

POWERS OF COURTS IN GRANTING ARBITRAL INTERIM MEASURES IN ENGLAND

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ABSTRACT

Arbitration is a powerful dispute resolution, in commercial disputes internationally, however, there is a need for municipal courts to support the proceedings if this process is to be internationally recognised due to the nature of the arbitration tribunal and also when orders that are not within the jurisdiction of the tribunal are needed. Indeed without enforcement by courts the process becomes meaningless. There Arbitration Act of 1996, limited the

involvement of courts in arbitral proceedings, so its involvement is subject to host reasons. This narrative is supported by UNCITRAL Model Law, ICSID, and theories have been advanced in support of this notion. The main question that arises is whether the parties may validly agree, in their agreement or elsewhere to exclude the possibility of recourse to courts for the purpose of obtaining provisional measures.

Key Words: *powers, courts, arbitral interim measures, England*

INTRODUCTION

Arbitration process is carried out pursuant to the agreement to arbitrate (party autonomy).¹ If the agreement is not to arbitrate, then the process cannot be said to be arbitration.² Interim measures of arbitration are an interface between the settlements of private disputes.³ The interface between national courts and the arbitral tribunal,⁴ which is both complex and over changing, is not the harmonious product of the agreement between parties to arbitration.⁵ In many cases, arbitral tribunals are composed and structured to handle international commercial disputes which are complex than courts.⁶ The enactment of the 1996 Arbitration Act, was intended to mark a departure from the traditional courts,⁷ and enforce doctrine of party autonomy.⁸ English law is viewed through the prism Arbitration 1996,⁹ where court intervention is the last resort.¹⁰ The English law provides an approach that is called court subsidiary.¹¹ 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

¹ See *Mavani v Ralli Bros* [1973] 1WLR 468. Which held that if the arbitration agreement expressly stipulates that a party shall not apply to national court for an order of the types in question, the principle of party autonomy will almost always require the municipal courts to honour the agreement and abstain from exercising its powers.

² See *Eketrim v Vivendi Universal (The Epsilon Rosa)* [2003] EWCA Civ 938 at 34-40.

³ See *Strumpffabrik GmbH v Bentley Engineering Co Ltd* [1962] 2 QB 587, where LK at 304, see Bingham LJ in *KS Bani v Korea Ship Building Corporation* [1987] 2 Lloyd's Rep 445.

⁴ See Lord Denning in *David Taylor & Sons v Barnett Trading Company* [1958] 1WLR 562 at 570.

⁵ See Chamber LJ in *Auber v Maze* [1801] 2 Bos at 75.

⁶ See UNCITRAL Model Law on Commercial Arbitration Art. 17 UN Doc A/40/17, UN Sales No. E.08.v.4 (2008).

⁷ See Kaminskien Natalija, Application of Interim Measures in International Arbitration; Lithuanian Approach (1 Feb 2010) Jssn 2029-2058 at 243-260.

⁸ 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.*"

⁹ See Arbitration Act 1996 S. 1 (c).

¹⁰ See *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] Bus LR 1289 at 26.

¹¹ See Robert Merkin, Arbitration Act 1996 at 72, where he asserts that judicial courts are ordinarily called upon when pathological situation occur during the course of arbitration in supervisory capacity.

exercise of public authority.¹² In spite of the protestation of party autonomy, arbitration depends on the underlying support of the courts¹³ that alone have the power to rescue the system when one party seeks to sabotage it.¹⁴ The role of courts is supported by Lord Mustil who chaired the DAC, which introduced the Arbitration Bill of 1996, that there is a central importance of a harmonious relationship between courts and the arbitral process.¹⁵ The involvement of the courts in arbitration is evident at the commencement of arbitration before the composition of the tribunal, in order to protect evidence before a final award is granted by the arbitration court.¹⁶

STAGES OF COURT INVOLVEMENT IN ARBITRAL PROCEEDINGS

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 Asserts that “*arbitration process cannot be said to be a small island in the sea of disputes resolution that enjoys total independency from national legal system at best they are semi- autonomous.*”¹⁷ it should be the New York Convention allows the courts to examine the validity of the arbitration agreement while arbitral proceedings are already pending.¹⁸ 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 adduces the interface between litigation and arbitration.¹⁹ Lord Mustil in *Coppee Lavalin v Ken-Ren Chemicals fertilizers*, said that “*there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it’s in danger of foundation, and that the only court which possess these powers is the municipal courts of an individual state.*”²⁰ This argument is supported by an arbitration writer Jan Paulson who said that “*the great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself.*”²¹ The proponents of party autonomy rely on judicial arm of the state to ensure that the agreement to arbitrate is given at least some degree of effect,²² hence it is of 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.²³ The author might speak of the international arbitration process as stretching its tentacles

¹² See EAA S. 12 (1) & (3).

¹³ See Civil Procedure Rules CPR 25.1 (1) (a), which provides thr types of provisional measures a court may order.

¹⁴ See *Channel Tunnel Group v Balfour Beatty Construction Ltd and Others* [1993] AC 334.

¹⁵ See Hunter and Redfern, *International Commercial Arbitration, Jurisdiction Denied: The Pyramid Collapse* (1986) JBL 15.

¹⁶ See Denning Mr in *Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd’s Rep375 at 362.

¹⁷ See Dickson, *Brussels 1 Review-Interface with Arbitration, Conflicts flaws ne June 17 2009.*

¹⁸ New York Convention Article II (3)

¹⁹ See UNCITRAL Article 9.

²⁰ See [1995] 1 AC 38 at J14 20-03.

²¹ See Paulsson, “Arbitration in Three Dimensions” (LSE Legal Studies working Group Paper No.12 at <http://ssrn.com/abstract=1536093> accessed 10 Dec 2015.

²² See EAA 1996 S. 44 (5) which provides the support of courts in arbitration.

²³ See ICC Article 23 (2).

down from the domain of international arbitration to the municipal courts to forage for legitimacy, support, recognition and effectiveness.²⁴

PRIOR TO THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

The conflict arises because of the legal system of most developed systems²⁵ and arbitral rules as both the municipal courts and arbitral tribunal are empowered to orders a wide range of interim measures.²⁶ The question that arises is when the intervention of courts becomes interference in the arbitral process. It should be noted that at the commencement of arbitral proceedings there is no tribunal constituted,²⁷ this gap is filled up by the courts in support of arbitral proceedings. In other words such circumstances warrant the intervention of the courts in support of arbitration, though some countries do object for the intervention of courts in arbitration process.²⁸ One of the problems facing a party to international arbitration is the threat of transferring assets, before the tribunal is established,²⁹ in comparison with the municipal courts.³⁰ The length process of the composition of the tribunal, or in circumstances where the appointed arbitrator is challenged, or if the recalcitrant party refuses to appoint an arbitrator.³¹ This may be contributed due to the geographical locations or dilatory tactics by the party to which arbitration is immune.³² Arbitration is like a young bird that 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 process, arbitral tribunals are young in dispute resolution; hence the need for municipal courts especially before the tribunal is constituted.³³ Prior to the establishment of the arbitral tribunal,³⁴ courts involved³⁵ where party initiates court proceeding despite,³⁶ and perhaps with intention of avoiding,³⁷ the agreement to arbitrate,³⁸ and where one party needs urgent protection that cannot await the appointment of the

²⁴ See *Mcreary and Rubber Co v CEAT SPA 501 F.2d at 1032*, see *Carolina Power & Light Co v Uranex* 451 F. Supp. 1044 (ND Cal 1977). See European Convention Article VI (4), Council Regulation 4/2009, which contains Article 14 and 9 (4), Arbitration Act 1996 S.39, 44 and 45.

²⁵ EAA 1996 S.39 provides jurisdiction of Courts to grant provisional measures.

²⁶ *Ibid.* S. 44 (5).

²⁷ See V Cracium, Lefter, Romanian, *The International Comparative Legal Guide to International Arbitration* 2007 London 2007 at 275.

²⁸ See 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 arbitration clause declares himself to be without jurisdiction, at the

²⁹ 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.

³⁰ See ICC Rules Art. 4 (4).

³¹ The president of ICC proposed that Arbitration should be amended to give ICC Court the power to make urgent measures of protection, pending the appointment of the arbitral tribunal.

³² See UNCITRAL Model Law 9-12.

³³ See *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] AC 334 at 119 -367.

³⁴ *Kastner Jason* [2004] EWHC 92 at 107-108.,

³⁵ See EAA 1996 S. 44 (5), S.36 and 9. See *Mann Hummel Co Ltd v Man Hummel GmbH* [2008] SDHC 67 [2008] 3 SLR at 55.

³⁶ See ISCID Article 39 (6).

³⁷ See Sir John Donaldson in *British Airways Board v Lake Airways Ltd* [1984] QB 142.

³⁸ See LCIA Article 25.

tribunal.³⁹ The tribunal may not have the powers,⁴⁰ this is usually a result of historical domestic legislation hearkening back to a time when the power to grant interim measures was considered to be a prerogative of the national courts⁴¹ for public policy reasons.⁴² In all cases,⁴³ the courts' duty is to uphold the arbitration agreement as provided by the Arbitration Act,⁴⁴ for example; *Belair LCC v Basel*,⁴⁵ where the Commercial Court granted an interim order to preserve the assets in the pending the outcome of an arbitral tribunal which had yet to be fully constituted,⁴⁶ in order to the status quo.⁴⁷ Courts involvement is not disruptive, and may be beneficial to the arbitral proceedings.⁴⁸ The DAC Report was interpreted in accordance with plain language as permitting parties to apply to municipal courts for provisional measures without any hindrances.⁴⁹

COURTS INVOLVEMENT DURING ARBITRAL PROCEEDINGS

During the arbitral process,⁵⁰ courts are called upon to support the arbitral proceedings.⁵¹ The involvement during the arbitration process comes in many forms and is rarely dealt with in arbitration statutes.⁵² This involves the courts making procedural orders that cannot be ordered,⁵³ or enforced by arbitrators for maintaining the status quo.⁵⁴ The courts may be of help in cases where the evidence needs cross examination⁵⁵ in protecting the integrity of the arbitral process.⁵⁶ This type of intervention is generally unobjectionable and appropriate in the circumstances,⁵⁷ where the arbitral tribunal cannot take measures sought and the

³⁹ Ibid.

⁴⁰ See Tweddle & Tweddle, *Arbitration of Commercial Disputes; International and English Law and Practice* (Oxford Press 2005) at 262.

⁴¹ See ICC Rules Article 8 (5).

⁴² See Redfern Hunter, *On International arbitration* (5th edn Oxford Press, 2009) at 44.

⁴³ 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 later affirmed by the Court of Appeal of Bermuda and enforced.

⁴⁴ EAA 1996 S.44(5).

⁴⁵ [2009] EWHC 725 Comm.

⁴⁶ Model Law in *Mitsui Engineering & Shipping Co Ltd v Easton Graham Rush* [2004] 2 SLR 14 [2004] SGHC 26.

⁴⁷ See *Premium Nafta Products Ltd v Fili Shipping Co.* [2007] UKHL 40 at 19.

⁴⁸ See *Motorola Credit Corp v Uzan No.2* [2003] EWHCA Civ 752 [2004] 1WLR 113.

⁴⁹ UNCITRAL Model Law Article 5 & 9, ISCID Rules 23 (2), see *CvD* [2007] EWCA 1282.

⁵⁰ See EAA 199 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 *Dongwoo Mann Hummel Co Ltd v Man Hummel GmbH* [2008] SDHC 67.

⁵¹ See *AesusKamengonogorks Hydro Power Plant LLP v Ustkamenogorsk Hydro Power Plant JSC* [2011] EWHCA Civ 647, [2012] 1ALL ER Comm 845, where Rix LJ said that there is no reason why courts should not intervene, where the safety of an arbitration agreement was threatened.

⁵² See *Qingdao Ocean Shipping Co v Shipping Establishment* [1995] 2 Lloyd's Rep 15. See *Maritime Bulgare (NMB) Rustal Trading Ltd* [2002] 1 Lloyd's Rep 106

⁵³ See *China Ocean Shipping (Owner of the MVfu NinHai v Wristler International Ltd Charters of MV Fu NingHai* [1999] HKCFI 693, see *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 784 (HC).

⁵⁴ See *Celtem SA v Rust Holdings* [2005] 2 Lloyd's Rep 294, where S.44 of EAA 1996 was applied. The court has powers under S.44 (2) of EAA 1996 and S.37 of the Supreme Court Act 1981.

⁵⁵ See *OT Africa Line Ltd v Magic Wear Corp* [2005] EWCA 710, see *Commerce and Industry Insurance Co of Canada v Lloyd's Underwriters* [2002] 1 Lloyd's Rep 219.

⁵⁶ See *Norwich Pharmacy v Her Majesty's Commissioner for Customs & Exercise* [1974] AC 1322.

⁵⁷ *Starlight Shipping Co Ltd v Tai Ping Insurance Co Ltd* [2008] 1 Lloyd's Rep 525.

intervention has the agreement of the tribunal.⁵⁸ Municipal courts help in taking of evidence,⁵⁹ and it should be noted that in order for any proceedings to take process under due process, evidence is a prima facie factor.⁶⁰ Although the tribunal can grant interim measures,⁶¹ its scope in taking evidence is only limited to the parties' to the arbitration agreement, and it cannot compel third parties,⁶² 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.⁶³ Courts can compel a witness to attend proceedings,⁶⁴ and a failure to attend can be turned into a contempt of court order.⁶⁵ In addition, courts have the power to freeze all assets during proceedings,⁶⁶ as a mechanism of preserving the evidence,⁶⁷ or the sale of property subject to the proceedings,⁶⁸ to avoid tactics of delay of proceedings or even appoint a receiver in cases of liquidation of companies,⁶⁹ where the power is not enshrined to the tribunal.⁷⁰ The tribunal may find its self in state of quagmire, where it cannot grant interim measures that need to protect the status quo,⁷¹ for example; anti-suit injunctions in support of arbitration,⁷² as remedial device to restrain a party from instituting proceedings in a foreign court.⁷³ Courts will grant anti-suit injunction in support of arbitral proceedings.⁷⁴ Municipal courts facilitate arbitral proceedings, but not to dominate, and this can be evidenced in the comments of Atkins LJ who 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.....* ”⁷⁵

It is of great importance to note that with limited scope of the arbitral power to grant interim orders, in order to widen the scope, courts get involved for example; freezing orders restraining a party from dealing with assets where they are within the jurisdiction or not.⁷⁶ The main purpose of such measures is to guard against the injustice of a defendant salting

⁵⁸ See *Permimasteelisa Japan KK v Bouguesstroj* [2007] EWHC 3508. See EAA 1996 s. 44 (2)

⁵⁹ See Sir Robert Megarry VC in *British Steel Corporation v Granada Television Ltd* [1981] HL 417 at 423.

⁶⁰ See *Sabmiller Africa v East African Breweries Ltd* [2009] EWHC 3508, where Christopher J had to consider an application for a temporary injunction under S.44 of EAA 1996.

⁶¹ EAA 1996 S. 38 and 39.

⁶² See Dicey Morris and Collins, *The Conflict of Laws*. Vol 12 (14 edn Sweet & Maxwell 2010) at 25.

⁶³ See *Hiscox Underwriting v Dickson Manchester & Co Ltd* [2004] EWHC 479.

⁶⁴ See Model Law Article 27,

⁶⁵ See Supreme Court Act 1981 S. 37..

⁶⁶ *Channel Tunnel V Balfour Beatty Ltd* [1993] AC 334.

⁶⁷ See EAA S.44 (2) (b).

⁶⁸ *Ibid* S.2 (d).

⁶⁹ See Sir Robert Megarry VC in *British Steel Corporation v Granada Television Ltd* [1981] 417 ChD CA and HL at 423.

⁷⁰ S.42 of EAA 1996 S.42 provides the relationship between courts and arbitral tribunals in regards to grant of provisional measures.

⁷¹ See Lawrence Collins, *Dicey Conflict of Laws* (14 edn 2006) at 500.

⁷² See *XLV Insurance Ltd v Owens Corning* [2001] 1 ALL ER Comm 530.

⁷³ See Sutton, *Ruseel on arbitration* (23rd edn 2007) at 105, see Thamas Raphael, *The Anti-suit Injunction*, (Oxford Press 2009) at 5. See *West Tankers v Allianz* [2007] UK HL.

⁷⁴ See Toulson LJ in *Bankers Trust v Jakarta* [1999] ALL ER 314, see *Deutz AG v General Electric Company* 270 F.3d 144 at 161 (3rd Cir 2001).

⁷⁵ See *Ellerman Lines Ltd v Reed and Others* [1928] 2 KB at 155.

⁷⁶ See *American Cyanamid v Ethicon Ltd* [1975] AC 396,

away or concealing his assets so as to deprive the claimant from being able to execute the judgment if successful at trial,⁷⁷ quite simply there may no longer be any assets left to execute the judgement debt,⁷⁸ whilst the order is a powerful litigation tool,⁷⁹ regarded by the courts as draconian in nature and will only be granted once onerous conditions are have been fulfilled.⁸⁰ The author argues that a successful market is the product good government and the law implemented by courts. A prominent scholar in economics said that “*commerce and manufacturing can seldom flourish along in a 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 contract is not supported to be 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.*”⁸¹ Adam Smith supports the notion that all forms of economic interaction are impeded by the degree to which personal property or assets 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 enforcement mechanism so that economic actors can proceed with confidence that their reasonable expectations will be met. Indeed it is on this assertion that courts may grant freezing orders, as an aid to claimants who would be at loss and this would jeopardise arbitral agreements due to lack of trust of coercive powers to grant certain measures.⁸²

COURTS INVOLVEMENT AFTER THE ARBITRAL PROCEEDINGS

Finally, after an award has been rendered,⁸³ the courts may become involved in two places; first 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,⁸⁴ where the successful party seeks the recognition and enforcement of an award or provisional measures.⁸⁵ Although the principles are outlined above are normal and desirable, one should be aware that when a national courts is asked to deal with any of these issues, it is in its simplest form a negation of the arbitration agreement,⁸⁶ more particularly, a national court will inevitably and unsurprisingly take a

⁷⁷ See *shell v Coral Oil* [1999] 2 Lloyd's Rep 640 at 667.

⁷⁸ See *Software Core Ltd v Pathan* (2005) Ltl 1/8/2005, see *Ninemia Corp v Travel* [1993] 1 WLR 1412.

⁷⁹ See Adrian Briggs and Peter Rees, *Civil Jurisdiction and Jugements* (2nd edn LLP London 1997). See Jonathan Harris, *The European Legal Forum, Private International Law and International Civil Procedure, The Brussels 1 Regulation and Re- Emergency of the English Common Law* 8th July/August 2008.

⁸⁰ See Neurberger J in *Customs and Exercise v Anchor Foods Ltd* [1991] 1 WLR 1139.

⁸¹ See Adam Smith, “ An Inquiry into the Nature and Causes of the Wealth of Nations,” [1952] Encyclopedia Britannica at 43.

⁸² See Denning Mr in *Bremer Vulkan Schibau and Maschinenfabrik (Respondents) v South India Shipping Corporation Ltd* [1981] 2 WLR 141.

⁸³ See EAA 1996 S. 68, see Hamlen J in *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 C0mm, see *Micharl Wilson & Partners v Emmott* [2011] EWHC 1441, see *Soeximex Sa v Agrocop International PTE Ltd* [2011] EWHC 2748.

⁸⁴ See EAA s.66.

⁸⁵ See English Companies Act 1985 S.726.

⁸⁶ See *Bhatia International v Bulk Trading SA* (2002) 4 SCC.

particular approach and determine these issues in accordance with its own law procedures.⁸⁷ The court serves as a check on arbitrators, thereby preserving the integrity and confidence in the arbitral process.⁸⁸ If a losing party fails to satisfy the award, the victorious party would invoke the powers of the court to enforce the award like a judgement. Recognition and enforcement of awards by courts creates "res judicata" issue estoppels.⁸⁹ The support of courts in arbitral proceedings, is manifested by a leading authority of Channel Tunnel V Balfour, however,⁹⁰ the involvement 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.⁹¹

THEORIES ADVANCED IN SUPPORT OF THE 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 interim measures, the case remains with the tribunal in order to be compatible with the arbitration agreement. 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 theories. It should be noted that for a court to order a particular measure are exhausted.⁹² 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,⁹³ sympathy and reference where appropriate,⁹⁴ in order to facilitate arbitral proceedings.⁹⁵ The effectiveness and good administration of justice are the determining balance factors for reconciling tension between courts and tribunals.

The doctrine of Co-operation

The role allocated to courts under the concept of co-operation is one of assistance.⁹⁶ 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.⁹⁷ It should be noted that the co-existence of judicial and arbitrators is similar and identical, and they sometimes overlap and may even be in conflict. Due to such overlapping and the possibility of conflict of concurrent jurisdiction, the coordination of the

⁸⁷ See DAC Report 1996 at 273.

⁸⁸ See *The Island Territory of Curaaco v Solitron Device Inc* 556 F.Supp (USDC SDNY 19730) and *Ghirados v Minister of High Ways* (BC) 1996 DLR at 469.

⁸⁹ See *Soleimany v Soleimany* [1999] QB 785.

⁹⁰ [1993] Ac 33 at 657.

⁹¹ See *PT Prime International Developments v Kempinski Hotels SA* [2011] 4 SLR 633.

⁹² See EAA 1996 S.44.

⁹³ See *Ellerman Lines Ltd v Read and Others* [1982] 2 KB at 155.

⁹⁴ See Blanch "Interim Measures in International Arbitration and the UK Courts- The Current Positions, *International Arbitral Law Review* (2003) at 161.

⁹⁵ See David Sutton and Judith Gill, *Russel on Arbitration* (23rd edn Sweet & Maxwell 2007) at 98.

⁹⁶ See *F Ltd v M Ltd* [2009] EWHC 275.

⁹⁷ See Catherine Bellsham –Revell, Olswang LLP, *International Arbitration News letter* Summer 2009.

powers of courts and arbitrators is felt necessary. The author argues that in practice, there is no effective communication of the arbitral tribunal to promote that cooperation, and to make it worse, arbitral rules and enactments are silent on the subject, hence this sets flames for reconciliation between the two jurisdictions in dealing with provisional measures, instead of the good administration of justice.

The Freedom of Choice of 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 on court access.⁹⁸ The general approach in many states, which accepts concurrent jurisdiction, is that parties are, unless otherwise agreed, to be given a free choice prior the appointment of the arbitral tribunal. Parties are free to make an application to either the arbitral tribunal or court's 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 interim measures, and such 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 resolved 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. 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 the 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.⁹⁹ 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 interim measures, be very limited and that an application to a court for a provisional remedy should be addressed to arbitration in order to maintain party autonomy.

The Doctrine of Complimentary Approach

Under 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 tribunal. The role of 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

⁹⁸ Kohlrusz, Okanyi, Hungary; *The International Comparative Legal Guide to International Arbitration*, London (2007) at 194. See Germany CCP S. 593.

⁹⁹ See ICC Rules Article 23 (2).

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 present 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 arbitration agreement. The court's 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 only at the pre-formation stage, where it is urgent and the power of the tribunal is limited in scope or paralysed. In such respect the role of courts should not have total exclusion, since there is maintenance of party autonomy doctrine, where after the formation, the tribunal takes over the proceedings, and the court's decision is not binding to the final decision of the award.

The Doctrine of Subsidiarity

After the appointment of the tribunal the role of the court is subsidiary. Arbitrators have the priority to deal with interim measures request 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 in nature. It should be noted that England has enumerated both arbitral tribunal and court interim measures, however, court ordered interim measures appear to be broader than those granted by the arbitral tribunal for example; only the courts have the power to grant "*ex parte mareva injunctions*." It should be noted that arbitral tribunal has over turned the court's power 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 EAA S44 (4) and court powers can cease under S.44 (6). The English Arbitration Act 1996, needs to be interpreted purposively, for example S.44 contains the most elaborate role on court assistance out of the laws surveyed. In the author's view, S.44 (5) provides 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 urgency, even if the courts have jurisdiction, they may decline to order any remedy sought by the party to the arbitration agreement.¹⁰⁰ Where there is no urgency a party can apply to court upon notice of other parties and the 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. Accordingly to S.44 (5), the court 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 affectively.

¹⁰⁰ See Mustil LJ in Channel Tunnel v Balfour

The Doctrine of Compatibility

A request for a judicial measure before, during or after the proceedings of the arbitral proceedings is compatible with the arbitration agreement. The doctrine of compatibility reflects dual principles,¹⁰¹ which are, in fact, a logical conclusion of acceptance of concurrent jurisdiction, meaning that tribunals and courts work together in order to effect the arbitral process.¹⁰² Both courts and tribunals have the choice to grant interim measures. In this situation, it is not always easy for a party to go to arbitration to determine which to approach—the arbitrators or 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. 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 interim measures but aids the effectiveness of the arbitral process. The unavailability of judicial courts in the arbitral process would normally be one of 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, and mainly demonstrated by New York Convention.¹⁰³ The New York Convention contains both an explicit obligation and an implied prohibition; an explicit obligation during courts to refer to arbitration agreement; an implied prohibition for courts to take measures incompatible with the said obligation. It should 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 centrally to their duty under the New York Convention to refer the parties to arbitration.

LIMITATIONS OF COURT INVOLVEMENT IN ARBITRAL PROCEEDINGS

The relationship between the courts and the arbitral tribunal is based on forced cohabitation in the end this creates tension,¹⁰⁴ which is unavoidable.¹⁰⁵ Due to the concurrent jurisdiction of the courts and arbitral 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,¹⁰⁶ or after failing to obtain

¹⁰¹ See EAA 1996 S. 44, 42, 43, 45 and 66.

¹⁰² See UNCITRAL Model Law (2006 Revision) Article 17 J.

¹⁰³ New York Convention Article II (3).

¹⁰⁴ See *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.

¹⁰⁵ See EAA 1996 S.1, that precludes courts in arbitral proceedings. See Article 17 of the Model Law.

¹⁰⁶ See ICC Order of 1 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 unsuccessfully applied before a court.

an interim order 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.¹⁰⁷

LIMITATION UNDER NEW YORK CONVENTION 1958

On international perspective, some jurisdictions have given their view that court involvement in arbitral proceedings is precluded, for example USA, courts take the view that courts have the duty to refer the parties to arbitration.¹⁰⁸ The New Convention contains both explicit and implied prohibition. An explicit obligation is an order directing the courts to refer the parties' to arbitration agreement,¹⁰⁹ while as an implied prohibition;¹¹⁰ courts take measures incompatible with the said obligation.¹¹¹ The ambiguity of the New York,¹¹² was given effect in the case of *Mc Creary Tire Co v CEAT*¹¹³ and *Carolina Power & Light Co v Uranex*,¹¹⁴ which was later followed by the House of Lords in leading case of *Channel Tunnel v Balfour Beatty Construction*.¹¹⁵ It should be noted that Court of Appeal in McCreary, interpreted New York Convention, as precluding any court interference in arbitral proceedings or forbids the courts of contracting states from entering a suit which violates an agreement to arbitrate. However, this was contrary to Carolina, where the Federal District Court of the Northern District, had to determine the same issue as the court in McCreary, and ruled exactly the opposite, that a contracting state, shall at request of one of the parties, refer the parties to arbitration.¹¹⁶ From the two American cases, McCreary and Carolina create a relay race, tension and a suggestion that arbitration is private and courts should keep out.

THE BRUSSELS 1 REGULATION AND ARBITRATION MEASURES

Since the accession of England to the European Union,¹¹⁷ the power of the English courts' to grant interim measures is limited.¹¹⁸ The Brussels convention on Jurisdiction and enforcement of judgement in civil and commercial matters was agreed on 27 September 1968.¹¹⁹ It has become increasingly common in recent years for claimants to use world freezing orders for the purpose of attempting to block assets being hidden or dissipated. However, with the replacement of Lugano Convention with Council Regulation on Jurisdiction and the Recognition and Enforcement of judgements in Civil and Commercial Matters,¹²⁰ English power to order provisional measures, mainly freezing orders, ex parte¹²¹

¹⁰⁷ Lord Mustil in *Coppe Levalin v Ken Fertilizers and Chemicals* [1994] 2 Lloyd's Rep at par 116.

¹⁰⁸ See Mustil analysis of the Convention, New York Convention 1958 Article II(3).

¹⁰⁹ See *Premium Nafta Products Ltd v Fill shipping Company* [2007] UKHL 40 at par 19 and 40.

¹¹⁰ See Alan Rdefern Hunter, Arbitration and the Courts; *Texas International Journal* Vol. 30 No.7 (1995) at 83-86. See *Jsc BTA Bank v Abkyyazov.*, [2012] EWHC 1819.

¹¹¹ New York 1958 Article 11-VI.

¹¹² See New York Convention interpretation of Article II (3).

¹¹³ 501 f.2d 1032 (3rd Cir 1974).

¹¹⁴ See 451 F.Supp 1044 (ND Cal.1977).

¹¹⁵ [1993] AC 33.

¹¹⁶ See New York Convention Article III of the Convention.

¹¹⁷ See European Communities Act 1978.

¹¹⁸ See Briggs and Rees, *Civil Jurisdiction and Judgement* (5th edn Informal Law 2009) at par 7.04.

¹¹⁹ Civil Jurisdiction Act and Judgement Act 1980.

¹²⁰ See Pierret, Council Regulation (EC) 44/2001 of 22 Dec 2000, Official Journal of the European Communities OJ 376, 28.12.99 at 1.

and anti-suit injunction, in support of arbitral proceedings was ambushed.¹²² The Brussels Regulation applies to where the defendant is domiciled in EU. One of the adversaries of the Regulation is Article 27, which requires a member state court to stay proceedings if another state 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.¹²³ 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 "*Lispendens rule*" undermines the efficacy of the choice of court agreement in an EU context. It should be noted that a difficulty arises as to the relationship between Article 27 and 22. The CJEU in *Overseas Union*¹²⁴ left open the question of whether the "*lispendens*" rule also applied where the court first seized had exclusive jurisdiction.¹²⁵ Under European law, the court first seized has exclusive jurisdiction under Article 22(4).¹²⁶

INTERFACE BETWEEN BRUSSELS I 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 in *West Tankers*.¹²⁷ Following *West Tankers*, the English Court of Appeal in *Endesa Generation*,¹²⁸ was compelled to decide that the judgement of a member state court¹²⁹ dealing with the incidental question of whether an arbitration clause had been validly incorporated into an agreement was covered 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. The author argues that *West Tankers*, give rise to an increased risk of a parallel court and arbitration proceedings and, consequently, of inconsistent judgements and arbitration awards. There are only two provisions that deal with provisional measures.¹³⁰ Article 31 provides exclusive jurisdiction on granting interim measures even if another state has jurisdiction as to the substance of the matter.¹³¹ One of the problems in regards to such interim measures is that they do not concern arbitration as such and are parallel rather than ancillary to arbitration agreement.¹³² Their place in the scope of the convention is thus determined not by their own nature but by the nature of the rights

¹²¹ See CJEC Case 125/79, 21 May 1980, Article 25 of the Lugano Convention, ex parte measure are enforceable if they were rendered ex parte.

¹²² See the ruling by European Court of Justice in *West Tankers SPA (Formerly Riunione Adriatica di Sicurtà SPA) v West Tankers Inc* [2009] 1 ALL ER 435.

¹²³ See *CJEU C-116/02 Erich Gasser GmbH v Misar* [2005] QB 1.

¹²⁴ See *CJEU C-352/89 Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317.

¹²⁵ See Brussels Regulation Article 24(4).

¹²⁶ See *GAT v Luk CJEU C-4/03 GAT v LUK* [2006] ECR I-6509.

¹²⁷ See *CJEU C-185/07 Allianz SPA v West Tankers* [2009].

¹²⁸ See *National Navigation v Endesa Generation SA* [2009] EWCA Civ 1397.

¹²⁹ ¹²⁹ See Robert Merkin, the Anti-suit Relief Foreign Proceedings Disregarding an Arbitration Clause, *Arbitration Law Monthly* May 2007, Vol.7 No.5

¹³⁰ See Council Regulation 42/2201 Article 31 and 47.

¹³¹ See Van Uden par 27-29.

¹³² *Ibid* par 33.

which they served to protect.¹³³ It should be noted that Brussels is to selective¹³⁴ as it does not consider all provisional measures for example the interim measure of a court calling a witness to the proceedings.¹³⁵ Indeed when critically analyses the Brussels Regulation,¹³⁶ there is dilemma faced with English counterparts when they are granting interim measures within EU, it should however, be noted that the limitation does not apply to commonwealth states, which is the biggest market for English common law, hence the ability to grant such measures internationally in support of arbitration agreement.

CONCLUSIONS

In relation to question to 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. Despite autonomous nature of arbitration, it depends on the courts to provide effectiveness,¹³⁷ support and assistance for the process. It's evident of cooperation between courts and tribunals, referred to as concurrent jurisdiction, under the doctrine of complimentary, subsidiary, freedom of choice, provide support to arbitration, especially in cases of insolvency, it would be impossible for the tribunal to grant orders for security for costs.¹³⁸ The author argues that the court's involvement should be supported with a degree of limitation,¹³⁹ to avoid the tension and collision between the two systems of dispute resolution in order to maintain the doctrine of party autonomy,¹⁴⁰ and also to adhere to the New York Convention. Article 31 of the Brussels Regulation, sets draconian procedures for provisional measures, should adopt another directive on provisional measures in order to avoid conflicts or directory tactics that arise under the principle of first seized court, without assessing measures from other venues for USA, Dubai and HongKong, which provides guarantees for their assets.

¹³³ See *case C-261/90 Reichert and Kockler v Dresdner Bank* [1992] ECR 1-12149 at par 22.

¹³⁴ See *Antonissen v Council & Commission* [1997] ECR 1-441 par 37.

¹³⁵ See *Case C- 104/03 Case C- 104/03 St. Paul Dairy Industries NV v Unible Exser BVBA* [2005] ECR 1-467.

¹³⁶ See *Case 125/79 Danilauler v CouchetFreres* 1980 par 15.

¹³⁷ See *CMA v Hyundai* [2009] 1 Lloyd's Rep 213, where it was held that the tribunal has no power to grant freezing orders.

¹³⁸ See *Bank Mellat Hellinik Techniki SA* [1984] QB 291.

¹³⁹ See Courts and Legal Services Act 1990 S.103 and 125 (7).

¹⁴⁰ EAA 1996 S.30.