parties to arbitration expressly empower the arbitral tribunal to grant provisional measures, on the grounds that the arbitration agreement is a separate contract and that the arbitral tribunal has the jurisdiction to rule on any dispute in their domain. The two doctrines (Separability and Competence-Komptenz) are often called the corner stones of international arbitration as they are both derived from the arbitral agreement, that provide the arbitrators with tools of granting provisional measures, as they work hand in glove, to maximize the effectiveness of arbitration as an effective means of resolving international disputes and minimizing the temptation of delay tactics.

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<sup>719</sup> See UNCITRAL Model Law of 2010 Article 26 (9).

Since arbitral provisional measures are granted in inter parties' proceedings in which both the applicant and the respondent are heard in adversarial proceedings, there is some debate in regard to ex parte provisional measures, on the grounds that the arbitral tribunal does not have set standards for such measures like courts. This criticism should not be borne in mind, since now the Arbitration Act, for example; s.44(5) provides a subsidiary mechanism in support of any lacunae in arbitral proceedings and the UNCITRAL 2006 revision.<sup>720</sup> Further, the English Arbitration Act should adopt the German Model,<sup>721</sup> which provides all powers exclusively to the arbitral tribunal to all commercial matters emanating out of the arbitration agreement.<sup>722</sup>

Although there some hurdles set up to keep provisional measures as much as possible in the realm of the arbitral tribunal, the tribunal is not in the best interest of the applicant seeking the freezing order.<sup>723</sup> The issue is that freezing orders to be enforced need a court order.<sup>724</sup> This argument is restricted since now the courts work in mutual respect of arbitral proceedings, the assistance of the courts to issue such a measure is not an indication of poor relations with the arbitral tribunal historically but a change in the way courts sees the arbitral tribunal as the best forum for any arbitral proceedings.<sup>725</sup> The English courts convert the breach of an arbitral order into a contempt of court.<sup>726</sup>

Although the arbitral tribunal has the authority to grant provisional measures,<sup>727</sup> which is supported internationally for example, the New York Convention, Hong Kong law,<sup>728</sup> the LCIA and UNCITRAL. It is clear that the arbitral tribunal cannot grant some urgent measures, for example; ex parte orders or freezing orders and anti-suit injunctions without the support of the courts. Hence, in order to avoid commercial litigants losing their claims and avoiding the dissipation of assets by defendants, courts are invited to give a legal effect, to avoid making the award meaningless.

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<sup>720</sup> UNCITRAL Model Law article 17 B.

<sup>721</sup> See Berger,(1998) "The Implementation of the UNCITRAL Model Law in Germany" Mealey's International Arbitration Report,13 (1) at 38-54.

<sup>722</sup> See Germany's Code Civil Procedure (CCP) 1998 s.1033, s.916, s.1945, s.1041 (2), and Article 103 of the German Constitution.

<sup>723</sup> See Hunter and Redfern, on International Commercial Arbitration.(5<sup>th</sup> edition 2009) at 322.

<sup>724</sup> Arbitration Act s.66 (1) and s.42 of the English Arbitration Act 1996.

<sup>725</sup> Ibid. s.39, 44 (5) and s.45.

<sup>726</sup> Ibid s. 44 (2) (c) and 43 (2).

<sup>727</sup> See Andrews,N (1994) Principles of Civil Procedure (London: Sweet & Maxwell) at 39.

<sup>728</sup>See s.34 C (1) of Part 11A Hong Kong Arbitration Ordinance 1997.

## CHAPTER SIX

### 6 Powers of the courts in granting measures in support of arbitral proceedings

#### 6.1 Introduction

Arbitration is a process carried out pursuant to the agreement to arbitrate (party autonomy).<sup>729</sup> If the agreement is not to arbitrate, then the process cannot be said to be arbitration.<sup>730</sup> Interim measures of arbitration are an interface between the settlements of private disputes.<sup>731</sup> The interface between national courts and the arbitral tribunal,<sup>732</sup> which is both complex and ever changing,<sup>733</sup> is not the harmonious product of an agreement between the parties to an arbitration agreement.<sup>734</sup> In many cases, the national courts are less suitable for the settlement of such complex international transactions, and arbitration is structured specifically to facilitate the resolution of disputes arising from transactions between parties from different states.<sup>735</sup> The enactment of the English Arbitration Act was intended to mark a departure from the traditional

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<sup>729</sup> See *Mavani v Ralli Bros* [1973] 1 WLR 468, which held that if the arbitration agreement expressly stipulates that a party shall not apply to a national court for an order of the type in question, the principle of party autonomy will almost always require the municipal courts to honour the agreement and abstain from exercising its powers.

<sup>730</sup> See *Eketrim v Vivendi Universal*, [The *Epsilon Rosa* [2003] EWCA Civ 938 at 34-40., where the parties agreed to settle disputes under LCIA, to avoid conflicting decisions of Geneva. The court refused to grant an anti-suit injunction on the grounds that a stay would breach party autonomy. The powers which are granted by the parties or any set of rules are valid within the boundaries of the “*lex arbitri*”. In other words, while the arbitration derives their powers from the parties the courts derive their powers from the state.

<sup>731</sup> See *Strumpffabrik GmbH v Bentley Engineering Co.Ltd* [1962] 2 QB 587, where Kerr LJ at 304, in reference to ICC at 304 said that “the rules provide a code that it intends to be self –sufficient, in the sense that it is capable of covering all aspects of arbitrations conducted under the rules, without a need for any recourse to any municipal system of law or any application to the courts of the forum.” In other words, English courts should be very slow in intervening in the arbitral process, due to party autonomy doctrine. See *Bingham LJ in KS Bani v Korea Ship building and Engineering Corporation*[1987] 2 Lloyd’s Rep 445.

<sup>732</sup> See Article 1672 of the Belgian Judicial Code, which provides authority to competent courts to grant interim measures. The introduction of a case before the judicial authorities does not imply a renunciation of the arbitration agreement or clause.

<sup>733</sup> See Lord Denning in *David Taylor & Sons v Barnett Trading Company* [1958] 1WLR 562 at 570, where he said that “*there is not one law for arbitrators and another for the court*”. The orthodox view was to ensure that the courts involvement is not a threat to the arbitration process.

<sup>734</sup> See Chamber J in *Auber v Maze* [1801] 2 Bos. & Pul at 375, where he said that “there is no doubt that an arbitrator bound by the rules of law lie every judge, and if it appears on the face of record, that the arbitrator has acted contrary of law, his award may be set aside.”

<sup>735</sup> See UNCITRAL Model Law on Commercial Arbitration Art 17, UN Doc A /40/17, UN Sales No. E.08.V.4 (2008), at <http://www.uncitral.org/pdf/english/texts/arbitration>.

courts and enforce the doctrine of party autonomy.<sup>736</sup> *The question that arises is whether the parties may validly agree, in their arbitration agreement or elsewhere to exclude the possibility of recourse to courts for the purpose of obtaining provisional measures.*

English law should be viewed through the prism of s.1 (c) of the Arbitration Act 1996, where interim measures in the first place are applied for before the arbitrator, and the court intervention is the last resort. This approach shifts interim measures as far as possible to the realm of the Arbitration Act 1996,<sup>737</sup> which makes it clear that court should not intervene except as provided by the Act. In other words, English law provides an approach that is usually called a “*court subsidiarity*”. Since arbitration is the creation of the parties, it is important to establish its legal nature, in order to decide whether it is subject to any legal regulation or not. Arbitration is not purely a private matter of contract in which parties have given up all their rights to engage judicial power and it is not wholly divorced from the exercise of public authority.<sup>738</sup> In spite of the protestation of party autonomy, arbitration wholly depends on the underlying support of the courts that alone have the power to rescue the system when one party seeks to sabotage it.<sup>739</sup> Courts are called upon to determine a question of arbitration jurisdiction, before or during the arbitral proceedings.<sup>740</sup> Today, most arbitration laws and rules assume that the court and arbitration have a concurrent jurisdiction to grant interim measures in international arbitration. There are however, variations among jurisdictions as to how and when each decision-maker should be involved.<sup>741</sup>

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<sup>736</sup> See Lord Steyn in response to Model Law of Arbitration (1994) 10 *Arbitration International* 1 at 10, where he said that “the supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on question of law and the power to remit.”

<sup>737</sup> In *Nomihold Securities INC v Mobile Telesystems Finance SA*, [2012] Bus LR 1289 at 26, Andrew Smith found that s.1 (c) does not limit the court’s jurisdiction, but provides statutory guidance about when it should be exercised in relation to arbitration to which Part 1 of the 1996 Act applies. He noted that parties in arbitration could not preclude the court’s jurisdiction by an agreement between them anymore than they could confer jurisdiction on the court.

<sup>738</sup> See EAA s. 12 (1) and (3).

<sup>739</sup> See Robert Merkin *Arbitration Act 1996* at 72, where he asserts that judicial courts are ordinarily called upon when pathological situations occur during the course of arbitration in a supervisory capacity.

<sup>740</sup> See EAA s. 9 (4) which provides that “on application of this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.”

<sup>741</sup> See Kaminskiene Natalija, *Application of Interim Measures in International Arbitration: Lithuanian Approach* (1<sup>st</sup> February 2010) *Jssn* 2029-2058 at 243-260.

Furthermore, it will enable one to decide whether a particular process is subject to the special relationship with municipal courts which is peculiar to private arbitration in England.<sup>742</sup> The debate in international commercial arbitration is what scale of judicial intervention should be allowed. Parties in arbitration want a prompt, less expensive and final resolution of the dispute, whilst also parties want to ensure that the arbitral process is just and impartial.<sup>743</sup> It should be noted that in arbitration, the preference is for a private resolution of provisional measures, therefore, it makes sense to insist that courts do not interfere in the arbitral process. However, being a private process, arbitration is not self-executing and has to rely on the coercive powers of the courts during and after the arbitral proceedings to ensure its efficacy.<sup>744</sup> While it is argued that arbitration must be free from the courts, in order to be effective, it is also accepted that arbitration needs the support of national courts to be effective.<sup>745</sup> Following this contention, laws and rules have been formulated to balance the competing interests. Lord Mustill explained the matter lucidly in his foreword to the treatise on Indian arbitration law by OP Malhotra SC that:

“First there is central importance of a harmonious relationship between the courts and the arbitral process. This has always involved a delicate balance since the urge of any judge is to see justice done, and not to put injustice wherever he or she finds it; and if it is found in an arbitration, why then the judges feel the need to intervene. On the other side, those active in the world of arbitration stress its voluntary nature, and argue that it is wrong in principle for the courts to concern themselves with disputes which the parties have formally chosen themselves with disputes which the parties have formally chosen to withdraw from them, quite apart from the waste of time and expense caused by gratuitous judicial interference. To a degree both views were right, and remain so; the problem has been to give proper weight to each of them. It was an unhappy feature of discourse arbitration in the century just past, the legitimate arguments which could be in favour of

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<sup>742</sup> See Civil Procedure Rules CPR 25.1 (1) (a) – (f), which categorises the types of interim measures a court may order.

<sup>743</sup> See Hunter and Redfern, *International Commercial Arbitration, Jurisdiction Denied: The Pyramid Collapse* (1986) JBL 15.

<sup>744</sup> *Ibid.*

<sup>745</sup> *Ibid.*

one or another to be expressed, in some instances at least, with quite unnecessary vigour.<sup>746</sup>

The involvement of the courts in modern commercial arbitration generally begins even before the arbitral tribunal is established,<sup>747</sup> when the courts are used to protect evidence,<sup>748</sup> to avoid damage.<sup>749</sup> The courts enforce the arbitration agreement for the arbitral process to start; during the pendency of the arbitration itself, it grants provisional measures and at the end of arbitration, it either recognises and enforces or sets aside arbitral awards. The national courts involvement in international commercial arbitration is a fact of life, as prevalent as weather. Municipal court involvement is based on a host of reasons when a pathological situation occurs during the course of the arbitral proceeding. In other words, courts usually intervene within the framework of what is referred to as arbitral litigation in a supervisory capacity. This chapter is aimed at addressing the question, to what extent do English Courts support the grant of provisional measures? In order to address the set question, this chapter will be divided into four sections; firstly, the stages of court involvement in arbitral proceedings, secondly, the thesis examines the relationship between courts and arbitral tribunals; thirdly, the limitation of the municipal courts in arbitral proceedings, and lastly, the conclusion.

## **6.2 Stages of court involvement in arbitral proceedings**

What happens in the most important phase of arbitration, when the arbitrators begin their task? The baton has been passed to them. Is there any need for national courts to be involved in the arbitral process? The answer in almost every case is “no”. Once the tribunal has been constituted most arbitrations are conducted without the need to refer to municipal courts, even if the parties fail to take part in the process. However, there are times when court involvement is needed in order to ensure the proper conduct of arbitration, for example; the preservation of evidence or property.

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<sup>746</sup> See OP Malhotra SC *The Law and Practice of Arbitration and Conciliation* (New Delhi: Lexis Nexis, 2002)

<sup>747</sup> See Article 28.8 of the ACICA Rules, which provides that such power shall not prejudice a party’s right to apply to any competent court for interim measures.

<sup>748</sup> See Denning Mr in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd’s Rep 375 at 362, where he said that “..... it does not oust the jurisdiction of courts. It only ousts the technicalities and strict constructions...”

<sup>749</sup> See Lew Julian, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International 2003) at 367.



Despite the autonomous nature of arbitration, it must be recognized that just as no man is an island, so no system of dispute resolution can exist in a vacuum. As Andrew Dickinson puts it, the

“arbitration process cannot be said to be a small island in the sea of disputes resolution that enjoys total independency from national legal systems-at best they are semi-autonomous.”<sup>750</sup>

The fact that courts can be seized in parallel to arbitral proceedings where the validity of the arbitration agreement is challenged by one party as a principal or preliminary issue, clearly shows an interface between litigation and arbitration. Article II(3) of the New York Convention allows the courts to examine the validity of an arbitration agreement while arbitral proceedings are already pending.<sup>751</sup>

Without prejudice to party autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help and effectiveness.<sup>752</sup> Provisional measures in international arbitration involve the intersection of national law and arbitral power, and a degree of conceptual uniformity is required if provisional measures are to complement arbitral effectiveness, as they are designed to do. In order to encourage harmonization regarding efficiency, the role of courts is an inevitable tool. UNCITRAL provides that

“it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court, an interim measure of protection and for a court to grant such a measure.”<sup>753</sup>

Lord Mustill considered in *Coppee Lavalin v Ken-Ren Chemical Fertilizers* (in Liquidation in Kenya) that:

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<sup>750</sup>See Dickson, Brussels 1 Review-Interface with Arbitration, Conflictolaws.net, June 17 2009.

<sup>751</sup> It provides that “the court of the contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

<sup>752</sup>See William Parker, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT@L &Comp.L.Q.(1983) at 21 and 30.

<sup>753</sup> See UNCITRAL Article 9.

“there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering, and that the only court which possesses these powers is the municipal courts of an individual state.”<sup>754</sup>

This statement reflects the position that in choosing the seat of an international arbitration, those involved should not only look to the rules by which arbitration run but also the *lex forum*, which would play a vital role if the need for provisional measures arises. Municipal courts provide essential support for the arbitral process, as professor Jan Paulson has noted,

”the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself.”<sup>755</sup>

Therefore, a harmonious relationship between the courts and the arbitral process is vital. Indeed, even the most enthusiastic proponents of party autonomy are bound to recognize that they must rely on the judicial arm of the state to ensure that the agreement to arbitrate is given at least some degree of effect, hence it is no good complaining that judges should keep right out of arbitration, for arbitration cannot flourish unless they are ready and waiting at the door, if only rarely allowed into the room.<sup>756</sup>

This assistance of municipal courts takes different stages of the arbitration process.<sup>757</sup> National laws are required to recognize and enforce the agreement, national laws are required to support the arbitration process.<sup>758</sup> In this overall scheme, international commercial arbitration can be envisaged as a giant squid which seeks nourishment from the murky oceanic world where the domain of international arbitration and national jurisdiction meet. The author might speak of the international arbitration process as stretching its tentacles down from the domain of international arbitration to the municipal courts to forage for legitimacy, support, recognition and effectiveness.<sup>759</sup> It should however, be noted that courts are only allowed to intervene in urgency,

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<sup>754</sup>[1995] 1 Ac 38 at J14.20-03.

<sup>755</sup> See J Paulson “Arbitration in Three Dimensions” (LSE Legal Studies Working Paper No.12.2010<http://ssrn.com/abstract=1536093>) at accessed on 10 December 2012.

<sup>756</sup> See Article 23 (2) of the ICC provides that an application to “any judicial authority for interim or conservatory measures will not be an infringement or a waiver of the arbitration agreement.”

<sup>757</sup> See EAA 1996 s.44 (1), which provides as follows “unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders....”

<sup>758</sup> See the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards Art.111, opened for signature, June 10 1958, 21 UST.

<sup>759</sup> The role of the court is subject to s.44 (5) of the EAA.

and are requested to refer the case to arbitration, unless the contract is void.<sup>760</sup> In this context, any other national courts' involvement in the arbitral proceeding is arguably illegitimate, including actions to protect national commerce, and jurisdictional interests, simply because the courts think that it is better suited than an arbitral tribunal to decide or grant provisional measures.

Municipal courts get involved in arbitral proceeding at different stages in order to enhance arbitral proceedings. The involvement has been classified into three stages, prior to the constitution of the tribunal, during and after the arbitral proceedings. The involvement of municipal courts in arbitral proceedings is supported by the Arbitration Act 1996,<sup>761</sup> the European convention,<sup>762</sup> the New York Convention,<sup>763</sup> the ICSID,<sup>764</sup> and the UNCITRAL Model Law.<sup>765</sup>

### 6.2.1 Prior to the constitution of the tribunal

The conflict arises because of the legal system of most developed legal systems and arbitral rules as both the municipal courts and arbitration tribunal are empowered to order a wide range of interim measures.<sup>766</sup> This in turn raises the question as to which state court and arbitral tribunal has jurisdiction to grant relief in the form of provisional measure.<sup>767</sup> The other question that arises is whether national courts may (should) become involved in a dispute which is subject to arbitration, and if so, how far should this involvement extend? To put it more directly, when does intervention become interference in the arbitral process. This is not simply a philosophical question. It is one with important practical consequences; and it is one to which there is no

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<sup>760</sup> See New York Convention Article II and III.

<sup>761</sup> EAA 1996 s. 45 & 44.

<sup>762</sup> See European Convention Article VI (4), Council Regulation 4/2009, which contains Article 14 and 9 (4) which were applied in *Van Uden* to grant provisional measures, even when the substance of the case is dealt by arbitrators.

<sup>763</sup> See Article II (3) given effect in *McCreary v and Rubber Co v CEAT SPA* 501 F.2d at 1032 and *Caroline Power & Light Co v Uranex* 451 F. Supp. 1044 (ND Cal 1977).

<sup>764</sup> See S. 39 of EAA which establishes the jurisdiction of the court to grant provisional measures in any arbitral proceedings, which the parties to the arbitration have agreed upon.

<sup>765</sup> Ibid s. 9, which expressly provides that parties do not violate their agreement when they seek provisional measures from courts.

<sup>766</sup> Ibid EAA 1996 s.44 (5).

<sup>767</sup> Parties request for interim measures is a common phenomenon in many European states for example; Article 12 of the Lithuanian Law on Commercial Arbitration, 2 April 1996 No.1-1274, Vilnius Official translation, Article 1166 of Polish CCP, Article 51 Serbian Law on arbitration, Article 71 of the Ukrainian Law on International Commercial Arbitration, compatible to Article 17 J, which provides that "a court shall have the same power of issuing an interim measures in relation to arbitration proceedings, irrespective of whether their places are in the territory state, as it has relation to proceedings in courts. The courts shall exercise such power in accordance with its own procedures in consideration of the specific features..."

simple answer. Indeed, under most legal systems,<sup>768</sup> the basic rule is that, provided the dispute is covered by a valid arbitration clause or agreement, which is invoked in due time by one of the parties, the arbitration clause gives rise to an arbitration exception, which has the result that state courts no longer have the jurisdiction to deal with the matter.<sup>769</sup> However, it has been recognized that the rule is not absolute and that with regard to provisional measures, there are circumstances where it is necessary or appropriate for courts to intervene, notwithstanding the existence of the arbitration clause.

One of the problems facing a party to international arbitration is the threat of transferring assets,<sup>770</sup> before the tribunal is established,<sup>771</sup> in comparison with the municipal courts.<sup>772</sup> The lengthy duration of the tribunal may not be a solution unless the courts intervene,<sup>773</sup> for that period until the tribunal is established and the files can be transferred. The delay may even be longer,<sup>774</sup> in circumstances where the appointed arbitrator is challenged<sup>775</sup> or if the recalcitrant party refuses to appoint an arbitrator.<sup>776</sup> It may further be contributed due to geographical locations or dilatory tactics by the party to which arbitration is immune.<sup>777</sup> Arbitration is like a young bird that is trying to fly: it rises in the air from time to time and falls back to its nest. This means that since courts developed before arbitration, arbitral tribunals are young in dispute resolution; hence they

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<sup>768</sup> See V. Cracium, A Lefter, Romania, *The International Comparative Legal Guide to International Arbitration* 2007 London 2007 at 275. See *Moscow Journal of International Law* 2005 No.1, see Article 90 of Russian APC, which provides that a request from the court is incompatible with the arbitration agreement.

<sup>769</sup> See for example Belgian Law Article 169 (1) of the Belgian Judicial Code, which provides that “the judge who is apprehended of a dispute that is covered by an arbitration clause declares himself to be without jurisdiction, at the request of any party, unless the clause in question is invalid or has ceased to have effect with regard to the dispute in question; the exception must be raised before all other exceptions and means of defence.” See EAA 1996 s.7.

<sup>770</sup> See Redfern Hunter para 7.10, David St John Sutton Judith Gill, Russell (how many people is this? – add commas between them) on *Arbitration* (Twenty-Second Edition, Sweet & Maxwell, (2003) para 7-005., where he states that at the beginning of arbitration a party may bring an action before the court instead of the tribunal. As the New York Convention provides under Article II (3) and Article 8, the court in such a situation decides the enforceability of the arbitration agreement at the request of the parties. In certain circumstances where the parties have failed to appoint the arbitrators and there are no applicable rules, they can apply the court to appoint arbitrators as provided under s. 18 of EAA 1996. At times, there may be a problem of jurisdiction in regard to the tribunal, which can only be settled by support of the court, hence intervention may be necessary.

<sup>771</sup> See Robert Merkin at 109-103.

<sup>772</sup> See ICC Rules Article 4 (4).

<sup>773</sup> See LCIA Rules Article 25.3 which provides that “parties can apply for interim measures before the formation of the tribunal, but they can only apply to a court for such relief after it is constituted in exceptional circumstances and must forward their application to the tribunal.”

<sup>774</sup> The average duration of arbitral process is between one and two years. See Paulson, *International Commercial Arbitration* (1990) at 20-21.

<sup>775</sup> See UNCITRAL 9-12.

<sup>776</sup> Ibid 6-8.

<sup>777</sup> The President of the ICC proposed that Arbitration should be amended to give the ICC Court the power to make urgent measures of protection, pending the appointment of an arbitral tribunal.

need the support of the courts especially before the tribunal is constituted. In addition, Mustill LJ describes the involvement of courts in a similar manner:

Ideally, the handling of arbitral disputes should resemble a relay-race in the initial stages, before the arbitrators are seized of the dispute, the bottom are in the grasp of the court, for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take the bottom and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the bottom so that the court can in case of need lend its coercive powers to enforce the measure. But in real life the position is no clear cut.”<sup>778</sup>

He further stated that

“This principle is an essential element in the balance of partnership which exists, under English law between the arbitral process and the court.....”<sup>779</sup>

Prior to the establishment of the arbitral tribunal,<sup>780</sup> courts become involved<sup>781</sup> where a party initiates proceedings to challenge the validity of an arbitral agreement,<sup>782</sup> where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate, and where one party needs urgent protection that cannot await the appointment of the tribunal.<sup>783</sup> The tribunal may not have the powers, this is usually a result of historical domestic legislation hearkening back to a time when the power to grant measures was considered to be a prerogative of the national courts for public policy reasons.<sup>784</sup>

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<sup>778</sup>See *Channel Tunnel group Ltd v Balfour Beatty Construction* [1993] Ac 364 at 119.

<sup>779</sup>Ibid para 367.

<sup>780</sup> See Sir John Donaldson in *British Airways Board v Lake Airways Ltd* [1984] QB 142.

<sup>781</sup>See English Arbitration Act 1996 s.42 (2) (e).

<sup>782</sup>See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[1993] AC 334, where at the time, the distinction between the times before and after the arbitrators received the files shows what would in event be obvious; that if the order is made at a later stage it is more likely to infringe the spirit of the arbitration agreement than if it had been made at a time when the arbitrators were not yet in charge.

<sup>783</sup> See EAA s.44 (5) is a useful weapon to the courts given that provisional measures will be needed many times at the start of the proceedings, for example, to secure one party’s assets, before the arbitral tribunal has been constituted and is therefore without power to act.

<sup>784</sup> See Redfern Hunter, on International Arbitration ( 5<sup>th</sup> edition Oxford University Press, 2009) at 44.

In all cases,<sup>785</sup> the courts' duty is to uphold the agreement to arbitrate, as provided by s.44 (5). A good example; is the case of *Belair LLC v Basel LLC*<sup>786</sup> where the commercial court granted an interim measure in order to preserve the assets in the case pending the outcome of an arbitral tribunal which had yet to be fully constituted. It was therefore, to use the language of s. 44 (5),<sup>787</sup> unable to act effectively and thus judicial assistance was permissible. In this case the courts fulfil the gap until the tribunal is established to protect the status quo.<sup>788</sup> Many national laws and rules,<sup>789</sup> such as the English Arbitration Act 1996 and Model Law by allow courts to grant interim measures before the tribunal has been established or where the applicable arbitration rules do not allow arbitrators to grant interim measures of protection.re-write this sentence<sup>790</sup> Indeed most would agree that, at this stage, the national courts' involvement is not disruptive,<sup>791</sup> and may be beneficial to the arbitration proceedings.<sup>792</sup> As expressly reflected in the UNCITRAL Model Law, the courts use their authority to give effect to the parties' agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties where the prescribed appointment mechanism does not work.<sup>793</sup>

Municipal courts have the authority to grant provisional measures prior to the constitution of the tribunal.<sup>794</sup> LCIA Institutional Rules provide that parties may seek provisional measures from the

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<sup>785</sup> See *SNE v Joc Oil* (1990) XV Yearbook Commercial Arbitration 31, where the tribunal assumed jurisdiction on the basis of the competence-competence concept, which was confirmed by the Court of Appeal of Bermuda and enforced.

<sup>786</sup> [2009] EWHC 725 Comm.

<sup>787</sup> See s. 44 (5) provision is a case in point of the court's powers being curtailed in comparison with the previous position under s. 12 of the 1950 Arbitration Act. The power to order security for costs is under tribunal competence. I do argue that this may leave the vulnerable potentially exposed where an experienced arbitrator over looks such an order. The corollary of such an oversight is that it would obviously be disadvantageous for the non-defaulting party left to cover costs incurred by the tribunal. In cases of insolvency, it would only be the courts that help with compensation or take into account the costs for the proceedings.

<sup>788</sup> See *Premium Nafta Prods Ltd v Fili Shipping Co.* [2007] UKHL 40 at 19.

<sup>789</sup> See ICC Rules Article 8 (5), which provides that: "before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent court for interim measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to effect the relevant powers reserved to the arbitrator."

<sup>790</sup> See Yves Derains & Eric Schwartz, A guide to the ICC Rules of Arbitration (2nd edition 2005) at 295-295.

<sup>791</sup> *Motorola Credit Corp v Uzan No.2* [2003] EWCA Civ 752 [2004] 1 WLR 113

<sup>792</sup> See Lew QC, Achieving the Dream: autonomous Arbitration? In *Arbitration Insight*, (2007) at 472-73.

<sup>793</sup> See UNCITRAL Un Doc A/40/17, UN Sales No.08 V.4 (2008), available at [http://www.unictral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_ebook.pdf](http://www.unictral.org/pdf/english/texts/arbitration/ml-arb/07-86998_ebook.pdf) accessed 10 November 2012.

<sup>794</sup> See ISCID Article 39 (6), which provides that "nothing in this rule shall prevent the parties, provided that they have stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceedings, for the preservation of their respective rights and interests."

national courts *before the formation of the arbitral tribunal in exceptional circumstances, thereafter.*<sup>795</sup>

The Model Law provides *that*;

“a request for interim measures addressed by any party to arbitration to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or waiver of that agreement.”

Indeed, Article 5 of the Model Law was obviously an attempt to curb judicial excesses, and has created some difficulties of interpretation and application. There is now a considerable body of case law in Model Law jurisdiction on the fundamental question of whether this provision means that the inherent jurisdiction of municipal courts to curb related abuses? Of the process and to ensure arbitral fairness and efficiency has been removed.<sup>796</sup> The DAC Report shared Lord Mustill’s concerns and it was therefore decided that the word “*shall*” in Article 5 should be replaced with word “*should*”. The differences were considered by Thomas LJ,<sup>797</sup> who accepted that the use of “*should*” as opposed to “*shall*” showed an absolute prohibition on the intervention by courts in circumstances other than specified in Part 1 of the Arbitration Act 1996 was not intended.

This provision has been interpreted, in accordance with plain language as permitting parties to apply to municipal courts,<sup>798</sup> for provisional measures without any hindrances or material qualifications. Indeed this is in line with the UNCITRAL Model Law<sup>799</sup> and ISCID rules.<sup>800</sup> Model Law further provides that:

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<sup>795</sup> LCIA Article 25.

<sup>796</sup> See a good example of Model Law in *Mitsui Engineering & Shipping Co Ltd v Easton Graham Rush*, [2004] 2 SLR 14, [2004] SGHC 26, which illustrates the “supportive rather than interventionist attitude of the Singapore Courts when called upon to exercise interventionist powers over arbitration.

<sup>797</sup> See *Vale Do Rio Doce Navegacao v Shanghai Bao Steel Ocean Shipping Co.* [2000] EWHC 205.

<sup>798</sup> See Lathan & Watkins, International Dispute Resolution, The English Court Continues to Support the Arbitral Process (July 2009). See Reynolds, Porter Chamberlain LLP, International Bulletin, (April 2011). See Ruth Hosking, Quadrant Chambers Forum, sharing leading experience in Commercial law, The Role of Courts and Experts in international arbitration (18 May 2010).

<sup>799</sup> See UNCITRAL Article 5 and 9.

<sup>800</sup> See ICC Rules Article 23 (2), which provides that “before files are transmitted to the tribunal in appropriate circumstances even after the parties may apply to a competent court for interim or conservatory measures.....the application is not a waiver or infringement of the arbitration agreement.”

“a national court shall have the same powers of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in a request for interim measures addressed by a party to judicial authority shall not be deemed incompatible with the agreement to arbitrate or waiver of that agreement.”<sup>801</sup>

Arbitral tribunals are not established when parties seek provisional measures. It is the courts with a set mechanism that one has to seek such measures.<sup>802</sup> The composition of the tribunal may take some time before it is established given that a short-coming of the courts is to get involved in order to avoid the dissipation of assets to other jurisdictions, which in the long run may make the arbitral proceedings of the final award meaningless unless the assets are protected. Municipal courts have the power to grant freezing orders in order to safe guard assets before arbitral proceedings.<sup>803</sup> A prominent scholar like Tweeddale argues that:

“the commencement of the arbitration is the first formal step that the claimant can take and in many regard this most important.”<sup>804</sup>

This quotation highlights the significance attached to the modalities by which a dispute is commenced. It should be noted that the arbitral tribunal should proceed with the order requested when the tribunal is established, unless there is a danger for assets to be dissipated to other venues, given the new technology which has eased the transfer of assets by the click of the mouse.

## **6.2.2 Courts involvement during the arbitral proceedings:**

During the arbitral process,<sup>805</sup> courts are called upon to support arbitral proceedings.<sup>806</sup> The involvement during the arbitration process comes in many forms and is rarely dealt with in

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<sup>801</sup> See UNICITRAL 2006 Revised Article 17J.

<sup>802</sup> See *C v D* [2007] EWCA 1282.

<sup>803</sup> See *Kastener v Jason*, [2004] EWHC 92 Para 107-108, where the High Court held that parties can empower the tribunal to grant freezing orders on a provisional basis. Indeed the Court of Appeal upheld the decision of the High Court and stated that it was not violation of the arbitral order.

<sup>804</sup> See Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) at 262.

<sup>805</sup> See EAA 1996 s.9, which provides that before or during the arbitral process or even if the award is pronounced, but before it is enforced under s.36, it may apply to court, during the arbitral process as demonstrated in *Dongwoo Mann Hummel Co Ltd v Man Hummel GmbH* [2008] SDHC 67, [2008] 3 SLR 9 r) 87 at 55.



arbitration statutes.<sup>807</sup> This involves the courts making procedural orders<sup>808</sup> that cannot be ordered,<sup>809</sup> or enforced by arbitrators, or orders for maintaining the status quo.<sup>810</sup> These measures are generally helpful.<sup>811</sup> There are also orders for the protecting and taking of evidence,<sup>812</sup> or otherwise protecting the integrity of the arbitral proceedings.<sup>813</sup> This type of intervention is generally unobjectionable and appropriate in the circumstances,<sup>814</sup> where the arbitral tribunal cannot take measures sought and the intervention has the agreement of the tribunal.<sup>815</sup> Under the English Arbitration Act, it expressly provides the ground in which the municipal courts should be involved during arbitral proceedings, under s. 44 (2) which details those matters in relation to

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<sup>806</sup> See *AesustKamengonogorks Hydro power Plant LLP v UstKamenogorsk Hydro power Plant JSC* [2011] EWHCA Civ 647, [2012] 1 ALL ER Comm 845 at 100, where Rix LJ saw no reason why the court should not intervene where the safety of an arbitration agreement was threatened. In such cases the role of the courts is to support arbitration and not to interfere with it.

<sup>807</sup> See *Qingdao Ocean shipping co v Shipping Establishment (Here after the Xing Su Hai )* [1995] 2 Lloyd's Rep 15. See *Maritime Bulgare (NMB) Rustal Trading Ltd* [2002] 1 Lloyd's Rep 106.

<sup>808</sup> See Lathan & Watkins, International Dispute Resolution, The English Court Continues to Support the Arbitral Process (July 2009).

<sup>809</sup> See *China Ocean Shipping Co (owners of the MV Fu NingHai v Whistler International Ltd Charters of MV Fu NingHai)* [199] HKCFI 693, where it was shown that a party had refused to disclose its place of business to avoid posting security for the costs of the arbitration and where the tribunal lacked the power to grant such orders, requiring compliance with such a fundamental requirement, and the court assisted the tribunal by making the appropriate provisional measures. Hence, Article 5 did not preclude the court from making orders because the issue for security for costs was not a matter governed by Model Law. See *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 784 (HC).

<sup>810</sup> Hunter at 87, where he states that "the tide is now turning," and it is increasingly realized in international arbitration circles that the intervention of courts must not necessarily be disruptive."

<sup>811</sup> See *Celtelelem Sa v Rust Holdings* [2005] 2 Lloyd's Rep 294, where s.44 of the EAA 1996 was applied to protect the subject matter of arbitration, including preventing one party from breaking the substantive agreement to which arbitration relates. There are two bases for the court jurisdiction; s.44 (2) (c) and s.37 of the Senior Courts Act 1981. It remains to be decided whether s.37 of the Senior Courts Act 1981 is exercisable in arbitration cases or whether s.44 is exclusively to be used.

<sup>812</sup> See *Norwich Pharmacy v Her Majesty's Commissioners for Customs & Excise* [1974] AC 1322, *Anton Piller A.G v Manufacturing Process* [1973] Ch 55, [1972] WLR 162 and *Mareva Compania Naviera SA v International IBulcarriers SA* [1975] 2 Lloyd's Rep 509. The Anton Piller relief authorizes the securing of evidence in the hands of the defendant, where evidence may be spoliated to the detriment of the plaintiff's cause. The Mareva injunction permits an injunction of assets belonging to a wrong-doer. Mareva prohibits defendants and certain third parties from removing assets from the jurisdiction or encumbering or dissipating them, thereby thwarting the effort to render the proceedings in which the defendant appears as null.

<sup>813</sup> See Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, (Student edition, Oxford University Press 2009) para 7.12. David John Sutton and Judith Grill, Russell on Arbitration (22nd edition, Sweet & Maxwell, 2003) Para 7-005 and 7-097. As a general rule, evidence should be preserved as soon as possible, because destroyed evidence cannot indicate the truths. If the tribunal is not established or the evidence is related to third parties, judicial assistance is needed. The assistance of the court covers all types of evidence such as documentary, photographic, and magnetic, as provided by s.44 of EAA 1996 and Article 27 of the Model Law.

<sup>814</sup> See *Starlight Shipping Co Ltd v Tai Ping insurance Co. Ltd* [2008] 1 Lloyd's Rep 525.

<sup>815</sup> See Lew Supra note 6 at 369-70, noting the lack of coercive powers held by the arbitration tribunals and the need to use courts in the compelling of witnesses and evidence. See *Permimasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508

which the court which has the power to make orders during the arbitral proceedings.<sup>816</sup> Municipal courts help in taking evidence,<sup>817</sup> and it should be noted that in order for any proceedings to take process under due process, evidence is a prima facie factor. Although the tribunal can grant provisional measures under s. 38 and s.39 of the Arbitration Act 1996, its scope in taking evidence is only limited to the parties to the agreement,<sup>818</sup> and it cannot compel third parties<sup>819</sup> for example banks that issue letters of credit, to provide witness statements to support such arbitral proceedings, since they are not party to the arbitration agreement.<sup>820</sup> Courts can compel a witness to attend proceedings<sup>821</sup> and failure to do so can be turned into contempt of court.<sup>822</sup> In addition, they have the power to freeze all assets during the proceedings,<sup>823</sup> as a mechanism of preserving the evidence,<sup>824</sup> or the sale of any goods subject to the proceedings,<sup>825</sup> to avoid tactics of delay of proceedings or even appoint a receiver in cases of liquidation of companies,<sup>826</sup> where power is not enshrined to the tribunal.<sup>827</sup> Indeed s. 42 details the relationship between the courts and arbitral tribunals with regard to provisional measures. In addition, the tribunal cannot grant all the provisional measures that are needed to protect the

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<sup>816</sup> See *OT Africa line Ltd v Magic Sports Wear Corp* [2005] EWCA 710. The main aim of such orders is to prevent a proliferation of litigation on procedural matters, and act with compliance with arbitral tribunals as demonstrated in *Commerce and Industry Insurance Co of Canada v Lloyds Underwriters* [2002] 1 Lloyd's Rep 219.

<sup>817</sup> See *Sabmiller Africa v East African Breweries Ltd* [2009] EWHC 3508, where Christopher LJ had to consider an application for a temporary injunction under s.44

<sup>818</sup> See Dicey, Morris and Collins, *The Conflict of Laws*, Vol2 (14<sup>th</sup> edition Sweet & Maxwell 2010) at 25.

<sup>819</sup> In cases of the disclosure of documents important to the proceedings, the tribunal has no coercive powers, to order documentary disclosure from other parties. However, if the party does not disclose the document of the relevant documents in possession of a third party, the tribunal has no power to compel them.

<sup>820</sup> See *Hiscox Underwriting V Dickson Manchester & Co Ltd* [2004] EWHC 479, where the Court made an order requesting the respondent's underwriting agents to hand over details of insurance policies which they had written on behalf of the claimant insurers, as the issue in arbitration was whether the respondent was seeking to place a renewal business with their own parent company rather than the claimant's and it was a matter of urgency for the claimant's to know how pending renewals were being treated.

<sup>821</sup> In general, the arbitral tribunal has no power to compel the attendance of the witness. Thus, the judicial assistance of the courts is needed. The English courts have this power under s.44 and also under Model Law article 27.

<sup>822</sup> See Supreme Court Act 1981 s.37.

<sup>823</sup> This helps to preserve the status quo, because sometimes, monetary compensation is not an adequate remedy for parties, for instance, the subject matter of the dispute may be about patents and this dispute may damage the reputation of the companies. In these circumstances, the specific performance of other parties may be the best remedy, as illustrated in *Chanel Tunnel Group v Balfour Beatty Construction Ltd* [1993] Ac 334.

<sup>824</sup> See EAA 1996s.44 (2) (b).

<sup>825</sup> Ibid 2 (d).

<sup>826</sup> See Sir Robert Megarry VC in *British Steel Corporation v Granada Television Ltd* [1981] 417 ChD( CA and HL ) at 423.

<sup>827</sup> Ibid (2) (e).

status quo,<sup>828</sup> for example, anti-suit injunctions,<sup>829</sup> as a remedial device to restrain a party from instituting proceedings in a foreign court.<sup>830</sup> Municipal courts order the defendant of the arbitration agreement to discontinue with the proceedings in another country in order to protect arbitration or to have matters referred to the tribunal.<sup>831</sup> The English approach in granting the anti-suit in protection of the arbitration has been developed in the USA, in the case of *XL V Insurance Ltd v Owens Corning*,<sup>832</sup> where Owens commenced proceedings against XL in Delaware seeking a declaration that it was liable to indemnify Owens for certain costs. XL then applied for an anti-suit injunction in England, although the arbitration clause did not expressly, on face value, provide that English law governed, and the court held that since the parties had chosen English law as the law governing the arbitration clause which was valid under English law, Toulson J, granted the anti-suit injunction order, pending arbitral proceedings.<sup>833</sup> An English court cannot, in the true sense, stop foreign proceedings as an anti-suit operating in persona against the respondent.<sup>834</sup> Hence English courts have no power over foreign courts but it may make orders against individuals who are subject to its jurisdiction. Hence, the main aim of the municipal courts, in granting an anti-suit injunction as a provisional remedy,<sup>835</sup> is to facilitate

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<sup>828</sup> See Lawrence Collins, Dicey, Morris and Collins *The Conflicts of Laws* (14th edit 2006) at 500-511. See Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) at 170-246., see Nygh and Martin Davies, *Conflict of Laws in Australia* (7th edition 2002) at 136-137.

<sup>829</sup> See *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2003] EWCA 938 at para 46, where the Court of Appeal held that even though the arbitration did not give an express power to the High Court to grant injunctions, it has the general power to grant such injunctions. See *Angelic Grace (The Golden Anne)* [1984] 2 Lloyd's Rep 640 at para 667, where the Court of Appeal held that; "where an injunction was sought to restrain a party from proceedings in a foreign court on breach of the arbitration agreement governed by English law, the English court ought not feel any different in granting the injunction provided it was sought promptly and before the foreign proceedings were too far advanced." Although an anti-suit injunction is a useful remedy, granted in common law states, where a failure to comply with a measure could potentially result in a finding of contempt of the Court under s.37 of the Supreme Court Act 1981, this has been considered as an indirect interference, since *West Tankers*. With the process of the foreign court by the European Court of Justice an anti-suit leads to conflicts of competence-competence, where the courts and tribunals are often cautious when ordering anti-suit injunctions because such interfere with parties' fundamental rights to free access to courts and in certain circumstances are necessary toll.

<sup>830</sup> See David Sutton, *Russell on Arbitration* (23 rd. edition 2007) at 105. See Thomas Raphael, *The Anti -suit Injunction*, Oxford Press (2009) at 5.

<sup>831</sup> See *Shell v Coral Oil*, [1999] 2 Lloyd's Rep 640 at 667. where Moore Bick J granted an injunction in order to strive to give effect to the intentions of the parties to the arbitration proceedings (party autonomy).

<sup>832</sup> [2001] 1 ALL ER Comm 530.

<sup>833</sup> See *Bankers Trust v Jakarta* [1999] ALL ER 314 where Creswell LJ Citing *Angelic Grace*, granted an anti-suit injunction on the grounds that there was a real risk or urgency that the developments and maintenance of an effective and productive world-wide market in derivatives and swaps might be undermined. See *Deutz AG v General Electric Company* 270 F.3d 144 at 161 (3rd Cir 2001).

<sup>834</sup> See Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgements* (2nd edition LLP London 1997).

<sup>835</sup> See Professor Jonathan Harris, *The European Legal Forum, Private International Law and International Civil Procedure, The Brussels 1 Regulation and the Re-Emergence of the English Common Law* 8<sup>th</sup> July/August 2008.

arbitral proceedings, not to dominate, and this can be evidenced in the comments of Atkins LJ, where he said that:

“the principle upon which an English Court acts in granting injunctions it is not that it seeks to assume jurisdiction over foreign courts, or that it seeks to criticise the foreign court or its procedure; the English court has regard to the personal attitude of the person subject to its jurisdiction has committed a breach of the covenant or acted in breach of some fiduciary or has in any way violated the principle of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgement obtained in such breach of such obligations, it will restrain him, not by issuing an edict to the foreign court, by saying that he is conscience bound not to enforce the judgement.”<sup>836</sup>

The author however, argues that seeking provisional measures under s.44 does not specifically include a provision to the effect that seeking recourse to the municipal court for provisional measures does not constitute a waiver of the arbitration agreement, however, it is recognised that the very existence of the section protects a party pursuant to this section from such an accusation. Furthermore, there are limits on the courts powers; for example s.44 (4) which provides that;

” if the case is not of urgency, the courts shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.”

Indeed pursuant to s.44 (4), therefore, unless the applicant party can prove urgency, the court can only act if either the arbitral tribunal or all the parties have agreed. In such circumstances, therefore, it is not possible for one party to apply without notice to the other party. This can be contrasted by s. 44 (3) which provides that:

“if the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.”

It should be noted that the scope of the tribunal in granting provisional measures is limited as provided in s.39, which provides that parties are free to agree that the tribunal shall have the

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<sup>836</sup>See *Ellerman Lines Ltd v Reed and Others* [1928] 2 Kb at 155.

power to order, on a provisional basis, any relief which it would have power to grant in a final award, namely the interim payment on account and costs. This limited scope hinders the arbitral process, in order to widen the scope of provisional measures,<sup>837</sup> the courts become involved<sup>838</sup> to grant provisional measures for example; freezing orders restraining a party from removing assets located within the jurisdiction<sup>839</sup> out of the country or from dealing with assets where they are within the jurisdiction or not.<sup>840</sup> The main purpose of such measures is to guard against the injustice of a defendant salting away or concealing his assets so as to deprive the claimant from being able to execute judgment if successful at a trial, quite simply there may no longer be any assets left to satisfy the judgement debt,<sup>841</sup> whilst the order is a powerful litigation tool, regarded by the courts as draconian in nature and will only be granted once the number of onerous conditions have been fulfilled.<sup>842</sup> With the rapid growth in economy, in technology and public policy, courts are called upon as international instruments to support the arbitral regime, and are relevant to award or grant provisional measures in support of prospective arbitration. The author further argues that most advanced economies have developed a sophisticated set of rules and mechanics for the identification and enforcement of promises in course of commerce, without a high level of assurance that such rules and mechanisms will operate effectively and efficiently, and the global market that has enhanced the welfare of so many people would simply not be possible. A successful market is the product of good government and the law implemented by municipal courts. A prominent scholar in economics said that:

“commerce and manufacturing can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of property, in which the faith of contracts is not supported to be

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<sup>837</sup> See Civil Jurisdiction and Judgements Act 1983 (Interim Relief) Order 1997 No.302. See Supreme Court Act 1983 s. 37 (3), see Regulation 2-3 of the County Court Remedies Regulations 1991 and CPR R.25.1 (f).

<sup>838</sup> See *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, where it recourse to national courts was prohibited, for this would run counter to the doctrinal writings which acknowledge the importance of the reinforcement which the courts can provide when the arbitral tribunal is powerless, as well as ensuring that the party who makes the application does not risk being held to have broken or waived the arbitration agreement.

<sup>839</sup> See *American Cyanamid v Ethicon Ltd* [1975] AC 396, which sets the legal test for any injunction to be granted by any court.

<sup>840</sup> See *Celtel SA v Roust Holdings Ltd* [2005] Civ 618 see *Blair LLC v Basel* [2009] EWHC 725.

<sup>841</sup> See *Software Core Ltd v Pathan* (2005) LTL 1/8/ 2005. See *Ninemias Corp v Travel* [1993] 1 WLR 1412, where Mustill J said that for any freezing orders to be granted there must be 50% chance of success.

<sup>842</sup> See Neuberger J in *Customs and Excise v Anchor Foods Ltd* [1991] 1 WLR 1139.

regularly employed in enforcing the payment of debts from all those who are able to pay in which there is a certain degree of confidence in the justice of government.”<sup>843</sup>

Adam Smith supports the notion that all forms of economic interaction are impeded by the degree to which personal property or assets’ rights are subject to unpredictable and arbitrary incursion so that people act on the basis of fear and suspicion rather than on the basis that others will act in a foreseeable manner and honour their promises. What the law delivers is a level of predictability or an enforcement mechanism so that economic actors can proceed with confidence that their reasonable expectations will be met. Indeed it is on this assertion that the courts may grant freezing orders<sup>844</sup> as an aid to claimants who would be at a loss and this would jeopardise arbitral agreement due to a lack of trust or a lack of coercive powers to grant certain measures.<sup>845</sup>

### **6.2.2 Courts involvement after the arbitral proceedings**

Finally, after an award has been rendered,<sup>846</sup> the courts may become involved in two places; firstly at the place of arbitration, when a party challenges and seeks to set aside the award or lodges an appeal against the award under the applicable arbitral laws or regime; and secondly, at the place of enforcement,<sup>847</sup> where the successful party seeks the recognition and enforcement of an award or provisional measures.<sup>848</sup> Although the principles as outlined above are normal and desirable, one should be aware that when a national court is asked to deal with any of these issues, it is in its simplest form a negation of the arbitration agreement, more particularly, a

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<sup>843</sup> See Adam Smith, “An Inquiry into the Nature and Causes of the Wealth of Nations”, (1952) Encyclopaedia Britannica In at 43.

<sup>844</sup> See Denning Judgement MR in *Siskina (owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 2 at para 258 G-H and 260 para Lord Diplock.

<sup>845</sup> See Denning Mr in *Bremer VulkanSchibau and Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] 2 WLR 141.

<sup>846</sup> See s. 68 of EAA 1996, an applicant can challenge the arbitral award on the grounds of serious illegality. The threshold for the challenge is high. This is perhaps best summarised by the DAC Report of 1996 on the Arbitration Bill reprinted in (1997) 13 Arb Int’l 1275 at 280, which described s.68 as “a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of arbitration that justice calls out for it to be corrected. “The court will not allow a party to challenge s.68, as demonstrated by Hamlen J who summarised the requirement for this section in *Abuja International hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm). The problem with s.68 is the wording of “substantial injustice” which is not defined, and there is no single test that English courts will apply in deciding whether or not it has been proved. See *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441, *Soeximex SA v Agropcorp International PTE Ltd* [2011] EWHC 2748.

<sup>847</sup> See s. 66 of EAA 1996.

<sup>848</sup> See s.726 of the Companies Act 1985 (1), the court has the jurisdiction to grant security for costs if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant’s costs if successful in his defence.

national court will inevitably and unsurprisingly take a particular approach and determine these issues in accordance with its own national law procedures.<sup>849</sup> More controversially, it may also be influenced by its parochial, legal, cultural, economic and political systems. The aspect of judicial intervention represents the most contestable interference in arbitral procedure. From a critical perspective, court interference at this stage necessarily entails an undermining of the meaning of arbitral awards, whereby parties are able to challenge, appeal or overturn the outcome of arbitration, with the finality and currency that such an award is a compromise.

In general, arbitrators are enjoined to be independent and impartial in the performance of their duties. Parties in arbitration therefore can challenge arbitrators who fail to observe this duty. Hence, municipal courts are called upon to set aside arbitral awards or provisional measures on the grounds that the tribunal was partial or biased. The court serves as a check on arbitrators, thereby preserving the integrity and confidence in the arbitral process. The author argues that the courts generally exercise this supervisory power on good grounds only.

The fact that arbitration is binding and final can only be affirmed by the courts. The recognition and enforcement of awards by courts creates *res judicata* issue estoppel. If a losing party fails to satisfy the award, the victorious party would invoke the powers of the court to enforce the award just like a court judgement. With the signing of the New York Convention, courts are generally inclined to enforce arbitral awards subject only to procedural errors and issues of public policy, particularly where the contract culminating in the award is founded on criminality.<sup>850</sup> For example; in the case of *Soleimany v Soleimany*,<sup>851</sup> the English court refused to enforce an award on the grounds of public policy because the contract of the parties was found on tax evasion under Iranian laws. This research reveals that with regard to the scope of the courts intervention in arbitration, there is universal consensus supporting the courts' role in the recognition and enforcing of provisional measures or arbitral awards, without which arbitration will lack efficacy. The courts also preserve the integrity of the arbitral process, by setting aside awards on certain grounds, when such awards are challenged for example, where a party was not given equal opportunity to advance its case. Arbitration is private in nature, as such parties will need to

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<sup>849</sup> See DAC Report 1996 at 273.

<sup>850</sup> See the decision in the case of *the Island territory of Curaacao v Solitron Device Inc* 556 F. Supp 1 (USDC SDNY 19730 AND *Ghirados v Minister of High ways* (BC) 1996 DLR at 469.

<sup>851</sup> [1999] QB 785.

enforce the arbitration agreement and also to enforce arbitral awards. The reality therefore, is that without the courts' support, the arbitral process cannot be effective. This explains why some countries are not attracted to international arbitration, for the simple reason that their courts are not supportive to arbitration. It was for this reason that compelled Belgium to review its policy on court intervention in arbitral proceedings in 1998. The fact that without the courts, arbitration will be ineffective is buttressed by the example from Pakistan, which is less developed in international arbitration.<sup>852</sup> The increasing growth in international trade and investments among states and private companies, demanded international commercial arbitration to be more effective, a way out is reforming national courts statutes on arbitration and sensitizing national courts to support the arbitral process, without which arbitration will remain ineffective, particularly in developing economies. Indeed the role of courts was addressed by Justice Sundaresh MenonSc, then Attorney-General for Singapore at the opening Plenary session of the ICCA conference in Singapore June 2012, in his masterly paper "International Arbitration; The Coming of New Age for Asia and Elsewhere."<sup>853</sup> It should, however, be noted that English courts have supported arbitration and they have limited their historical involvement, as demonstrated by the leading case for arbitral jurisdiction to grant provisional measures in *Channel Tunnel v Balfour Construction Ltd.*<sup>854</sup> The author argues that judicial interference should be kept at a minimum and should only get involved where the order is necessary and appropriate, in order to maintain the doctrine of party autonomy.

### **6.2.3 Relationship between Courts and Arbitral Tribunals**

The relationship between courts and arbitral tribunals is termed as concurrent jurisdiction. Under the concurrent jurisdiction, if there is a request to a court for a provisional measure, the case remains with the tribunal in order to be compatible with the arbitration agreement.

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<sup>852</sup> See Hunter on Arbitration at 412-413.

<sup>853</sup> Where he said; "that the switch from initial judicial scepticism to the establishment of an entire framework built upon supporting international arbitration and its enforcement has been nothing short of remarkable. We have come a long way indeed. However, we cannot afford to rest on our laurels. The worrying trends I have thus far described have coincided with, and may even be the reasons for recent signs of tension between courts and arbitration." Justice Menon identified a few recent problems, including the decisions of the Supreme Court of India for example; *Bhatia International v Bulk Trading SA* (2002) 4 SCC, *PT Prim International developments v Kempinski Hotels SA* [2011] 4 SLR 633.

<sup>854</sup>[1993] AC 33 at 657.



Arbitration is an interface between arbitral tribunals and municipal courts. The relationship between courts and tribunals does not depend on a simple link, but depends on a number of relationships arising from theories, arbitration enactments and common law. The relationship mainly promotes the doctrine of party autonomy and is given the utmost significance. In most circumstances, for the court to order any provisional measures in support of the process, it has to make sure all arbitral means of granting a particular measure are exhausted.<sup>855</sup> Due to comity which refers to mutual courtesy or civility, in private international law, there is a family relationship between courts and tribunals. Hence, each owe each other reciprocal respect,<sup>856</sup> sympathy and reference where appropriate,<sup>857</sup> in order to facilitate arbitral proceedings.<sup>858</sup> The effectiveness and good administration of justice are the determining balancing factors for reconciling tension between courts and tribunals.

Doctrines have been advanced in support of concurrent powers of courts and arbitral tribunals, namely the doctrine of co-operation and coordination, the doctrine of freedom of choice approach, the doctrine of complimentary and subsidiarity, and the doctrine of compatibility.

### **6.2.3.1 The doctrine of co-operation**

The role allocated to courts under the concept of co-operation is one of assistance.<sup>859</sup> International conventions and national laws generally provide circumstances when or where the courts intervene in arbitral proceedings, in order to make the process effective. For example, courts intervene in setting aside an award and refusal of recognition and enforcement. Furthermore, international legislation specifies, in most cases, circumstances where the assistance of the courts could lend to arbitration. The grant of interim measures by courts is among those circumstances.<sup>860</sup> Once judicial involvement in support of arbitration is accepted, a need to regulate the co-existence of jurisdictions of judicial authorities and arbitrators arises. This is because both jurisdictions are generally similar or identical, and they sometimes overlap and may even be in conflict. Due to such overlapping and the possibility of conflict of concurrent

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<sup>855</sup>See EAA 1996 s. 44.

<sup>856</sup>See *Ellerman Lines Ltd v Read and Others* [1982] 2 KB at 155.

<sup>857</sup>See Blanch “Interim Measures in International Arbitration and the UK Courts - The Current Position,” *International Arbitral Law Review* (2003) at 161.

<sup>858</sup>See David Sutton and Judith Gill, *Russel on Arbitration* (23<sup>rd</sup> edition Sweet & Maxwell 2007) at 98.

<sup>859</sup>See *F Ltd v M Ltd* [2009] EWHC 275.

<sup>860</sup>See Catherine Bellsham-Revell, *Olswang LLP, International Arbitration Newsletter Summer 2009*.

jurisdiction, the coordination of the powers of courts and arbitrators is felt necessary. It should however, be noted that in practice, there is no effective communication to the arbitral tribunal to promote that cooperation, and to make it worse, arbitral rules and enactments are silent on this subject. Hence, this sets flames for reconciliation between the two jurisdictions in dealing with provisional measures, instead of the good administration of justice.

#### **6.2.3.2 The doctrine of coordination**

The concept of coordination recognizes the overwhelming need for cooperation and is in line with the principles of legal certainty and protection. Coordination contributes to the effectiveness of arbitration and the effectiveness of justice. It should be noted that national laws do not regulate this principle of coordination between the arbitration and judicial jurisdiction.

Only a few national laws and arbitral rules deal with methods of coordination. Under some of those laws, parties are free to either apply to courts or the tribunal, the choice is open. This freedom of choice approach is, however, against the doctrine of party autonomy and is a free invitation for abuse. Thus, such an approach hinders the effectiveness of arbitration. So, in order to make arbitration more effective and to avoid any such invitation, some other laws and rules are envisaged for restricted access to courts. Under the restricted approach, the grant of interim measures by courts is only allowed in appropriate circumstances. The courts' role is described as complementary, prior to the appointment of the tribunal and subsidiary after. The courts, in exercising this authority, must take utmost caution when the balance plainly favours the grant of relief. The grant of security for costs and provisional payment should at all times be left to the arbitral tribunal, as there is no immediate urgency in regard of such measures and assessment of the likelihood of success on the merits and the need for those measures are better made by the tribunal. It should, however, be noted that courts should endeavour to do everything in their power to prevent the abuse of either coordination methods. The parties have the power to exclude the courts' jurisdiction.

#### **6.2.3.3 The freedom of choice approach**

Under this doctrine, the party is at liberty or will to choose a mechanism for the dispute resolution, either the tribunal or the courts. Under the free choice approach, there are no

restrictions imposed on court access.<sup>861</sup>The general approach in many states,<sup>862</sup> which accepts concurrent jurisdiction, is that parties are, unless otherwise agreed, given both a free choice prior to the appointment of the arbitrators or during arbitral proceedings. Parties are free to make an application to either the arbitral tribunal or the courts' jurisdiction with no hindrances at any given time. The freedom of choice approach should be approached with great care, when a party is given a free choice to determine the forum to apply for any provisional measures, and such a freedom may be susceptible to abuse. A request for such a measure could be used as a procedural weapon. Courts should be aware of the possibility of abuse, and they should not accept any request where the courts find that the request is not genuine or urgent, and that its aim is at gaining tactical advantage over a respondent. The freedom of choice approach, if accepted in full, intervenes with the principle of party autonomy and the parties choice of arbitration over litigation. The party autonomy doctrine demands prejudice towards arbitral jurisdiction when parties agree that their disputes will be solved according to the arbitration agreement, and such an agreement must be respected. Parties can opt in, by agreement, to have judicial authorities' assistance in regard to provisional measures. The parties are at liberty to exclude the jurisdiction of arbitral tribunal in that regard. Otherwise the prejudice should be in favour of the arbitral jurisdiction. In fact, the degree of equilibrium between party autonomy and the judicial courts' involvement in arbitral proceedings should be on the side of the former. The intervention of judicial courts, should only be accepted where the exercise of the arbitral tribunal to grant provisional measures is ineffective or such power is not or has exhaustively been used by the party in the arbitration agreement. The principle of priority is very much taken into account by international arbitral rules, for example; the ICC Rules Article 23 (2) permits court support where necessary, however, it is not explicitly clear how the power should be limited or how it should be used.

The intervention of the courts is justifiable for maintaining effective legal protection, and thus the effective distribution of justice. Parties are advised to follow the common law approach in choosing a forum to make their provisional measures' applications. The freedom of choice should not be abused by the parties otherwise they might be held liable for damages arising from

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<sup>861</sup> See KohlruszZ,Okanyi,Hungary;The International Comparative Legal guide to International Arbitration, 2007,London 2007 at 194. See s.1041 (2) of the Germany CCP and s.593 (3) CPC.

<sup>862</sup> See Poland Article 730 ( 1) CCP, Ukraine Article 9 and 17.

such abuse. It should, however, be noted that the ICC Rules favour or allocate jurisdiction to only the tribunal. Thus, the arrangement is valid where there is exclusion or limitation of the courts, on the grounds that once the arbitrators have seized the file, applications for interim measures should be addressed to them. The principle of choice needs re-addressing by giving the party autonomy to choose what or where to go when they have disputes, which shows a negative manner. The author recommends that the mechanism should explicitly state that the jurisdiction of the tribunal should grant provisional measures, be very limited and that an application to a court for a provisional remedy should be addressed to an arbitral tribunal in order to maintain the doctrine of party autonomy. In addition, the freedom of choice approach is an open invitation for abuse and against the doctrine of party autonomy, hence the approach should not be adopted.

#### **6.2.3.4 The doctrine of complimentary approach**

Under the doctrine of complimentary approach, national laws or even arbitral rules, support or accept the support of the courts in arbitral proceedings, especially prior to the constitution of the arbitral tribunal. The role of the courts, in this regard, is complimentary. This means that the courts' role is to support the arbitral process by adding some powers to enforce the proceedings. An arbitrator has no direct powers to invoke the process by which a court enforces compliance with its own orders, and accordingly a number of remedies, which are unavailable to the arbitrators, are left vested in the courts to be used in aid of the arbitral proceedings. The courts need to consider the objectives and aims of the parties when coming to arbitration, in order to strike a balance of justice.

The powers which support arbitral proceedings, for example, injunctive relief, such as freezing orders, anti-suit injunctions, and freezing orders to preserve the status-quo and the power to secure attendance of a witness. The question of whether to resort to the supplementary powers of the English courts can be excluded by an agreement between the parties which presents fewer difficulties than in the case of coercive remedies. If the judicial courts have jurisdiction over the respondent, in accordance with the conflict of the rules of the laws, then the jurisdiction of the courts' provisional measures cannot be excluded by the arbitral agreement. The courts' discretion of whether or not to exercise these remedies will rarely, if ever, be exercised if the parties have agreed not to invoke the powers. The courts' role should be advanced or permitted

only at the pre-formation stage, where it is urgent and the power of the arbitral tribunal is limited in scope or paralysed. Hence, there should not be a total exclusion of the courts, since it maintains the party autonomy doctrine, where after the formation, the tribunal takes over the proceedings, and the courts' decision is not binding to the tribunal at this stage.

#### **6.2.3.5 The doctrine of subsidiarity**

After the appointment of the tribunal, the role of the court is subsidiary. The court subsidiarity model, in which interim measures should, in the first place, be applied for before the arbitrator, and court intervention is the last resort, from the English Arbitration Act 1996, it is not presented in Central and Eastern Europe. Arbitrators have the priority to deal with provisional measure requests and where the circumstances are not appropriate for them to grant the sought orders, then only the national courts step in and provide assistance. The role of the courts in the arbitral proceedings remains subsidiary if arbitrating parties previously agreed for one of the emergency measure mechanisms. In such a case, a measure could be made to a party determined authority, and there is generally no need for courts to compliment. It should be noted that England has enumerated both tribunal and court provisional measures, however, court ordered measures appear to be broader than those granted by the tribunal, for example; only courts have the power to grant *ex parte mareva injunctions*. It should be noted also the arbitral power has over turned the court's powers in regard to the granting of security for costs. All judicial powers, in regard to any sought measures, are limited by the tribunal as provided by s. 44 (4) and court powers can cease under s.44 (6).

The English Arbitration Act needs to be interpreted purposively, for example s.44 contains the most elaborate rule on court assistance out of the laws surveyed. In the author's view, s.44 (5) provides assistance to the courts which can be appropriate where the arbitral powers are used exhaustively or unable to perform, for example, prior to the formation of the tribunal. Courts also have to consider the urgency of a case in order to provide their assistance, for example, in case of Anton Pillar orders, where a search is required to get evidence of the case in question. Where there is no clear urgency, even if the courts have jurisdiction, they may decline to order any remedy sought by the party to the arbitration agreement as demonstrated by Mustill LJ in *Channel Tunnel v Balfour*. Where there is no urgency, in accordance with s. 44(4), a party can apply to a court upon the notice of other parties and the arbitral tribunal. Indeed, permission must

be provided by the parties for the court to intervene, which means that this section was enacted in order to prevent courts from interfering with or usurping the arbitral proceedings. According to s.44 (5), the courts shall grant an interim measure only if or to the extent that the tribunal or the person vested by the power is unable, for the time being, to act effectively. This provision and reference to a complementary mechanism should be seen as a change to the role of the courts in the pre-formation stage from the subsidiary to complimentary.

#### **6.2.3.6 The doctrine of compatibility**

A request for a judicial provisional measure before, during or after the proceedings of the arbitral proceedings is compatible with the arbitration agreement. One aspect of the doctrine of compatibility reflects dual principles,<sup>863</sup> which are, in fact, a logical conclusion of acceptance of concurrent jurisdictions, meaning that tribunals and courts work together in order to effect the arbitral process. This is demonstrated by the revised edition of UNCITRAL Model Law 2006, Article 17 (J) which provides that:

“national courts shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in a territory of this state, as it has in relation to proceedings, in courts. The courts shall exercise such powers in accordance with its own procedures in consideration of the specific features of international arbitration.”

The powers of the court may not be exclusive; however, the Model Law goes on to provide that arbitrators may also grant interim measures of protection. The irony is that the Model Law does not specify explicitly in any way what these may be, for example Article 17 of the Model Law provides that:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral

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<sup>863</sup>See EAA 1996 s.44, 42, 43, 45, and 66 in regard to the enforcement of the provisional measures or awards. All these provisions adduce the mutual respect between the two jurisdictions in regard to arbitral proceedings.

tribunal may require any part to provide appropriate security in connection with such measures.”

Thus, there may be a choice; both the arbitrators and the courts may be empowered to grant interim measures of protection. In this situation, it is not always easy for a party to go to arbitration to determine which to approach- the arbitrators or the courts. The party may wish to approach the tribunal but finds it pointless, either because the tribunal is not in existence, or because it does not possess coercive powers to affect an enforcement order in regard to the contemplated measure.

Any request by a party to arbitration does not waive the rights of a party subject to an arbitration agreement, nor does the existence of an arbitration agreement prevent a judicial authority from granting provisional measures. It should be noted that despite the initiation of judicial proceedings or a request, the merits of the case in question remains within the arbitration domain. This is supported by the Model Law, which championed the English Arbitration Act 1996, which provides that:

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

As to the judicial grant of provisional measures, national laws and arbitral rules generally grant or accept that an arbitration agreement does not hinder the granting of provisional measures by judicial courts. Court intervention in arbitral proceedings does not hinder the granting of provisional measures but aids the effectiveness of the arbitral process. The unavailability of judicial courts in the arbitral process would normally be one of the most significant reasons for parties not to choose arbitration as a dispute mechanism on the grounds that when they face the need for coercive powers they have no back up for supporting the process, for example where there is the dissipation of property or where there are parallel proceedings. It should, however, be noted that there is some criticism in the issue of judicial courts’ intervention, mainly demonstrated by New York Convention Article II(3), which provides that:

“The court of a contracting state, when seized of an action in a matter respect of which the parties have made an agreement within the meaning of this article, shall at the request of the parties refer parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

The New York Convention contains both an explicit obligation and an implied prohibition: an explicit obligation directing courts to refer to arbitration of the parties to an arbitration agreement; an implied prohibition for courts to take measures incompatible with the said obligation. This prohibition marks the maximum degree of legitimate court intervention. It should, however, be noted that it is not a precise limit. Whether a court measure is or is not compatible with the obligation to refer the parties to arbitration depends on the interpretation of the quoted provision, which may vary considerably among the courts before one can assert where the maximum degree of court intervention on a particular jurisdiction lies. Still, even within one jurisdiction, courts may disagree on which court measure is contrary to their duty under the New York Convention to refer the parties to arbitration.

### **6.3 Limitations of court involvement in arbitral proceedings**

The relationship between the courts and the arbitral tribunals is based on forced cohabitation; in the end this creates tension,<sup>864</sup> which is unavoidable.<sup>865</sup> Due to the concurrent jurisdiction of the courts and tribunals over interim measures, there is a risk of conflicting decisions for interim measures, where a party may be tempted to file a simultaneous application for interim measures before the court and the tribunal, or after failing to obtain an interim measure from the court, a party may apply the same relief from the tribunal in the hope of securing a more favourable ruling or vice-versa.<sup>866</sup>

Mustill LJ in *Coppe Levalin v Ken fertilizers and Chemicals* said that:

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<sup>864</sup>*Lake Airways Ltd v Sabena* (731. F.2d 909 at 926, quote from Elliot, where the USA Court held that granting an anti-suit injunction creates tension between the two jurisdictions.

<sup>865</sup> See EAA s.1 that precludes courts in arbitral proceedings. See Article 17 of the Model Law.

<sup>866</sup> See *ICC Order of 2 April 2002 in (2003) ASA Bull. 810*, where it was held that a party should not be given a second chance to obtain measures from a tribunal, where he had applied unsuccessfully for an identical interim measure before a court. The application was based on the same facts and evidence as the one in the court. The tribunal in this order held that an interim measure would be appropriate if the new facts had arisen since the decision of the court, or new evidence had become available. See Jochen A. Frowe in *American Journal of Int'l Law* Vol. 107 No.2 2013.



“There is plainly a tension here, on the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnational leans against the involvement of the mechanism of the state through a medium of municipal court. On the other side, there is a plain fact, palatable or not, that this is only a court possessing coercive powers which would rescue the arbitration if it is in danger of foundering.”<sup>867</sup>

### **6.3.1 Limitation under the New York Convention 1958**

On an international perspective, some jurisdictions have given their view that court involvement in arbitral proceedings is precluded.<sup>868</sup> For example, the USA courts take the view that the courts have a ‘duty to refer the parties’ to arbitration under the New York Convention. Article II (3) of the Convention provides that:

“the court of a contracting state, when seized of an action in a matter respect of which the parties have made an agreement within the meaning of this article, shall at the request of the parties to refer parties to arbitration, unless it finds that the said agreement is null and void, or inoperative or incapable of being performed.”

The New York Convention contains both explicit obligation and an implied prohibition. An explicit obligation is an order directing courts to refer parties to an arbitration agreement, while as an implied prohibition, courts take measures incompatible with the said obligation. This prohibition to some lawyers provides the maximum degree of court intervention.<sup>869</sup> It should, however, be noted that it is not a precise limit. On such grounds, the author discusses whether a court measures is or is not compatible with the obligation to refer the parties to arbitration depending on the interpretation of the quoted provision, which may vary considerably among the courts before one can assert where the maximum degree of court intervention on a particular section lies. Still, even within one jurisdiction, courts may disagree on which court measures are central to their duty under the New York Convention, and refer the parties to arbitration.

The ambiguity of this provision was given effect in two leading American cases namely; *McCreary Tire Rubber Co V CEAT SPA*,<sup>870</sup> and *Caroline Power & Light Co v Uranex*,<sup>871</sup> which

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<sup>867</sup>[1994] 2 Lloyd’s Rep at para 116.

<sup>868</sup> See *Premium Nafta products ltd v Fill Shipping Company* [2007] UKHL 40 at para 19 and 40

<sup>869</sup>See New York Convention Article 11-VI.

<sup>870</sup>501 f.2d 1032 (3rd Cir 1974).

was followed by the House of Lords in the leading case of the *Channel Tunnel V Balfour Beatty Construction Ltd.*<sup>872</sup>

In *McCreary*, a dispute arose which related to a breach of an exclusive distribution agreement subject to arbitration agreement, between *McCreary*, a Pennsylvania Corporation and *CEAT*, an Italian Corporation under the ICC Rules in Brussels ( Belgium). *McCreary* attempted to frustrate the arbitration agreement and imitated??a suit. The court of Appeal for the Third Circuit in Philadelphia was called to rule on the compatibility of a pre-trial attachment under the New York Convention Article.<sup>873</sup> The court declared that quite possibly a foreign attachment might be available for the enforcement of an arbitration award. This does not seek to enforce an arbitration award by foreign attachments. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the New York Convention, if one party in the agreement objects to it. The court further interpreted the New York Convention as referring parties to arbitration, rather than stay the trial of the action. The court also held that the New York Convention forbids the courts of contracting states from entering a suit which violates an agreement to arbitrate. Further, the Court of Appeal provided that the obvious purpose of the enactment was permitting the removal of all cases falling within the terms of the treaty, to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with the purpose.

The second case that was brought to the attention of interpretation of the New York convention (Article 11 93) is *Carolina Power* which gave a contrasting decision to *McCreary*. In the *Carolina* case, there was contract between *Carolina power*, a North Carolina public utility company and *Uranex*, a French company selling uranium concentrates. With an increase in uranium, a French company ceased delivering uranium according to the agreed arbitration agreement. *Carolina power* attached a debt owed to *Uranex*, for the satisfaction of a future award in its favour. The Federal District Court of the Northern District of California had to determine the same issue as the court in *McCreary*, and it ruled exactly the opposite; the Convention and implementation statutes contained no reference to a prejudgment attachment, and provided little guidance in this controversy. Article II of the Convention states only that:

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<sup>871</sup> 451 F. Supp 1044 ( ND Cal. 1977).

<sup>872</sup> [1993]AC 33.

<sup>873</sup> New York Convention Article II (3).

“a court of a contracting state, ‘shall at the request of one of the parties, refer the parties to arbitration.’”

To implement this aspect of the Convention, s. 206 of title 9 provides that:

“a court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place between therein provided for, whether that place is within or without the United States.”

The language of this provision provides little apparent support for defendant’s argument. This case does not find McCreary convincing, as the convention does not exclude pre-judgment attachments. The analysis of these two cases created a relay race, tension and a suggestion that arbitration is private and courts should keep out.

From these two cases, the minimum degree of court intervention under the New York Convention is established both by the explicit order of Article II (3) and by Article III. According to those provisions, courts are under the following obligations;

To refer the parties to arbitration at the request of one of them as provided by Article II (3) or to recognize and enforce a foreign arbitral award as provided by Article III of the convention. In between the maximum and minimum degree of court intervention, the New York Convention remains silent, except for some rules concerning setting aside the award.

From these two cases the minimum degree of court intervention under the New York Convention is established both by the explicit order of Article II (3) and by Article III. According to those provisions, courts are under the obligation; to refer the parties to arbitration at the request of one of them as provided by Article II (3) or to recognize and enforce a foreign arbitral award as provided by Article III of the convention. In between the maximum and minimum degree of court intervention, the New York Convention remains silent, except for some rules concerning setting aside the award.

The English courts have interpreted the New York Convention, Article II (3) and the two American cases above in *Channel Tunnel v Balfour Beatty*,<sup>874</sup> where a contract contained twelve contractors, all French and British. The contract contained an arbitration clause, to refer disputes

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<sup>874</sup>[1993] AC 33.

to an arbitral tribunal when a dispute arises. A dispute arose, about variation order on payment regarding a cooling system. Upon the contractors' threat not to perform, the Channel tunnel made a request for an injunction to prevent the contractors from suspending work. The case went to House of Lords on the issue of whether a court had the power to order interim measures when the case fell within the New York convention and arbitration. Mustill LJ, with other Lords was in agreement and expressly disagreed with the Court of Appeal interpretation of Article II (3) of the New York Convention. Mustill LJ stated that:

“the purpose is not to encroach on the procedure powers of the arbitrators but to reinforce them and to render a more effective decision at which the arbitration will ultimately arrive on the substance of the case of dispute.”<sup>875</sup>

Furthermore, Raymond, an experienced lawyer in international arbitration, has expressed his view on Channel Tunnel and said that:

“Over the last 120 years the development of international arbitration has been marked by an obvious tendency to limit the possibilities of court intervention in the course of arbitration. Thus England abolished the special case and curtailed the powers of the courts even in support of arbitration. It may be that the tide is now turning; it is increasingly realised in international arbitration circles that the intervention of the judicial courts is not necessarily disruptive of the arbitration. It may be equally being definitely supportive, in the best English tradition.”<sup>876</sup>

In such circumstances as the case above, this case may be interpreted, to limit any judicial intervention in arbitral proceedings even in cases of urgency. It seems that where there is an agreement to arbitrate, and particularly where there is an arbitration clause, judges will often be reluctant to interfere in arbitral proceedings, in order to respect the doctrine of party autonomy, which sets the foundation of arbitration. It should be noted that although tension exists at times, it promotes the process effectively for example; in cases of electronic transfer,<sup>877</sup> done by third parties, such as banks, who issue the letters of credit or bank guarantees, which may legally hold goods in dispute or under subcontracts, and the courts are called upon to save the arbitral

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<sup>875</sup>Ibid para 657.

<sup>876</sup> See Alan Redfern Hunter, Arbitration and the Courts: Texas International Journal Vol.30 No.7 (1995) at 83-86.

<sup>877</sup>See *JSC BTA Bank v Ablyazov* [2012] EWHC 1819.

process, however, such power should be exercised cautiously and carefully by judges to avoid the effect.

### 6.3.2 The Brussels 1 Regulation and Arbitration Provisional Measures

Since the accession of England to the European Union,<sup>878</sup> the power of the English courts to grant provisional measures became limited.<sup>879</sup> The Brussels convention on Jurisdiction and the enforcement of judgements in civil and commercial matters (The Brussels Convention) was agreed on 27 September 1968.<sup>880</sup> In compliance with the Directive, England originally, enacted the Civil Jurisdiction and Judgement Act,<sup>881</sup> to support proceedings pending Brussels or Lugano contracting state. The applicability of the provision was later extended to proceedings outside the scope of the convention.<sup>882</sup> It has become increasingly common in recent years for claimants to use worldwide freezing orders for the purpose of attempting to block assets being hidden or dissipated. However, with the replacement of the Lugano convention with Brussels 1 Regulation which ushered in Council regulation 44/2001 On Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters,<sup>883</sup> the English power to order provisional measures, mainly freezing, ex parte<sup>884</sup> and anti-suit injunctions, in support of arbitral proceedings was ambushed.<sup>885</sup>

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<sup>878</sup> See European Communities Act 1978.

<sup>879</sup> See A Briggs and Rees, *Civil Jurisdiction and Judgements* (5<sup>th</sup> edition Infoma Law 2009) para 7.04.

<sup>880</sup> See OJL 299, 31.12.1972 at 32. OJL 304, 30.10.1978 at p1, OJL C15, 15.1.1997.

<sup>881</sup> See Civil Jurisdiction Act and Judgement Act 1980.

<sup>882</sup> See *Allianz SPA (Formerly Riunione Adriatica di Sicurtà SPA) v West Tankers Inc* [2009] 1 ALL ER (Comm) 435.

<sup>883</sup> See C. Pierret, Council Regulation (EC) 44/2001 of 22 December 2000, official Journal of the European Communities OJ 376, 28.12.99 at p1. See OJ C 117, 26.4.2000.

<sup>884</sup> According to the CJEC case 125/79, 21 May 1980, Article 25 of the Lugano Convention, ex parte measures are not enforceable if they were rendered ex parte.

<sup>885</sup> See The ruling of *West Tanker*, which invaded the jurisdiction of arbitration which was not in the first place?? in the convention pre -1968.

### 6.3.2.1 The Domicile Technicalities under Brussels

Imagine that a Swedish Company is contemplating suing a company domiciled in Germany-Berlin for the payment of some goods delivered in Germany, under a contract between the two companies. As the defendant is domiciled in Germany, which is also the place of performance of the contract, there is barely any doubt that the German courts would have a jurisdiction pursuant to the Brussels Regulation,<sup>886</sup> at least in the absence of a valid choice of court clause in the contract providing otherwise. In fact, German courts are probably the only courts in the EU that are competent to make decisions on the substance of the dispute. However, let us assume the assets of the German defendant company consist mainly of a bank account with an English bank in London. In accordance with Brussels 1, the forthcoming German judgement on the substance of the dispute will almost certainly be recognized and enforceable within the whole of the EU, including England, yet the Swedish company fears that by the time the final judgement has been made, the account may be empty, and all the money has been consumed or dissipated to an offshore account in an exotic country where German judgements are neither recognised, nor enforced. In view of this risk, the German court can grant provisional measures pursuant to German law., such as freezing the account and the measures will be enforced in England.

The Brussels Regulation only applies where the defendant is domiciled,<sup>887</sup> in an EU member state.<sup>888</sup> One of the adversaries of the Regulation is Article 27, which requires a member state court to stay its proceedings if another state court has been first seized of proceedings involving the same cause of action and between the same parties and to allow the court first seized to determine whether or not it has jurisdiction.<sup>889</sup> The ability of the parties to determine the court that shall decide disputes arising between them is of considerable importance to the international commercial community however, the current relationship between Article 23, which gives effect to parties choice of court agreement and Article 27, which contains “*lis pendens rule*”, undermines the efficacy of the choice of court agreements in an EU context. This allows a party

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<sup>886</sup>Council Regulation 44/2001 of 22 December 2000 on the Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters [2001]OJ L 12/1.

<sup>887</sup> See *Owusu v Jackson* CJEU C-281/02/ *Owusu v Jackson* [2005] ECR I-1383. As a result there is uncertainty whether a member state court must also take jurisdiction in accordance with Brussels I Regulation, even where the parties have entered into a choice of court agreements in favour of a non EU-Court or the subject matter of a dispute.

<sup>888</sup>See Article 2,5 and 6 or Article 9 (2), 15 (2) and 18 (2) on? Article 23 subject to matters of member states under Article 22.

<sup>889</sup>See CJEU,C-116/02 *Erich Gasser GmbH v MisatSrl*[2005] QB1.

to obstruct the bringing of proceedings in the chosen member state court by bringing torpedo action to another member state (albeit in violation of the choice court agreement). This problem is magnified where such violating procedures are brought in a member state court whose procedural rules do not provide for the determination of jurisdiction as a preliminary issue or in a speedy manner.

It should be noted that a difficulty arises as to the relationship between Article 27 and 22. The CJEU in *Overseas Union Insurance v New Hampshire Insurance*,<sup>890</sup> left open the question of whether the *lis pendens* rule also applied where the court first seized had exclusive jurisdiction.<sup>891</sup> It was further decided in *GAT v Luk*,<sup>892</sup> that where a party in a patent action raises the issue of validity of the patent by way of defence, this will trigger the exclusive jurisdiction.<sup>893</sup> The two cases raise the question of whether there is an exception to the *lis pendens* rule where the court first seized has exclusive jurisdiction under Article 22 (4). This would mean that a defendant in an infringement action could divert any proceedings to the courts of the member states in which the patent right was registered by simply raising the validity defence. Indeed, the way Brussels operates theirs has too much scope for prospective defendants to manipulate it and obstruct any infringement action against them.

### **6.3.2.2 Interface between Brussels 1 Regulation and Arbitration**

Although Article 1 (2) (d) provides for the exclusion of arbitration from the scope of Brussels, the delineation of this exclusion has recently become blurred as a result of the CJEU decision in *Allianz SPA v West Tankers*.<sup>894</sup> This decision has been criticised in England and widely in the international arbitration community and has significantly undermined the efficacy of arbitration agreements which had, until then, been considered to be less vulnerable to *torpedo* actions than the choice of court agreements. The decision raised uncertainty as to how far arbitration is or should in fact be excluded from the scope of Brussels Regulation. *West Tankers* determined that a member state court has jurisdiction to decide upon the existence, validity and scope of an

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<sup>890</sup> See *CJEU C-351/89 Overseas Union Insurance Ltd v New Hampshire Insurance Co.* [1991] ECR I-3317.

<sup>891</sup> See Brussels Regulation Article 24.

<sup>892</sup> *CJEU C-4/03 GAT v Luk* [2006] ECR I-6509.

<sup>893</sup> *Ibid* Article 24 (4).

<sup>894</sup> *CJEU, C-185/07 Allianz SPA v West Tankers* [2009].

arbitration agreement by way of incidental or preliminary issue where otherwise the substance of the dispute falls within the scope of Brussels 1.

Consequently, the CJEU considered it to be underpinning the Brussels 1 Regime for the member state court at the seat of the arbitration to grant an anti-suit injunction restraining a party from commencing or continuing court proceedings in breach of an arbitration agreement.<sup>895</sup> Following on from *West Tankers*, the English Court of Appeal in *Endesa Generation*,<sup>896</sup> was compelled to decide that the judgement of a member state court dealing with the incidental question of whether an arbitration clause had been validly incorporated into an agreement was covered by the Brussels Regulation and therefore binding on the member states' court at the seat of the arbitration proceedings dealing with the same issue in normal arbitration proceedings. Indeed, this leads to a peculiar result that a judgement dealing with the efficacy of an arbitration agreement as an incidental issue in normal court proceedings is binding on the court at the seat of arbitration, where a similar judgement obtained from a court in context of arbitration (which falls outside of the Brussels Regulation) would not need to be recognized by other member states under Brussels. The author argues that the decision in *West Tankers* gives rise to an increased risk of a parallel court and arbitration proceedings and, consequently, of inconsistent judgements and arbitration awards.

#### **6.3.2.4 Brussels 42/2001 and arbitral provisional measures**

There are only two provisions under the Council Regulation 42/2201, which address the issue of provisional measures, which are Article 31 and 47.

Article 31 provides that;

“application may be made to the courts of member states for such provisional measures, including protective measures as may be available under the law of that state, even if, under this Regulation, the courts of other members state have jurisdiction as to the substance of the matter.”<sup>897</sup>

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<sup>895</sup>See Robert Merkin, the Anti-suit Relief foreign Proceedings Disregarding an Arbitration Clause, *Arbitration Law Monthly*, May 2007, Vol.7 No.5

<sup>896</sup> See *National Navigation v Endesa Generation SA* [2009] EWCA Civ 1397.

<sup>897</sup>See *ReichertKockler v Dresdner Bank* [1992] ECR 1-2149 para 34.



Article 31 of the Regulation reproduces the test of Article 24 of the Convention of 27 September 1968 on the Jurisdiction and Enforcement of Judgements in Civil and Commercial matters,<sup>898</sup> and most of the case law of the ECJ is based on the convention.<sup>899</sup> It should be noted that the above cited provisions are not only the ones regulating measures. Other provisions regarding the rules on jurisdiction and the enforcement of judgements also apply to the jurisdiction on granting provisional measures and their enforcement. Article 31 provides exclusive powers to the courts of contracting states to order provisional measures “*as maybe available under the law of that state*” even if the courts of another state have jurisdiction as to the substance of the matter. Thus, the ECJ held in *Van Uden*<sup>900</sup> that Article 31 can be used for the purpose of obtaining provisional measures even where proceedings on the substance of the dispute have already been or may be, commenced before the arbitrators, apparently irrespective of whether the arbitration proceedings take place in a member state or elsewhere. One of the problems in regards to such provisional measures is that they do not concern arbitration as such and are parallel rather than ancillary to arbitration proceedings.<sup>901</sup> Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.<sup>902</sup>

The *Van Uden* judgement has been criticised, inter alia, for blurring the distinction between arbitration and judicial proceedings. The wording of the text points out that the types of provisional measures determined by the national law of the court to which the application is made have to meet all the requirements for the admission of such measures provided by national law.<sup>903</sup> The definition of the notion is given by ECJ.<sup>904</sup> The expression provision, including protective measures within Article 31 must therefore be understood as referring to measures which, in matters within the scope of the convention are “intended to preserve a factual or legal situation so as to safeguard rights and the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter. The fact that a measures is considered as provisional does not automatically bring it within the purview of the current Article 31 and the

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<sup>898</sup> Hereinafter the Brussels Regulation 44/2001.

<sup>899</sup> See Berglund, M, Cross-border enforcement of claims in the EU: history, present and the future; Stockholm: Kluwer Law International 2009 at 203-206.

<sup>900</sup> See *Van Uden* para 27-29.

<sup>901</sup> *Ibid* para 33.

<sup>902</sup> See case C- 261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149 para 32.

<sup>903</sup> Per argumentum a fortiori ( explicitly par 22 *Van Uden Maritime Bv v Kommanditgesellschaft in Firm Decoline* [1999] QB 1225.

<sup>904</sup> See case C- 261/90 *M. Reichert, H. Hreichert and Kockler v Dresdner Bank AG* [1992] ECR I-2149.

proposed Article 36. According to *Reichert*,<sup>905</sup> the main feature of provisional measures within Article 31 is that they are intended to protect a factual or legal situation so as to safeguard rights, the recognition of which is sought from another court having jurisdiction as to the substance of the matter.

Brussels I under Article 31 does not consider the important measure of hearing a witness.<sup>906</sup> The starting point of the ECJ's argument is the aforesaid concept of provisional measures which are intended to preserve a factual or legal situation so as to safeguard rights, the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the dispute and are incumbent on ordering the court to take "particular care, "and detailed knowledge of the actual circumstances in which the measures are to take effect. "The principle of legal certainty, which constitutes one of the aims of the Brussels regime, requires the defendant reasonably be able to foresee before, which courts, other than those of the state in which he is domiciled, he may sue. The court pointed out that such a hearing measure, before a court of the contracting state, of a witness resident in the territory of that state, is intended to establish facts on which the resolution of future proceedings could depend and in respect of which a court in another contracting state has jurisdiction. Its only aim is to enable the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard. On these grounds, the ECJ rules that:

"measures ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of "provisional, including protective measures."<sup>907</sup>

Indeed, this quotation adduces the dilemma English counterparts are facing when they are granting measures within the EU, however, the limitation does not apply to commonwealth states, which is the biggest market for English common law, hence the ability to grant such measures in international arbitration.

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<sup>905</sup> Ibid.

<sup>906</sup> See Case C- 104/03. case C-104/03 *St.Paul Dairy Industries NV v UnibleExser BVBA* [2005] ECR I-467

<sup>907</sup> Ibid.

In the cases of *Mietz*,<sup>908</sup> the ECJ ruled that;

“it is important to ensure that enforcement, in the state where it is sought, of provisional or protective measures allegedly founded on the jurisdiction laid down in Article 31 (24) of the Convention, but which go beyond the limits of that jurisdiction, does not result in circumstances of the rules on jurisdiction as to the substance set out in Article 2 and 5 to 18 of the convention.”

Indeed the ECJ made it clear that the ordering of an interim payment to the plaintiff does not constitute a provisional measure capable of being granted under article 31, unless the payment to the defendant is guaranteed if the plaintiff is ultimately unsuccessful as regards the substance of the dispute and secondly, the measure relates only to specific assets of the defendant located, or to be located, within the confines of the territorial jurisdiction of the court to which the application is made.<sup>909</sup>

There must exist a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought.<sup>910</sup> Indeed, this contradicts the England Arbitration Act which avails that the arbitrators have the power to grant interim payment on account.<sup>911</sup> It is not quite clear what the ECJ meant by guarantee; obviously, the mere duty of the unsuccessful plaintiff to return the money does not constitute a real guarantee of repayment. On the other hand, the requirement of bank guarantee, or similar security arrangements, would make interim payments very difficult and expensive to use. The problem was mentioned by the European Commission in its Green Paper in the review of Brussels 1 Regulation,<sup>912</sup> but the proposal does not address it. The ECJ held that provisional measures under Brussels 1 Regulation,

“are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern is not arbitration as such but protection of a wide variety of rights. Their place in the scope of the Convention

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<sup>908</sup>*Mietz v Internship Yachting Sneek Bv* [1999] ECR I-2277.

<sup>909</sup> See case C 261/90.

<sup>910</sup> See Van Uden.

<sup>911</sup> See EAA 1996 s.39.

<sup>912</sup> COM (2009) 175 final.

is thus determined not by their own nature but by the nature of the rights which they serve to protect.”<sup>913</sup>

Under Brussels 1,<sup>914</sup> a court with jurisdiction over merits is not impeded by EU law from making an order for the examination of an individual who held office in defendant’s company, even where they are domiciled in another member state,<sup>915</sup> on the basis that the court has jurisdiction over the merits which may make an order ancillary to the exercise of substantial jurisdiction.<sup>916</sup> However, under English law such an order will not be granted if a person is outside the territorial jurisdiction of the UK courts, when the application is made and the effect of the EU law does not exist.

It is submitted that the ECJ judgement should be interpreted to mean that there are measures for the purpose of preserving known evidence in civil or commercial matters under Article 31, but the search for potential evidence (evidence fishing) is not. The last mentioned type of evidence collecting can, instead, often be carried out using the Regulation on co-operation between the courts of member states in the taking of evidence in civil and commercial matters.<sup>917</sup> This dichotomy is maintained and confirmed explicitly with the Proposal in Article 2 (b), and even more clearly in recital 22, which clarifies that the notion of provisional measures, including, in particular, protective orders aimed at seizure orders referred to in Article 6 and 7 of the Enforcement of the Intellectual Property Rights Directive,<sup>918</sup> but does not include non-protective measures, such as ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case.

The Brussels 1 jurisdiction provides for any measure to be granted, and such a measure is required to undertake a preliminary assessment for example; the measure has to have a

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<sup>913</sup> See Case C- 190/89 *Rich v Societa Italian Impianti*.

<sup>914</sup> See Council Regulation (EC) 44/2001 of 22<sup>nd</sup> December 2000 on Jurisdiction and enforcement of judgements in civil and commercial matters.( Brussels 1 Regulation)

<sup>915</sup> See *Masri v Consolidated Contractors Int*( UK) Ltd No.4 [2008] EWCA Civ 876. [2009] 2 WLR 699.

<sup>916</sup> See *Olga, Jacob, Samy*, Judicial Cooperation in Civil Matters, Brussels 1 Regulation and Arbitration-Trading Torpedoes for Trust-Commission’s Proposal on Brussels 1 Regulation 2011 at 2-9.

<sup>917</sup> See Council Regulation 120/2001 of 82(?) May 2000 on the cooperation between the Courts of the member state in the taking of Evidence in Civil and Commercial Matters [2001] OJ L 174/1.

<sup>918</sup> See Directive 2004/48 of 29 April 2004 on the Enforcement of Intellectual Property [2004] OJ L 157/45.

connecting link,<sup>919</sup> to the substance, and the court has to have jurisdiction to grant such an order sought by the party. However, even if the court has passed the Brussels Criteria set in Article 31,<sup>920</sup> an ex parte order may not be granted. This raises the question “*should judicial decisions authorizing provisional measures which are delivered without a party against which they are directed having been summoned to appear and which are intended to be enforced without prior service come within the system of recognition provided by Title III of the Convention.*”

The exorbitant jurisdiction grounds such as the nationality of the plaintiff applicant are certainly not acceptable. As the ECJ pointed out in the case of *Daniel*,<sup>921</sup>:

“ the courts of the place or, in any event, of the contracting state where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedure and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measure authorised.”<sup>922</sup>

The rationale underlying this requirement in relation to Article 31 is that the courts of the country/place, where the assets subject to the provisional measure sought are located, are the ones best able to assess the circumstances, which may lead to the granting or refusal of the measure in question. According to the ECJ in the case of *Van Uden*, the presence of the defendants assets is particularly important in cases of interim payment, which cannot constitute provisional measures under Article 31, unless they relate to the specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which the application is made.

Under Brussels, the order is granted against specific assets, not the defendant,<sup>923</sup> to appear, which in turn destroys their objective of being enforced without trial. For such an order to be effective, it has to be sought from the court of the place where the assets are located. This may create

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<sup>919</sup> See van Uden par40.-41 see Case C-393/96 *Antonissen v Council and Commission* [1997] ECR I-441 para 37.

<sup>920</sup> See Case C-391/95.

<sup>921</sup> See Case 125/79 *Danilauler v Couchet Freres* 1980 para 15.

<sup>922</sup> Ibid Par 16.

<sup>923</sup> See Brussels I Article 34 (2).

irreconcilable decision of the local court leading to the opposite effect. The exposition of this effect demonstrated in *Daniel*,<sup>924</sup> where the ECJ decided that the respect of the rights of defence dictates that the measure ordered on claimant's unilateral application, without a notice to the defendant, cannot benefit from automatic recognition provided in article III of the Brussels 1 Regulation. According to the ECJ,

“the conditions imposed by Chapter III of the Brussels Convention.... are not fulfilled in the case of provisional or protective measures which are ordered or authorised by a court without the party against whom they are intended to be enforced without prior service on that defendant.”<sup>925</sup>

It should be noted that the specific objective of such protective measures is thought to produce a surprise effect intended to safeguard the threatened rights of the party seeking them by preventing the party against whom they are directed from moving the assets in possession, whether they be the subject matter of the dispute or constitute the creditors security. To stipulate that the recognition of such types of judgements must be subject to prior service on the other party and from the stage of the proceedings in the contracting state of origin would make them totally meaningless. The policy argument in *Danilauler*, creates the question of whether it is appropriate for a court remote from the assets to be seized to order their seizure or whether such orders should be a matter for a court local to the asset concerned.<sup>926</sup>

The ECJ judgement in *Danilauler* reflected both textual and general policy consideration. The textual argument concentrated on the question of whether the word judgement, as used in article 27 and 6, included a judgement ordering provisional measures and whether a judgement given in default included a judgement delivered after an ex parte hearing or whether it was by definition limited to a judgement delivered after the defendant had been summoned but had failed to appear.<sup>927</sup> According to Article 2 (a) of the Brussels Proposal, even ex parte orders will

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<sup>924</sup>See Case C- 125/79 *Bernard Danilauler v SNC CouchetFrers*[1980] ECR 1555.

<sup>925</sup>Ibid para 17.

<sup>926</sup> See W. Kennet *Chronique on the Enforcement of Judgements*, *European Review of Private Law*, 1997 vol. 34. see Collins *Provisional measures in International Litigation in Essays on International Litigation and the Conflict of Laws*, Clarendon press 1994 at 38.

<sup>927</sup>See case C- 148 84 *Deutsche genossenschaft bank v Brasserie due Pecher* [1981] ECR.

be recognised and enforced, provided the defendant has the right to subsequently challenge the measure under the national law of the member state of origin (in case of such a challenge, the enforcement of the measure may be suspended pursuant to Article 44 (3) of the proposal).

### **6.3.3.5 Regulation 1215/2012 of the European Parliament and the Council on Jurisdiction and the recognition and enforcement of judgements in civil and commercial matters of 12<sup>th</sup>December 2012.**

Due to shortcomings in Brussels 42/2001,<sup>928</sup> and many recommendations,<sup>929</sup> especially after *West Tankers*,<sup>930</sup> the European Council of Europe at Brussels on 11 December 2009, adopted a new Regulation,<sup>931</sup> in order to protect European member states or citizens.<sup>932</sup> The question that arises is to what extent has the new Regulation become a turning point and a landmark in the granting and enforcement of cross border arbitral provisional measures in European member states? This question can only be answered by analysing the Article of this Regulation in the ambit of arbitration.

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<sup>928</sup> See the UK Consultation Paper CP18/10 “Revision of the Brussels I regulation - How should the UK approach the negotiations at 20ff. See B Hess, T Pfeiffer and P Schollosser, Heidelberg Report (no. 5).

<sup>929</sup> See Bogan Michael, Proposed Recast of Rules on Provisional Measures under the Brussels I Regulation, Council Regulation 42/2001 of 22 December 2000 on the Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial matters [2001] OJL 12/1. See European Commission, Green Paper on the Review of Council Regulation (EC) No.42/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, Com (2009) 175.

<sup>930</sup> See The Transcript of the meeting of the House of Commons European Committee B (Recognition and Enforcement of Judgments) dated 28 March 2011, which provides a summary overview of the responses received to the MOJ’s Consultation on whether the UK should opt-in to the Brussels I Review Proposal and which refers to 94% of respondents supporting the principle of abolishing the intermediate procedure for the recognition and enforcement of judgements between member states; and the letter of the Financial Law dated 15 February 2011, available on CLLS website <http://www.citysolicitors.org.uk/Default.aspx?sID=924&11D+0>, accessed on 10 Jan 2013.

<sup>931</sup> See European Commission, Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Recast) Com (2010) 748 final (14 December 2010).

<sup>932</sup> See European Parliament RapporteurZwiefka, Draft Report of 28 June 2011 on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters ( Recast) Com 2010 748, PE467.04v01-00. See Opinion of the European Economic and Social Committee on the Proposal for Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, Com (2010) 748 final (2011/c 218/14) point 4.5.

It should be noted that even after the adoption of the new Regulation No.1215/2012, which is to have effect in 2015, the position of provisional measures has not drastically changed much,<sup>933</sup> for example Article 42 (2) (c), provides that “*where a measure was ordered without the defendant being summoned to appear, proof of service of judgement.*” In other words an ex parte order will not be granted as provided under Article 31 in the *case of Daniuler*. Furthermore, Article 33 provides that ex parte measures are not enforceable..

The problem of parallel proceedings under Article 33 is unsolved, since the issue of jurisdiction is still the same as provided by Van *Uden* under Article 31 ( Article 24) of the Brussels Regulation. Although, Article 25 of the new Regulation provides harmonious administration to minimize the possibility of concurrent proceedings. Since the regulation does not address the issue of time in regard to concurrent proceedings , its success is still debatable.

In addition, a measure may not be granted by a competent court due to public policy, and this is provided under the new Regulation Article 45 (1).

There is a limitation to the selection of a protective measure under Brussels 1 and even the new Regulation does not provide any remedy under Article 25, where any order for a witness for evidence is not classified as a provisional measure. The Regulation does not address the issue of the European Convention on Human rights, especially when ex parte measures are granted without the defendant being summoned, which violates Article 6 of the Convention rights.

#### **6.4 Conclusion**

In relation to the question of whether the national courts’ involvement undermines the arbitral process, the answer is that it depends on the nature and circumstances of the involvement at any given stage. However, notwithstanding the above, there are a number of principles that ought to inform the way in which national courts approach the issue of involvement with international arbitration. First, despite its autonomous character, international arbitration depends on municipal courts to provide effectiveness, support and assistance for the process. Secondly, arbitration does not depend on municipal courts for legitimacy; this exists as a right, based on the

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<sup>933</sup> See G Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2<sup>nd</sup> edition, Kluwer 2006) at 61. See Andrew Dickson, *Free Movement of Judgements in the EU Knock Down the Wall but mind the Ceiling*, The Proposal Published in December 2010, to recast Council Regulation 44/2001.



agreement of the parties (party autonomy). The limitations of the tribunal should also be taken into account, that without the supportive role of courts, arbitration will be meaningless, on the grounds that assets will be sold before the tribunal is established.<sup>934</sup>

Accordingly, municipal courts should become involved where they asked to give effect to the arbitration agreement or to grant measures only in urgent circumstances and support the agreed mechanism between parties, including assisting with the constitution of the arbitral tribunal, the protection and collection of evidence for use in arbitration proceedings, and if need be, preservation of the status quo.

The examination discussed the doctrines advanced in support of this relationship which is referred to as concurrent jurisdiction. This chapter examined the doctrine of co-operation, which adduces that courts and tribunals have a mutual respect that promotes this co-operation for assistance and support when the tribunal calls it upon it for help, in emergencies. In addition, the thesis examined the concept or doctrine of coordination, which demonstrates the over whelming need for cooperation. The thesis also examined the freedom of choice concept; which adduces that a party is at liberty to choose which mechanism is needed for a dispute resolution, either the courts or the arbitral tribunal. Under this concept, the doctrine of party autonomy is enshrined, and due to this fact, courts may only get involved on consultation of the tribunal, and they should be cautious not to open doors for abuse, by those who have agreed that their disputes be settled by arbitration agreement. The principle of complementary, examined the role of courts as complementary not as intervenient. The role of the courts, in this concept, is rarely excluded by the parties. The role of the courts is mostly subsidiary, in other words to provide support where the tribunal cannot provide such relief to the party affected. The thesis examined the doctrine of compatibility, which means that a request for provisional measures from courts is compatible with an arbitration tribunal. In other words, the courts and tribunals work together in order to affect the arbitral process. The party can approach the court if he finds it meaningless to approach a tribunal, where it may not have the coercive powers against the measures sought.

In cases of insolvency it would be impossible for the tribunal to grant orders for security for costs as demonstrated in *Bank Mellat*<sup>935</sup> and *Ken Chemicals*<sup>936</sup> where if the proceeding is

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<sup>934</sup> See *CMA v Hyundai* [2009] 1 Lloyd's Rep 213, where it was held that based on the agreement, the tribunal has no powers to grant freezing orders.

unsuccessful, the respondent will almost certainly have sufficient means to pay costs. The English courts, to exercise their undoubted jurisdiction to intervene and order security for costs in this situation, avoid a risk of third party, while financing what would prove to be unfounded litigation,<sup>937</sup> sheltering behind an impoverished party so as to escape what would be otherwise a normal consequence of being unsuccessful in the arbitration.

The thesis examined the limitation of court jurisdiction to the arbitral proceedings, mainly the Brussels Regulation 44/2001, and Article 31, which sets draconian procedures for provisional measures to be granted. The Brussels 1 Regulation should adopt a directive, specifically on provisional measures,<sup>938</sup> and allow member states to implement it in their jurisdictions, in order to avoid conflicts or directory tactics that arise under the doctrine of first seized court, without assessing the court at the commencement of the arbitral proceedings. This will prevent applicants seeking measures from other venues, for example; Hong Kong, USA, and Dubai, which provide guarantees of their assets.

The author argues that the court's involvement<sup>939</sup> should be supported with a degree of limitation,<sup>940</sup> to avoid the tension and collision between the two systems of dispute resolution in order to maintain the doctrine of party autonomy,<sup>941</sup> and also to adhere to the New York Convention, and the UNCITRAL Model Law. Since parties enter into arbitration with the expectation of respect for their agreement, they may be disappointed if a dispute arose and they may be constrained to fight against their will on the public battlefield of the courts.

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<sup>935</sup> *Bank Mellat v Helliniki Techniki SA* [1984] QB 291.

<sup>936</sup> See *Coppee Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* (In liquidation in Kenya) [1995] 1 AC 38.

<sup>937</sup> See ICC Rules 8 (5) and &^^(?) of the Companies Act 1985.

<sup>938</sup> See Briggs and Rees (n5) para 736, see Heidelberg Report, par 736-762, M. Illmer/b Steinbruck, submission to the European Commission regarding the Green Paper Com 92009) 175 at [http://ec.europa.eu/justice/news/consultating\\_public/0002/contributions/civil\\_society-ngo\\_academic\\_others/max\\_planck\\_institut\\_fur\\_auslandisches-und-internationales\\_privatetech-en.pdf](http://ec.europa.eu/justice/news/consultating_public/0002/contributions/civil_society-ngo_academic_others/max_planck_institut_fur_auslandisches-und-internationales_privatetech-en.pdf), accessed on 19 September 2011. See M Illmer, Brussels 1 and Arbitration Revisted - The European Commission's Proposal Com (2010) 748 75 *Rebels Z* 645 (658).

<sup>939</sup> The power of the court should only be restricted to that only provided in the Arbitration Act 1996 under s.44. Other powers for example the Courts and Legal Services Act 1990, s.103 and 125 (7) and Schedule 20, which provides a wide discretion for the courts to grant orders relating to security for costs, giving evidence by affidavit, examining on oath of any witness before an officer of the High Court or any other person, examination of the witness statement out of jurisdiction, the sale of goods or preservation of goods, and the appointment of a receiver, all need to be subject to a clause in the arbitration by the parties, to avoid the litigation process of a mechanism they avoided when entering into arbitration as a place for provisional measures.

<sup>940</sup> See *Bremer Vulkan Schiffbau and Maschinefabrik v South India Shipping Corporation Ltd* [1981] AC 909, which held that courts should not intervene during the arbitration process.

<sup>941</sup> See EAA s.30 which provides the competence of the tribunal to rule on any matters pertaining to arbitration.

## **CHAPTER SEVEN**

### **7 The enforcement of provisional measures (tribunals & courts)**

#### **7.1 Introduction**

The jurisdiction of international arbitrators to order provisional measures is generally recognized in national legislations, international conventions and arbitral rules. This jurisdiction is without prejudice to the concurrent jurisdiction of municipal courts to grant interim measures despite the existence of an arbitration agreement.<sup>942</sup> Since the jurisdiction of arbitrators is universally recognized, the next debatable question is the issue of recognition and enforcement of provisional measures ordered by the arbitral tribunal; no uniformity of opinion existed in that respect. The absence of a virtually universal international instrument such as the 1958 New York Convention on Recognition and Enforcement of foreign awards led to the adoption of different legislative and jurisprudential solutions by national courts and legislators. Commentators and surveys are in agreement when they point out that interim measures ordered by arbitral tribunals are frequently complied with spontaneously by the parties.<sup>943</sup>

International transactions concern the movement or organization of assets across the borders of two or more countries, and might involve the entities of different countries. In the case of disputes regarding international transactions, it is important to ensure that provisional measures are enforceable in all countries affected by the transaction, preferably in all countries where the losing party has assets that can be attached to satisfy the credit of the winning party.<sup>944</sup> The enforceability of provisional measures differs depending upon the forum. The arbitral provisional measures are not self-executing whereas judicial provisional measures are directly enforceable because they have state authority and parliamentary mandates under the arbitral enactment.

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<sup>942</sup> It is only the Italian law that prohibits the arbitral tribunal from ordering an attachment or other provisional measures, as provided under Article 818 of the Italian Civil Code.

<sup>943</sup> A survey concerning arbitrators under the Rules of the American Arbitration Association, concluding that interim measures are spontaneously complied with in 90% of the cases observed. See Naimark, Keer, Analysis of UNCITRAL Questionnaires on Interim relief, in Mealey's March 2001 at 26; for a similar survey concerning arbitration administered by the Cairo Regional centre for International Arbitration, pointing out that all 5 orders adopted in the year 2000 were wilfully complied with by the parties, see Abu-Enein, Issuing Interim Relief Measures in International Arbitration in Arab States, in the Journal of World Investment, 2002, at 81. See Berger, International Economic Arbitration, Deventer, Boston 1993 at 334.

<sup>944</sup> See Adrian Briggs & Peter Rees, Civil Jurisdiction & Judgements (5<sup>th</sup> edition, British Library 2009) at 658-659.

Since international arbitration is used all over the world, it is considered more flexible, speedier and enforceable.

Provisional measures are enforceable if the country where the award is to be enforced is party to the New York Convention 1958 on the Recognition and Enforcement of Foreign Awards for example; for countries with a long history of arbitration such as England, USA, Germany and France. Judicial provisional measures for example; in the UK are directly enforceable.<sup>945</sup> An arbitral tribunal or a court of competent jurisdiction takes proper, timely and compulsory provisional measures, and such measures can serve the purpose to maintain the status quo, preserve evidence and prevent the malicious transfer of assets. Therefore, such measures are widely enforced in international arbitration. Normally, the party to whom the provisional measure are applied against is inclined to carry out the provisional measure as directed and show deterrence to the arbitral tribunal or court in order to avoid bearing unfavourable consequences in arbitral proceedings. Under such circumstances, the enforcement of provisional measures becomes critical.

Parties need enforcement nowadays, more than before, because of the ease or technological advancement which make the transfer of assets possible by the click of a button, to another jurisdiction state as a safe heaven. This may be a problem when a party has successfully been victorious in proceedings but no asset is left to enforce the award. Arbitrating parties nowadays, have too great an expectation of their ability to enforce their rights. The rise of higher expectations is due to the predictability and speed required in international commerce and advice or counselling that is provided by lawyers and barristers in the resolution of international disputes. The involvement of legal expertise or solicitors, who have an international office, almost in all venues or seats of arbitration, are familiar with all available tools for structuring a strategy for the resolution of a dispute that is most suitable for their client's interest.

The thesis, in this chapter, aims to address the question; to what extent are provisional measures enforced by the arbitral tribunal and municipal courts. This section will be divided into sections in order to examine the question set in this chapter,. Firstly, the enforcement of provisional measures by the arbitral tribunal, in other words the tools of arbitral compliance. Secondly, the

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<sup>945</sup> See s.44 (5) of EAA 1996. It should be noted that the courts have an extraterritorial effect under state law to threaten compliance of its order with contempt of court of huge fines.

recognition and enforcement of arbitral measures by municipal courts. It should be noted that when parties to an arbitration agreement vehemently refuse to comply with an interim measure voluntarily, the intervention of municipal courts becomes necessary in order to obtain its judicial recognition and enforcement by giving coercive powers.

Thirdly, the applicability of the New York Convention to the recognition and enforcement of arbitral interim measures, in other words these sections examine whether interim measures can be enforced like arbitral awards, internationally or whether arbitral measures which are breached by a defendant, who escapes to another jurisdiction or venue, can be enforced by the New York Convention? Fourthly, this chapter aims to examine the enforcement of interim measures under the Brussels regime. It is of great importance that the Brussels 1 Regulation is examined since England is a member of the European Union, and any rulings or European enactments affect its jurisdiction among member states. Lastly the role of Model Law or the work of Model Law in regard to enforcement will further be examined.

## **7.2 Tools of arbitral enforcement of provisional measures**

Tools of arbitral enforcement are subdivided into subsections, namely;(a) voluntary compliance,(b)sanctions of compliance, and (c) arbitral damages. If the measure is not complied with, (d)Adverse Inference, and varying need for enforcement. Such tools assist enforcing and recognizing any arbitral provisional measures that are granted by the arbitral tribunal. Indeed, these tools adduce that the arbitral tribunals have several remedies at their disposal to ensure compliance with their own orders for interim measures. It should, however, be noted that the chances of such success for these legal instruments are highly uncertain, for they only aim, as a last resort, to pressurize the recalcitrant party to abide by the arbitral tribunals' decisions and therefore, to obtain wilful compliance. These do not replace interventions by municipal courts, to which the parties will have recourse whenever these remedies are not complied with or prove to be unsuccessful. The wilful compliance with orders from the tribunal should not be overestimated, since it largely depends on the parties intentions to not negatively influence the arbitration pending the decision on the merits. Furthermore, the availability of effective sanctions for the case of non-compliance represents the best deterrent and guarantee of the measures'

effectiveness.<sup>946</sup> Therefore, provisional measures granted by the tribunal cannot be effective unless the interested party can obtain its enforcement. The remedies for ensuring compliance with arbitral provisional measures and strengthening their effectiveness, can take the form of sanctions imposed by the arbitrators on the basis of either the law or the will of parties or mechanisms involving the co-operation of municipal courts.<sup>947</sup>

### **7.2.1 Voluntary compliance**

None of the established set of arbitral rules and enactments expressly provides a mechanism for the arbitral tribunal to enforce provisional measures. This silence has been filled with the voluntary mechanism of enforcement. An increase in international trade and investment, coupled with the reluctance on behalf of the parties to bring their disputes before courts' system, has created a growing market for the resolution of arbitral disputes by the arbitration mechanism.<sup>948</sup>

As a result, experienced institutions have emerged providing an impartial arbitration service, time tested rules for the conduct of arbitral proceedings, and most importantly, an effective network guaranteeing the enforcement of arbitral provisional measures or arbitral agreements. Those who are familiar with the industry are aware that the growth of arbitration would not be possible without the voluntary support of the parties.<sup>949</sup> Considering the voluminous literature on international judicial and arbitral settlement, it may at first seem surprising that there has been relatively little interest shown by international lawyers on the problem of enforcement of provisional measures rendered a matter that the author regards crucial in international arbitration.

The reasons for lack of attention are not difficult to discern. Mainly, it has been the voluntary mechanism to submit to arbitration, with the main purpose of voluntarily complying with arbitral tribunal orders and not preparing to run the risk of adverse decision; the parties would not have submitted to arbitration in the first place if they were not ready to voluntarily enforce orders of the tribunal. Most orders direct a party to perform or refrain from performing a specific act. Such

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<sup>946</sup>See Besson, *Arbitrage International et mesures provisoires*, Zurich, 1998) at 315.

<sup>947</sup> See Tommaeo, *Lex fori e tutela cautelare nell'arbitrato commerciale internazionale*, Rivarbo (1999) at 28. See Poudret, Besson, *Comparative Law of International Arbitration*, London (2007) at 540. Knoepfler *Les Mesures Provisoires et l'arbitrage international*, in Kellerhals (edn), *Sciedsgerichtbarkeit*, Zurich, (1997) at 307. Reiner, *Les Mesures provisoires et conservatoires et l'arbitrage international*, notamment l'arbitrage CCI, *Journal du droit international* (1998) at 861.

<sup>948</sup> See Michael Mustill and Stewart Boyd, *Mustill & Boyd: Commercial Arbitration* (2<sup>nd</sup> Edition London Butterworths, 1989) at 47.

<sup>949</sup> See Italian Arbitration Association rules 1994 Article 19 and Arbitral Rules of European Fund Article 27(1).

orders by the tribunals are “*lex imperfecta*”, as the tribunal lack the power to enforce their orders directly against the parties. It should, however, be noted that many orders are voluntarily complied with,<sup>950</sup> because they are conscious of their obligation to mitigate damages and refrain from aggravating the dispute. Indeed, no compliance with orders for interim measures may have an adverse effect on a tribunals’ assessment of damages. Parties willing to comply with such orders may be justified with the concern of not antagonizing the arbitral process.<sup>951</sup> It is expected that parties who comply voluntarily with arbitrators’ orders tend to because arbitrators will be deciding their case. Hence, a failure may be taken into account by the arbitral tribunal’s final decision. Thus, parties want to look favourably in the eyes of the arbitrators. They do not want the arbitrators to draw any adverse inference and hold them responsible for any costs caused by neglecting to abide by the order.<sup>952</sup>

Some commentators have suggested that, although the tribunal may lack explicit powers to enforce interim measures,<sup>953</sup> the tribunal’s power as the ultimate decision maker of the dispute itself, serve to encourage most parties to comply with arbitral orders.<sup>954</sup> Ultimately, of course, the arbitrators greatest source of power resides in their position as arbiters of the merits of the dispute between the parties. Parties seeking to appear before the arbitrators as good citizens who have been wronged by their adversary will generally not wish to defy the instructions given to them by those whom they wish to convince of the justice of their claims. Although there is no international vehicle to enforce provisional measures, according to many surveys, most of the arbitral provisional measures are voluntarily, wilfully and spontaneously complied with by the parties.<sup>955</sup> Since the arbitrators, under the “*lex arbitri*,”<sup>956</sup> are allowed to grant provisional

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<sup>950</sup> See Misteris, *Comparative International Commercial Arbitration*, The Hague, London (2003) at 60.

<sup>951</sup> See Omar Mashoor Hadithen Thesis, University of Kent, *Jurisdiction of Commercial Arbitration* (June 2000) at 272.

<sup>952</sup> *Pacific reins Mgt. Corp v Ohio Corp*, 935 F.2d 1019 1022-23 ( 9<sup>th</sup> Cir 1991), where the Circuit court held that “temporary equitable relief in arbitration may be essential to preserve or enforce performance which, if not preserved or enforced, may render the award meaningless.

<sup>953</sup> See E.A Schwartz, *The Practice & Experience of ICC Courts: in Conservatory & Provisional Measures*, In *International Arbitration*, ICC Int’l Court of Arb (Paris ICC 1993) at 59-60.

<sup>954</sup> See Gabriel Kaufman Kohler, *International Arbitration in Switzerland: A Handbook for PR actioners*, Kluwer International, The Hague-Netherlands (2004).

<sup>955</sup> See Yesilmark, *Provisional Measures in International Arbitration*, The Hague ( 2005) at 238, Aboul-Enein, *Issuing Interim Relief Measures in International Arbitration in the Arab State*, *Journal of World Investment* (2002) at 81. See Berger, *International Economic Arbitration*, Deventer, Boston (1993) at 334. *Guide to International Arbitration*, New York (2004) at 239. Lew, Mistelis, Kröll, *Comparative, International Commercial Arbitration*, The Hague, London, New York (2003) at 610, Sanders, *Quo Vadis Arbitration? Sixty? Years of Arbitration Practice*, A Comparative study, The Hague (1999) at 269.

measures,<sup>957</sup> their enforcement is not a surprise both domestic and internationally.<sup>958</sup> It should be noted that although the tribunal's provisional orders can be complied with, at times there is a risk when a defendant refuses to comply with the order, and the tribunal is left with no remedy.<sup>959</sup> Where the order was not voluntarily complied with,<sup>960</sup> and there is substantial risk, the tribunal has the power to take all issues in an award. Parties to arbitration agreement usually tend to comply with the arbitral orders, in order to win the battle for the final awards as they would not like to put themselves in a disadvantageous position through wrongful conduct. When a party does not comply with such an order, there is assistance from the courts.<sup>961</sup> According to a survey of corporate attitudes and practices on international arbitration conducted by Price water house Coopers and the School of International Arbitration, Queen Mary, University of London (QMUL) in 2008, it was adduced that most of the arbitral provisional measures are voluntary performed by the parties without going to municipal courts.<sup>962</sup>

### **7.2.2 Sanctions imposed by the arbitrators for non-compliance**

International arbitrators have several remedies at their disposal to ensure compliance with their own orders for interim measures. However, the chances of success for these legal instruments are highly uncertain, for they only aim, as a last resort, to pressurize the recalcitrant party to abide with the arbitrators' decision and, therefore, to obtain wilful compliance. These do not replace the intervention of the courts, to which the parties will have recourse whenever these remedies prove unsuccessful. The sanctions of non-compliance are divided into two categories; namely damages or costs for non-compliance and the ability to draw adverse consequences on the merits of the dispute against a recalcitrant party.

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<sup>956</sup>The law governing arbitration.

<sup>957</sup> See EAA1996 s.38, 39 and 48.

<sup>958</sup> See Gary Born, *International Commercial Arbitration; Commentary and Materials* (2nd edition, Kluwer Law International, The Hague (2001) at 921.

<sup>959</sup> See *Kastner v Jason* [2005] 1 Lloyd's Rep 39 para 14-19.

<sup>960</sup> EAA 1996 s.41 (6) provides a dismissal of claims of the claimant of the party that does not comply with the claimant of the party and does not comply with the order for security for costs. s.41, if a claimant fails to comply with a peremptory order of the tribunal they may make an award dismissing their claim.

<sup>961</sup> See EAA s.44 (5) and 49.

<sup>962</sup> See Pricewater House Coopers LLP and QMUL, *International Arbitration: Corporate Attitudes and Practice 2008 Transitional Disputes Management* 1 March 2009.



### 7.2.2.1 Arbitral damages or costs for non-compliance

Interim measures have an undeniable contractual value deriving from the power conferred by the parties to the arbitral tribunal through an arbitral agreement; under the doctrine of party autonomy. The power to hold the recalcitrant party liable for costs and damages is derived from the broad interpretation of the arbitration contractual proximity. An arbitrator may hold a recalcitrant party liable for damages and costs arising from or related to a failure to comply with the measure ordered by the tribunal.<sup>963</sup> The power to hold a party for costs or damages is an implied duty.<sup>964</sup> The tribunal, in regard to such a breach, can award punitive or multiple damages in proportion to a given case in question, with no bias.<sup>965</sup>

Arbitrators have the power to rule for damages,<sup>966</sup> resulting from non-compliance with the interim measure orders.<sup>967</sup> This is drawn from the conclusion that an arbitration agreement is a contract and such damages are connected to the contract. Interim measures have an undeniable contractual value deriving from the power conferred by the parties to the arbitrators through the arbitration agreement. This contractual obligation is strengthened by the obligation of good faith incumbent on all parties subscribing to arbitration, so as not to frustrate the smooth settlement of dispute through arbitration. As a consequence of a breach of this contractual obligation,<sup>968</sup> the tribunal has the power to sanction for non-compliance by ordering the recalcitrant party to compensate for any damage incurred by the other party as a consequence of non-compliance.<sup>969</sup> Compliance with the order specifically under agreement does not necessarily lead to compensation for damages. In the absence of any damages, the beneficiary could only obtain an award ordering the specific performance of the obligation, which per se is incompatible with the

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<sup>963</sup>See Un Doc A/CN 9/460 para 119.

<sup>964</sup> See Hunter para 8-13. See Allan Farnsworth, Punitive Damages in International Commercial Arbitration, 10 (3) Int'l Arb 67 (1993), Karen Tolson, Conflicts Presented by Arbitral Awards of punitive Damages, 4 (3) Arb Int'l 2 (1988) at 255.

<sup>965</sup> EAA1996 s. 48 (5) (b), the English law empowers an arbitral tribunal to order the specific performance of a contract unless the contrary is expressed in the arbitral agreement.

<sup>966</sup> See ICC Award 4156 (1984) at 937, where the tribunal allowed the principal to call upon a third party? To continue the work on the site and order the contractor to leave the site.

<sup>967</sup> The contractual element was illustrated in *Channel Tunnel* [1993] AC 334, where court referred the parties for a specific performance and enforcement of their arbitration agreement. Further Mustill LJ in the Channel Tunnel said that "there is no reason why Parliament should have the least concern to regulate the conduct of arbitration carried on board pursuant to foreign arbitral law," para 114-158.

<sup>968</sup> See *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another* (Case C-391/95) [1999] 2 W.L.R. 1181.

<sup>969</sup>LCIA Article 25.1 and ICC Arbitral Rules Article 23 (1).

urgency of most cases of interim relief. Compensation for damages is not an adequate remedy and is incompatible with the need to protect a party's right against harm which is by definition deemed irreparable. This remedy however, is not entirely satisfactory for several reasons.<sup>970</sup> Firstly, the jurisdiction of the tribunal to grant or award damages for the non-respect of interim measures is far from certain and should be established on a case-by-case basis regarding the scope of the arbitration agreement and the arbitration rules, to see if any are applicable on basis thereof. Secondly, non-compliance with sanctions does not necessarily lead to compensation for damage. Lastly, even where theoretically possible, compensation for the damage suffered as a consequence of non-compliance with the arbitrators' order is generally not an adequate remedy for the protection of a party's right against harm, which by definition is irreparable.

Some scholars argue that the power to rule on damages is implied within the power of the arbitrators to issue provisional measures.<sup>971</sup> Since arbitrators have the power to grant provisional measures,<sup>972</sup> they should also have the power to ensure compliance or enforcement with these orders to calculate the amount of damages resulting from non-compliance. Despite the availability of damages for non-compliance, there are some circumstances where a party disregarding the sanction may refuse to comply with an interim measure issued by the tribunal, as demonstrated in the famous case of *Kastner v Jason*.<sup>973</sup> In this case, two partners Mr Ernest Kastner and Mr Marc Jason agreed to refer their disputes to arbitration under Jewish law subject to the English Arbitration Act 1996. Mr Kastner invested in Marc Jason's business, and later sought to recover his investment in arbitration before the Beth Din (Jewish arbitration tribunal or the Federation of Synagogues, a court of the Jewish law. The parties agreed to comply with the orders of the tribunal or comply with any sanctions of the tribunal where an order was not complied with. In due process, Kastner complained that his investment in Jason's business was procured by fraud in 2001, the arbitral tribunal (Beth din) made an award in Mr Jason's favour, on the basis that fraud had been established. The arbitral tribunal granted a freezing order against Jackson, refraining him from selling his house on Helmsdale Gardens until he has received permission from the tribunal (Beth Din). On application of Kastner on 27 February 2002 and

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<sup>970</sup> See Besson Arbitrage, *Internationaleet Measures Provisoires Zurich* 1998 at 320.

<sup>971</sup> Pierre Karrer, *International Commercial Arbitration and the Courts; Less Theory, Please "International Arbitration and National courts"* Kluwer, 2000 at 103.

<sup>972</sup> EAA s.39 and 38.

<sup>973</sup> [2005] 1 *Lloyds Rep* 397 at 19.

pursuant to the powers invested in the tribunal by virtue of Arbitration Act 1996, ordered Jason from refraining taking any steps altering the status quo regarding ownership of the property until permission is granted. Later he made an application of the caution on the land registry to protect his interest in property with permission of the tribunal. Indeed the respondent Jason agreed in March to comply with the arbitral order. However, on 11 April 2002, in flagrant breach of the direction of the agreement, Jason entered into a contract of sale and completed the contract of sale of the property to Mr and Mrs Sherman and decamped to USA. Mr Sherman's solicitor (Brian of famer Millar) inexplicably failed, when he carried out his Land Registry search, to read the caution. In negligence of the caution, with constructive notice, Sherman proceeded to complete the purchase on 20 May 2002. They paid full purchase price and Mr Jason executed transferred interest of them. Sherman financed the purchase in part with HSBC mortgage. The balance was paid after two prior mortgages were discharged. The tribunal after finding fraud on property and profits of sale awarded quantified damages payable to Kastner in the sum of £ 237,224.50. The purchasers in regard of this property found later that their property could not be registered. They commenced proceedings against Mr Kastner on the grounds that they were not party to the arbitration agreement as third parties. This case was mentioned earlier.

Although the arbitrator had the power to grant orders and provide sanctions of compliance, subject to the powers of the tribunal under s.39 (4), and s. 48 (5), it was held by Rix LJ that it did not have the power to grant attachment orders, in order to protect the property disposition. The irony in this case is that the arbitration mechanism lacks protection, even when there is a sanction or damages to the defendant, which can defraud the system without any adverse influence. The Court's power exercised under s.44 (2) (e), in granting interim measures should only be to protect the party who has proprietary rights, and who has acted on the conscience of the other party. Indeed, this adduces that English law on enforcement needs more changes if England is to be a better venue for arbitration and enforcement. The law in this case is not straight forward, and should provide a remedy especially to third parties. Although the tribunal has wide scope of power, under s. 39(1), it does not confer powers to the tribunal to make freezing orders, even when the parties do give such powers to the tribunal as in the case above. The Report on the Arbitration Bill, which provides Mareva injunctions to be only judicial instruments, is misleading and many arbitrators are unhappy with such powers. It would be desirable to give the arbitral tribunal the power to make provisional orders where the parties have

so agreed. The expert reports should be a key factor in regard to provisional remedies, and an expert report should be given consideration in cases of enforcement. If the law is not changed, the role of provisional measures will be meaningless since at the time of the final award, the subject matter of the dispute is already disposed and the defendant can even have a safe haven in another country.

### **7.2.2.2 The ability to draw adverse consequences**

Amore effective remedy to ensure the respect of the tribunal's provisional measures is the ability to draw adverse consequences on the merits the dispute against the recalcitrant party in the tribunal's final award, so as not to negatively influence the arbitrators, pending a decision on the merits. The tribunal may draw adverse inference for non-compliance with a measure, where a party may be held liable on the substance of the dispute in question due to a lack of co-operation. The most obvious example is the case of the dissipation of assets. If a party is to dissipate all of his or her assets then it may have no fear of the consequences of sanctions of being unsuccessful in the arbitration or the threat of being held liable for costs or damages. In addition, with an increased means of technology, by the time a sanction is granted the assets are transferred with a twinkle of an eye. An award will be meaningless since the subject matter of the dispute will not be available. The arbitrators should consider whether the provisional measure relief is unnecessary on the basis that the damages at the end of the case will be a sufficient remedy if the claimant or applicant is found to be right and whether an undertaking to pay damages, from the party seeking the provisional relief to compensate for any damage done in the event of providing unjustified effects on the respondent of any proposed order.<sup>974</sup>

The adverse remedy enhances the efficiency of arbitral provisional measures against the non-compliant party concerning the merits of the dispute. Parties will obviously be reluctant to disregard such an order to avoid negatively influencing the arbitrators, pending a decision on the merits and the psychological effects might prove decisive.

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<sup>974</sup> See Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Ocean Publications 2000) at 416.

An arbitral tribunal may draw an adverse inference for not complying with its ruling on key issues like the preservation of evidence.<sup>975</sup> Where the arbitral tribunal considers that such evidence supports the case of the applicant, and the evidence is or ought to be in the recalcitrant party's possession, the tribunal will draw adverse inference to the defendant if he/she has not complied with the order.<sup>976</sup> In reality, the tribunal has no enforcement mechanism in regard to the preservation of evidence, and drawing adverse inference from the failure will not make any impact. Due to the failure to preserve or enforce the evidence, it is felt that the arbitral tribunal lacks coercive powers to enforce its orders.

Arbitrators' decisions on the merits are totally different. A negative attitude from the arbitrator in the final decision would be therefore unjustified in most cases. Unless there is a casual link between the party's failure to comply and the outcome of the arbitration, the tribunal may not penalize the recalcitrant party in the final award as sanctions for failure to respect the procedure decisions.<sup>977</sup> The tribunal, in dealing with such matters has to be impartial so as not to cause injustice to either party to the arbitration agreement.<sup>978</sup> Given the composition of the tribunal and the subsidiary approach, such cases of non-compliance may occur but are not something that in England's jurisdiction, would be a serious issue to deal with since the Arbitration Act 1996 provides a lot of remedies and authority to the tribunal in regard to any matters subject to arbitration,<sup>979</sup> and also the backup of the courts is another weapon if there is a demand for urgent compliance.

It should however, be noted that the tribunal's decision on the request for interim measures and its decision on the merits are founded on entirely different bases and scope. There is, however, an exception to the above principle, which is manifested in the English Arbitration Act 1996,<sup>980</sup> which provides dismissal of the claims of the claimant of the party which do not comply with an Order for security for costs. The tribunal power, in regard to the ordering of security for costs, is one of the golden goals of the Act, and a refusal may even be subject to contempt of court.

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<sup>975</sup>See Tommaseo *LexForietuteraCauteclare Commercial Internazionale RivArb*, (199) at 28.

<sup>976</sup> See Hunotia B, *Order of Interim Relief in Support of Arbitral Proceedings by National Courts in Civil Law countries*, a paper submitted to the ICC Joint Symposium in London on 2<sup>nd</sup> March 1998.

<sup>977</sup>Poudret, Besson, *Comparative Law of International Arbitration*, London 2007 at 540.

<sup>978</sup> See UNCITRAL Article 17 B of the 2006 Version.

<sup>979</sup>See EAA 1996 s.30.

<sup>980</sup>*Ibid* s.41 (6).

Furthermore, the EAA 1996<sup>981</sup> provides general powers of the arbitral tribunal to “draw such adverse inference from the Act of non-compliance to the circumstances as may justify.” Nothing in the Act prevents the tribunal from sanctioning the non-respect of an order in its decision on the costs of the proceedings, in respect of which it is generally recognized that arbitrators can take circumstances other than the outcome of the case on the merits into account. In some European states, for example, England, France, Belgium, and Dutch, there is a coercive “*astreintes*”<sup>982</sup> remedy that is available to arbitrators to ensure that the payment of a pre-determined sum of money every day or month is respected where the decision is not complied with. Unless the tribunal is put on the same footing as the courts,<sup>983</sup> there is a grey area between the merits and enforcement of such orders.<sup>984</sup> The English arbitral tribunals should adopt a system where the tribunals and courts are put on the same footing,<sup>985</sup> in the enforcement of provisional measures, as in other European states, where the national legal system expressly provides for the arbitrators powers to issue “*astreintes*” for example, the Netherlands,<sup>986</sup> Belgium,<sup>987</sup> and Sweden.<sup>988</sup> In France, doctrine and case law tend to permit the powers of the arbitrators to enforce both decisions on the merits and procedural orders by *astreinte*, on the assumption that arbitral jurisdiction can be assimilated to the jurisdiction of the state courts.<sup>989</sup> It has been denied however, that arbitrators have the power to liquidate the *astreinte*, as this power is reserved for state courts and subject to the previous *exequatur* of an award incorporating the arbitral order.<sup>990</sup>

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<sup>981</sup> s.7 (7) (b).

<sup>982</sup> This power has given rise to a large debate, to a hybrid nature and it is found in conflict between enforcement and merits or *iurisdictio* and *imperium*.

<sup>983</sup> FAA, provides no official express guidance as to enforceability of arbitral provisional measures but a number of cases have held that decisions of granting interim measures are final and binding. See *Southern Seas Nav.Ltd v Petroles Mexican city*, 606 F.Supp.692 ( SDNY) 1985), where the court held that “*if an award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing it or vacating it at the time it is made.*” See *Mettalgesellschaft AG vMV Capitan Constane*, 790 F.2d 280-83 ( 2<sup>nd</sup> Cir 1986).

<sup>984</sup> See Germany Code Civil (ZPO) S.1041 (2).

<sup>985</sup> See article 183 Swiss Law on Private International Law, which provides that “*if a party does not comply with a measure the tribunal may request assistance from competent court.*”

<sup>986</sup> See Article 1056 of the Dutch Code of Civil Procedure.

<sup>987</sup> Article 1709-bis of the Belgian Code judiciaire, which puts the arbitrators on the same footing in this regard.

<sup>988</sup> s.25 para 4 of the Swedish Law dated 4 March 1999, expressly excludes such powers. However, it permits arbitrators to order liquidation only when the bases of the parties express agreement.

<sup>989</sup> See De Boissesson, *Le droitfrançais internet international*, Paris 1990 at 257-258.

<sup>990</sup> See Paris Court of Appeals, 8 June 1990, *SocieteHocheFriedl and Societe le Grand Livre du mois* in *Rev arb* 1990 at 917.

One of the most powerful weapons of the arbitral tribunal in England in regard to the enforcement of its orders is the power to order costs. This power is derived from s.38 (3) of the EAA 1996. The tribunal, under this section, has the power to provide security for the costs of the arbitration, and secondly, the power to make interim payments on account of the costs of the arbitration. The term ‘costs’ means all fees and costs of the arbitral tribunal. In other words, the claimant has to provide security for costs. This power is provided by the parties, and it is only exclusive to the jurisdiction of the tribunal. It should, however, be noted that this power is best exercised on application by the respondent rather than by the tribunal of its own motion. The tribunal has to assess evidence showing that there is a serious ground for doubting whether the claimant’s assets within jurisdiction are sufficient to cover an eventual costs’ order. The amount required ought to be proportionate and should not be sought exclusively to guarantee the payment of the tribunal fees. Where a claimant fails to comply by such an order of costs, the tribunal may make a peremptory order setting a time limit for compliance, and if the claimant fails to provide security for costs, the tribunal can make an award dismissing the claim. Indeed, the above section is backed up by s. 39, which provides that the tribunal has the power to make provisional awards, which it would have the power to grant in the final award, for example the provisional order for the payment of money or the disposition of property between parties or an order for payment on account of the costs of the arbitration. The tribunal, in exercising its power, has the same power as the court to make a declaration to any matter of the proceedings, to order a party to do so or refrain from doing anything; it can order a specific performance of a contract. However, unlike the USA,<sup>991</sup> Holland,<sup>992</sup> France and Belgian,<sup>993</sup> which provides the tribunal with the power to make an ancillary order for a payment of a pre-determined sum of the money every day or monthly where an provisional measure is not complied with,<sup>994</sup> tribunals in England have no power to compel the enforcement of their orders for example, imposing time lights to make psychological effects to disobedience.

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<sup>991</sup> AA Article 2, authorizes the tribunal at a party’s request to take whatever measure for protection. Article 21 further provides that a request from the court to enforce the measure shall not be deemed incompatible with the agreement to arbitrate.

<sup>992</sup> Article 1056 of the Dutch Civil Code.

<sup>993</sup> Article 1709 puts the courts on the same footing to enforce provisional measures.

<sup>994</sup> See Thomas selected issues: Interim Measures in International Arbitration; Finding the best answer Craot.ArbitNo.12 , 2005 at 218.

Arbitral sanctions are mainly drawing adverse inferences and holding the recalcitrant party liable for damages and costs.<sup>995</sup> Drawing adverse inferences concerning the preservation of evidence against the recalcitrant party could provide full protection. However, the threat of holding such a party liable for damages may not always be sufficient for measures related to the conduct of arbitration and the relation between parties during proceedings.<sup>996</sup> Where there is an issue of dissipation of assets, the tribunal has no power to temporarily freeze the assets to prevent them from dissipation. The non-enforceability influences the effectiveness of the arbitral provisional measures, that is because the sanctions for non-compliance with an arbitral provisional measure may not always, and are potentially not sufficient to protect arbitrating parties' rights on an interim basis. Any provisional relief to be effective must be enforced at the time it is granted, not after a final award.

### **7.3 Enforcement and recognition through national courts**

Courts are considered in resolving the conflict,<sup>997</sup> apart from the question of jurisdiction, they help in enforcement of interim measures and final awards. There is little point in an arbitration tribunal ordering interim measures if the measures in question are not capable of being rapidly and efficiently enforced. In this respect, it is often required to enforce in a jurisdiction which is not the jurisdiction where the tribunal is situated, for instance, the interim measures may order the conservation of assets or evidence which is located in a third party jurisdiction, which is not the jurisdiction of the tribunal. In such circumstances, in order to ensure the rapid and effective enforcement of the interim measures in question, it may be required to obtain such measures in question from the state court of the jurisdiction where the assets are located.<sup>998</sup> Indeed

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<sup>995</sup>The scope and interpretation of Brussels Regulation Article 1 (2) (d), in cases like *C-190/89 March Rich & Co AG v Societa Italian Impianti*. See Council Regulation 44/2001 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, OJ No L12 16.1 2001, where a breach of an arbitration agreement may not be subject to damages even when the contracts provided that any disputes that may arise between the buyer and seller shall be referred to in arbitration. See the Scholer Report on the application of the Brussels Regulation in member states, Heidelberg; 2007 available from <http://ec.europa.eu/civiljustice/news/whatnewen.thm> accessed 10 February 2012.

<sup>996</sup>See *Kastner v Jason and others* [2004] EWHC 592 para 35.

<sup>997</sup> See Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> edition Sweet & Maxwell 1999) at 448.

<sup>998</sup>See the fact that the agreement of the parties is the foundation of arbitration which has led to willingness on the part of the state to recognize the binding effect of an arbitral award and employ their enforcement machinery to enforce arbitral awards, as provided in s.58, and 66 of the EAA 1996.



provisional measures are enforced where possible, otherwise this could undermine the efficiency of arbitration proceedings.

When the parties do not voluntarily comply with an interim measure, intervention of state courts becomes necessary,<sup>999</sup> in order to obtain its judicial recognition and enforcement.<sup>1000</sup> The courts' involvement in enforcement is based on the territorial principle,<sup>1001</sup> which means that a judgement delivered in one country cannot, in absence of international agreement, have a direct operation of its own force in another.<sup>1002</sup> Nevertheless English courts have enforced foreign judgements since the seventeenth century.<sup>1003</sup> Slade LJ said that "the society of nations will work together if some foreign judgements are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found."<sup>1004</sup>

Another principle that supports enforcement by the courts is obligation theory, which is based on the notion that if the original court assumed jurisdiction on a proper basis, the court judgement should be regarded prima facie as creating an obligation between the parties to the foreign proceedings which the English courts ought to recognize and, where appropriate, enforce.<sup>1005</sup> This theory is adopted by English courts and forms a basis of recognition for judgements and enforcement.<sup>1006</sup>

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<sup>999</sup> See Thomas Muller, Switzerland, the Supreme Court declares the UK Worldwide freezing Order Enforceable, International Litigation News October 2004.

<sup>1000</sup> See *Teradyne Inc v Mostek Corp*, 797 F.2d 43,51 ( 1<sup>st</sup> Cir 1986), where it was held that a court can grant injunctive relief in an arbitrable dispute pending arbitration. see *Rose-Lino Bev v Coca-Cola Bottling Co*, 749 F.2d 124,125 ( 2<sup>nd</sup> Cir 1984), *Albatross S.S Company Bros*, 95 F.Supp 459,436 (SDNY 1951), where it was held that courts are not limited in their equity powers to the specific function of enforcing arbitration agreements to preserve status quo.

<sup>1001</sup> Foreign judgements may be entitled to recognition and enforcement under a number of different legal regimes. These include Common law rules, The Administration of Justice Act 1920, the Foreign Judgements (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgements Act 1982.

<sup>1002</sup> See Peter Noth and JJ Fawcett, Cheshire and North's Private International Law (13th edn Butterworth's London 1999) at 405.

<sup>1003</sup> See Dicey and Morris, The Conflicts of Laws, (13<sup>th</sup> edition, Sweet & Maxwell, London 2000) at 469.

<sup>1004</sup> See *Adams v Cape Industries* [1990] Ch. 433 at 552.

<sup>1005</sup> See Clarkson & Hill, Jaffrey on Conflicts of Laws, (Butterworth's 1997) at 146.

<sup>1006</sup> See Blackburn LJ *Schibsby v Westenholz*, [1870] LR 6 QB 155 at 159, where he said that "the judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgement is given, which the courts in this country are bound to enforce. "See Scott LJ in *Adams v Cape Industries* [1990] Ch.33, who accepted Blackburn's view.

Another theory based on reciprocity is provided by the English rules of conflict of laws. According to English court judgement is conclusive, provided that the foreign court had jurisdiction to give a judgement.<sup>1007</sup> It should be noted that this is now limited by many defences which may invoke the party wishing to resist the enforcement of the judgement, for example, where the foreign judgement is obtained by fraud<sup>1008</sup> or is at odds with English public policy, or natural justice, such judgements will not be enforced and recognized by English courts or if the judgement contravenes the arbitration agreement or party autonomy.<sup>1009</sup>

Interim measures ordered by an arbitral tribunal do not, by definition, finally resolve any point in the dispute. An award or order of interim measure is therefore unlikely to satisfy the requirements of finality under the New York Convention, which may render it unenforceable internationally. As a consequence, where there may be a need for international enforcement of interim measures, parties should consider applying for such measures before the courts of the place of execution provided that this is not incompatible with the arbitration agreement. Non-compliance of the order could also expose the non-complying party to an action for breach of the an arbitration agreement, which invites the courts as a host for enforcement.<sup>1010</sup> If a party to arbitration refuses to comply with the arbitral order for interim relief, the party seeking to enforce the award is left only with the option of seeking redress from the municipal courts.<sup>1011</sup> The concept of recognition applies in the case where a party seeks to introduce an interim measure in the national legal order without actually having it enforced,<sup>1012</sup> as in the case of measures of a merely declaratory or constitutive nature or content, or in the event that the measure does not require any form of co-operation by the party against which it is issued and is, so to say, self-executing. The concept of enforcement comes into play when the order must be given that the particular effect consists of the possibility to obtain compulsory enforcement through the co-operation of the state authorities or courts. However, this distinction does not have any specific consequences on the procedural regime, which is the same for both recognition

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<sup>1007</sup> See *United States of America v Inkley* [1988] 3 WLR 304.

<sup>1008</sup> See *Jet Holdings Inc v Patel* [1990] 1 QB 335.

<sup>1009</sup> See *ED & F Man (Sugar) Ltd v Haryanto* [1911] 1 Lloyd's Rep 249.

<sup>1010</sup> See *Yusuf Ahmed Alghanim & Sons v Toysir US INC* 126 F.3d 15 20-23 ( 2<sup>nd</sup> Cir 1997) applying Chapter 1 of the FAA 1925.

<sup>1011</sup> See EAA 1996 s.9.

<sup>1012</sup> See *Ninth Circuit in Pacific Reinsurance Management Corp v Ohio reinsurance Corp* 935 F.2d at 1023., where the court enforced provisional measures to preserve the integrity of the parties. See *Southern Sea Navigation Ltd of Monrovia v Petroleos Mexican city* 606 F. supp 692.694 (SDN 1985).

and enforcement. It should be noted that the recognition and enforcement of protective measures are outside of the control of party autonomy and arbitration rules, and are only governed, through legislative provisions in particular, by the law of the state, in which the measures produce their effects. It should be noted that for a long period of time,<sup>1013</sup> the issue of enforcing arbitral provisional measures was not even raised in national legislation, as priority was given to other aspects of the legal regime of interim measures. Debate characteristically focused on the possible application of recognition and enforcement arbitral awards to provisional measures. Recently, numerous national legislators have turned their attention to this issue, and have consequently adopted specific rules. However, most legal systems still do not tackle this problem, as a result jurisprudence solutions have been sought to deal with them.<sup>1014</sup> There is still an evident lack of uniformity among countries that have adopted specific rules on the recognition of provisional measures.

Recourse to municipal courts with a view to obtaining the enforcement of provisional measures ordered by the arbitral tribunal may take two distinctive forms.<sup>1015</sup> The first approach consists of applying for a declaration of enforceability (*exequatur*) of the arbitral tribunal's decisions, based on the assumption that the latter can be assimilated to an award. The second approach consists of a particular procedure leading to the court order confirming the arbitral tribunal's decision of compelling a recalcitrant party to comply with. It is of great imperative note, that in jurisdictions following the *exequatur* model,<sup>1016</sup> the intervention of the courts is limited to ensuring that the arbitral decision meets certain basic requirements and declares it enforceable, without reproducing or modifying it. This approach is followed in numerous jurisdictions for example, England has adopted the UNCITRAL Model Law, by means of the extension of provisions

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<sup>1013</sup> Andrea Carlevaris, *The Enforcement of Interim Measures ordered by International Arbitrators: Different Legislative Approaches and Recent Developments in the Amendment of the UNCITRAL Model*, Antwerp :Maklu 2007 at 13-26.

<sup>1014</sup> See Andreas, *Enforcement of Provisional measures* at 19-22. See Professor Franco Ferrari, Andrea Carlevaris, George Berman and Massimo Benedette, Centre for Transnational Litigation, Arbitration and Commercial Law, New York University, Law School, a seminar addressing Interim measures, (October 7 2013).

<sup>1015</sup> Tijana Kojović, "Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional?", *Journal of International Arbitration*, Kluwer Law International, Vol. 18. No. 5 October 2001, pp. 511-532

<sup>1016</sup> Defined as a procedure by which a party requires of a national tribunal to confer the execution on a foreign legal decision. *Exequatur* is a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad.

dealing with the recognition and enforcement of awards,<sup>1017</sup> to provisional measures.<sup>1018</sup> In some cases, this extension is subject to a specific agreement between the parties. This approach presupposes the characterization of the arbitral decision as an award, but not necessarily its adoption in the form of an award; while certain jurisdictions provide what the measures must take from an award,<sup>1019</sup> others simply put provisional measures on the same footing as awards, irrespective of their form.<sup>1020</sup> The *exequatur* of the provisional measures only produces its effect in the jurisdiction in which it is granted. The author argues that *exequatur* approach is not entirely satisfactory, applying the legal regime of arbitral awards to provisional measures only transforms them into factious awards, whose legal nature is recognized within the same legal order, but does not allow recognition and enforcement abroad.

A significantly different approach is followed in jurisdictions providing a specific court support mechanism. This consists of the adoption of a self-standing order in support of the arbitral measure by municipal courts, which is sometimes initiated on the initiative of the arbitrators,<sup>1021</sup> contrary to the *exequatur model*, and the judge makes his own autonomous order with a view to pursuing the aim of the arbitration measures and ensuring effectiveness. The content of the order may vary, and the judge generally has the power to adapt the measures to its own procedural law. The court's order in support of the arbitral measures is no different from any ordinary judicial decision, and may calculate it on the basis of the applicable rules on the recognition and enforcement of foreign judicial decisions. The power of the courts to assist in the enforcement of a provisional measure must not be confused with its autonomous power to grant provisional measures on the basis of concurrent jurisdiction. When they exercise their own power to order provisional measures, judges do not merely give assistance in enforcing the arbitrators decisions, and their discretion is therefore unlimited both in respect of the assessment of the requirements for granting interim measures and in respect of the content of the order.<sup>1022</sup>

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<sup>1017</sup> Model Law article 35 and 36.

<sup>1018</sup> See Binder, *International commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, London (2005) at 154.

<sup>1019</sup> See Arbitration Act of Scotland Article 17 (2).

<sup>1020</sup> See Article 1051 para 3 of the Dutch Code of Civil Procedure, Article 23 para 2 of the 2003 Spanish Ley de Arbitraje.

<sup>1021</sup> See EAA 1996 s. 44, Article 183 para 2 of the Swiss Arbitration Act.

<sup>1022</sup> See s.1041 para 2 ZPO, which allows the party which has obtained an order from the tribunal, to apply to court for enforcement under the court support model, which allows the court to modify the order, see s. 1041 para 3 ZPO.

Furthermore, provisional measures may be enforced by municipal courts under the principle of territorial sovereignty. The principle of territorial sovereignty means that a judgement delivered in the country cannot, in the absence of international agreement, have a direct operation on its own force.<sup>1023</sup> Nevertheless, English courts ought to recognize and, where appropriate, enforce the provisional measures granted by the tribunal.<sup>1024</sup> The theory of obligation supports the notion of enforcement of provisional measures. It is based on the notion that if the original court assumed jurisdiction on a proper basis, the court's judgement should be *prima facie* as creating an obligation between the parties to the foreign proceedings which English courts ought to recognize and, where appropriate enforce it. The theory was adopted by Blackburn LJ in nineteenth century in *Schibsy v Westnholz*,<sup>1025</sup> where he said that:

“the judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum of which judgement is given, which the courts in this country are bound to enforce.”

This theory is still a powerful weapon for the enforcement of interim measures in England. Another different legislative model that exists is where the judge makes an autonomous interim measure on the basis of the factual and legal assessment already made by the arbitral tribunal. This approach, which presupposes a duplication of proceedings, is extremely restrictive in respect of the arbitrators' powers, and is generally not provided in isolation, but rather in combination with the *exequatur* mechanism.<sup>1026</sup>

A different approach from all the above mechanisms of arbitral provisional measures is provided under English law. This approach combines all most all the above mechanisms but mainly the *exequatur* model, together with elements of the court subsidiary mechanism. Unlike the jurisdictions following *exequatur*, the Arbitration Act 1996 does not put provisional orders on the same footing as awards,<sup>1027</sup> and provides for a different specific mechanism for the former.<sup>1028</sup> However, unlike court support mechanisms, English courts do not have their own orders, but

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<sup>1023</sup> See Redfern Hunter at 446-470. See Cheshire and North's Private International Law, (13<sup>th</sup> edition Sweet & Maxwell (2000) at 469.

<sup>1024</sup> See Clarkson & Hill Jaffey on Conflict of Laws, Butterworth's London (1997) at 146.

<sup>1025</sup> [1879] QB 155.

<sup>1026</sup> See Article 7 para 2 of the Kenyan Arbitration Act 1995, see Article 9 of the New Zealand Arbitration Act.

<sup>1027</sup> Which are subject to their own distinct regime of recognition and enforcement?

<sup>1028</sup> See EAA 1996 s. 42.

only give the arbitral order a legal force that it originally lacked. They are also totally deprived of any power to revise or modify the arbitral measures. The court makes an order requiring a party to comply with a peremptory order,<sup>1029</sup> that the arbitral tribunal is empowered to make only after the party has failed to comply with a previous order without showing sufficient cause.<sup>1030</sup> In order for the interested party to be able to have recourse to the courts to obtain assistance in the enforcement of provisional measures, a double refusal by the other party is therefore necessary; first, in respect of the original arbitral order, and then in respect of the more coercive peremptory order.<sup>1031</sup> Furthermore, under English Arbitral rules, recourse to national courts is only made subject to the previous exhaustion of all available remedies for non-compliance before the arbitral tribunal,<sup>1032</sup> and to the expiry of any deadlines set by the arbitrators to abide by the order. The English courts have more powers, which are not provided in the Arbitration Act 1996, for example, the courts can convert a breach of an arbitration order into contempt of court, subject to judicial procedure.<sup>1033</sup> Although arbitration orders can be enforced by courts,<sup>1034</sup> such judicial intervention often effectively nullifies many of the traditional advantages of arbitration, for example, the need to seek enforcement from courts can protract the dispute, create jurisdictional problems and increase the expense. The difficulties inherent in jurisdiction in the current enforcement system have encouraged many to seek to amend the arbitral rules and Arbitration Act 1996, and to provide arbitral tribunals with the power to enforce their own orders.<sup>1035</sup> It is not axiomatic that courts should have the competence to enforce such provisional measures.<sup>1036</sup> Indeed, there is the obligation to support the arbitral process by upholding the arbitration agreement by referring parties to arbitration, and by recognition and enforcement of

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<sup>1029</sup> *Ibid* s.42 (1).

<sup>1030</sup> *Ibid* s.41 (5).

<sup>1031</sup> See *Kojovic* at 518.

<sup>1032</sup> EAA 1996 s.41 (3).

<sup>1033</sup> See s.37 of the Supreme Court Act 1981.

<sup>1034</sup> It should be noted that even the court enforcement mechanism is limited by Public policy, whereby a court will enforce any award subject to fraud even if the arbitration agreement is separable from normal contract procedures, due to public policy. See *Regazzoni v Sethia* [1857] 2 Lloyd's Rep 289, see *Foster v Driscoll* [1929] 1 KB 470,

<sup>1035</sup> See Ferguson, Possible Future Work in the Area of International Arbitration by UNCITRAL 32 session para 120 UNDOc A/CN 9/460 (1999).

<sup>1036</sup> See *Channel Tunnel* [1993] AC 33.

arbitral decisions made in other Signatories to the New York Convention.<sup>1037</sup> Any suit should be referred to arbitration to maintain party autonomy.<sup>1038</sup>

#### **7.4 The applicability of the New York Convention to the recognition and enforcement of provisional measures**

With globalization and privatization, the volume of arbitration disputes has increased,<sup>1039</sup> which makes both a numerical and geographical increase in qualified arbitrators and it is very important to ensure that arbitral provisional measures are enforced under international conventions,<sup>1040</sup> so that the claimants do not lose out, especially when the parties have no assets at the seat of arbitration.<sup>1041</sup> Since England is signatory to the New York Convention,<sup>1042</sup> it is of great importance that this thesis examines<sup>1043</sup> how provisional measures can be enforced under the New York Convention.<sup>1044</sup> The convention requires signatories<sup>1045</sup> to recognize and enforce commercial arbitration awards involving foreign interests.<sup>1046</sup> Paragraph 1 of Article 1 contains two definitions of foreign awards. The first definition, set forth in the first sentence of paragraph 1 is an award made in the territory state other than the state where recognition and enforcement are sought. Accordingly, paragraph 1 applies to awards made in any other state. However, a state, when becoming party to the convention, can limit this field of application by using the first

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<sup>1037</sup> See Article IV-V of the New York Convention 1958.

<sup>1038</sup> EAA s. 2 (2), s.42, s.45 (1) and s.1

<sup>1039</sup> See Albert Jan Van, The New York Convention of 1958: An Overview, published in Yearbook Vol. XXVIII (2003) also available on line at <http://www.kluwerarbitration.com>, accessed on 12 December 2012.

<sup>1040</sup> See Lew, Mistelis and Kroll, Comparative International Commercial Arbitration Para 21-26, see ICCA's Guide to the interpretation of the 1958 New York Convention: A Handbook for judges at 6.

<sup>1041</sup> See Jan Van Berg's thesis "The Judicial Interpretation of and Application of the New York Convention, (1981) at 200.

<sup>1042</sup> The New York Convention on the Recognition and Enforcement of Foreign Awards, in New York, 10 June 1958. See The English Arbitration Act 1979, which was enacted by Westminster in compliance with the New York Convention of 1958.

<sup>1043</sup> See New York Convention 1958 Article II (1), which encompasses an agreement under which parties under take to submit to arbitration all or any future differences which have arisen or may arise between them. This means that the New York Convention treats it like the submission agreement (*acte de compromise*) by which an already existing dispute is referred to arbitration and the arbitration (*clause Compromissoire*) by which future disputes are settled. Indeed this sets the motion that in enforcing interim measures, the Convention is compatible with the doctrine of party autonomy.

<sup>1044</sup> See Albert Van den Berg, available on line at: <http://www.kluwerarbitration.com>, accessed Jan 2013.

<sup>1045</sup> For a list of signatories to the New York Convention, see [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention-status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention-status.html).

<sup>1046</sup> See United Nations Convention on the Recognition and Enforcement of Foreign Awards 19 Jun 1958.

reservation of Article 1(3). The state making that reservation will apply the convention to the recognition and enforcement of awards made in the territory of another contracting state.<sup>1047</sup> The main genesis of the definition as discussed at the New York Convention, was to see that arbitral awards recognized in member states are enforceable.<sup>1048</sup> The convention contains no provisions on the matter of conservatory, provisional, protective or interim measures issued by a court in aid of arbitration. Hence, their availability and procedure depend on the law of the court before which the measure is sought.<sup>1049</sup> National courts can indeed assist international arbitration in an effective manner in this respect.<sup>1050</sup> No court in the reported cases has doubted that an attachment in connection with the enforcement of an arbitral award, or post award attachment, in order to secure payment under the award, is compatible with the convention. Reported cases also leave no doubt as to the possibility of a pre-award attachment.

The convention is known as the fundamental treaty of international arbitration.<sup>1051</sup> It regulates the recognition and enforcement of arbitral awards by contracting states' courts. The convention applies to awards that are not domestic in nature.<sup>1052</sup> The question of the applicability of the convention to the recognition and enforcement of provisional measures has given rise to wide theoretical debate,<sup>1053</sup> the main difficulty in giving an ambiguous answer derives from the absence in the convention of an explicit expressed definition of its main objective namely the

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<sup>1047</sup> See Article XIV, the so-called reciprocity reservation, whereby two thirds of contracting states employ the first reservation.

<sup>1048</sup> See the Leading case of the *US Court of Appeal of Second Circuit in Bergesen v Muller* (US No. 54, Reported in Yearbook Vol.1 IXP. 487). In *Bergesen*, the court enforced the award made in New York, under the New York Law between the Norwegian and Swiss party by relying on the second definition contained in Article 1(1). The place where the award was made is meaningless, in this case.

<sup>1049</sup> Guixing Liu and HangyuShen, Recognition and Enforcement of Foreign Arbitral Awards in China: A reflection on the Court Practice; report presented at the Private International Law Global forum, held in Beijing on 22-23 October 2011.

<sup>1050</sup> See Jan Paulsson, Towards Minimum Standards of Enforcement: Feasibility of the Model Law in Albert Jav Van den Berg (edn), ICCA Congress Series No.9 (Kluwer Law International 1999).

<sup>1051</sup> See Andrea Carlvis enforcement of interim measures at 21-22.

<sup>1052</sup> William W.Park, The International currency of Arbitral awards in International Arbitration, Practicing law Institute 2007 at 318-319. See New York Convention Article V (1) and III, which provides that: "each contracting state shall recognize arbitral awards as binding and enforce them in according with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following order." See *Dardan v Yukos* [2002] ALL ER Comm 819.

<sup>1053</sup> See Besson at 329, see Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Ocean Publications 2000) at 456; and see Lam, Sporenberg, The Enforcement of Foreign Arbitral awards under the New York Convention, Recent Development, in Stockholm Arbitration Report, 2001 at 1.



concept of “*arbitral awards*”.<sup>1054</sup> Despite the opinion expressed by eminent authors, the form of the measures should be considered irrelevant for the purpose of determining whether it can be enforced under the New York Convention. A court whose recourse is made for the enforcement of an interim measure would, in fact, be free to characterize the measure as it deems appropriate, and even to re-characterize it if it considered that the arbitral tribunal had erroneously chosen the form of an award. Furthermore, it is not open to the parties to influence the regime of the recognition and enforcement of an arbitral decision by jointly requesting that the measure be issued in the form of an award.<sup>1055</sup> Many theories have been advanced in favour of the applicability of the New York Convention to arbitral provisional measures generally aimed at ensuring that the measure be fully effective,<sup>1056</sup> and that it circulates in the jurisdictions of all contracting states.<sup>1057</sup>

Some commentators refer to the final nature of provisional measures in respect to their own objective, although only for the limited duration of the arbitral proceedings. Other scholars generally emphasize that the New York Convention sets forth the principle for enforcement of arbitral awards not the provisional orders, and that such principles do not apply to court orders. To this end, it should be noted that neither the test of the Convention nor the preparatory materials on it explicitly deal with the Convention application of enforcement of provisional measures.<sup>1058</sup> In a much known and thoroughly motivated ruling, the Supreme Court of Queensland had to examine whether a decision labelled “*Interim arbitration order and award*” made by an arbitrator to protect the contractual rights of a party during the proceedings, was capable of recognition and enforcement in Australia under the New York Convention. The court came to a negative conclusion on the basis of an interlocutory, rather than final, nature of the

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<sup>1054</sup> See Van Uden, in his PhD Thesis, *The Judicial Interpretation and Application of the New York Convention 1981, Van Uden, and the 1958 New York Convention, Revisited* in ASA Special Series No.15 *Arbitral Tribunal or State Courts: Who must defer whom?* 2001 at 141.

<sup>1055</sup> The state under reciprocity, Article 1 (3) of the Convention may play a role in the sense that a court may be prepared to consider an award as domestic for the purpose of the New York Convention only if the parties (or at least one of them) comes from the contracting states.

<sup>1056</sup> See the US Court of Appeal for the Second Circuit Court in *Begesen v Muller*, US No. 54, reported in *Yearbook Vol. IX 1983* at 483.

<sup>1057</sup> See Kojovic at 532, Yesilmark, *Provisional Measures* at 265.

<sup>1058</sup> See *LexFori*, the law of the contracts should try to find solutions to such gaps, whether the arbitration agreement deals with a matter capable of being settled through arbitration, arbitration should not be particularly an aid of another legal order, therefore, it should be determined under international policy rather than by looking at a set of legal provisions of a given domestic law.

decision.<sup>1059</sup> According to the Australian judges the reference to arbitral awards in the Convention does not include an interlocutory order made by an arbitral tribunal, but only an award which finally determines the rights of the parties.

The author argues that the Queensland court should have considered enforcing the provisional measures, even though by nature an interim award is not final. The word final used by the court is ambiguous and misleading to the application or enforcement of provisional measures, since the New York Convention does not expressly provide that an award has to pass the test of binding and final.<sup>1060</sup> On a preliminary basis, it should be stressed that the specific objective of the Convention are, on one hand, the recognition and enforcement made pursuant thereto. It would be inconsistent to consider interim measures excluded from the scope of the Convention in respect of the former covered by it in respect of the latter. In order for the Convention to benefit the applicants, it should provide adequate mechanisms for the modification of the *exequatur*.<sup>1061</sup>

This contrasts to *Kastner v Jason*,<sup>1062</sup> where a defendant breached the arbitral sanction and disposed of property to a third party without the consent from the tribunal, and escaped to the USA with the proceeds of sale, thereby evading enforcement in England of the eventual final award. The provisional award was enforced under the New York Convention. This case classically adduces the application of the New York Convention to English cases.<sup>1063</sup>

Arguments against the applicability of the New York Convention to provisional measures are mainly based on a systematic interpretation of the provisions of the Convention,<sup>1064</sup> and form an analysis of the requirements,<sup>1065</sup> of the recognition and enforcement of awards there under based on the rationale in McCreary's doctrine and its progeny has faced harsh criticism by

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<sup>1059</sup> See the Supreme Court of Queensland, *Resort Condominiums International, Inc v Ray Bowlwell and Resort Condominiums (Australasia) Pty Ltd*, Y.ComArb. 1995 at 628; for an in depth comment on the decision see Pyle, *Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v Bolwell*, Arb Intl. 1994 at 585. See Jovic at 56.

<sup>1060</sup> See Article 1 (1) of the New York convention 1958, which provides that "this convention shall apply to recognition and enforcement of arbitral awards made in the territory as a state other than the state where the recognition and enforcement of awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic in the state where their recognition and enforcement is sought."

<sup>1061</sup> See Bernardini, *Arbitrato Internazionale e misure cautelari* at 24. See Yesrimark at 146-147.

<sup>1062</sup> [2005] 1 Lloyd's Rep para 20.

<sup>1063</sup> See EAA 1996 s.103 which restates Article V (1) of the New York Convention 1858.

<sup>1064</sup> See Article V of the New York convention on grounds for refusal for recognition.

<sup>1065</sup> See *Speryy International trade Inc v Government of Israel*, F, 2d 301 (Cir 1989), where it was held that provisional measures are enforceable under the New York Convention.

commentators and courts. One commentator summed up the alleged flaws in logic of McCreary stating that the

“McCreary decision is based on the wrong presumption that Article II (3) of the New York Convention completely diverts the courts of contracting states of their jurisdiction. The effect of Article II (3) is merely that the courts have no jurisdiction to hear the merits of the dispute. No contrary inference can be drawn from the use of the word refers in Article II (3) rather than stay the court action. The word refer is used for historical reasons and its technical procedure sense must be deemed as court directives staying the court proceedings on merits.”<sup>1066</sup>

Furthermore, Gaja has concluded that the New York Convention permits the enforcement of provisional measures on the grounds that the pre –award attachments are consistent with the convention goals, by stating that:

“The fact that courts cannot continue proceedings on the merits does not mean that they should also dismiss any request for interim measures of protection. These are generally outside the scope of the arbitrators’ competence, and foreign decisions on such matters are seldom recognised. If the convention did not allow the courts to grant any provisional remedy in the presence of an arbitral agreement covered by the convention, the arbitral award might be prevented from reaching any practical effect. The purpose of the convention seems to better served if an obligation not to grant interim measures is not considered as having been set in Article II (3).”<sup>1067</sup>

The New York Convention Article II (3), which is seen as draconian provides that:

“a court of a contracting state when seized of an action in matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties refer the parties to arbitration unless it finds that the said agreement is void, inoperative or incapable of being performed.”

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<sup>1066</sup> See A. J Van Berg, recent Enforcement Problems in New York and ICSID Convention, *Arb Int’l No.1*, London, Chartered Institute of Arbitrators (2007) at 15-17. See *China Metal Products. Import/Export v Apex Digital Inc* 155 F. Supp 2<sup>nd</sup> 1174 (Cal 2001) where it was held that McCreary is not sounding.

<sup>1067</sup> See Gaja, G, *International Commercial arbitration: New York Convention 1980*.

Based on the quotations above the Convention looks to be silent with the enforcement of provisional measures, however, on the subject of interim measures,<sup>1068</sup> the absence of a provision for authority to grant interim measures is not surprising as the main aim of the Convention was to promote the enforcement and recognition of awards rather than provide a procedural framework for arbitral proceedings. In advancement of arbitration, three years after *McCreary* was decided,<sup>1069</sup> the Federal Court in California, in *Uranex*,<sup>1070</sup> held that prejudgement attachments can be enforced in cases governed by the New York Convention. The court's reasoning in *Uranex* was based on the argument that nothing in the text of the New York Convention implies that court ordered interim measures were prohibited in arbitration. The court found no meaningful distinction between Article II (3) of the Convention and s.3 of FAA, which directs courts stay trial of action. Stay does not mean directive but to apply the convention purposively. It should, however, be noted in the recent case of *Contichen LPG v Parsons shipping Co*,<sup>1071</sup> that the second circuit court held that the New York Convention interim relief under Article II (3) is not available in international arbitration governed by the convention as the legislative history of the statute specified that the decision was not meant to displace Cooper, hence the application may vary depending on a case-by-case basis.<sup>1072</sup>

On a preliminary basis, it should be stressed that the specific objectives of the New York Convention are, on the one hand, the recognition of the arbitration agreement, and on the other, the recognition of arbitral awards made pursuant thereto. It would be practically inconsistent to consider interim measures excluded from the scope of the New York Convention in respect of the former,<sup>1073</sup> and covered by it in respect of the latter.<sup>1074</sup> However, admitting that provisional

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<sup>1068</sup> The application of New York is subject to the limitation of public policy under Article V (2) (b) which provides that the "recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that the enforcement of the award would be central to public policy in the country." The convention does not define public policy; this creates tension between the tribunal and courts, during the enforcement process. See Article III. See *Regazzoni v KC Sethia Ltd* [1957] 2 Lloyd's Rep 289.

<sup>1069</sup> See *McCreary Tire and Rubber Co v CEAT ASPA* 501 F.2d 1038 (3<sup>rd</sup> Cir 1974).

<sup>1070</sup> *Caroline Power and Light Co v Uranex* 451 F.Supp.1044 ( N.D Cal 1977).

<sup>1071</sup> F.3d 426 ( 2<sup>nd</sup> Cir 2000) 430-34.

<sup>1072</sup> See *Barden Inc v Meiji Milk Products Co. Ltd* 919 F.2d 822, 826 ( 1990).

<sup>1073</sup> Article IV sets conditions that need to be fulfilled by the petitioner to guarantee enforcement. One of them is that a party supplies a copy of the original agreement and a duly certified original award or a duly certified copy thereof. The authentication of the document is the formality which the signature thereon is attested to be genuine. Hence if a member court testifies a provisional measure, it can be enforced under the New York Convention. The irony that the definition of award is still not clear which does not adduce interim measures to fall within the same ambit.

<sup>1074</sup> See Jovic 528.

measures can be recognized and enforced on the basis of the Convention would necessarily lead to admitting that arbitrators have exclusive jurisdiction to make provisional measures under the Convention which, on the contrary, is almost universally excluded.<sup>1075</sup> Considering the arbitral tribunal's power to revoke or modify provisional measures, the Convention should provide for adequate mechanisms for the corresponding revocation or modification of the *exequatur*, but no such mechanisms presently exist in the New York Convention.

Although the scope of the New York Convention should not be confused with the requirements set out therein for the enforcement of awards, several grounds for refusing the recognition and enforcement of arbitral awards under the Convention,<sup>1076</sup> are clearly applicable exclusively to the final awards on merits, and not to provisional measures, which would require the elaboration of a specific regime.<sup>1077</sup> This is particularly true in respect of the New York Convention,<sup>1078</sup> which allows municipal courts in which recognition is sought, to refuse *exequatur* if the arbitration agreement is invalid; thus implying a previous and positive assessment of the arbitrators' jurisdiction on its merits.

It should, however, be noted due to the urgency of provisional measures, that they're frequently granted before the full assessment of the arbitral jurisdiction. It would be of great imperative to note that a suitable mechanism for recognizing provisional measures should therefore take these circumstances into consideration, while the Convention does not allow any flexibility in this respect. Another ground for refusal that is incompatible with the recognition and enforcement of provisional measures is the lack of uniformity with most public policy of the state in which the enforcement is sought.<sup>1079</sup> The concept of public policy is a useful criterion with which to challenge the effectiveness of decisions on the merits when they are in conflict with the fundamental principles of the legal order of the state in which recognition is sought.

The author argues that the concept of public policy does not make any sense in regard to arbitral provisional measures, the contents of which largely depend on a comparative assessment of the interests of the parties involved and are generally neutral with regard to public policy. Another

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<sup>1075</sup> See New York Convention Article II (3).

<sup>1076</sup> Ibid Article V (VI)

<sup>1077</sup> Jovic at 520.

<sup>1078</sup> See Article V (1) (a) of the New York Convention.

<sup>1079</sup> Ibid Article V (2) (b).

bar to the New York Convention<sup>1080</sup> is the bar on the recognition of ex parte measures, which allows judges to refuse the recognition of awards issued against parties which were not given proper notice of the appointment of the arbitrators and the arbitral proceedings, or were otherwise unable to present their case. It should be noted that part of the doctrine (ex parte order) is in favour of the recognition and enforcement of provisional measures in countries like Italy, where arbitrators have no power to make provisional measures.

The approach is based on the already mentioned theory that allows enforcement of provisional measures, provided that they are adopted in the form of awards. Any recourse to this formal requirement, according to the same theory, would be possible, provided that the parties have specifically agreed to it possibly by making reference to the rules of arbitration, and that it is not contrary to the law of the place of arbitration.<sup>1081</sup> In the same vein, judges of a country where arbitrators have no powers to make provisional orders should enforce foreign orders under the New York Convention when the orders can be characterized as awards.<sup>1082</sup>

The choice of the form of the order, even when it confirms that the parties cannot provide it with a legal nature of which it is devoid due to the lack of the relevant substantive elements don't understand. The approach would result in the inequality of treatment at the stage of enforcement on the place of arbitration.<sup>1083</sup> It should be noted that in order to enhance arbitration in England and internationally, the New York Convention should adopt a special provision for interim measures' enforcement, otherwise assets will be dissipated by the defendant and they would not be enforced in foreign jurisdictions by courts, hence awards become meaningless and more costly to the claimants. In addition, the approach of most USA courts in regard to the enforcement of provisional measures by courts should be given a wide acceptance by all signatory states, since the purposeful interpretation of the New York Convention, harmonizes or

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<sup>1080</sup> Ibid Article V (II) ( b).

<sup>1081</sup> See Bernardini, *Arbitrato Internazionale e Misure cautelari* at 24.

<sup>1082</sup> Derains, *Technical Expertise and referee Arbitral*, in Sanders edition, ICC Congress series No.1 *New Trends in the Development International Commercial Arbitration and the Roles of Arbitral tribunal* at 38.

<sup>1083</sup> See Commentators of the ICC Rules for an arbitral referee, who do support the non-enforceability of the arbitral provisional measures made by pre-arbitral referees. See Besson at 75, Craig Paulsson at 708, Arnaldez, Schafer, *Le Reglement de referee pre-arbitral de la chambre de Commerce international ( envisageur depuis janvier 1990)* at 848. Hausmaninger, *The ICC Rules for a Pre-Arbitral Referee Procedure: A step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration?* ICSID Review-Foreign Investment Law Journal 1992 at 90.

enhances the effectiveness of arbitral provisional measures through international enforcement, despite the criticism of those against this mechanism of arbitral recognition and enforcement.<sup>1084</sup>

### **7.5 The work of UNCITRAL in respect of the recognition and enforcement of provisional measures**

The 1985 UNCITRAL Model Law on International Commercial Arbitration in its present version does not contain any provision on the recognition and enforcement of provisional measures. However, the lack of satisfactory and harmonized mechanisms for the recognition and enforcement of interim measures has prompted the UNCITRAL working Group on International Conciliation and Arbitration to pay specific attention to these issues during the recent work aimed at amending the Model Law.<sup>1085</sup>

The work on this topic, which lasted for many years, resulted in two new provisions that are intended to be integrated in the Model Law, respectively devoted to the recognition and enforcement of provisional measures,<sup>1086</sup> and the grounds for refusing enforcement.<sup>1087</sup> Both provisions clearly allow an *exequatur* approach similar to that applicable for awards under the same Model Law.<sup>1088</sup> Among the most innovative aspect of the new provisions, one should mention their extension to all types of provisional measures, irrespective of the place of origin, which intended to overcome the difficulties that are presently being experienced with regard to a transnational circulation of the measures. Furthermore, the amended text provides the introduction of several specific new grounds for refusal, In addition to those applying towards what are mandatory and do not allow the judges any discretion. As with most of the jurisdiction

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<sup>1084</sup> The New York Convention on enforcement of provisional measures, has got mixed views. The test and preparatory material on the convention are silent, In addition, both the courts and commentators have divergent views on this subject. The Convention requires that an award to be enforced under Article V (I) (e) has to be final and binding. The parties in arbitration have to accept whether the award is binding or not, and this adduces the doctrine of party autonomy which determines the enforcement. There is no clarity, and this grey area, in regard to enforcement, is still debatable and no clear solutions have been provided by either the New York Convention or any international convention.

<sup>1085</sup> See Besson at 75.

<sup>1086</sup> UNCITRAL Article 17.

<sup>1087</sup> Ibid 17 (d).

<sup>1088</sup> Model Law Article 35 and 36.

allowing the *exequatur* of provisional measures, the draft also states that the form of the measure is irrelevant for the purpose of its enforcement and recognition.<sup>1089</sup>

As far as the specific grounds for refusal are concerned, the amended text distinguishes between grounds which have to be raised by a party,<sup>1090</sup> to non-compliance with a tribunal's orders to provide security in connection with an interim measure, and to the termination or suspension of the measure, and grounds which can be raised by the court on its own motion.<sup>1091</sup> One of the problems of Model Law is the failure of the states to adopt the changes of enforcing provisional measures with no any hindrances. Since many states have not adopted the UNCITRAL Model Law in support of the New York Convention, and the costs embedded in adopting it in their national laws, the success of this innovation has not yielded as expected. The harmonization and effective enforcement will only be achieved after the new adoption of an enforcement protocol to the New York Convention that deals with the enforcement of Provisional measures.

## **7.6 Enforcement under the Brussels Regime/Regulation**

One of the purposes of the Brussels regime is to simplify the formalities governing recognition and enforcement of judgements.<sup>1092</sup> The main aim of the Brussels Regime is to facilitate, to the greatest possible extent, the free movement of judgements by providing a simple and rapid enforcement procedure.<sup>1093</sup> The rules governing the enforcement of judgements<sup>1094</sup> generally apply to the enforcement of provisional measures in member states other than the one in which they have been granted. This is provided by Article 38 which provides that:

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<sup>1089</sup> See for an in depth analysis of UNCITRAL's work on the recognition and enforcement of interim measures, Danovan, *The Scope of Enforcement of Provisional measures in International Commercial Arbitration; A survey of Jurisdiction, the work of UNCITRAL and Proposal for Movements*. See Yesilmark, *Provisional Measures* at 146-147.

<sup>1090</sup> UNCITRAL Model Law Article 17 (1), which refers to grounds under Article 36 (c) (1) a-I,ii and iv of Model Law.

<sup>1091</sup> Incompatibility of the interim measures with powers of the court, a lack of arbitrability of the dispute and contrast with public policy.

<sup>1092</sup> See judgement 21 May 1980 in Case *Danilauler v CouchetFrers* [1980] 1553.

<sup>1093</sup> See Judgement of March 18. 2000 in Case C-1/98 *Krombach* [2000] 1-1935.

<sup>1094</sup> See Article 32 of Brussels 1 Regulation states that "for the purpose of this Regulation 'judgement' means any judgement given by a court or tribunal of a member state, whatever the judgement may be called, including a decree, order, decision..... as we as the determination of costs or expenses by an officer of the court." Following the argumentation of the ECJ in case 80/00 and the disposition of the Brussels 1 Regulation it is apparent that the act ordering provisions including protective measures falls within the meaning of "Judgement" and its recognition ends enforcement which shall be those provided for by judgements in Chapter Iii " Recognition and Enforcement" of the Brussels 1 Regulation.



“a judgement given in a member state and enforceable in that state shall be enforced in another member state when, on the application of any interested party, it has been declared enforceable there.”

An important principle in this respect is declared in the Italian Leather case,<sup>1095</sup> where the ECJ declared that :

“it is unimportant whether the judgement at issue has been delivered in proceedings for interim measures or in proceedings on the substance.”<sup>1096</sup>

Further Article 27 of the Brussels Regulation,<sup>1097</sup> provides that:

*“for the purpose of the free circulation of judgements, a judgement given in a member state should be recognized and enforceable in another member state even if it is given against a person not domiciled in a member state.”*

A classic case on enforcement of provisional measures was demonstrated in the decision of *Uzan v Motorola Credit Corporation*,<sup>1098</sup> where the Motorola Credit Corporation (Motorola) granted Telsim, the second largest GSM operator in Turkey, substantial loans primarily for the purpose of acquiring Motorola hardware. Telsim was controlled by the Turkish Uzan family. As a consequence of a very severe economic crisis which hit Turkey at the end of 2000 and 2001, combined with a sharp downturn in the worldwide telecom markets, Telsim was unable, by April 2001, to repay the loans granted by Motorola. Attempts to agree on the rescheduling of the loan repayment failed. Litigation commenced in England and USA. Motorola, rather than initiating arbitration proceedings as agreed in the loan agreement, sued members of the Uzan family personally plus some companies of the Rumeli Group in New York for alleged violation. A New York Judge granted an ex parte temporary order restraining certain assets in New York owned by Uzan family. Later, on application by Motorola, the UK high Court, on 30<sup>th</sup> May 2002, issued an ex parte freezing order against the Uzan family under s.25 of the Civil Jurisdiction and Judgement Act 1980. One of the defendants had a domicile in England and owned real estate in

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<sup>1095</sup>Case C-80/00.

<sup>1096</sup> Ibid.

<sup>1097</sup> See Council Regulation EU 1215/2012 of the European Parliament and the Council on Jurisdiction and the recognition and enforcement of judgement in civil and commercial matters of 12 December 2012.

<sup>1098</sup> See Decision of the Federal Tribunal (DTF) date 03 July 2003 in *Uzan v Motorola Credit Corp* ( 129 III 626).

London, the other two defendants had no contact with the United Kingdom. On 12<sup>th</sup> November 2002 Motorola was granted an enforcement order in Switzerland, which was presented to the District judge in Switzerland. The District court rejected it on the grounds of Article 34 of Brussels I, due to the fact that the defendants were not heard by the Zurich court, and were not aware of the ex parte order. Motorola appealed successfully, and granted enforcement. However, the Uzan family challenged the enforcement of the order. The Supreme court of Switzerland explicitly confirmed that the UK freezing ex parte order under Article 34 would be enforceable. This decision contradicts the ECJ decision in *Daniulaule*,<sup>1099</sup> where a freezing order was refused for enforcement on the grounds that a party had not been summoned to defend itself. Hence the measure did not fall within Article 34 and was unenforceable.

This case raises a debate since none of the Uzan family were residents of the Brussels Regime to rely on the jurisdiction grounds of enforceability and recognition.<sup>1100</sup> This case extended the scope of Brussels, where the Supreme Court held that *Van Uden* and *Mietz*<sup>1101</sup> principles are generally applicable not only in the case of decisions relating to the preliminary performance, but also to decisions of provisional measures solely aimed at preserving the status quo, and the ECJ did not reject this decision.

Tension exists between arbitration and Brussels and it posed the question of whether English courts have allowed the Regulation to be used to evade arbitration clauses as demonstrated by *Van Uden*. It should not be a mechanism to deprive the parties of their wish to go to arbitration by bringing arbitration disputes to the Regulation. After all, the main purpose of arbitration is to exclude the jurisdiction of national courts. It should be noted that one of the unique features of arbitration is its neutrality. The place of arbitration is often unrelated to the substance of the dispute and this ensures the all-important neutrality. If the Brussels I Regime or Council Regulation 42/2001 is applied it would mean one would have to determine what provisions of the Regulation conferred jurisdiction on the court at the place of arbitration. Surely this defeats the whole purpose of having an arbitration agreement as it is no longer a private agreement between the parties.

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<sup>1099</sup>Case 125/79 *Danilauler v Couchet Freres*.

<sup>1100</sup>Case C-391/95 *Van Uden v Deco line*.

<sup>1101</sup>See case C-991/95 27 April 1999 *Mietz v Intership Yachting Sneek Bv*.

### 7.6.1 Restrictions on the enforcement of protective measures under Brussels

The Brussels I Regulation provides for a member state judgement to be recognized in other member states without any special procedure being required.<sup>1102</sup> However, a judgement will not be recognized and enforced under the limited grounds of objection set out in Article 34 (public policy, default judgement and irreconcilable judgements). Or Article 35 (1) of (limited review of jurisdiction).

Chapter III of the Brussels Convention/Regulation contains far-reaching and compulsory rules that leave little scope for judgements given in one member state to be refused recognition and enforcement in another member state, which are usually called an “automatic defence”. This simplification is possible thanks to the introduction of unified direct rules of jurisdiction in Chapter II allowing for the due respect of the rights of the defence. As the ECJ observed in *Danilauler* decision:

“ all the provisions of the convention, both those contained in Chapter II on Jurisdiction and those contained in Chapter III on Recognition and Enforcement, express the intentions to ensure that within the scope of the objective of the convention, proceedings leading to the delivery of judicial decisions take place in such away that the rights of the defence are observed. It is because of the guarantees given by the defendant in the original proceedings that the convention is very liberal in Chapter III in regard to recognition and enforcement.”<sup>1103</sup>

It should be noted that after the Commission’s proposal, the new Regulation 1215/2012,<sup>1104</sup> provides that:

“ the judgement is enforceable in a member state of origin; and where the measure was ordered without the defendant being summoned to appear, proof of service of the judgement.”

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<sup>1102</sup> See Article 36 of Brussels I Regulation.

<sup>1103</sup> See *Denilauler* para 13.

<sup>1104</sup> See Council regulation 1215/2012, Article 42 (2) (ii) (c).

This quotation is a change, indeed, by allowing ex parte judgements to be recognized under Brussels is a clear step towards greater trust between a jurisdiction. Although the new Regulation considers the enforcement of ex parte measures, it does not consider that such measures should be better granted by the states of origin which could at least establish the extent necessary for protective measures or the existence of the debt. Indeed, this was one of Commission's proposals for the revision of Brussels, in order to allow provisions to be implemented without reference to court. All contracting states grant interim measures, and there is a large degree of similarity of the kind of measures made available. The author argues that the European law on provisional measures should be given more trust among member states like other areas for example; in areas of financial services, companies are regulated by a competent authority in a member state(FSA),<sup>1105</sup> and other host states are confident that appropriate standards of regulation are being applied, and can allow service providers to access their own domestic consumers. Possibly there is scope for European Protective Measures to be based on similar principles. If minimum standards were established for the granting of such measures, any other state requested to enforce measures should have no grounds for objection.

### **7.6.1 Exclusive jurisdiction and protective measures**

Article 22 of the Brussels Regulation provides several areas where courts of the respective member states have exclusive jurisdiction. According to Article 35(1) of the Regulation infringement of the rules on exclusive jurisdiction, there is a ground for refusal for recognizing and enforcing judgement. Generally, the rules for recognition and enforcement of judgement also apply to protective measures. However, it is not particularly clear whether certain protective measures, relating to the exclusive jurisdiction of the courts, can be granted only by the courts having such jurisdiction.

Exclusive jurisdiction is related to certain matters, which will be executed in the same member state, where courts have exclusive jurisdiction. Such matters are connected with immovable property or the state's public authorities (such as public register and other state bodies). These are areas of particular importance to the state, which justifies the exclusive jurisdiction. The jurisdiction of the courts in such member states to grant interim measures is unquestionable. This

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<sup>1105</sup>UK Financial Service Authority.

conclusion may also be seen in the ECJ decision.<sup>1106</sup> On the other hand, Article 31 of Brussels clearly states that any court of a member state seized with a motion for granting interim measures has the jurisdiction to authorize such measures, regardless of the fact that under the Brussels Regulation, the courts of another member state may have jurisdiction as to the substance of the matter. The provision does not differentiate between the rules on exclusive jurisdiction and other jurisdiction rules in the Regulation. Under Article 34 (1) failure to observe the rules of exclusive jurisdiction is also grounds for the refusal of the enforcement of protective measures. However, under Article 42 of the Regulation, both these grounds have to be invoked by the defendant on appeal against the declaration of enforceability. Therefore, the Regulation lacks clear grounds on which a court, does not have exclusive jurisdiction and can declare inadmissible a motion granting protective measures, which fall within the exclusive jurisdiction of another state's courts. The rules governing exclusive jurisdiction have precedence over any other jurisdictional rules, including Article 31. This conclusion also follows the fact that exclusive jurisdiction rules are the same as in Chapter II on the Brussels 1 Regulation, as the rule governing jurisdiction on interim measures.

### **7.6.2 Procedures for obtaining an order for enforcement**

An important principle is declared by the ECJ in *Deutsche Genossenschaftsbank v Braseriedu Pecher*.<sup>1107</sup> The Convention merely regulates the procedures for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which the execution is sought. Consequently, a foreign judgement for which an enforcement order has been issued is executed in accordance with the procedure rules of the domestic law of the court in which execution is sought, including those on legal remedies. This principle has important correlated consequences: firstly, the interested parties have at their disposal the legal remedies provided by the national law of the state where the execution take place, secondly, the legal remedies available under national law must be precluded when an appeal against the execution of a foreign judgement for which an enforcement order has been issued is lodged by the same person who could have appealed against the enforcement order and is based on an argument which could

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<sup>1106</sup>Van Uden case.

<sup>1107</sup>See case C-148/84 [1985] ECR I-1981.

have been raised in such an appeal.<sup>1108</sup> Since this principle applies to the enforcement of interim measures, this means that the claimant may only rely on the provisional measure he has obtained to the extent that such measures are enforceable in the state, where it will be executed.

### 7.6.3 Irreconcilable decisions

The ECJ has also interpreted one of the grounds on which the national courts may refuse the enforcement of protective measures under Article 34 (3) of Brussels.<sup>1109</sup> If a measure is irreconcilable with the decisions on interim measures given in a dispute between the same parties in the member state which recognition is sought, it will be unenforceable. The ECJ attempted to define irreconcilable decisions in these case at stake as follows:

“a foreign decision on interim measures ordering an obligor not to carry certain acts is irreconcilable with a decision on interim measures refusing to grant such an order act is irreconcilable with a decision on interim measure refusing to grant such an order in a dispute between the same parties in the state where recognition is sought.”<sup>1110</sup>

The irreconcilability lies in the effects of the judgements. It does not concern the requirement governing admissibility and procedure which determine whether judgements can be given and which may differ from one state to another. Accordingly, concluded the court, where a court in the state in which recognition is sought finds that a judgement of a court of another contracting state is irreconcilable with a judgement given by a court of the former state in a dispute between the same parties, it is required to refuse to recognize the foreign judgement. It is obvious that this rule is unconditional. As the court pointed out in Article 34(3) of Brussels, it sets out a ground for refusing to recognize a judgement which is mandatory. It should be noted that any ground for refusal of enforcement can only be brought by the defendant. Article 41 of the Regulation 422001, provides that judgements shall be declared enforceable immediately on completion of formalities in Article 53.<sup>1111</sup> The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submission on the

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<sup>1108</sup> See Case C- 145/86 *Hoffmann v Krieg*.

<sup>1109</sup> See Case C-80/00 *Italian Leather SPA*.

<sup>1110</sup> *Ibid*.

<sup>1111</sup> The party seeking enforcement, must produce a copy of the court order granting the interim measure and certificate of enforceability, issued by the court, which has granted the measure.

application.<sup>1112</sup> Therefore, these are the grounds for refusal of the enforcement. Such measures can only be enforced on appeal, which are regulated by Article 43 of the Brussels 1 regulation. In the opinion of the ECJ Article 36 of the Convention, it must be interpreted as meaning that a party who has not appealed against the enforcement order referred to in that provision is thereafter precluded, at the stage of the execution of the judgement, from relying on a valid ground which such a party could have pleaded for in the appeal against the enforcement order, and that this rule must be applied for their own motion by the courts of the state in which enforcement is sought.<sup>1113</sup>

#### **7.6.4 Public policy related restriction on the enforcement of protective measures**

The main defence against the recognition of a foreign judgement is the fact such recognition would be contrary to public of the state in which the recognition is sought. It is generally accepted that this ground for refusal should be interpreted strictly. The narrow scope of interpretation of this provision was confirmed in *Krombach and Renault*,<sup>1114</sup> in the judgement of the court of justice and eventually validated during the transformation of the Brussels. It is underlined, in Article 34(1) that a judgement shall not be recognized if such recognition is manifestly contrary to the public policy of the recognizing member state. It is interesting to call that the Renault judgement was given in an intellectual property case don't understand. In Italy, the claimant sought the enforcement of a decision of a French court that found the defendant guilty of forging manufactured and marketed body parts for Renault cars.

The ECJ held that a judgement of a court or tribunal of contracting (member) states recognized the existence of an intellectual property right in body parts for cars, and conferred the holder of those rights enabling him to prevent a third party trading in another contracting state from manufacturing and commercializing in that state such body parts that cannot be considered contrary to public policy. Strict interpretation of public policy does not allow invoking it in order to thwart the enforcement of cross-border judgement prohibiting the patent infringement, and

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<sup>1112</sup> See Article 34 & 35.

<sup>1113</sup> See case 145/86 *Hoffmann v Krieg*.

<sup>1114</sup> See judgements of March 28, 2000 in *Case C-7/98 Krombach* [2000] 1-1935 and May 11, 2000 in case C-28/98 *Renault v Maxicar* [2000] 1-2973.

this judgement was given in the summary proceedings. Such conclusions are well illustrated by a French decision of 28<sup>th</sup> January 1994 in the *Eurosensory v Teiman & Blind Equipment case*.<sup>1115</sup> In this case a Dutch Court granted a cross border injunction in the summary proceedings that was to be enforced , among others, in France. In first instance, the President of the Court of the First Instance in Paris had registered the Dutch judgement for enforcement. On appeal, the French company claimed that the recognition of an extraterritorial judgement was contrary to the public order in France because it would not be possible to obtain a similar provisional injunction in the summary proceedings under French law. The Court of Appeal rejected this argument and recognized the Dutch decision.

The lack of appropriate national enforcement procedural rules for a particular measure would usually would mean that the legal order of such a state does not recognize such a protective measure. In some situations, such protective measures may be manifestly contrary to basic legal principles in the state where enforcement is sought and thus contrary to public policy. Although provisional measures vary from one state to another, the differences are seen between civil and common law states. Anti-suit injunctions are readily granted in the UK, to refrain a party from commencing proceedings in another state. Generally, a court in one member state has no jurisdiction to order the court in another state to take or decline jurisdiction. The recognition and enforcement under Brussels I, however, raises the question of whether such measures can be recognised in another member state. In *Turner v Grovit*,<sup>1116</sup> the ECJ ruled that:

“ a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute. “Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of convention.”<sup>1117</sup>

The court does not expressly state that such an injunction would be incompatible with the contracting states’ public policy, because this is a question of national law. However, it may be argued that in its interpretation of the ECJ, it elevates the provisions of the convention to super

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<sup>1115</sup>

<sup>1116</sup>Case C-159/02 *Turner v Grovit*.

<sup>1117</sup> *Ibid.*



mandatory principles, which would be considered as forming part of the contracting state's public policies.<sup>1118</sup> The refusal to recognize such orders on the principle of public policy is not proportionate, since the main aim of such orders is intended to safeguard the plaintiff's interests and ensure the enforcement of the future decision on the dispute. It does not impose restrictions on the jurisdiction of the courts in other member states and therefore, does not contradict the Brussels 1 Regulation.

It would seem, therefore, that the public policy argument is not a very effective tool in blocking the recognition and execution of a decision of a foreign court. It should be noted that although the Brussels 1 Regulation uses the word public policy with no clear procedures and definition, the New Regulation 1215/2012, does not provide any better success since Article 45 provides grounds for refusal of judgement under public policy. These considerations show that the application of the general rules of recognition and enforcement to provisional measures is not particularly adequate. Article 42 (2) of Brussels 1 provides that the declaration of enforceability has to be served to the respondent, while Article 43 (3) refers to the rules governing appellate proceedings for the appeal against the declaration. Normally, the launch of an appeal suspends the execution of the decision being appealed. In this respect, the Bulgarian Civil Procedure Article 623(3) expressly provides that the declaration of enforceability may not be subject to preliminary enforcement in the case of an appeal. Therefore, the application of the general rules on recognition and enforcement to protective measures means that the respondent will be notified of the measures against him, before such has been executed. This is clearly central to the purpose of provisional measures.

## **7.7 Conclusion**

Although the arbitral tribunal has no coercive powers, this chapter examined how the tribunal orders function, under its tools of enforcement. However, given the nature of arbitration, the English legal procedures provide a legal effect, where it is called upon to support the system. Most of the sanctions or the tools are voluntary by nature hence, parties may antagonize the process were they not abided. There cases where decisions are not complied and such orders are

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<sup>1118</sup> See Case C-185/07 *West Tankers v Allianz*.

of international effect, the New York Convention 1958, may provide support but, the support is also debatable due to its application and how the courts have applied its provisions in regard to the enforcement of provisional measures, especially Article II (3).

When it comes to the enforcement stage of interim measures ordered by the tribunals, it is still questionable whether the state will issue its own order or will issue an order for the enforcement of the tribunal order. There are still questions to be answered, which the national courts require as a condition for the enforcement of interim measures ordered by tribunals that they should satisfy the judicial standards of awards. The courts will have to consider such orders as awards within the meaning of the convention to be enforced under New York.

The almost universal recognition of the arbitrators' power to adopt provisional measures is not sufficient to ensure the real effectiveness of arbitral interim relief in the absence of an effective mechanism of recognition and enforcement.<sup>1119</sup> The abstract recognition and enforcement of provisional measures might be seen as a paper tiger, unless a satisfactory enforcement mechanism is provided. The lack of harmony among the various legal systems, and the absence of an international instrument comparable to what the New York Convention is for arbitral awards, renders initiatives such as the text elaborated by the UNCITRAL Working Group extremely useful and interesting.

The opinion of commentators concurs on the need for elaboration on an adequate regime, but no agreement exists as to what is the best instrument for pursuing this aim. Some authors support the adoption of an international convention,<sup>1120</sup> while others are in favour of a softer form of harmonization among the various legal systems, to be fostered through uniform instruments such as Model Law. The version of UNCITRAL Model Law, which per se is a positive development, seems, however, inadequate to achieve the desired level of harmonization for several reasons; (a) the solution would not be binding on states, which remains entirely free to disregard the uniform text, (b) revision is likely to be adopted in jurisdictions that have already adopted Model Law, and would be compatible with jurisdictions whose arbitration legislation follows different approaches and lastly (c), the newly adopted provisions are not even capable of implementation in the jurisdictions of all Model Law countries, since many of them have already introduced

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<sup>1119</sup> See Kojovic at 531; sandars quo vadis Arbitration at 275.

<sup>1120</sup> See Lew. Mistelis, Kroll at 614.

modifications and amendments to the provisions on the recognition and enforcement of provisional measures following a very different approach from that chosen by the Working Group.

The adoption of a new international binding instrument therefore seems the most adequate manner for achieving real harmonization. However, a revision of the New York Convention, aimed at covering interim measures, does not seem to be an appropriate solution. It might jeopardize the success of the Convention by inducing states in disagreement with the version to withdraw their participation. Furthermore, a revision of the Convention would inevitably result in a lengthy and burdensome process, during which no harmonization would be realised between states which have already ratified the revised text and states... Finally, since the New York Convention, was drafted in the view of final decisions on the merits, its extension would result in the mere combination of different and in homogeneous regimes.

The only viable solution therefore, seems to be the adoption of a distinct international instrument, drawn up on the basis of the experience of the New York Convention, but substantially different in its content. The adoption of such an instrument, though certainly problematic, would not jeopardize the success of the Convention, and would allow the peculiarity of provisional measures to be fully taken into account. The Model Law needs to be modified to add enforceable provisions that would explicitly require courts to enforce interim measures granted by the arbitral tribunal.

The current Brussels 42/2001 does not provide sufficiently detailed rules on the jurisdiction, recognition and enforcement of protective measures or the new Regulation 1215/2012. Indeed the member states seems reluctant to introduce change in this area, which could probably be attributed to the considerable differences in their legal systems. However, the development of international civil proceedings and the growing number of cross-border disputes would eventually lead to changes in the regulation of the fast and effective relief which the protective measures provide. One of the main objectives of such future changes should be the easier enforcement of protective measures-without notification to the defendant and without the possibility to stay the enforcement on appeal. A step towards the achievement of these objectives would be the adoption of the European order on the attachment of bank accounts. For the time being, though, the parties seem to prefer applying for protective measures to the court in the

member state, where this will be executed as this the most secure approach. The other important issue that is of great importance is whether the European Convention on Human Rights will not be violated as result of court's enforcement of an ex parte order? The answer to such a question is clear as any ex parte orders in breach of the Convention rights, should not be enforced at all and courts should try to interpret the Brussels Regulation, in so far as possible, according to the Convention Rights. It should, however, be noted that neither the Brussels 1 Regulation nor its new successor, has addressed this issue. The author argues that, in order to avoid commercial litigants being exploited by the system, they should all be given the right to be heard under Article (6) (1) and the right to challenge any provisional order before it is enforced.<sup>1121</sup> Since England provides a subsidiarity model, human rights should be adopted in all provisional measures,<sup>1122</sup> the only irony is that some courts may argue that since arbitral tribunals are not public, the Convention does not apply,<sup>1123</sup> and such a scope should be interpreted purposively to promote human rights in arbitral proceedings.<sup>1124</sup>

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<sup>1121</sup> See English Human Rights Act 1998 S.3.

<sup>1122</sup> See *R v Switzerland Application No.10881/84*. See *Bramelidand Malmstrom v Sweden* Applicant No 8588/79. Report of Commission on 12 December 1983.

<sup>1123</sup> See *Dewer v Belgium* 1980 Reported in EHRR at 454.

<sup>1124</sup> See ECHR Article 6(1).

## **CHAPTER EIGHT**

### **8 Conclusion and recommendations**

#### **8.1 Conclusions**

The aim of the thesis has been to examine whether the arbitral tribunal has the autonomy to grant all provisional measures or the courts have the same power to grant provisional measures. In order to enhance the effectiveness of arbitration, and to meet the expectations of business persons, and ultimately, to ensure the success of arbitration, the problems and uncertainties regarding the interim measures should be resolved, because they are as important as the final award. The thesis is in favour of the subsidiarity model whereby both the courts and arbitral tribunals work together in granting provisional measures as this promotes efficiency and reduces tension between the two jurisdictions, due to mutual respect. However, the power of courts should be used cautiously since parties chose this private dispute settlement to avoid litigation.

The identification of the above problems, as well as their suggested solutions, are affected by business needs which are set out below.

**Chapter one** offered an introduction outlining the research significance, the initiation of arbitral provisional measures and the duration, questions of research, the problem of the study, the aims of the thesis, research methodology, previous studies, the limitations of the project, definitions of terminology, the characteristics of the provisional measures' initiation of arbitral proceedings, the composition of a request, the duration for a request and lastly the structure of the thesis.

**Chapter two;** the thesis started by examining the early relationship between the courts and arbitration or legislative legal developments.<sup>1125</sup> It investigated the reasons for the early conflicts between the courts and arbitration and why the courts were not so receptive towards arbitration.<sup>1126</sup> It clearly demonstrated that the early conflicts were not based on grounds of

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<sup>1125</sup> See Common Law Procedure Act 1854 S.28

<sup>1126</sup> See *Kill v Hollister* [1746] 1 Wil 129, *Haris v Reynolds* [1845] 7QB 69, *Scot v Avery* [1860] ALL ER 5.

public policy, but on jealous grounds.<sup>1127</sup> This jealousy hampered the arbitral competence and autonomy to grant provisional measures or any disputes emanating from the arbitration agreement. The tension between the two jurisdictions started to improve, with the enactment of the 1950,<sup>1128</sup> and 1979<sup>1129</sup> Arbitration Acts, however, there was still mistrust, and parties lacked autonomy in regard to arbitral proceedings, due to the stated procedure provided by the Arbitration Act 1950 s.21 and Arbitration Act 1979 s.22. In order to rectify the appalling situation, the 1996 Arbitration Act was enacted as an attempt to reform arbitration law in England and to see that English arbitral laws reflected Model Law,<sup>1130</sup> and the New York Convention. The motive for reform was the fear of losing London as a leading centre for commercial disputes and that economic powers may shift to other territories. The thesis, in examination, has adduced that there are still short-comings to the Arbitration Act 1996 and it needs reform, since it does not address all the recommendations of the DAC Report,<sup>1131</sup> and Model Law which was supposed to be a true reflection. Furthermore, the Act does not consider the European Convention for Human Rights,<sup>1132</sup> especially when it comes to ex parte measures. The degree of court intervention should be restricted only to enforcement, and any other provisions like s.37 of the Supreme Court Act 1981, should be precluded in the arbitral proceedings to the municipal courts. The scope of provisional measures granted should be widened, to meet the demands of litigants who use arbitration as a private dispute mechanism,<sup>1133</sup> and for this process to be effective, arbitrators should have the power to grant all measures sought by a party to arbitration agreement.

**Chapter Three** examined the doctrine of party autonomy as the main source of arbitral authority to grant provisional measures.<sup>1134</sup> Party autonomy is based on the assumption that parties to an arbitration agreement are knowledgeable and informed,<sup>1135</sup> and that they use the doctrine

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<sup>1127</sup> *Wellington v Mackintosh* [1743] 2 568.

<sup>1128</sup> See S.21 of Arbitration Act 1950.

<sup>1129</sup> See S.1 (1) of Arbitration Act 1979, see the *Oinoussian Virtue* [1981] 1 Lloyd's Rep 533.

<sup>1130</sup> See Model Law Article 5 and 9.

<sup>1131</sup> See DAC Report 1996 Par 18, 19 and 20.

<sup>1132</sup> See Article 6.

<sup>1133</sup> See Loukas Mistelis, 'International Arbitration-Trends and Challenges', at [www.ardmeda.org](http://www.ardmeda.org) accessed on 10 Jan 2014.

<sup>1134</sup> See *West Minister Chemical & Products Ltd v Eichholz and Loeser* [1954] 1 Lloyd's Rep 99.

<sup>1135</sup> See Tweddale & Tweddale, *Arbitration of Commercial Disputes; International and English and Practice*, Note 40 at 201.

responsibly.<sup>1136</sup> The expression “*unless otherwise agreed by the parties*” is a common phenomenon of occurrence in the Arbitration Act 1996.<sup>1137</sup> International conventions like the New York Convention,<sup>1138</sup> the ICC Rules,<sup>1139</sup> UNCITRAL Model Law,<sup>1140</sup> and LCIA,<sup>1141</sup> support the notion of party autonomy as the main source of arbitral power to grant provisional measures.<sup>1142</sup> The concept of party autonomy is derived from the concept that the intent of the parties shall be respected and enforceable.<sup>1143</sup> Hence, a guiding principle in determining the procedure should be followed in international commercial arbitration, as Hong Lin perceives that “*arbitration, unlike national courts system, is a commercially oriented product that flourishes on the basis of the market forces. To avoid fading away, the popularity of this product depends on whether the demands of customers are satisfied. However, excessive interference exercised by state courts can result in the dissatisfaction of the customers,*”<sup>1144</sup> as further evident in the *Channel Tunnel*.<sup>1145</sup> The chapter examined the main sources of party autonomy, for example, case law as demonstrated in *McCrearyTire Rubber Co v CEAT*,<sup>1146</sup> *Black Clawson International Ltd*,<sup>1147</sup> *Oxford Health Plans LLC v Sutter*<sup>1148</sup>.

Furthermore, the thesis examined the theories advanced in support of party autonomy. First, there is contractual theory.<sup>1149</sup> It is argued that party autonomy is the essence of arbitration.<sup>1150</sup> According to contractual theory, arbitration is an agent of parties, and what is done therefore is regarded as the will expressed by the parties. This theory has been supported by many prominent judges like Diplock, and academic scholars like Fourchard, Gillard & Goodman,<sup>1151</sup> Mustill and

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<sup>1136</sup> See *M/S Alghanim Industries Inc v Skandia International* [2001] 2 ALL ER Comm 30.

<sup>1137</sup> See EAA S.6,7,38,39,48,41,42, see LCIA Article 25.2, DAC Par 12.

<sup>1138</sup> New York Convention 1958 Article II (3).

<sup>1139</sup> ICC Rules Article 23.

<sup>1140</sup> Model Law Article 9.

<sup>1141</sup> LCIA Article 25.

<sup>1142</sup> See Mustil & Boyd (1989) at 223.

<sup>1143</sup> See *Black clawston International Ltd v Papier* [1998] 2 Lloyd’s Rep 446.

<sup>1144</sup> See Hong Lin Yu, “Five Years on A Review of the English Arbitration Act 1996,” 19(3) *Journal of International Arbitration* 92002) at 209.

<sup>1145</sup> [1993] AC 334, [1991] 1 ALL ER 664, [1911] 1 Lloyd’s Rep 291.

<sup>1146</sup> 501 F.2d 1038 (3<sup>rd</sup> Cir 1974).

<sup>1147</sup> [1981] 2 Lloyd’s Rep 446.

<sup>1148</sup> 675 F.3d 215 No.12-135 (US June 2013).

<sup>1149</sup> See *Bremar Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909.

<sup>1150</sup> See EAA 1996 S.7.

<sup>1151</sup> See Gaillard, Fourchard Gaillard Goldman on International Commercial Arbitration (Kluwer 1999) at 79.

Boyd.<sup>1152</sup> However, contractual theory fails to explain the much needed coercive palliative And coercive powers of the state in helping the proper function of arbitration.<sup>1153</sup>

Secondly, is jurisdictional theory,<sup>1154</sup> advanced by Rubelin.<sup>1155</sup> He argues that arbitration is controlled by the state and that the tribunal is on the same footing as municipal courts. Since the theory provides that party autonomy is derived from the state, the author argues that it is against the wishes of the parties who surrender to arbitration to avoid recourse to courts.<sup>1156</sup> This theory sits with a view that there must be state control over arbitration for ultimate public policy,<sup>1157</sup> and fails to take into account the need to free arbitration from the shackles of the state and the judicial grasp.<sup>1158</sup>

Thirdly, there is competence theory, provided under s.30,<sup>1159</sup> which provides that parties vest their powers in an arbitration agreement;<sup>1160</sup> this principle means that courts should only intervene in limited cases. Lord Steyn in response to adoption of the Model Law said that *“arbitrators are entitled and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the courts has the last word.”*<sup>1161</sup> The advantage of permitting the arbitral tribunal to rule on matters of its own jurisdiction was emphasised in the DAC Report where it was noted that the application of the *Komtenz-Komptenz* principle would prevent parties from delaying *“ valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.”*<sup>1162</sup> Furthermore,*Rokinson explains that“ it is probably true to say that the majority of those who include arbitration in their contract do so because they do not wish their disputes and their*

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<sup>1152</sup>See Mustil& Boyd, Commercial Arbitration 2001 Companion ( 2<sup>nd</sup>Edition,Butterworths London 2001) at 45.

<sup>1153</sup> See EAA 1996 S.44 and 42.

<sup>1154</sup> See Lord Roskill in *Wilcock v Pickfords Removals Ltd* [1979] 1Lloyd’s Rep 224.

<sup>1155</sup>Ibid S.48 (5).

<sup>1156</sup>Model Law Article 5.

<sup>1157</sup>Ibid S.66.and S.9.

<sup>1158</sup>Ibid S.7.

<sup>1159</sup> Ibid.

<sup>1160</sup>Ibid S.48 (2).

<sup>1161</sup> See Lord Steyn, England’s Response to the UNCITRAL Model Law of Arbitration (1994) 10 Arbitration International1 at 1.

<sup>1162</sup> See DAC Report 1996 at par138. See Lord Savile Speech at the Middle Temple hall 8 July 1996.



*commercial relationship to be referred to a national court, whether out of a desire for privacy or for a fear for suspicion of bias.*"<sup>1163</sup>

The courts make a distinction between the issues on which arbitrators should be allowed in the first instance to rule the jurisdiction on their own and those on which it is preferable for the court to resolve themselves.<sup>1164</sup> In some circumstances, there is an issue of urgency, for example; the existence of a clause where the courts are happier to deal with the issue themselves. Indeed, even the validity of an arbitration clause should be determined by the arbitration tribunal not municipal courts. The argument that courts can examine the clause better is not a good justification of intervention. There is the possibility of erroneous and incorrect findings arising in the aspect of arbitration not only in s.30. Why have the courts not said that there is a possibility that the tribunal may get it wrong and why should decisions in the tribunal be challenged by the courts? The issue of arbitrability is not determined by competence but left to courts<sup>1165</sup> and also the issue of illegality is outside the scope of the competence of the arbitral tribunal. The theory provides that the tribunal has the power to decide on its own jurisdiction without having to refer to courts. The author argues that this theory does not consider the practical reality of the English courts' constant interfering and the different provisions that provide court intervention.

Fourthly, there is separability theory,<sup>1166</sup> which provides that an arbitration agreement is separable from the main contract,<sup>1167</sup> hence a contractual obligation.<sup>1168</sup> It should be noted that given the private nature of arbitration party, autonomy provides a lot of advantages, and disadvantages. For parties to have exclusive autonomy they have to exclusively exclude courts in the arbitral process,<sup>1169</sup> which in practice is impossible given the lack of coercive powers in the Arbitration Act 1996 and arbitral rules, and the need for the enforcement of measures by support of the courts. The freedom of modern arbitration should be a system which is a consensual process under which the agreement of the parties should be respected. The views of the users or

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<sup>1163</sup> See Kenth Rokinson QC, "Pastures New: Review of the Arbitration Act 1996," in *Arbitration Insight: Twenty Years of annual Lecture of the School of International Arbitration*, Lew and Mistelis Eds Note 45 at 214.

<sup>1164</sup> *Ibid* S.44(5).

<sup>1165</sup> Polish Arbitration Act 1212-1214, on recognition and enforcement of arbitral awards and settlement reached before it.

<sup>1166</sup> See *Iran v Irani* [2000] 1 Lloyd's Rep 412.

<sup>1167</sup> *Ibid* S.7

<sup>1168</sup> *FionaTrust & Holding Privaluo* [2007] UKHL 40.

<sup>1169</sup> *Ibid*.

parties to an arbitration agreement should be respected and must be listened to.<sup>1170</sup> Any form of reasoning to oust arbitral tribunal is arguably inconsistent with the principle of separability,<sup>1171</sup> and jurisdiction embodied in s.7 and 30, and overrides the express agreement of the parties to confer jurisdiction on arbitrators.<sup>1172</sup>

**Chapter Four** provided conditions and procedures for granting provisional measures. The chapter commenced by discussing the authority to determine procedures and conditions for granting arbitral provisional measures and arbitral proceedings; both negative and positive. The Arbitration Act 1996 under s.34 (1) (2) provides that a tribunal has the authority to grant all the procedures and conditions, as adduced in *Mobil Oil Indonesia v Samera*.<sup>1173</sup> It should be noted that tribunals should only set such procedures, after the parties have agreed to the conditions. Indeed, this sets conflict, and the Act has not been supportive in regard to party autonomy relating to proceedings. The tribunal should only implement what it is agreed by the parties. There is still a lack of clarity in regard to the conditions and most of the time tribunals refer to municipal courts' criteria, which conflicts with the arbitral due process. In addition, the chapter examined the advantages of arbitral provisional measures.

**Chapter five** examined the types of provisional measures. The thesis, in examining the types of provisional measures, demonstrated that the arbitral tribunal has a very limited scope of granting provisional measures enshrined in s.39, which in reality is too limited in scope and inadequate when a party seeks provisional measures from the arbitral tribunal. English Arbitration needs to provide a wide scope in regard to the types of provisional measures that can be granted by an arbitral tribunal. The author argues that given the current legal framework, the English arbitrators should adopt the ICSID Rules,<sup>1174</sup> and the German Model,<sup>1175</sup> Netherlands Arbitration rules, Italian Civil Code,<sup>1176</sup> French Civil Code,<sup>1177</sup> where all disputes emanating from the tribunal are all decided by the tribunal, including emergency measures.<sup>1178</sup> In addition, since there is no tribunal at the commencement of the arbitral proceedings, the municipal courts should only be

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<sup>1170</sup> See *Channel Tunnel v Balfour Beatty Construction Ltd and Others* [1993] AC 334.

<sup>1171</sup> See *Harbour Insurance v Kansa General Insurance Ltd* [1993] 1 Lloyd's Rep 455, [2002] EWCA 479.

<sup>1172</sup> *Hayman v Darwins Ltd* [1942] AC 356.

<sup>1173</sup> (1977) 392 NYS 2d 614.

<sup>1174</sup> Article 26. See *Amco v Indonesia Yearbook XI* (1986) at 159.

<sup>1175</sup> Germany Civil Code S.1041, S.1033.

<sup>1176</sup> Article 1349.

<sup>1177</sup> Article 1592

<sup>1178</sup> See George Petrochilos, *Procedural Law of International Arbitration* (Oxford) 2014 at 108.

called in where the emergency arbitral referee is unable to enforce a given order or when granting freezing orders.<sup>1179</sup> Since the Arbitration Court for Sports (CAS), can handle all cases for sports without recourse to courts, it is of great importance that the English Arbitration Act should limit courts in granting provisional measures in emergency as provided under s.44 (5) as supported by Diplock in *Bremer VulkanSchffbau and MaschinenFabrik v South India Shipping Corporation Ltd.*<sup>1180</sup> The irony is that in theory it may be easy but in practice it may not be implemented. Since the efficacy of arbitration depends on provisional measures to prevent adverse parties from destroying assets or removing assets as to render the award meaningless,<sup>1181</sup> the Arbitration Act 1996 needs to be adjusted to meet the demands of commerce. The author argues that ex parte orders should be left to municipal courts,<sup>1182</sup> but with taking into account the Convention of Human Rights,<sup>1183</sup> so that a party to whom a measure is issued is given a chance to represent his case. The current English Arbitration Act lacks this legal tool of fairness manifested also in the Brussels Regulation<sup>1184</sup> as adduced in *Van Uden*.<sup>1185</sup> The issues that courts are more prepared to handle ex parte orders<sup>1186</sup> is a truism and should not be halted to avoid a breach of an agreed mechanism of dispute resolution. It would be incumbent if all provisional measures are granted by the tribunal and the courts' role is to give legal effect to the arbitral measures if called upon.

**Chapter six** examined the role of the courts in arbitral proceedings and how court involvement supports the arbitral process.<sup>1187</sup> Although arbitration is a private mechanism which would mean courts keeps out, it has become unavoidable for courts to intervene for host reasons in support of arbitration proceedings.<sup>1188</sup> There is an interface between courts and tribunals in England to work together, with mutual respect and support. The main reason for the intervention of courts is enshrined in s.42 (1), s. 43, 44, 45, and 66. Although courts have such powers provided by the Arbitration Act 1996, this power should be applied cautiously. The thesis identified the stages of

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<sup>1179</sup>CPR 25.1(1) (f). See *Astrol Exito Navegacion v South Land Ent Ltd* [1982] QB 124.

<sup>1180</sup>[1981] AC 909.

<sup>1181</sup>*Kastner v Jason* [2004] EWHC 592.

<sup>1182</sup>CAS Rules Article 32, Austrian Law 2005 S.593910 CPC, ICDR Rules 2006 Article 37.

<sup>1183</sup>Article 6.

<sup>1184</sup>42/2001

<sup>1185</sup>Case C-391/95 (1998) ECR-2314 par 43.

<sup>1186</sup>EAA S.44(3) and (6).

<sup>1187</sup>See New York Convention Article II (3).

<sup>1188</sup>EAA S.44 (5).

court intervention for example; prior to the formation of the tribunal, courts get involved in emergencies to avoid the dissipation of assets, as demonstrated in *Hiscox Underwriting Ltd v Dickson Manchester and Company Ltd*,<sup>1189</sup> which renders the final award meaningful. In addition, during the arbitral proceedings courts get involved providing orders to third parties which the tribunal cannot,<sup>1190</sup> arbitral contractual obligation does not bind third parties. Hence, in cases of liquidation, it would be impossible for the tribunal to make orders and be enforced, since it lacks the coercive powers to enforce orders like guarantees from banks.<sup>1191</sup> In given circumstances, they may be called upon to give a legal effect to an arbitration measure,<sup>1192</sup> for example; an arbitral measure can be converted into contempt of court if a party does not comply with it under s.37 of the Supreme Court Act 1981. Since the tribunal lacks the power to preserve evidence as evident in *Claxton Engineering services Ltd v Txm, deutz v Amarco*,<sup>1193</sup> *The Golden Anne*.<sup>1194</sup> The relationship between courts is termed as concurrent, which means that a tribunal is not an island. This has been supported by advanced theories. Firstly, the doctrine of complimentary should be noted that any intervention of courts is against the freedom of the parties and party autonomy.<sup>1195</sup> The courts involvement is determined by the doctrine of complimentary. The author argues that courts need to consider the main purpose of arbitration which is to avoid municipal courts, hence courts need to strike a balance of justice. The irony is that if courts have jurisdiction over a respondent under the conflict of laws, then the court jurisdiction cannot be excluded by arbitral agreement, indeed this creates a tension between the tribunal and the courts, which is not the main aim and objective of the parties choosing arbitration for provisional measures. Furthermore, the doctrine of subsidiary should be used purposefully in support of party autonomy as demonstrated by Mustill LJ in *Tunnel*<sup>1196</sup>. The party applying for this support should first notify the person and the tribunal in time. The doctrine of compatibility, complimentary, coordination, and cooperation are subject to debate,

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<sup>1189</sup>[2004] ALL ER 521.

<sup>1190</sup>EAA S.42(1).

<sup>1191</sup>IbidS.44(5).

<sup>1192</sup>Ibid S.42.

<sup>1193</sup>[2010] EWHC 2567 Comm.

<sup>1194</sup>[1995] 1 Lloyd's Rep 87.

<sup>1195</sup>See Model Law Article 5.

<sup>1196</sup>[1993] AC 334.

since any court intervention is a breach of party autonomy, as provided by the interpretation of the New York Convention Article II (3) in *McCreary*<sup>1197</sup> and *Caroline Power*.<sup>1198</sup>

Under the European Union to which England is a member, there are stringent conditions for courts to grant provisional as demonstrated in *Van Uden*<sup>1199</sup> and *West Tankers*.<sup>1200</sup> Conflicting decisions, in regard to European law under the Brussels I Regulation,<sup>1201</sup> impede the grant of provisional measures. It should be noted that Brussels should not be used as a mechanism to deprive the parties<sup>1202</sup> of their wish to go into arbitration,<sup>1203</sup> after all the purpose of the arbitration is to exclude the courts.<sup>1204</sup> If the Regulation is applied,<sup>1205</sup> it would determine what provision of Regulation conferred jurisdiction on the courts at the place of arbitration. This defeats the main purpose of having an arbitration agreement,<sup>1206</sup> and public not private between parties.<sup>1207</sup> In order to make the granting of provisional measures international, the role of the courts cannot be avoided despite some complications, and in order to harmonize and promote efficacy, the New York Convention should be interpreted purposefully in order to fill in the gap in the law of arbitration.<sup>1208</sup> In addition, the Brussels Regulation should adopt a directive on provisional measures,<sup>1209</sup> to enhance arbitration in its member states,<sup>1210</sup> if not the European Union will be invaded by competition from Asia which has very strong grounds for the enforcement of provisional measures. This will impact on the status of London as the leading commercial city in the world.

**Chapter seven** examined the enforcement of provisional measures granted by a tribunal. Arbitral provisional measures are voluntarily complied with. This can be demonstrated with the

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<sup>1197</sup>(501F.2d 1038, 3<sup>rd</sup> Cir 1974).

<sup>1198</sup>(451 F.Supp 1044 N.D Cal 1977).

<sup>1199</sup>[1999] 2 WLR 181.

<sup>1200</sup>[2007] UK HL4.

<sup>1201</sup>42/2001.

<sup>1202</sup> See Directive 2004/148 Article 9(4), Art 34 (1).

<sup>1203</sup> See EC Treaty Article 220.

<sup>1204</sup> See Schosser P, 'The Brussels Convention and Arbitration,' [1991] 7(3) *Arbitration International* at 227.

<sup>1205</sup> Brussels I Regulation 42/2001.

<sup>1206</sup> See EAA 1996 S.6 (1).

<sup>1207</sup> Brussels Regulation 42/2001 Article 24,31,27 (2).

<sup>1208</sup> NY Convention Article II (3) and Article IV.

<sup>1209</sup> See the New Brussels Regulation 12/15, does not address the recommendations of the commission, the Green paper and Schosser Report, which advocated for the wide powers of granting provisional measures within member states.

<sup>1210</sup> Article 220 of the Treat Establishing European Economic Community was to make the Recognition and Enforcement of Judgements from Member States rapid and simple. When one looks at Recital 2 of the new Regulation 2015 the practical relevance of the Brussels has turned out to be otherwise.

growing market of arbitration internationally. Parties comply with orders to avoid any encumbrances during the final stage. Where the measures are not complied with, the tribunal has the power to grant sanctions for non-compliance. Such sanctions just pressurize the recalcitrant party and have less chances of success.<sup>1211</sup> The main sanctions are damages and costs.<sup>1212</sup> Where a measure is not complied with, such sanctions can be granted. Such remedies are implied from the contractual theory that arbitration is a contract; hence a breach is subject to damages.<sup>1213</sup> It should be noted since such measures have no legal effect, there are cases where parties will dissipate assets or sell the assets, even when the order was granted for example; in the case of *Kastner v Jason*.<sup>1214</sup> Secondly a tribunal may grant adverse consequences to a party who does not comply with the measure, especially in the case of the dissipation of assets. For the tribunal to order such an order there must be a causal link between the parties in the final award. In practice, parties do not antagonize the process; few cases have been reported in regard to non-compliance. The tribunal may even impose a time limit for compliance which has a psychological effect.<sup>1215</sup> At times, the tribunal may be permitted to impose a penalty for failure to comply with a decision. What is most important is the weight and effectiveness of the sanctions; most of the measures do not ascertain evidence.

In England there are no coercive powers available to the tribunal to respect their order for payment. Unless the tribunal in England is put on the same footing as courts, like Sweden, Belgium, France, and the Netherlands, there is a grey area in regard to the enforcement of these measures. It should be noted that arbitral orders are given legal effect by the courts, where a failure may be sanctioned as a contempt of court.<sup>1216</sup> In some cases they did not comply, and it became an issue of urgency that a court had to render its support. As far as the present system goes, the English Arbitration Act 1996 is probably the only national legislation that comes close to providing a comprehensive coverage of all types of provisional measures. Both the courts and the legislation have supported the provision of interim measures from courts and arbitrators. As seen in Chapters two and five, traditionally the English have been favourable to the availability

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<sup>1211</sup> See EAA S.41 (5) and (6).

<sup>1212</sup> Ibid S.41 (6) and (7).

<sup>1213</sup> Channel tunnel v Balfour [1993] HL.

<sup>1214</sup> [2004] EWHC 592.

<sup>1215</sup> See EAA S.40.

<sup>1216</sup> See Supreme Court Act 1980 S.37

of provisional measures over the years. But even in English Legislation,<sup>1217</sup> there is some doubt regarding the enforcement of provisional measures by the arbitrators themselves and the power to approach the courts for enforcement. This position holds good for most countries where civil and common law are based, hence there is a need for a more harmonized international set up to address this issue.

Provisional measures can be enforced under the New York convention.<sup>1218</sup> However, it was demonstrated that it is not automatic for a provisional measure to be granted by the English courts which will be automatically enforced under the New York Convention.<sup>1219</sup> This is not clear and provides neither the definition nor the procedures of enforcement, and creates a tension between different courts. New York, as demonstrated in the thesis, is subject to debate and criticisms, since the text and preparatory materials on the Convention are silent on the scope of arbitral provisional measures. Courts, tribunals and commentators have different views on the application of the New York Convention. The application of New York would be achieved by a purposeful interpretation of Article V (1) (e) under the law of the state where the award was rendered. That should be sufficient to consider the enforcement of an award or provisional measures, the irony being that New York's main objective was to enforce a final award,<sup>1220</sup> and this may be seen as a contradiction and breach of the convention. In order to harmonize the enforcement of provisional measures, the only viable solution therefore seems to be the adoption of a distinct international instrument, drawn up on the basis of the experience of the Convention, but substantially different in content. The model law needs to adopt a special provision for procedures of enforcement, in order to harmonize the enforcement of provisional measures.

The work of the UNCITRAL to amend the Model Law, so as to provide for issues involved in the interim measures is really important. Indeed, many countries whether developed or developing, are considering the UNCITRAL Model Law as a basis for drafting their own legislation. So, a comprehensive application of the Model Law in England would definitely go a long way in setting up a more harmonized view on this issue. Looking at the extensive discussions so far, the working group would consider the varying aspects involved and would

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<sup>1217</sup> Ibid

<sup>1218</sup> See Supra Note 1038, 1041 and 1040.

<sup>1219</sup> Ibid.

<sup>1220</sup> See New York Convention article II (3).

come up with coherent, extensive and universally accepted provisions to deal with all the issues surrounding the availability of provisional measures. It would be of great importance in England to consider amending their rules by providing a more elaborate structure for the tribunals to work with like the preconditions necessary for providing provisional measures,<sup>1221</sup> the scope of the relief that the arbitrators can grant which are not contained in the Arbitration Act 1996, and whether the arbitrators may have difficulty in deciding if an interim measure is necessary and if they have authority to grant such an order. The author suggests that the UNCITRAL Working Group should also work on UNCITRAL Arbitration Rules to make it in consonance with the amendment to the Model Law, so that parties using the rules for ad-hoc arbitration and also other institutions can take advantage.

## 8.2 Recommendations

Since the English Arbitration Act 1996 was adopted on the recommendation of the DAC which advanced its study on Model Law,<sup>1222</sup> it would be of great importance if the Arbitration Act completely matched Model Law instead of its piecemeal sections,<sup>1223</sup> which leaves the arbitrators in state of quagmire.<sup>1224</sup> One of the advantages would be the exclusion of recourse to courts in arbitration proceedings.<sup>1225</sup> The role of the courts should be supportive in that the courts supports the parties' agreement to solve their disputes privately without judicial interference. The courts should not be directly be concerned with supervision of the arbitral proceedings. The question is really is whether national courts judges will restrict their involvement, and uphold the principle of non-intervention, resisting temptation to make ex post facto value judgements of the work and conclusions of the arbitral tribunal.<sup>1226</sup> The proposal for developing the Arbitration Act 1996,<sup>1227</sup> in a friendly manner was to mirror the Model Law of 1985. In other words to reflect the provisions of the Model law in its entirety.<sup>1228</sup> This was to give autonomy to the arbitral

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<sup>1221</sup> See EAA 1996 S.34.

<sup>1222</sup> See DAC Report 1996 at par 20.

<sup>1223</sup> See Supra Note 233.

<sup>1224</sup> Julio Cesar Betancourt Jason A. crook, ADR, Arbitration And Mediation, A Collection of Essays ( Chartered Institute of arbitrators (CI Arb) 2014 at 452-456.

<sup>1225</sup> Model Law Article 5.

<sup>1226</sup> See DAC Report 1996 Par 21, “ *there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means of resolving their disputes.*”

<sup>1227</sup> Arbitration Bill 1996.

<sup>1228</sup> See DAC Report 1996 par 18 at 44-45.



tribunal and any recourse to courts or intervention was to be halted.<sup>1229</sup> The main objective of 1996 was to promote arbitration internationally, from the domestic, and adopting the Model Law does not take away all the powers of the English tribunals, something that was feared at the time of the bill, but a key element for making London the best centre for settling arbitral disputes and best venue.<sup>1230</sup> This is clearly evidenced by Lord, who said that “ *only time will tell whether we have succeeded in our objective to retain and enhance the reputation of this country as the leading place for the form of dispute resolution known as arbitration.*”<sup>1231</sup> This was further advanced by Sims and Rutherford who said that “ *there is a strong feeling that EAA arbitral system should take account of the needs and wishes of the commercial and trading community.*”<sup>1232</sup>

The current EEA, provides only two types of provisional measures provided under S.38. 39 and 48. The model law which was adopted has been regularly revised from 1976,1986, 2006,2010 and 2012, when one revisits UNCITRAL Model law 1976,<sup>1233</sup> there is a clearly expression that a tribunal has the power to grant provisional measures which deems necessary in respect of the subject matter. This provision provides abroad power to grant provisional measures by imposing a limitation on any court intervention.

Further Model Law 1985, which was recommended by DAC, provides that “ *unless the parties agreed the tribunal may at the request of a party order any to take such measures of protection as the tribunal may consider necessary in respect of subject matter of a dispute*”<sup>1234</sup>. It expressly confirms the power of the tribunal to order a significant range of provisional measures, which the EAA does not provide in its two provisions of S.38 and 39.

Model Law 2006 Article 17 was amended and provides that “ *unless otherwise agreed by the parties the tribunal may at request of a party grant interim measures.*” The new revision confirms the expansive scope of or wide discretion of Article 17 by omitting the provisions of the original language- that interim measures may be granted, where the tribunal considers them

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<sup>1229</sup> See Model Law Article 5.

<sup>1230</sup> Supra Note 193. And 194.

<sup>1231</sup> Supra Note 186.

<sup>1232</sup> Supra Note 198.

<sup>1233</sup> UNCITRAL 1976.

<sup>1234</sup> Model Law 1985 Article 17.

“necessary” in respect of the subject matter of the dispute. The 2006 revision of Model Law,<sup>1235</sup> permits even granting of ex parte measures, which the EAA does not provide for an important tool in enforcement of provisional measures within England and Wales. The 2006 Model Law, further provides that “*interim measures issued by the tribunal shall be recognised as binding, and unless otherwise agreed by the tribunal, enforced upon application to the competent court*”.<sup>1236</sup> In other words, enforcement may be sought irrespective of the country in which it has granted, permitting provisional measures to be enforced outside the seat of arbitration. As a practical matter it means that where the law of the seat forbids or limits arbitrators from granting provisional measures they will not do so.<sup>1237</sup>

The 2010 UNCITRAL revision, widens the gap of authority to the tribunal, where it gives the tribunal power to order a party to preserve status quo, to refrain from actions that cause imminent harm to protect or preserve assets to satisfy an award. The author’s view in respect to this revision provides a wide scope that gives the tribunal impunity from court intervention, hence promoting the sanctity of party autonomy.

The arbitration Act 1996, despite the fact that it provides some provisions on provisional measures as provided in s.39 38 and 48, does not provide a clear definition of what the provisional measures are,<sup>1238</sup> in order to set clear prerequisites for granting such measures. International Conventions, like New York,<sup>1239</sup> do not expressly define provisional measures. This creates tension in the application of the law by courts and tribunals when a request is brought to attention by the two mechanisms.<sup>1240</sup> In addition, arbitrators should be given the mandate to grant orders to third parties, who have a close connection to the subject matter of a dispute.

Parties to arbitration should have autonomy in practice to draft their conditions, determine the procedures, and choose the venue and where the courts have been exclusively precluded by parties, to be respected by courts. It would be very important if parties seeking provisional measures are also given some time to learn the types of measures that they can practically seek

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<sup>1235</sup> Model Law 2006 Article 17 B.

<sup>1236</sup> Ibid 17 H.

<sup>1237</sup> Ibid 17 C.

<sup>1238</sup> EAA 19986 S.1(c).

<sup>1239</sup> See Article II(2) and V.

<sup>1240</sup> See Queens Land decision in *Resort Condominiums International Inc v Ray Bolwel and Resort Condominiums* [1995] Y.Com Arb.

from the tribunals so that they are given a better chance whether to seek recourse to the courts or not. All types of provisional measures should be subject to the European Convention on Human Rights, so that no measures are given in ex parte, as this deprives the other party of the right to a fair hearing, and also breaches the notion of European Union of mutual respect and co-operation.

Party autonomy should only be the source of any arbitral tribunal authority in regard to provisional measures.<sup>1241</sup> This means that provisions in the Arbitration Act that invite recourse to the courts should be subject to strict conditions, and that parties have to be consulted before the tribunal seeks assistance of the parties.<sup>1242</sup> The tribunal should have a wider scope of provisional measures than the two provided by the Act, namely a provisional order for payment of money or the disposition of property and the interim payment on account of the costs of arbitration. In order to make arbitration effective, the Arbitration Act 1996 needs to be amended, to provide clarity and the scope of application. This will reduce tension between the courts and tribunals that compete for jurisdictions. Furthermore, the LCIA should also address the problem of enforcement, to avoid parties going to alternative forums to enforce their awards.

Since the most contentious issue for provisions measures is enforcement, the Arbitration Act 1996 should specifically address this issue as a case of urgency. Failure to do so will make the final award unenforceable.<sup>1243</sup> Since arbitrators have no legal effect, the role of the courts should only be to enforce the measures granted by the arbitral tribunal. In addition, the principle of public policy should be limited when enforcing provisional measures under the New York Convention.<sup>1244</sup> It would be of great importance if England champions an additional instrument for enforcement of provisional measures under the New York Convention, in order to enforce provisional measures internationally, as this will harmonize the system.

### **8.3 Future Study**

Arbitral provisional measures in England have been considered in a few studies in accordance with research knowledge. The current study is one of the first to investigate or to critically analyse the role of the courts and arbitral tribunals in granting arbitral provisional measures in

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<sup>1241</sup> Supra Note 284.

<sup>1242</sup> EAA 1996 S.44 (5).

<sup>1243</sup> Supra Note 995.

<sup>1244</sup> See Article IV of New York Convention 1985.

England. Therefore, there is a need for research, from different areas of law that permit the granting of arbitral interim measures as well as literature to fill the gap relating to provisional measures in England. Some suggestions for future research regarding provisional measures are;

1. The enforcement of provisional measures under European law, since England is a signatory state to the European Union or whether provisional measures are better protected under New York than the European Union Regulation.
2. The study of arbitral provisional measures in England is still in its infancy; therefore, there is enormous potential to research this area using comparative analysis, with civil jurisdictions.
3. The enforcement of provisional measures taking into account the Convention on Human Rights will be a significant contribution to knowledge, since the current thesis does not address issues of human rights in regard to provisional measures.
4. The arbitrability of provisional measures will be a great impetus to knowledge. A study that excludes courts in determining whether a case is arbitral? is required to enhance the scope of provisional measures.
5. The importance of the Brussels Regulation directive on recognition and enforcement of provisional measures should not be seen as stumbling block for granting and enforcement of provisional measures within European member states. A new Regulation is needed like that of Intellectual property to address issues on provisional members within signatory countries.
6. The study does not analyse case-by-case or award-by-award to find the true position of provisional measures. Future research, with a survey of cases, through developing solutions in the light of the text of relevant laws would be of great importance to arbitration not only England as an international venue but also to other states both with common and civil law. In addition, the research only covered few provisions of the Act 1996 (S. 7,38,39,41,41,42,4 48), future research with all provisions of the Arbitration Act would be a significant tool to clear ambiguity in the law of arbitration.

## BIBLIOGRAPHY

### ARTICLES AND JOURNALS

Bellsham-Revell C, Oswang LLP, International Arbitration Newsletter (Summer 2009).

Bergqvist L, Olsson E and Azelius K, 'Making the Use of SCC Rules on Emergency Arbitration: Why the Emergency Arbitrators' decisions cannot be enforced and how the new rules may be made useful nonetheless' (2009).

Blake G, Litigation and Dispute Resolution, Supporting the Role of Arbitration and Courts; Examining S.44 of the Arbitration Act 1996 (September 2006).

Blanch J, 'Interim Measures in International Arbitration and the UK Courts – The Current Position', International Arbitral Law Review (2003).

Chartered Institute of Arbitrators (CIArb) Practice Guideline 1: Guidelines for Arbitrators on how to approach an application for Provisional or Interim Relief, 30th October 2011.

Debattista C, 'Arbitrators Power to Order Interim Measures Including Ant-suit Injunction', Stone Chambers and the Institute of Maritime Law', University of Southampton.

Devlin P, 'The Relationship between Commercial Law and Commercial Practice' (1951) 14 MLR, 249, 260.

Fisher, G (2010) 'Anti-suit Injunctions to Refrain Foreign Proceedings in Breach of An Arbitration Agreement', Bond Law Review, 22 (1) Article 1.

Guideline 1 to the UNCITRAL Model Law and Rules: Guidelines for arbitrators on how to approach an application for provisional or interim relief (30th October 2011).

Harris J, 'The European Legal Forum, Private International Law and International Civil Procedure, The Brussels 1 Regulation and the Re-Emergence of the English Common Law' 8th July/August 2008

Holmes Jr OW, The Common Law, (Project Gutenberg 2000), at 210

<<http://www.gutenberg.org/dirs/etex00/cmnlw10.txt>> (accessed 10 October 2013).

Hosking R, 'Quadrant Chambers, Quadrant forum, sharing leading edge in commercial law, The Role of the courts and experts in international arbitration' ( 8 May 2010).

Hotzmann HM and Neuhaus JE, 'A guide to the UNCITRAL Model Law on International Commercial Arbitration Legislative History and Commentary (1988)

Kennedy T, 'A Reviews of Cases on Arbitration Act 1996', A review of the position as 19 December 2012.

Kennedy-Grant T, 'The Role of Courts in Arbitration Proceedings', A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore on 22-23 September 2005).

Lathan & Watkins, 'International Dispute Resolution, The English Court Continues to Support the Arbitral Process' (July 2009 ).

Lew JDM, 'Commentary on Interim Measures in ICC Arbitration Cases', 11 (1) Int'l Ct Arb Bulletin 23 ("Commentary").

Lew JDM, 'Does National Court Involvement Undermine the International Arbitration?' Lecture at Washington College of Law ( 15 October 2007).

Lew JDM, 'ICC Commission on International Arbitration' , (1988) 91 Int'l Arb Bull 37.

Lew JDM, 'LCIA New Arbitration Rules 1998 – Jurisdiction, interim relief and award', Kings College London Conference (5th June 1998) .

Merkin R, 'Anti-suit Injunctions, The Future of Anti-suit Injunctions in Europe', (2009) Arbitration Law Monthly, 8 (4).

Merkin R, 'Anti-suit Relief foreign Proceedings Disregarding an Arbitration Clause', Arbitration Law Monthly, 7 (5).

Merkin R, 'Arbitration Law Monthly, (2008-2009) 9 (1).

Merkin R, 'Arbitration Law Monthly, Anti-arbitration Injunctions Restraining Participate in an arbitration', (2007) 7 (7).

Merkin R, 'Judicial Support Anti-suit Injunction' *Arbitration Law Monthly*, (2009) 9 (2).

Mustil Lord Justice, (1986), *Delays in Arbitration: The Role of the Court*," *Arbitration International*, 163-166.

Muller T, 'Switzerland Supreme Court Declares UK Worldwide Freezing Order Enforceable', *Arbitration Law Monthly*, *International Litigation News*, October 2004.

Paulsson J and Rawding N, 'The Trouble with Confidentiality', (1994) *ICC Int'l Ct Arb Bulletin* 48 (5), 91.

Pyles, Michael, (2007) *Limits of Party Autonomy in Arbitral procedures*," *Journal of International Arbitration*, Vol.24 No.3.

Porter R, Chamberlain LLP , *International Arbitration Bulletin* (April 2011).

Posner R, 'Conventionalism; The Key to Law as an Autonomous discipline' (1988) 39 *University of Toronto Law Journal* 1992.

Queen Mary University of London of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices 2008*, sponsored by Price Waterhouse Coopers, [www.pwc.co.uk/eng/publication/international\\_arbitration.html](http://www.pwc.co.uk/eng/publication/international_arbitration.html)

Redfern Hunter & Jane Jenkins, 'Arbitration and the courts: Interim measures of protection - Is The Tide About to Turn?' *Texas International Law Review* (1995) 30, 71-79.

Sau SM, 'Can International Commercial Arbitration Be Effective Without a National Court? A Perspective of Court Involvement in International Arbitration', (September 2009).

Schaefer JK, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: Germany, Hong Kong Law Compared' ( National University of Singapore).

Shackleton S, 'The Internationalization of English Arbitral Law', (2000) *ICC Int'l Ct Arb Bulletin* 11 (1) .

Shaughnessy P, 'Arbitrator power to preserve status quo early', *Presentation for the Vienna Arbitration* (25th Jan 2013).

Tucker LE, 'Interim Measures Under Revised UNCITRAL Arbitral Rules; Comparison to Model Law Reflects Both Greater Flexibility and Remaining Uncertainty', American University of Washington, (2011) *International Commercial Arbitration* Belief 1(1).

Williams DAR and Smith H, 'SMU Asian Arbitration Lecture', Singapore (2012).

## BOOKS

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Encyclopaedia Britannica (1952).

Blackaby N, Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009)

Born G, *International Civil Litigation in United States Courts – Commentary and Materials* (3rd edn, Kluwer Law International 1996).

Born G, *International Commercial Arbitration – Commentary and Materials* (2nd edn, Kluwer Law International 2001).

Briggs A and Rees P, *Civil Jurisdiction & Judgements* (5th edn, Lloyds of London Press 2009).

*Cheshire & North Private International Law* (13<sup>th</sup> edn Sweet & Maxwell 2000) at 216.

Clarkson & Hill, *Jaffrey on Conflict of Laws* ( Butterworth's 1997).

Collins L, *Essays in International Litigation and on the Conflict of Laws* (Clarendon Press 1994).

*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, New York, UNCITRAL E/ CONF.26/8Rev.1 (New York Convention).

*Council Implementing Regulation (EU) No 668/2010 on 26 July 2010, Implementing Article 7(2) of Regulation (EC) No423/2007 Concerning Restrictive Measures Against Iran.*



Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters.

Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, OJ 12/1 (Brussels Regulation).

Craig L, Park W and Paulsson J, Craig, Park & Paulsson's Annotated Guide to the 1998 ICC Arbitration Rules With Commentary (Ocean Publications 1998).

Craig, L, Park W and Paulsson J, International Chamber of Commerce Arbitration (3rd edn, Ocean Publications 2000).

Flannery & Merkin, Arbitration Act 1996 (5th edn, Routledge, to be published 2014).

Gaillard E and Savage J (eds), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999).

Goldstajn A, 'Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects', in Sarcevic P (ed), Essays on International Commercial Arbitration (Graham & Trotman / Martinus Nijhoff Publishers 1989).

Harris B, Planterose R and Tecks J, The Arbitration Act 1996, Commentary (3rd edn, Wiley-Blackwell, 2003).

International

Julio Cesar Betancourt Jason A. Crook, ADR, Arbitration And Mediation, A Collection of Essays (Chartered Institute of Arbitrators (CIArb) 2014).

Kennett W, Oxford Monographs in Private International Law: The Enforcement of Judgements in Europe, Oxford University Press 2001)

Kun F, China and International Economic Law Series, Arbitration in China, A Legal and Cultural Analysis (Oregon 2013).

Lein E, The Brussels I Review Proposal Uncovered (British Institute of International and Comparative Law 2012).

Lew J, *Applicable Law in International Commercial Arbitration* (Ocean Publications 1978).

Lew JDM, Mistelis L and Kroll SM, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) .

Merkin R, *English Arbitration Act 1996* (Routledge 2005).

Mistelis LA and Lew JDM (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) .

Moses ML, *The Principles and Practice of International Commercial Arbitration*, (2008 Cambridge University Press) at 101. Mustill, Lord and Boyd S, *Commercial Arbitration 2001 Companion* (2nd edn, Butterworths 2001).

Nygh P, *Autonomy in International Contracts* (Clarendon Press 1999).

Onyema E, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010).

Pollock F and Maitland F W, *The History of English Law* (2nd edn Cambridge University press 1889).

Possible Future Work in the Area of International Arbitration UNCITRAL ACN 9/460 Note by Secretariat (6 April 1999).

#### Publications

Raphael T, *The Anti-suit Injunction*,(Oxford University Press 2008).

Redfern A and Hunter M (eds), *International Commercial Arbitration* (2nd edn, Sweet & Maxwell 2004).

Regulation (EU) No 1215/2012 of the European Parliament and the Council of Europe on 20 December 2012 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, Official Journal of the European Union.

Report from The Commission of the European Parliament, the Council and European and Social Committee on the Application of Council Regulation (EC) 44/2001 on Jurisdiction and

Recognition and Enforcement of Judgements in Civil and Commercial Matters and Green Paper Proposal COM (2009) April 2009.

Report of the Departmental Advisory Committee on Arbitration, Department of Trade and Industry, Chaired by Lord Justice Saville (London 1996).

Sutton & Gill, Russel on Arbitration ( 23<sup>rd</sup>edn Sweet & Maxwell 2007).

Sutton D and Grill J, Russell on Arbitration (22nd edn, Sweet & Maxwell 2003).

Tweeddale A and Tweeddale K, Arbitration of Commercial Disputes: International and English Law and Practice (Oxford University Press 2005).

Tweeddale K and Tweeddale A, A Practical Approach to Arbitration Law (Oxford University Press 1999)

UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, UN Document A/20/17 (Model Law).

Van Berg AJ, The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation (Kluwer Law International 1981 ).

Yesilirmak A, Provisional Measures in International Arbitration (Kluwer Law International 2005).