

# **THE CRITICAL ANALYSIS OF PROCEDURES AND CONDITIONS FOR GRANTING ARBITRAL INTERIM MEASURES IN ENGLAND**

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## **ABSTRACT**

The arbitral tribunal should be the best forum for seeking interim measures, given the fact that it derives its authority from the arbitration agreement (party autonomy). However, there stringent conditions for the tribunal to use its powers to grant interim measures. The main aim of such standards and procedures is generally to preserve the status quo, facilitate enforcement of final arbitral awards or arbitral proceedings. In determining the standards it is incumbent upon the tribunal to take into account the temporary nature of arbitral interim measures. The standards need to be pragmatic in order to suit the practical needs of arbitral proceedings in international commerce. The tribunal looks at case law, arbitral rules, and awards and at times makes a comparative appraisal of international arbitral rules and

conducts an analysis of arbitral awards and case law as a yardstick for determining the procedures and standards for interim measures. The irony with regard to international comparative analysis is the nature of arbitral awards, which are confidential; hence access to some court records is impeded, in relation to providing examples and references on this point. This article critically examines the procedures and conditions of granting provisional or interim measures in England. The article will examine standards and procedures, positive and negative conditions, merits of interim measures, the relationship between courts and arbitral tribunal in granting interim measures.

**Key Words:** *critical analysis, procedures and conditions, arbitral interim measures, England*

## **INTRODUCTION**

The arbitral tribunal has strict conditions that are more examined than litigation cases, hence they establish the arbitral jurisdiction as the best dispute mechanism for arbitral proceedings.<sup>1</sup> Under arbitral proceedings, for a tribunal to have the power to grant arbitral interim measures, it has first to ascertain whether it has been given such power by the parties to make an order on provisional relief. Indeed after the tribunal has been constituted, it then sets the prerequisites or standards and procedures for granting interim measures.<sup>2</sup> This approach of determining the standards and procedures facilitates predictability and consistency of arbitral proceedings; and hence makes arbitration more effective and efficient.<sup>3</sup> The main objective of such standards and procedures is generally to preserve status quo, and enforcement of arbitral awards.<sup>4</sup> Although many enactments and rules are silent on the issue of arbitral standards and procedures for the grant of interim measures,<sup>5</sup> arbitrators are given broad powers and a wide

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<sup>1</sup> See Yasrimark Ali, *Provisional Measures in International Commercial Arbitration*, (2006) Kluwer International at 84-86.

<sup>2</sup> See English Arbitration Act (EAA) S.34 which provides the tribunal with authority to set procedures and evidential matters.

<sup>3</sup> See London Court of International Arbitration (LCIA) Article 25 (1).

<sup>4</sup> See International Centre for the Settlement of Investment Disputes (ICSID) Article 39.

<sup>5</sup> See Ian Black Shaw/ Roberts, *The Court of Arbitration for Sports 1984-2004* (Cambridge University Press) at 227-229.

scope of discretion in establishing arbitral principles.<sup>6</sup> It should however, be noted that there is little precedent in international commercial arbitration and that each case is judged on its merits.<sup>7</sup> Given the foregoing, arbitral tribunals with support of courts have developed standards and procedures for granting immediate provisional measures or interim measures in order to safe guard parties from serious injuries that would cause delays in the in the arbitration process.<sup>8</sup> Thus unless the arbitral tribunal sets procedures and standards for granting interim measures its objective of providing a final relief may be lost and meaningless, and the parties may suffer considerable damage or unnecessary costs.

## **AUTHORITY TO DETERMINE PROCEDURES & CONDITIONS BY ARBITRAL TRIBUNAL**

The English Arbitration Act 1996 provides that “ *it shall for the tribunal to decide procedural and evidential matters, subject to the right of the parties’ to agree to any matter.*”<sup>9</sup> This section adduces that in all arbitral proceedings the tribunal applies relatively straightforward procedures to request provisional measures. This has been advanced by the Supreme Court in the case of *Mobil Oil Indonesia Inc v Asamera Oil (Indonesia) Ltd* where it was held that “ *it is for the arbitral tribunal to set standards for provisional measures as parties intend to refer to the rules.*”<sup>10</sup>

UNCITRAL Model Law, confirms that the authority of the tribunal to set conditions as to when a measure is to be granted.<sup>11</sup> Preliminarily, the procedures applied by an arbitral tribunal will be determined, or at least heavily influenced, by contractual obligations agreed by the parties to the arbitration agreement.<sup>12</sup> In certain circumstances, parties’ may agree that interim measures or injunctive relief orders may be granted upon the claimant making certain showings.<sup>13</sup> This is common to intellectual property contracts, which often contain provisions expressly authorising interim measures.<sup>14</sup> It should be noted that arbitral institutions internationally and domestically have not provided clear meaningful standards of interim relief.<sup>15</sup> It should be noted that despite the challenges, most institutions provide that an arbitral tribunal may grant such provisional relief as it “*deems necessary or appropriate.*”<sup>16</sup> The author argues that such formulation confirm the wide powers to grant interim measures, but do not establish the standards or procedures for when that actual authority should be recognised. The tribunal is left with power to apply legal standards when granting interim

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<sup>6</sup> See EAA S.33 (1) LCIA Article 14, WIPO Article 38, UNCITRAL Article 15 (1), ICC Rules Article II,

<sup>7</sup> See Jan den Berg, *The Art of Arbitration awards* (Kluwer International 1982) at 223-332.

<sup>8</sup> See EAA 1996 S. 44 (5).

<sup>9</sup> See EAA S.34 (1) & (2).

<sup>10</sup> [392 NYS 2d 614 {1977}.

<sup>11</sup> see UNCITRAL Model Law Article 17 of the UNCITRAL Model Law 2006.

<sup>12</sup> See Gary Born *International Commercial Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2<sup>nd</sup> edn 2006) at 91-92.

<sup>13</sup> See Model Law Article 17.

<sup>14</sup> See Gary Born at 93.

<sup>15</sup> See UNCITRAL Article 17 A of 2006 version.

<sup>16</sup> *Ibid* UNCITRAL Article 26 (1), ICC Article 23, WIPO Article 40, ICDR Article 46 and LCIA Article 25 (1).

measures.<sup>17</sup> It should further be noted that most institutions dealing with arbitral interim measures in the commercial context consider the following as the agreed standards, namely: (a) serious or irreparable harm to the claimant, (b) urgency of the matter, (c) no prejudgement of the merits,<sup>18</sup> while some arbitral tribunal also require the claimant to adduce a prima facie case on the merits. The author argues that the lack of clarity in relation to standards for granting interim measures was left to the arbitral tribunal to solve, because it was not easy to foresee the types of solutions that might be required. A clear set of standards would impede party autonomy as the tribunal would not adapt to the prevailing commercial circumstances, since commerce changes according to economic trends of supply and demand. In granting interim measures, the tribunal can in practice take guidance from arbitral case law, and the comparative analysis of arbitral conventions and rules. The examination of both academic views and arbitral institutions demonstrate that there are general requirements, both positive and negative, that the tribunal needs to take into consideration before granting an interim measure. The arbitral tribunal's refusal to grant interim measures will potentially infringe the party's rights or party autonomy.<sup>19</sup> In practice, an arbitral tribunal will consider the nature of the provisional measure that are requested and the relative injury to be suffered by each party, in deciding whether to grant a measure or not. Interim measures, for example; performance of a contract or preserving status quo, the claimant need to prove or to show urgency, harm and prima facie case; however, interim measures do not require the same showing.<sup>20</sup> It may be submitted that such lacunae provides the arbitral tribunal to grant interim measures under the probability principle or the material risk or harm if the measure is not granted.

## **NEGATIVE REQUIREMENTS OF GRANTING ARBITRAL PROVISIONAL MEASURES**

The negative requirements are that are provided by the tribunal; where firstly, the tribunal does not need to examine the success or the merits of the case. Secondly, the tribunal may not grant or refrain from granting such a measure in the form of a provisional measure. Thirdly, the tribunal under negative requirement may refuse to grant any measure sought by the party where there is evidence that such order may not be complied with by a party. Fourthly, the tribunal may not grant the measure where it is clear that the order will not prevent the harm suffered by the party seeking the order. Fifthly, the order may not be granted where it is found to be too remote in regard to the case in question or moot. Lastly as the doctrine of equity provides that however, comes to court must come with clean hands, the arbitral tribunal will not grant any interim measures, where there is ambiguity, that is to say fraud, duress or misrepresentation by a party to an arbitration agreement.

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<sup>17</sup> See *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316.

<sup>18</sup> See arbitration generally tends to apply the urgency requirement in a less strict way than courts. In practice tribunals may grant interim measures notwithstanding the fact that the urgency has not been established properly or even alleged. By way of illustration Article 14 (2) of the Cas Arbitral Rules for sports, does not list urgency among the conditions for interim measures. A defence of lack of jurisdiction raised by one party does not prevent the tribunal from making an order, once the files has been transmitted to it provided it is prima facie. See Berger, *International Economic Arbitration*, The Hague 1993 at 335-336.

<sup>19</sup> See EAA 1996 S. 39 (4).

<sup>20</sup> *Ibid* S.38 (3) for example preservation of evidence, confidentiality and security for costs.

## **THE REQUIREMENT SHOULD NOT NECESSITATE EXAMINATION OF MERITS OF THE CASE**

Where there is clear evidence that the merits of the case require examination, the tribunal may refrain from issuing interim relief requested by a claimant. This applies on the condition that there is no prejudice to the outcome of the case in question. The tribunal has to take the substance of a case in dispute for the establishment of a prima facie jurisdiction.<sup>21</sup> The arbitral tribunal has to prove that justice prevails but not to promote any infringement of parties' rights,<sup>22</sup> as infringement breaches the arbitral doctrine of impartiality.<sup>23</sup>

Interim measures (provisional measures), must not prejudice the merits of the parties' underlying dispute.<sup>24</sup> However, it is not precisely clear what this requirement means; for instance, does it argue against the tribunal making a decision that may prejudice or bias its final decision on the merits, or does it argue against the arbitral tribunal granting the same order that is requested on the merits, or does it argue against the arbitral tribunal granting the same order that is requested on the merits? The author argues that there is no need for any provisional measure to be subject to prejudging the merits, because interim measures are subject to alteration and revocation at any stage in the final award. Hence the outcome of a provisional measure should not as a technical matter prejudice or predetermine the final award.<sup>25</sup>

There are circumstances where the arbitral tribunal has refused to grant interim measures requested, for example in the ICC case 6631,<sup>26</sup> where both parties' to an arbitration agreement applied for an order for security for costs, however, the tribunal declined the application. The arbitral tribunal when dealing with any provisional measure in relation to not prejudging the merits, must take care to ensure that it does not, in considering any request, partially close its mind to one party's submission or deny one party the opportunity to be heard in subsequent proceedings, on the grounds that the same relief sought as final relief may ordinarily be issued on a provisional basis.

## **NO GRANTING OF FINAL RELIEF**

An arbitral tribunal will not grant a decision on the merits under the guise of provisional measure. This means that the tribunal will not order any interim measure if it happens that the

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<sup>21</sup> See International Chamber of Commerce (ICC) Interim Award 5835 of 1998, extract

<sup>22</sup> See EEA 1996 S.1 (a).

<sup>23</sup> See Model Law Article 34 (2) (a)-(b), New York Convention Article V (1) and V(2) (b), which provides that in any case the provisional relief should not prejudice of the substance.

<sup>24</sup> See *Emilo Augustin Maffezini v Kingdom of Spain*, Procedural Order No.2, ICSID Case No. Arb/97/7 ( 28 Oct 1999)

<sup>25</sup> See Lew, Commentary of Interim and Conservatory Measures in ICC Arbitration Cases, II (1) ICC Ct.Bull 23, 27 (2000).

<sup>26</sup> See order of 1999 in AAA Case No.507181-0014299 ( un Published), ICC Partial award 8113 of 1995, extracts published in 11(1) Ct arb Bull 65-69 ( 2000), where the tribunal denied the request for interim relief as the request by the claimant implied a pre- judgement of the dispute.

relief sought not convincing.<sup>27</sup> An arbitral interim measure may not operate to grant the final relief sought for preserving the provisional nature of the interim measures. This can be demonstrated in the case of *Behring*,<sup>28</sup> where the dispute arose out of a contract for the servicing of helicopter components owned by the respondents. Upon the claimant's request for reimbursement of the storage costs for preservation of the goods, the Iran –US claims Tribunal, by taking into account the fact that one of the claims submitted by the claimant was for storage charges, refused the request by ruling that it appeared that the request for the provisional measure was, in that respect, identical to one of the claimant's claims on the merits. Under such circumstances, to grant this request would have amounted to a provisional judgement on one of the claimant's claims.<sup>29</sup>

### **THE TRIBUNAL MAY NOT GRANT MEASURES DUE TO DOCTRINE OF EQUITY**

This is an international maximum adopted by the doctrine of equity in England that, when one needs justice or when one goes to any legal institution one must go with clean hands.<sup>30</sup> In this case, the claimant concluded a distribution contract with the respondent, whereby the respondent was granted the exclusive right to sell touch screen computers. The parties also signed a non competition clause, in which the respondent undertook not to compete. The claimant alleged that the respondent breached their contract, and as a consequence, terminated the contract. The claimant then filled a request for arbitration. The claimant also applied for an injunctive relief in order to stop the responding manufacturer from distributing and selling the claimant's products. The arbitral tribunal considered the time and found out that the ground of the claim requested was time barred.<sup>31</sup>

### **THE MEASURE MUST BE CAPABLE OF PREVENTING THE ALLEGED HARM**

In considering when to make any provisional measure, the arbitral tribunal has to balance this with the objective of the measure. If that measure is not going to provide a remedy for the victim to the arbitration agreement there is no need for such request to be granted. Provisional measures are designed to safeguard, on an interim basis, the right in question; or in other words, to avoid any harm to that right. Thus they should, at least on the face of it, be capable of serving this purpose.<sup>32</sup> In addition, the measure requested must not be moot, for example; in *Iran v United States*,<sup>33</sup> where the claimant requested the tribunal to prevent the public sale of nuclear fuel allegedly belonging to it. In fact the fuel had already been sold before the tribunal was able to consider the case; thus the tribunal held that the request had become moot.

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<sup>27</sup> See Interim Award ICC Case No. 8786, 11 (1) ICC Ct Bull 81 (200) where the arbitral tribunal rejected the application of an order where the defendant failed to be sufficient or convince the tribunal. See ICC Rules Article 8 (5).

<sup>28</sup> See *Behring International Inc v Iranian Air Force* (1985) No. 382, Interim Award No. ITM 46-382-3 ( 22 Feb 1985), *United Technologies Int'l v Iran* (1986), Case No. 114, Decision No. 53-114 ( 10 Dec 1986).

<sup>29</sup> See Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382 ( 21 Jun 1985).

<sup>30</sup> See ICC Partial Award 7972 ( 1997) un published.

<sup>31</sup> See *Ibid*.

<sup>32</sup> See YasriMark, on Provisional Measures in International arbitration ( Kluwer International 2005).

<sup>33</sup> See Case A-15 ( 24 Nov 1986).

## THERE MUST BE ADEQUATE DAMAGES

When the arbitral tribunal is considering granting any provisional measure especially that of preserving the status quo, where there is likelihood of potential or actually prejudicing the counter party's rights, in such circumstances, an arbitral tribunal should request from the applicant adequate security for damages. Indeed this is common practice even in judicial courts when granting any provisional remedy.<sup>34</sup> The main reason for requesting security for damages is to obtain a form of an undertaking whereby the successful moving party undertakes to indemnify the adversary, should the measure prove to be unjustified.<sup>35</sup> The other fact is that interim measures are based on a summary review of the facts and law, and such review would affect the prima facie establishment of the case, and most important, the outcome of the case or review changes at the end of the adjudication. The purpose of the security is to cover to any actual loss and potential damages to the adverse party. In practice there are quite a few cases where security for damages was dealt with.<sup>36</sup>

## AN UNDER TAKING

An arbitral tribunal may refuse to grant an interim measure if there is an undertaking or declaration in good faith by the party against whom such a measure is sought that it does not intend to infringe the right in question. Apparently, it is within the discretion of the tribunals to accept the undertaking, subject to the terms of the arbitral tribunal. In deciding to accept the declaration, the circumstances of the case and previous actions of the arbitrating parties need to be taken into consideration. The arbitral tribunal has the power not to consider other requirements of granting any order requested.<sup>37</sup> In case 67692,<sup>38</sup> a dispute arose from the agreement according to which the claimant was entitled to the use of the respondent's software, which related to the prediction of movements in financial instruments. The claimant requested an injunction, in order to prevent dissemination of its technology and data by the respondent, pending the final award. The respondent, countering the claimant's arguments, claimed that the claimant's technology was not in possession. There was an initiative taken by the respondent or an undertaking not to use the technology during the course of arbitration. It was prima facie established from the outset that there was not sufficient likelihood that the respondent would use the technology. Indeed, the arbitral tribunal on the balance of probability declined the request on the grounds that it was a waste of time and that if it was not granted the claimant would not suffer any substantial harm.

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<sup>34</sup> See Brussels Convention Article 24, see *Van Uden Africa Line v Kommanditgesellschaft*, Case C- 391/95 (1998) ECR I-2314 par 42.

<sup>35</sup> See ICC Interim Award 5835 of 1998, Published in 8(1) ICC Int'l Arb. Bull 67 ( 1997).

<sup>36</sup> See ICC Case 7544, where the arbitral tribunal ruled that " *the tribunal is faced with the delicate task of weighing up the probability as whether, after the claims and counter claims have been fully argued before it, the net result will be in favour of the claimant. As the latter alleges, or in favour if defendant.. in order to cover the risk that the final decision might not be consistent with the decision reached in this award.... the order to defend to pay the amount is to guarantee.....*"

<sup>37</sup> See ICC Caase 7592.

<sup>38</sup> See Unreported.

## **POSITIVE REQUIREMENTS**

The positive requirements element is sometimes referred to as the necessity doctrine for the granting of interim measures. Indeed the conditions set under this criteria are almost the same as those for the municipal courts when dealing with civil proceedings in the commercial arena. In other words, the tribunal has to be satisfied beyond reasonable doubt that there is an imminent or serious danger to the application's right and that the tribunal needs to take urgent action to remedy the danger. There are no clearly expressed positive requirements set by any law of any country of jurisdiction, and so the tribunals have established four conditions for granting a request under positive requirement, according to the merit of the case, for example;

(a) jurisdiction to rule on jurisdiction, (b) prima facie case, (c) urgency due to harm caused to applicant, (d) serious or there should be substantial link and the applicant has to prove the substantial prejudice element and lastly (e) the degree of proportionality in gaining legitimate justice.

## **IRREPARABLE OR SERIOUS HARM**

The arbitral tribunal frequently require that the party seeking provisional measures should demonstrate that it may suffer either irreparable or serious injury,<sup>39</sup> unless those provisional measures are granted.<sup>40</sup> In other words, the arbitral tribunal will only order interim measures if the requesting party has substantiated the threat of not easily reparable prejudice.<sup>41</sup> Some authorities argue that irreparable harm is required for a grant of interim measure, for example; in the case of Ukraine, where it was held that interim measure is necessary where the actions of a party are capable of causing or threatening irreparable prejudice to the rights invoked. In contrast, other authorities appear to require only serious or substantial harm to be shown, without requiring that the injury be irreparable in the literal sense.<sup>42</sup> Most commentaries and decisions gloss over the potentially substantial difference between the risks of irreparable and serious damage.<sup>43</sup> The author argues that it is obviously difficult to demonstrate truly irreparable harm that cannot be compensated by pecuniary or monetary damages in a final award. In practice, the irreparable harm requirement would limit interim measures principally to cases where one party was effectively insolvent or where the enforcement of a final award would be impossible. Most of the arbitral decisions which state that damage must be irreparable, do not appear to apply this formula in its literal form, but instead require that there must be a material risk of serious damage to the claimant. Arbitral tribunal in many cases is likely to grant interim measures in order to protect or minimise damage resulting from commercial dealing, for example; where there is a prima facie claim that appears to cause injury. For instance, the respondents is planning to transfer a disputed property or sell it outside the ordinary course of business and the respondent does not appear to suffer material harm from granting of interim measure. The grant of such measures is

<sup>39</sup> See EAA 1996 S. 41 (3) (a) & (b).

<sup>40</sup> See Gary Born, *International Commercial Arbitration* Vol.1 1981.

<sup>41</sup> See ICC Case No. 8786, 11 (1) ICC Ct. Bull 81, 83-84 ( 2000). See *Islamic Republic of Iran v USA*, Decision No. 116 ( 18 May 1993).

<sup>42</sup> See UNCITRAL Model Law, 2006 Revision Article 17 (1) (a).

<sup>43</sup> See Jo with Interim or Preventative Measures in Support of International Arbitration in Switzerland. 18 ASA Bull 31, 37 ( 2000).



commercially viable as it makes the enforcement of the final award more simply more simple which would otherwise be too difficult. This is common where intellectual property shares in a company may be frustrated by the disposition of the respondent, hence disposing of the subject matter or removing assets from the business whose ownership is in dispute frustrate contractual obligation. In such circumstances, the tribunal is likely to consider the conduct of a party under balancing interests of balancing hardships in order to issue interim measure.<sup>44</sup>

### **PRIMA FACIE CASE OR PROBABILITY OF SUCCESS ON MERITS**

Some tribunals and commentators have held that the party requesting interim measures must demonstrate a prima facie case on the merits of its claim or a probability of prevailing on its claim.<sup>45</sup> The tribunal needs to be satisfied that the moving party has a reasonable probability of success in a case. In other words, the claim or request must not be frivolous or vexatious.<sup>46</sup> The arbitral tribunal is not a referee jurisdiction, but a jurisdiction seized of interim measures.<sup>47</sup> At the same time some commentators have refused to consider whether one party or both parties have stated a prima facie case, sometimes saying that this conflicts with the requirement that an interim measure should not prejudge the merits of the arbitral tribunal's judge.<sup>48</sup> In the author's view, the tribunal should at all times consider the prima facie strength of the parties' respective claims and defences, in deciding whether to grant a provisional measure or not. The prima facie case requirement does not prejudge the merits of the case; it is a purely a provisional assessment based upon incomplete submissions and evidence, without preclusive effects. In practice the examination of the substance of a case for prima facie is commonly limited.<sup>49</sup>

### **THE NEED FOR URGENCY**

Urgency is an essential requirement for the arbitral tribunal to grant any interim measures requested by a party.<sup>50</sup> The degree of necessity adduces urgency for the arbitral tribunal to act as a deterrent to that effect.<sup>51</sup> In other words, the tribunal will be coerced to grant interim measures in order to safeguard the right in question before the final award is rendered.<sup>52</sup> In such circumstances, if the tribunal was to wait for the final award,<sup>53</sup> then the commercial

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<sup>44</sup> See UNCITRAL Model Law 2006 Article 17.

<sup>45</sup> See K. Lenaerts and D Arts, *Procedural Law of the European Union* Sweet & Maxwell 1999 at 299.

<sup>46</sup> See UNCITRAL Model Law Article 17 A.

<sup>47</sup> See D. Caron *UNCITRAL Arbitration Rules: A Commentary* 537 (2006), *ICC Arbitral Practice II* (1) ICC Ct, Bull

31.

<sup>48</sup> See Lesw, *Comparative International Commercial Arbitration* ( 2003) at 23-16., see Yesilmark, *Interim & Conservatory Measures in ICC Arbitration Practice* , 11 (1) ICC Ct.Bull 31 ( 2000), *ICSID Convention: A Commentary* Article 47 ( 2000) tribunals must strike a balance between the urgency of a request for interim measure and the need to prejudge the merits of the case.

<sup>49</sup> See ICC Interim Award 9301 of 1997. See ICC Final Award 5804 of 1989, Published in 4(2) *ICC Int'l Ct Bull* 76 (1993).

<sup>50</sup> See *Compagnie Maritime Belge Transport NTV v Commission* Case- 24/93 [1993] ECR II-543 par 32-35.

<sup>51</sup> See ICC Case No. 8786

<sup>52</sup> See Gary Born *Cases & Materials* ( Aspen Publishers 2011) at 833.

<sup>53</sup> See *CAS. Suchi di Frusta SPA v Commission* Case T-191/96 [1997] ECR 211, see *Bayer v Commission* Case T-41/96 [1996] ECR 381.

users would refrain from coming to arbitration.<sup>54</sup> But it is of paramount importance that the tribunal needs to be persuaded that the immediate action is necessary in order to prevent irreparable damage to the claimant and in all circumstances there is some establishment of a case.<sup>55</sup> However, the UNCITRAL Model Law, revised in 2006 omits any reference to urgency for the arbitral tribunal to grant interim measures.<sup>56</sup> The urgency requirement is closely related to the serious harm requirement,<sup>57</sup> just as relief prior to a final award is generally not ordered, save to prevent serious damage from occurring during the course of the proceedings, so pre- award relief is generally not ordered until such time as it is necessary to prevent such serious harm from taking place.<sup>58</sup> If the possibility of such damage remains contingent, arbitral tribunals should not intrude into the parties' relation. However, under international practice, the arbitral tribunal may grant interim measures if any of the requirements are satisfactory to their mandate.<sup>59</sup> It should be that if any of the requirements are satisfied in its literally mechanical form but given a purposive scope, in order to take a realistic commercial view of the likelihood if such a measure is declined by the tribunal.<sup>60</sup>

## **PROPORTIONALITY PRINCIPLE**

When considering granting any interim measures, an arbitral tribunal also has to take into consideration the gravity of granting interim measures requested by any of the parties to the arbitration agreement.<sup>61</sup> the tribunal, when achieving, when its legitimate objective, has to weigh the decision of the outcome to the victim, if it is proportionate given all the circumstances of the case. The tribunal ought to take into account the effect of the order.<sup>62</sup> The injury suffered must not be out of proportion to the advantage which the claimant hopes to derive.<sup>63</sup>

## **JURISDICTION**

It is very important to note that for the arbitral tribunal to grant interim measures, it has to have the jurisdiction for the particular order being requested.<sup>64</sup> Some commentators argue that the tribunal has to establish its jurisdiction before it grants interim measures.<sup>65</sup> In most practical cases, the arbitral tribunal is able to issue interim measures.<sup>66</sup> In most practical

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<sup>54</sup> See Yesrilmark, Interim & Conservatory Measures in ICC Arbitral Practice, II (1) ICC Ct Bull 31, 34 (2000).

<sup>55</sup> See Born VOI.11.

<sup>56</sup> See UNCITRAL Model Law Article 17 (2006 Version).

<sup>57</sup> See *Telecino v Commission*, Case T-191/93 R [1993] ECR II-1409

<sup>58</sup> Ibid.

<sup>59</sup> See *Biwater Gauff ( Tanzania) Ltd v United Republic of Tanzania*, Procedure Order No. 1 ICSID Case No ARB/05/22 ( 31 March 2006) at 76.

<sup>60</sup> See *Tanzania Electricity Supply Co v Independent Power Tanzania Ltd* ISCID Case No. ARB/98/8 ( 20 Dec 1999) at par18.

<sup>61</sup> See *Konecker v Commission*, Case 44/75 [1975] ECR 637 par 4.

<sup>62</sup> See D Born International Commercial Arbitration ( 2009) at 1983-85.

<sup>63</sup> See Berger, International Economic Arbitration 336-37. See *MAT Cied'Electricite de sofia et de Bulgarie (Belgium v Bulgaria)* (1992) 2 TAM 924p26-27.

<sup>64</sup> See EAA 1996 S. 30.

<sup>65</sup> See Lew, Comparative International Commercial Arbitration (2003) at 23-24. See Partial Award ICC Case No. 8113 (1) ICC Ct Bull 65.69 ( 2000). See D. Caron, The UNCITRAL Arbitration Rules: A Commentary 535 ( 2006).

cases, the arbitral jurisdiction challenge and also notwithstanding the fact the tribunal has not ruled on this challenge. It is therefore important to note that the tribunal as a practical matter is not incapacitated from granting interim measures, which are central to a fair resolution of the parties' dispute because of jurisdiction challenge.<sup>67</sup> Arbitral tribunals have not infrequently ordered provisional relief notwithstanding the existence of an unresolved jurisdiction challenge.<sup>68</sup> The author argues that in practice, where the arbitral tribunal concludes that a jurisdictional challenge is well grounded, and it lacks actual authority to order interim measures it will not grant any provisional measures. However, the arbitral tribunal's provisional measures are entitled to the same force as its direction regarding the conduct of the arbitration. In other words, the tribunal will establish its jurisdiction in that case in question in order to grant interim measures. Assuming that the general criteria for granting interim measures are satisfied,<sup>69</sup> the tribunal has a substantial discretion in selecting and ordering appropriate provisional measures.<sup>70</sup> As the standards of granting interim measures continue to develop, therefore the arbitral tribunal's discretion needs to be established as a legal right.<sup>71</sup>

### **ADVANTAGES OF ARBITRAL INTERIM MEASURES**

Provisional measures play a vital role in commercial proceedings; indeed, without such measures the whole arbitral process becomes meaningless and arbitral tribunals would be unable to come to final awards, and even if they did so, it would be useless to a victorious party to find that the assets pertaining to the proceedings have been dissipated by the respondent in another jurisdiction or have been sold or hidden. This would render the award unenforceable and also useless, and lead to additional costs in search of the hidden assets.

Given the international image of interim measures and the support of the courts for example; in England<sup>72</sup> a breach of the measures can lead to contempt of court.<sup>73</sup> Parties submit to arbitration to settle their problems because any kind of alternative procedures like the courts could wreck the agreed mechanism. The most important reason for provisional measures to be granted by the arbitral tribunal is utmost respect for the sanctity of the contract, the agreement to arbitrate. When parties choose arbitration to resolve a dispute their primary aim is simply to reach a resolution of whatever dispute they may have before arbitrators and to avoid resorting to any other forum. The forum that parties avoid is a court and such aim should be respected. Respecting that aim is a reflection of the doctrine of party autonomy.

Respecting the risk allocation agreed between the contracting parties' at the time the contract was entered into also supports arbitral jurisdiction. Indeed, the chosen arbitral forum is an

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<sup>67</sup> See D. Caron & Pellonpa, *The UNCITRAL Arbitration Rules: A Commentary* 536-37 (2006).

<sup>68</sup> See Ibrahim Shita & Antonio Parra, *The Experience of the International Centre For settlement of Investment Disputes* (1999) 14. ICSID Case No. ARB/02/18 (1 July 2003) at 6.

<sup>69</sup> See Yaslirmak *Interim and Conservatory Measures in ICC Arbitral Practice* (II) ICC Ct Bull 31 33 (2000).

<sup>70</sup> See Yaslirmak, *Interim Conservatory Measures in ICC Arbitral Practice*, (11) (1) Ct, Bull 31 33 (2000).

<sup>71</sup> See D. Caron, *The UNCITRAL Arbitration Rules: A Commentary* 536 (2006) The Rules provide that interim measures should be necessary not just desirable or recommendable.

<sup>72</sup> See Supreme Court Act 198 S. 37.

<sup>73</sup> See Gary Born *International Commercial Arbitration*, see Hartley *Interim Measures under the Brussels Jurisdiction and Judgments Convention* (1999).

important element in the allocation of risks between contracting parties. At the time of entering into a contract, a party may have the intentions not to take the risk of dealing with the vagaries of the laws of foreign court practice. Arbitration is a depoliticised forum that does not harbour potential biases towards national of the domestic court's jurisdiction.

If the resolution of a final remedy in regards of a dispute is entrusted to arbitrators, the same trust should logically be shown to the arbitral domain in determining a provisional remedy concerning the same dispute. Arbitrators are generally in a better position than judicial authorities<sup>74</sup> to identify whether a request for interim measures is being used as a dilatory tactic, or as an offensive or abusive weapon or whether there is a genuine need. This is because the arbitral tribunals are far more acquainted with the facts of the dispute than judicial authorities as arbitrators follow the case from the outset to the end.<sup>75</sup>

### **LIMITATION ON ARBITRAL TRIBUNAL'S POWER TO ISSUE PROVISIONAL MEASURES**

Although most developed jurisdictions now recognize the power of the arbitral tribunal to grant interim measures, there are several significant limitations to this power. Such limitations or short-coming arise in part from the inherent nature of the arbitration process, which is a contractual mechanism between particular parties' and which requires the constitution of a tribunal for each dispute that arises; these limitations arise mainly from the terms of some of the arbitral agreements. The most common limitations that hinder the progress of arbitral proceedings are follows;

- (a) The arbitral tribunal lacks the power to grant of interim measures against third parties; for example; freezing orders. These provisional measures developed,<sup>76</sup> as a form of course against foreign-based defendants with assets within the UK, and consequently the early authorities assumed that the order was not available against England-based defendants. In the same vein an early judicial guideline for granting the order required claimants to establish the existence of a risk of the removal of the assets from the jurisdiction. The Supreme Court Act provides that the injunction for granting freezing orders in all cases where it appears to the court to be just and convenient to do so. The Court of Appeal held<sup>77</sup> that the wording of S. 37 did not restrict the scope, geographical or otherwise.<sup>78</sup> The Civil Procedure Rule,<sup>79</sup> further provide currently that the injunction may be granted in relation to assets whether located within the jurisdiction or not.
- (b) An arbitral power is virtually limited to only the parties to the parties' to the arbitration agreement. As a consequence, an arbitrator generally orders interim measures only against the parties to the agreement. The arbitration tribunal has no power to order any attachment or preservation of property orders held by a third party

<sup>74</sup> See *Sacheri v Robotto* (1989) Court of Cassation (Italy) & Jun, No. 2765.

<sup>75</sup> See *Cetelm SA V Roust Ltd* [2005] EWCA Civ 618. And S.44 of 1996 Act.

<sup>76</sup> See *Mareva Campania Naviera v International Bulkcarries SA* [1975] 2 Lloyd's Rep 509.

<sup>77</sup> *Babanaft International Co v Bassathe* [1990] Ch.13.

<sup>78</sup> See Supreme Court Act 1981 S.37 (1).

<sup>79</sup> See CPR 25.2 (f).

to the arbitration agreement. This limitation is evident in some arbitration legislation, including the UNCITRAL, which authorises an arbitral tribunal to order any party to take such interim measures of protection as may be deemed necessary. This is made explicitly by the Belgian Judicial Code, which provides that an arbitral tribunal may order any provisional measures with the exception of attachment orders. This adduces that the arbitral tribunal's authority is limited to the parties' to arbitration. Despite the foregoing, an arbitral tribunal would have the power to order a party to take steps vis-a-vis third parties' in order to prevent specific actions, for example; a corporate entity could be ordered to direct its subsidiary to take some steps. Such orders test the limitations of the arbitral powers, but in appropriate cases, where there is a necessity to accomplish justice, the arbitral tribunal should be prepared to issue them.

- (c) Specialized institutions arbitration rules for expedited provisional measures; some arbitral institutions have adopted specialised rules that seek to provide a non-judicial mechanism for obtaining urgently needed provisional measures at the outset of the arbitral proceedings. The ICC Rules for a pre- arbitral referee procedure are the leading example of such efforts. These rules have however, rarely been used in practice. This is because the parties' to the arbitral agreement must agree in writing to the use of the specialized procedure, and given the realities of litigation, this cannot often be expected to occur after a dispute has arisen. At an earlier stage, when the underlying contract and arbitration agreement are negotiated, parties' have not generally been sufficiently focused on the procedural intricacies of future disputes to make provisional measures for specialised issues. With the modern approach to arbitral proceedings by some countries like Netherlands with its Arbitration Institute's current Arbitration Rules, and the revised version of ICDR Rules provided that in case of urgency. A sole arbitrator should be appointed to resolve interim measures in a matter of days. Although not directly addressing the need for rapid mechanisms for tribunal-ordered provisional measures, this appointment procedure is a sensible and practical means for making tribunal ordered interim measures a realistic possibility in many disputes.
- (d) Limitations to the subject matter of dispute; arbitration legislation also sometimes limits the scope of the arbitral tribunals' power interim measures. That was arguably true under the original 1985 UNICTRAL Law text, which granted the arbitral tribunal the power to issue interim measures which they consider necessary in respect of the subject matter of the dispute. It is some times said that this language limits the arbitral authority in its granting of interim measures, and there is general support for this conclusion in the Model Laws' drafting history, as the language is ambiguous and inconsistent with Model's objectives. It should be noted that the requirement that interim measures be issued in respect of the subject matter of the dispute ought not to limit a tribunal's power to particular items whose ownership is in dispute. Instead Article 17 of the Model Law can readily be interpreted as extending to the preserving all aspects of that relationship are properly regarded as being in respect in respect of the subject matter of the dispute. The same analysis can be extended to the preservation of assets sufficient to satisfy a party's claim; such

relief is properly considered as being in respect of the subject matter of the parties' dispute, because it is necessary in order that such disputes can be resolved.

## **CONCLUSION**

Provisional measures assist in facilitating the effectiveness of arbitration in providing an effective means for the interim measures of rights at the pre-formation stage. Indeed, there is a growing recognition of interim measures. The standards and principles for the granting of arbitral provisional measures are the cornerstone of interim measures in any arbitral proceedings. These standards provide arbitral efficacy, by making it predictable and consistent, hence adducing the fact that the best forum for arbitral interim measures is the arbitral tribunal. However, despite the role played by such standards there is still a lacuna in the scope and the application, as there appear to be no clear rules in their application, by the arbitral tribunal, which causes a problem and in the process hinders the efficacy of arbitration. The author argues that since interim measures are given upon request by a party, the request should at least contain the relevant rights for which protection is being sought, the kind of measure sought and the circumstances that necessitate the order being requested by a party.

The English Arbitration Act 1996 should add another provision in the annex of S.39, which provides the tribunal with the power to grant interim measures. Indeed this would explicitly provide guidance to the tribunal when determining the standards of granting provisional measures. And also halt the reference to courts to provide guidance in given cases. The UNCITRAL Model Law should provide a revision and add a provision in regard to the conditions of interim measures, the initiation of such proceedings and how long the tribunal should hold or allow a given measure will aggravate the dispute.