

THE ENFORCEMENT OF PROVISIONAL MEASURES BY TRIBUNALS AND COURTS IN ENGLAND

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ABSTRACT

The grant of provisional measures in England is very important, however, if such measures are not enforced then the arbitral award will not be able to be enforced. The absence of international instrument for recognition and enforcement such as the New York Convention 1958 will impede the progress of arbitration. Since arbitral provisional measures are not self executing, without support of the municipal courts, assets

subject to final award will be dissipated to other forums. This article examines the enforcement of provisional measures, under the English Arbitration Act 1996, New York Convention, and Brussels regime and court support. The power to hold the recalcitrant party liable for costs and damages is derived from the broad interpretation of the arbitration contractual proximity.

Key Words: *enforcement, provisional measures, tribunals, courts, England*

INTRODUCTION

Interim measures have an undeniable contractual value deriving from the power conferred by the parties to the arbitral tribunal through an arbitral agreement;¹ under the doctrine of party autonomy.² Arbitrators have the power to rule for damages, resulting from non-compliance with the interim measure orders.³ The contractual obligation of enforcement 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. The tribunal has the power to compensate for damages incurred by other party as a consequence of non-compliance.⁴ Compliance with the order specifically under contract agreement does not necessarily lead to compensation for damages. In the absence of any damages, the beneficiary could only obtain in award ordering the specific performance of the obligation of the, which per se is incompatible with the 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. First 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 case by case basis regarding the scope of the arbitration agreement. Secondly, non-compliance with sanctions does not necessarily lead to compensation for damage. Lastly,, even where theoretically possible, compensation for the damages 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,⁵ which definition is irreparable.⁶ Scholars argue that the power to rule on damages is implied within the power of the arbitrators to issue

¹ See ICC Award 4156 (1984) at 937.

² See Yesilirmak Provisional Measures in International arbitration (Kluwer Law International 2005).

³ See *Channel Tunnel v Beaty* [1993] AC 334.

⁴ See *Van Uden Maritime Bv v, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* (Case C- 391/95 [1999] 2WLR 1181.

⁵ See EAA S.39 & 38.

⁶ See *Kastener v Jason* [2005] 1 Lloyd's Rep 397 at 19.

provisional measures.⁷ If the law is not changed, the role of interim 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.

TOOLS OF ARBITRAL ENFORCEMENT OF PROVISIONAL MEASURES

Tools of arbitral enforcement are subdivided into sections, namely (a) voluntary compliance, (b) sanctions of compliance, and (c) arbitral damages and adverse inference. 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 that their disposal to ensure compliance with their own orders for interim measures. It should be noted that chances of such success for legal instruments are highly uncertain, for they only aim, as a last resort, to pressurize the recalcitrant party to abide by the arbitral tribunal's decisions and therefore, to obtain wilful compliance. 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. The availability of effectiveness sanctions for the case of non-compliance represents the best deterrent and guarantee of the measures effectiveness.⁸ Therefore provisional measures granted by tribunal may not be effective unless the interested party can obtain its enforcement. The effectiveness of enforcement depends so much on the co-operation of municipal courts.⁹

Voluntary Compliance

None of the established set of arbitral rules and enactments provides a mechanism for the tribunal to enforce provisional measures. This silence has been filled with the voluntary mechanism enforcement. This silence has been filled with the voluntary compliance.¹⁰ An increase in international trade and investment, coupled with the reluctant on behalf of the parties' to bring their disputes before courts, has created a growing market for the resolution of arbitral disputes by the arbitration mechanism.¹¹ 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 interim measures. Those who are familiar with the industry are aware that the growth of arbitration would not be possible without voluntary support of the parties.¹² 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 of lack of attention are not

⁷ See Pierre Karrer, *International Commercial Arbitration and the Courts; Less Theory, International Arbitration and National Courts* Kluwer, 2000 at 103.

⁸ See Benson *Arbitrage International atmesuresprovisories*, Zurich (1989) at 315.

⁹ See Tommaeo, *Lexfori, e tutelacutelarence Commercial international*, Rivarb (1999) at 28, see Poudret, Besson, *Comparative Law of International Arbitration*, London (2007) at 540.

¹⁰ See Reiner, *LesMesures Provisoires et conservatoires et i'arbitrage International,notammentl'arbitrage CCI*, *Journal du droit international* (1998) at 861.

¹¹ See Michael Mustil and Stewart Boyd, *Mustil and Boyd; Commercial Arbitration* (2nd edn London Butterworths, 1989) at 47.

¹² See Italian Arbitration Association Rules 1994 Article 19 and Arbitral Rules of European Fund Article 27 (1).

difficult to discern. Mainly, it has been 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 measures orders by the tribunals are “*lex imperfecta*” as the tribunals lack the power to enforce their orders directly against the parties. It should be noted that many orders are complied with, because they are conscious of their obligation to mitigate damage and refrain from aggravating the dispute. Parties willingly to comply with such orders may be justified with the concern of not antagonizing the arbitral process.¹³ Parties do not want arbitrators to draw any adverse inference and hold them responsible for any costs caused by neglecting to abide by the order.¹⁴ Although the tribunal may lack explicit powers to enforce interim measures,¹⁵ the tribunal’s power as the ultimate decision maker of the dispute itself, serve to encourage most parties’ to comply with arbitral orders.¹⁶ The arbitrators’ powers reside in their position as arbiters of the merits of the dispute between the parties. Parties seeking to appear before the arbitral tribunal 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 interim measures, accordingly, to many surveys, most of the arbitral measures are voluntarily complied with and spontaneously complied with by parties, since the arbitrators under the “*lex arbitri*”¹⁷ are allowed to grant interim measures,¹⁸ their enforcement is not a surprise both domestic and internationally.¹⁹ The author argues that although the tribunal’s provisional measures 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.²⁰ Where the order is not complied with, and there is substantial risk, the tribunal has the power to take all issues in an award.²¹ Parties to arbitration agreement usually tend to comply with the arbitral awards, 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.²² According to the survey of corporate attitudes and practices on international commercial arbitration conducted by Price Water House Coopers and the School of International Arbitration, Queen Mary University of London (QMUL) in

¹³ See Omar Mashoor Hadithen Thesis, University of Kent, Jurisdiction of Commercial Arbitration (June 2000) at 272.

¹⁴ See *Pacific reins mgt Corp v Ohio Corp*, 935 F.2d 1019 (9th cir 1991).

¹⁵ See Lew, Mistelis, Comparative, International Commercial Arbitration, The Hague, London, New York (2004) at 239.

¹⁶ See Yesilmark , Provisional Measures in International Arbitration, The Hague (2005) at 238. See Berger International Economic Arbitration, Deventer, Boston (1993) at 334. See Aboul-Enein, Issuing Interim Relief Measures in International Arbitration in the Arab State, Journal of World Investment (2002) at 81.

¹⁷ See the Law governing arbitration.

¹⁸ See English Arbitration Act 1996 S. 38, 39 and 48.

¹⁹ See Gary Born, International Commercial Arbitration; Commentary and Materials (2nd edn, Kluwer Law International, The Hague (2001) at 921.

²⁰ See *Kastener v Jason* [2005] 1 Lloyd’s Rep 39 par 14-19.

²¹ See EAA 1996 S. S.41 (6).

²² See Failure to comply courts give a coercive force under S.44 (5) and 49.

2008, it was adduced that arbitral provisional measures are voluntarily performed by the parties' without going to municipal courts.²³

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 consequence on the merits of the dispute against a recalcitrant party.

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 damage is derived from the broad interpretation of the arbitration contractual proximity. An arbitrator may hold a recalcitrant party liable for damages and cost arising from or related to a failure to comply with the measures ordered by the tribunal.²⁴ The power to hold a party for costs or damages is an implied duty.²⁵ 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.²⁶ Arbitrators have the power to rule for damages, resulting from non-compliance with the interim measures orders.²⁷ This is drawn from the conclusion that an arbitration agreement is a contract and such damages are connected to the contract. Interim measures have a undeniable contractual value deriving from the power conferred by the parties' to the arbitrators through the arbitration agreement. The tribunal has the power to sanction for non-compliance by ordering a recalcitrant party to compensate for any damages incurred by the other party as a consequence of non-compliance.²⁸ Compliance with the order specifically under the 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 urgency of most cases of interim relief. Compensation for damages is not adequate remedy and is incompatible with the need to protect a party's right against harm which is by definition deemed irreparable. Since arbitrators have the power to grant provisional measures, they should also have the power to enforce these measures they order.

²³ See Price water House Coopers LLP and QMUL, *International Arbitration: Corporate Attitudes and Practice 2008 Transitional Dispute Management* 1 March 2009.

²⁴ See Un Doc A/CN 9/460 par 119.

²⁵ 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.

²⁶ See EAA 1996 S.48 (5) (b).

²⁷ See *Channel Tunnel* [1993] Ac 334.

²⁸ See LCIA Article 25.1 and ICC Arbitral Rules Article 23 (1).

Although the EAA 1996,²⁹ grants power to tribunals, the tribunals have no power to grant attachment orders to protect the property disposition.³⁰ The courts' power, in granting interim measures should only be to protect the party who has proprietary rights, and who has acted on the conscience of other party.³¹ There is urgent need for reform the law of arbitration if England is to remain in the competitive market of international arbitration. It would be desirable to give the tribunal the power to make provisional or interim measures orders where the parties have requested for them, for example; freezing orders, which are conferred to municipal courts.³² If the law is not changed the role of interim 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.

The ability to draw adverse consequences

A more effective remedy to ensure the respect of the tribunal's provisional measures is the ability to draw adverse consequences on the merits of the dispute against the recalcitrant party in the tribunal's final award, so as not 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 disputes in question due to lack of cooperation, for example dissipation of assets. With increased means of technology where transfer of assets is so simple by twinkling of an eye, a party who has dissipated all his property will not have fear of the consequences of arbitral tribunal sanctions.³³ The adverse remedy enhances the efficiency of the arbitral provisional measures against non-complaint party concerning the merit 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. An arbitral tribunal may draw an adverse inference for not complying with its ruling on key issues like the preservation of evidence.³⁴ Where the tribunal considers that such evidence supports the case of the applicant, and the evidence is or ought to be in the recalcitrant part's possession, the tribunal will draw adverse inference to the defendant if he/she has not complied with the order.³⁵ In reality the tribunal has no enforcement mechanism in regards to preserving evidence, and drawing adverse inference from failure to comply with the order will not make any impact. 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.³⁶ The tribunal, in dealing with such matters has to be impartial so as to not cause injustice.³⁷ Given the composition of the tribunal and the

²⁹ See S.39(4) and 48 (5).

³⁰ See Rix LJ in *Kastner v Jason* [2005] 1 Lloyd's Rep 397.

³¹ EAA 1996 s. 44(2)(e).

³² Ibid S.39 is too restrictive to the arbitral tribunal. Since *Mareva* injunctions are granted by courts only.

³³ See Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Ocean Publication 2000) at 416.

³⁴ See Tommaseo *Lexforieturtera Cautelare Commerciale Internazionale*, Riv Arb (1999) at 28.

³⁵ 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, (2nd March 1998).

³⁶ See EAA 1996 S. 30.

³⁷ Ibid S. 41 (6).

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.³⁸ And also the back up of the courts is another weapon if there is demand for urgent compliance. It should be noted that the tribunal's decision on the request of interim measures and its decision on the merits are found on entirely different bases and scope. There is however, an exception to the above principle, which is manifested in the English arbitration, which provides dismissal of the claim of the claimant of the party which do not comply with an order for security for costs.³⁹ The tribunal power, in regard to the ordering of security for costs is one of the golden goals of the Act, since a refusal may subject to contempt of court.⁴⁰ England needs to adopt a remedy (astringes) that is common to other European countries, which provides coercive powers to ensure that payment of a pre-determined sum of money every day or a month is respected where an order is not complied with.⁴¹ However, for the tribunals to enforce an order the arbitration Act, needs to be equated to the same footings like municipal courts,⁴² as in other European countries.⁴³ France considers the arbitration tribunal to the same footing like municipal courts, which provides authority to arbitrators to grant and enforce any orders ordered by the tribunal.⁴⁴ It should be noted that the power to liquidate the "astreinte" is reserved for the courts and subject to the previous exequatur of an award incorporating the arbitral award.⁴⁵ Since the tribunal is granted authority by Arbitration Act 1996 S. 39, which provides that a tribunal has the power to grant interim measures, which it would have the power to grant in a final award, for example; order for the payment on account of the costs of the arbitration. The tribunal in exercising its power has the same power as the court to make declaration to any matter of the proceedings,⁴⁶ to order a party to do so or refrain from doing anything, for example; it can order specific performance of a contract. It should be noted that unlike USA,⁴⁷ Holland,⁴⁸ France⁴⁹ and Belgium, which provides the tribunal with power to make ancillary order for a payment of a pre-determined sum of money every day or monthly where an order is not complied with,⁵⁰ tribunals in England have no power to compel the enforcement of their orders for example; imposing time lights to make psychological effects to disobedience.⁵¹ It

³⁸ See UNCITRAL (2006 Version) Article 17 B.

³⁹ EAA S.7 (7) (b).

⁴⁰ See Supreme Court Act 1981.

⁴¹ See this power has given rise to a large debate, to a hybrid nature, and its found in conflict between enforcement and merits or jurisdiction and imperium.

⁴² See EAA S.38 (3) and 39.

⁴³ See Netherlands, Dutch Code Civil Procedure Article 1056, see Belgium Code Judiciare Article 1709. See Swedish code Civil S.25 dated 4th April 1999, which permits arbitrators to order liquidation.

⁴⁴ See de Boissesson, *Le droitfrançais internet international*, Paris (1990) at 257-258.

⁴⁵ See Paris Court of Appeals, 8 Jun 1990, *SocieteHochefriedl and Societe le Grand Livre du mois in Rev arb* (1990) at 917.

⁴⁶ See Hunter, *Law & Practice of International Commercial Arbitration* (3rd Edn Sweet & Maxwell 1999) at 448.

⁴⁷ See AAA Article 2.

⁴⁸ See Dutch Civil Code Article 1056.

⁴⁹ See Belgian Code Civil Article 1709.

⁵⁰ See *March Rich & Co v AG v Societa Italian Impiant C-190/89*.

⁵¹ See Thomas, selected Issue; *Interim Measures in International Arbitration, Finding the best anser Craot*. Arbit No.12 (2005) at 218.

of great importance to note that 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-enforcement influences the effectiveness of the arbitral interim measures that is because the sanctions for non-compliance with an arbitral measure may not always, and are potentially not sufficient to protect arbitrating parties' rights on an interim basis. For any provisional relief to be effective, must be enforced at the time it is granted, not after the final award.

Enforcement and recognition of Interim Measures through Courts

Courts are considered in resolving the conflicts apart from the question of jurisdiction; they help in the enforcement of interim measures and final awards. There is little point in 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.⁵² When the parties do not voluntarily comply interim measures, intervention of state courts becomes necessary,⁵³ in order to obtain its judicial recognition and enforcement.⁵⁴ The courts involvement in enforcement is based on the territorial principle, 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.⁵⁵ Nevertheless English courts have enforced foreign judgements since the seventh century.⁵⁶ 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.*”⁵⁷

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.⁵⁸ This theory is adopted by English courts and forms a basis of recognition for judgements and enforcement.⁵⁹

⁵² See EAA 1996 S.58 and 66.

⁵³ See Thomas Muller, Switzerland, the Supreme Court declares the UK Worldwide freezing Order Enforceable, International Litigation News October 2004.

⁵⁴ See The Administration of Justice Act 1920, the Foreign Judgements (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgements Act 1982.

⁵⁵ See

⁵⁶ See Dicey and Morris, The Conflicts of Laws, (13th edn, Sweet & Maxwell, London 2000) at 469.

⁵⁷ See *Adams v Cape Industries* [1990] Ch. 433 at 552.

⁵⁸ See Clarkson & Hill Jaffrey on Conflicts of Laws (Butterworth's 1997) at 146.

⁵⁹ See Blackburn LJ in *Schibsby v Westenholz* [1870] LR 6 QB 155 at 159.

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.⁶⁰ 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,⁶¹ 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.⁶² 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 an arbitration agreement, which invites the courts as a host for enforcement.⁶³ If a party to arbitration agreement 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.⁶⁴ The concept of recognition applies in the case where a party seeks to introduce an interim measure in the legal order without actually having it enforced,⁶⁵ as in the case of measures does not require any form of cooperation 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 and enforcement. It should be noted that for a long period of time the issue of enforcing arbitral award 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. Most legal systems still do not tackle this problem, as a result of jurisprudence solutions have been sought to deal with them.⁶⁶ There is still lack of uniformity among countries that have adopted specific rules on the recognition of provisional measures. Recourse to courts with view to obtaining the enforcement of interim measures ordered by the arbitral tribunal may take two distinctive

⁶⁰ See *United States of America v Inkley* [1988] 3 WLR 304.

⁶¹ See *Jet Holdings Inc v Patel* [1990] 1 QB 335.

⁶² See *ED & FMan 9sugar Ltd v Haryanto* [1911] 1 Lloyd's Rep 249.

⁶³ See *Yusuf Ahmed Alghanim & Sons v Yoysir US Inc* 126 F.3d 1520 (2nd Cir 1997) applying Chapter 1 of the FAA 1925.

⁶⁴ See EAA 1996 S.9.

⁶⁵ See *Ninth Circuit in Pacific Reinsurance Management Corp v Ohio reinsurance Corp* 935 F.2d at 1023., see *Navigation Ltd of Monrovia v Petroleos Mexican City* 606 F,supp 692.694 (SDN 1985).

⁶⁶ See Andreas, Enforcement of Provisional measures at 19-22, see Franco, Centre for Transnational Litigation, Arbitration and Commercial Law, New York University, Law School, a seminar addressing Interim Measures Interim Measures (October 7 2013).

forms.⁶⁷ 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. For jurisdictions following exequatur model, 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 adopted Model Law, by means of the extension of provisions dealing with recognition and enforcement of awards,⁶⁸ to provisional measures.⁶⁹ This approach presupposes the characterization of the arbitral decisions as an award, but not necessarily its adoption in the form of an award; while certain jurisdictions provide what the measure must take from an award,⁷⁰ others simply put provisional measures on the same footing as awards, irrespective of their form.⁷¹ Exequatur of 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. The power of the courts to assist in the enforcement of interim measures 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 requirement for granting interim measures and in respect of the content of the order.⁷²

Further, 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.⁷³ The theory of obligation which was adopted by Blackburn LJ⁷⁴ in the nineteenth century supports the notion of enforcement of provisional measures. This theory 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. It should be noted unlike the jurisdictions following "*exequatur*", the Arbitration Act 1996 does not put provisional measures on the same footing as awards,⁷⁵ and provides for

⁶⁷ See TijanaKojovic, Court Enforcement of Arbitral Decisions on Provisional Relief: How Final Provisional ?" *Journal of International Arbitration*, Kluwer International Vol. 18 No. 5 Oct 2001 at 511-532.

⁶⁸ See Model Law Article 35 & 36.

⁶⁹ See Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, London (2005) at 154.

⁷⁰ See Arbitration Act of Scotland Article 17(2).

⁷¹ See Dutch Civil Code Procedure Article 1051, see Article 23 Par 2 of the 2003 Spanish Ley de Arbitraje.

⁷² See Germany ZPO S. 1041.

⁷³ See Rdfern Hunter at 446-470.

⁷⁴ See *Schibsy v Westholz* [1879] QB 155.

⁷⁵ See New Zealand Arbitration Act Article 9.

a different specific mechanism for the former.⁷⁶ English courts do not have their own orders, but 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, that the arbitral tribunal is empowered to make only after the party has failed to comply with a previous order without showing sufficient cause.⁷⁷ Under English Arbitral rules, recourse to national court is only made subject to the previous exhaustion of all available remedies for non-compliance before the arbitral tribunal, and to the expiry of any deadlines set by the arbitrators to abide by the order. It is not axiomatic that courts should have the competence to enforce their own orders.⁷⁸ There is an obligation to support the arbitral process by upholding the arbitration agreement by referring parties to arbitration, and by recognition and enforcement of arbitral decisions made in other signatories to the New York Convention.⁷⁹ Any suit should be referred to arbitration to maintain party autonomy.⁸⁰

Enforcement under New York Convention on Recognition and enforcement of interim measures

With globalization and privatization, the volume of arbitration disputes has increased,⁸¹ which makes both a numerical and geographical increase in qualified arbitrators and it is very important to ensure that interim measures are enforced under international conventions,⁸² so that the claimants do not lose out, especially when the parties have no assets at the seat of arbitration.⁸³ Since England is a signatory country to New York, it is of great importance that this article examines how interim measures can be enforced under the convention.⁸⁴ The convention requires signatories to enforce commercial arbitration awards involving foreign interests under paragraph 1 of Article 1(3). The convention contains no provisions on the matter of provisional measures issued by court in aid of arbitration. Hence their availability depends on the law of the court before which the measure is sought.⁸⁵ No court in the reported cases has doubted that an attachment in connection with the enforcement of an 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.⁸⁶ The convention is internationally recognised, it regulates the recognition and enforcement of arbitral awards by contracting states' courts. The convention applies only to foreign awards not domestic, however, the convention has no concept of provisional measures. The test of interim measures enforcement and recognition was brought to attention by the Supreme Court of Queensland, where the court came to a negative conclusion on the

⁷⁶ See EAA 1996 S. 42.

⁷⁷ Ibid S.41 (3).

⁷⁸ See Channel Tunnel [1993] AC 33.

⁷⁹ See New York Convention Article IV –V.

⁸⁰ See Jan Van Berg, *The Judicial Interpretation of and Application of the New York Convention* (1981) at 200.

⁸¹ Albert Jan Van, *The New York Convention 1958; An OverView*, published in *Yearbook Vol.XXVIII* (2003).

⁸² See ICCA's Guide to the interpretation of the 1958 New York; A handbook for judges at 6.

⁸³ See Ibid.

⁸⁴ See United Nations Convention on the Recognition and Enforcement of Foreign Awards 19 Jun 1958.

⁸⁵ See *Bergesen v Muller* (US No.54 Reported in *Yearbook Vol.1 IXP*. 487.

⁸⁶ See *Dardan v Yukos* [2002] ALL ER Comm 819.

basis of an interlocutory, rather than final, nature of the decision. 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.⁸⁷ The author argues that the word final used by the court in Queensland, is ambiguous, since New York Convention does not expressly provide that an award has to pass the test of binding and final.⁸⁸ 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*.⁸⁹

A classic case of enforcement of provisional measures was adduced in the case of *Katner v Jason*,⁹⁰ where the defendant breached the arbitral sanction and disposed of property to a third party without consent of the tribunal and escaped to 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.⁹¹ 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,⁹² and form an analysis of the requirements, 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 commentators and courts,⁹³ where the court did not support the enforcement of provisional measures under New York.⁹⁴ However, in contrast the Federal Court in California in *Uranex*⁹⁵, held that interim measures (prejudgment attachments) can be enforced in cases governed by New York Convention. The court's argument was based on the argument that nothing in the text of the New York implies that court ordered measures were prohibited in arbitration. The author argues that the adoption of an enforcement protocol to the New York Convention that deals with the enforcement of interim measures.

Enforcement under Brussels Regulation

One of the purposes of the Brussels regime is to simplify the formalities governing recognition and enforcement of judgements.⁹⁶ The main aim of the Brussels regime is to facilitate, to the greatest extent, the free movement of judgements by providing a simple rapid enforcement procedure.⁹⁷ The rules governing enforcement of judgements, generally apply to the

⁸⁷ See Supreme Court of Queensland, *Resort Condominiums International Inc v Ray Bowlwell and Resort Condominiums (Australia) Pty Ltd* Com Arb 1995 at 68.

⁸⁸ See Article 1 (1) of New York Convention 1958.

⁸⁹ See Yesrimark on Provisional Measures at 146-147.

⁹⁰ See [2005] 1 Lloyd's Rep par 20.

⁹¹ See EAA 1996 S. 103.

⁹² See Article V of the New York Convention on grounds of refusal.

⁹³ See *McCreary Tire and Rubber Co v CEAT ASPA* 501 F.2d 1038 (3rd Cir 1974) analysis of Article II(3).

⁹⁴ See *Contichen LPG v Parsons Shipping Co* F.3d 426 (2nd Cir 2000) 430.

⁹⁵ See *Carolina Power and Light Co v Uranex* 451 F.Supp 1044 (ND Cal 1974).

⁹⁶ See case *Danilauler v Couchet Fres* [1980] 1553.

⁹⁷ See Case C-1/98 *Kromach* [2000] 1-1935.

enforcement of interim measures⁹⁸ in member states other than the one in which they have been granted.⁹⁹ Article 27 of Brussels provides that “*for the purpose of the free circulation of judgements. A judgement given in a member state should be recognised and enforceable in another member state even if it given against a person not domiciled in a member state.*” Further Article 38 provides that “*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.*”. The classic case on enforcement under the Brussels was demonstrated in the decision of *UZAN V Motorola*,¹⁰⁰ where the supreme court of Switzerland explicitly confirmed that UK freezing ex parte order under Article 34 would be enforceable. This case contradicts with *Daniulaule*,¹⁰¹ where freezing order was refused to be enforced on the grounds that a party had not been summoned to defend itself. Hence arguing that the measure did not fall within Article 34, the author argues that the application of the Brussels Regime under Article 34, was too restrictive and that the court should have interpreted Brussels purposively in order to enforce the freezing order. There is always tension between arbitration and Brussels; it posed the question of whether English courts have allowed the Regulation to be used to evade arbitration clauses as demonstrated in *Van Uden*.¹⁰² For interim measures to be enforced under Council Regulation 42/2001, would mean one would have to determine what interim measures 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 private agreement between the parties.

A provisional measure, under Brussels 1 Regulation provides for a member state judgement to be enforced has to pass the criteria of Article 36. However, judgement will not be enforced even if Article 34 is complied due to public policy grounds or Article 35 (1) (limited review of jurisdiction). It should be noted that Chapter III of the Brussels 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 respect of the rights of the defence.¹⁰³ The new commission’s proposal 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.*”¹⁰⁴

Article 22 of the Brussels, provides exclusive jurisdiction where courts of respective member states have exclusive jurisdiction, however, infringement of rules of exclusive jurisdiction, is a ground for refusal and enforcement of a judgements.¹⁰⁵ On the other hand Article 31 of

⁹⁸ See Italian Leather Case acse C-80/00.

⁹⁹ See Brussel Article 38

¹⁰⁰ See Decision of the Federal Tribunal (DTF) date 03 July in *UZan v Motor Credit Corp* (129626)

¹⁰¹ *Case 125/79 Danilauler v CouchetFreres.*

¹⁰² See Case C-391/95 *Van Uden v Deco line.*

¹⁰³ See ECJ observation in *Danilauler* decision at par 13.

¹⁰⁴ See Regulation 1215/2012.

¹⁰⁵ See Brussels Exclusive Jurisdiction under Article 35 (1).

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 Brussels Regulation,¹⁰⁶ courts of another member state may have jurisdiction as to the substance of the matter. The irony is that this provision does not differentiate between exclusive jurisdiction and other jurisdiction¹⁰⁷ rules in the Regulation.¹⁰⁸ A provisional measures will not be enforced even if it complies with all articles of the Regulation will not be enforced unless the draconian criteria¹⁰⁹ established by the European Court of Justice are complied with.¹¹⁰ The interim measure will not be enforced by national courts,¹¹¹ if a measure is irreconcilable with the decisions on interim measures given in a dispute between the same parties in the member state.¹¹²

CONCLUSION

Although the arbitral tribunal has no coercive powers, this article examined how the tribunal orders can be enforced with support of municipal courts, which are called for host reasons to support the arbitral proceedings. The support rendered by the New York Convention plays a pivotal platform in recognition of provisional measures. It should however, be noted that the New York provisions provide for a final award to be enforced, not provisional relief, this gap of interpretation or equating interim measures to an award is subjective in nature. Courts in different jurisdictions have interpreted Article II (3) differently, has brought to contentious issue in regards to enforcement of provisional measures in signatory states. There are still questions to be answered, which national courts require as a condition for enforcement of interim measures ordered by tribunals that they should satisfy judicial standards. The abstract recognition and enforcement of provisional measures might be seen as a paper tiger, unless a satisfactory enforcement mechanism is provided. The 2006 Version of the Model Law per se is a positive development, however there inadequacies to achieve the desired harmonization of enforcement of interim measures. The Brussels Regulation 42/2001 does not provide sufficient detailed rules on the jurisdiction, recognition and enforcement of protective measures or the new Regulation 1215/2012. Member states seem to be too reluctant to introduce a change in this area. The other question that needs to be brought to attention is whether the European Court of Human Rights will not be violated as a result of court's enforcement of an arbitral ex parte order? The author argues that in order to avoid commercial exploitation; parties should be given the right to be heard under Article 6 (1) and the right to challenge any interim order before it is enforced.¹¹³ The irony is that some courts may advance their argument on the grounds that arbitral tribunals are not public, the convention

¹⁰⁶ See *Eurosensory v Teiman & Blind Equipment* Case France Court 28 Jan 1994.

¹⁰⁷ See *Turner v Grovit* Case C-159/02.

¹⁰⁸ See Article 34, 31 and 42 of the Brussels Regulation.

¹⁰⁹ See Bulgarian Civil Procedure Article 623(3), which allows enforcement of interim measures with no hinderances.

¹¹⁰ See ECJ in *Deutsche Genossenschaftsbank v Braseriedu Pecher* Case C- 148/84 [1985] ECR 1-1981.

¹¹¹ See Article 53 of the Regulation provides formalities of enforcement of interim measures. See Article 45, 42 (2) and 43 (3).

¹¹² Under Article 34 (3),41,of Regulation 42/2001.

¹¹³ See *R v Switzerland application* No. 1088/84. See *Bramelidand Malmstrong v Sweden v Sweden* Applicant No. 8588/79.

does not apply,¹¹⁴ and such scope be interpreted purposively to promote human rights in arbitral proceedings.¹¹⁵ Since the position of England after it exit out the European Union after a referendum that ushered in a new Prime Minister Teresa May, the issue of enforcement in the arbitral provisional measures will not be subject to Brussels since England is no longer a signatory to the convention, hence not binding on its judicial structure. It is not clear if the new prime minister will discuss reservations as an independent country, to promote cooperation in the neighbouring states as a whole.

¹¹⁴ See ECHR Article 6(1).

¹¹⁵ See *Dewer v Belgium* 1980 Reported in EHRR at 454.