Interim Measures in International Commercial Arbitration – A Comparative Study of the Egyptian, English and Scottish Law

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ABSTRACT

Interim Measures are viewed as an essential means to protect parties' rights in international commercial arbitration disputes. Most Arbitration Laws and Rules have recognised the arbitral tribunal's power to grant such measures. The success of this system relies on the court's assistance of the tribunal during the process. This relationship between the tribunal and the court is something vague under Egyptian Law, since there are no clear rules addressing the matter. Hence, this research examines the theories that explain the tribunal's authority and the relationship with the authority of the court.

This study uses a comparative analytical approach in terms of analyzing relevant legal texts to determine the optimal legal approach to the issue. The purpose of the study is to address deficiencies in the Egyptian law – the Code of Civil Procedure and Egyptian Arbitration Law – and compare it with English, Scottish Arbitration Acts and international arbitration systems, laws, and practices.

The findings of this research offer several recommendations that could help achieve a successful and smooth arbitration process. This study identifies and explains types of interim measures and explores the international practice of every type. It gives some important recommendations for future development and improvement of the Egyptian law. It also makes general recommendations that would help improve the efficiency of the English and Scottish laws.

Further research directions are also suggested in light of the findings and potential limitations of this study.

DECLARATION

I, Wael Shalaan, hereby declare that no portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or institute of learning.

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Table of Abbreviations

A I A J	Asian International Arbitration Journal
Afr J Int'l & Comp L.	African Journal of International and Comparative Law
Am J Comp L	American Journal of Comparative Law
Am Rev Int'l Arb.	American Review of International Arbitration
Am U Int'l L Rev.	American University International Law Review
Arb Intl.	Arbitration International
ASA Bull.	ASA Bulletin
Aust Bar Rev.	Australian Bar Review
Brook J Int'l L	Brooklyn Journal of International Law
C J Q	Civil Justice Quarterly
Cardozo J Conflict Resol.	Cardozo Journal of Conflict Resolution
CIA	Chartered Institute of Arbitrators
CIArb	Journal of the Chartered Institute of Arbitrators
Colum J Transnat'l L.	Columbia Journal of Transnational Law
Croat Arbit Yearb	Croatian Arbitration Yearbook
Disp Resol J.	Dispute Resolution Journal
EAL	Egyptian Arbitration Law
ECPL	Egyptian Civil Procedures
EEL	Egyptian Evidence Law
EU	European Union
FAA	French Arbitration Association
FOSFA	Federation of Oils, Seeds and Fats Associations
GAFTA	Grain and Feed Trade Association
I C L Q.	International & Comparative Law Quarterly
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Center for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
Int A L R	International Arbitration Law Review

Int Bus Lawy.	International Business Lawyer
Int'l Trade & Bus L Ann.	International Trade and Business Law Annual
J B L	Journal of Business Law
J Int'l Arb.	Journal of International Arbitration
J Priv Int L	Journal of Private International Law
L M C L Q	Lloyd's Maritime and Commercial Law Quarterly
N Y L J.	New York Law Journal
NAI	Netherlands Arbitration Institute
PCA	Permanent Court of Arbitration (The Hague)
Rev.arb	Revue de l'Arbitrage
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
Tex Int'l L J.	Texas International Law Journal
UNCITRAL	United Nations Commission for International Trade Law
UNECAFE	United Nations Economic Commission for Asia and the Far East
UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review
WIPO	World Intellectual Property Organisation

General Abbreviations

AA	Arbitration Act
AC	Law Reports, House of Lords (Appeal Cases)
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
AO	Arbitration Ordinance
AR	Arbitration Rules
Arb Int	Arbitration International
Arb J	Arbitration Journal
BYBIL	British Yearbook of International Law

CA	Court of Appeal of England and Wales
CCP	Code of Civil Procedure
ChD	Chancery Division
CLR	Common Wealth Law Reports
Comm	Commercial
Con LR	Construction Law Reports
CPR	Civil Procedure Rules
DAC	Departmental Advisory Committee
Dis Res J	Dispute Resolution Journal
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
English AA 1996	English Arbitration Act 1996
ER	English Reports
EU	European Union
European Convention	European Convention on International Commercial Arbitration 1961
European Ct HR	European Court of Human Rights
EWCA Civ	Neutral Citation for England and Wales Court of Appeal civil division decisions
Geneva Convention	the Geneva Convention on the Execution of Foreign Arbitral Awards 1927
Geneva Protocol	the Geneva Protocol on Arbitration Clauses 1923
Harv Int'l LJ	Harvard International Law Journal
HKHC	Hong Kong High Court
HKLJ	Hong Kong Law Journal
HL	House of Lords
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999
ICC Int'l Ct Arb Bull	International Chamber of Commerce International Court of Arbitration Bulletin
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	Centre International Centre for the Settlement of Investment Disputes

ICSID Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
ILA Rep	International Law Association Report
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
J Int'l Arb	Journal of International Arbitration
J Law Soc Scotland	Journal of Law Society of Scotland
J Mar L & Com	Journal of Maritime Law and Commerce
JBL	Journal of Business Law
KB	King's Bench
Law & Policy in Int'l Bus	Law & Policy in International Business
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NSWLR	New South Wales Law Reports
NY L Sch J Int' 1 & Comp L	New York Law School Journal of International and Comparative Law
NYLJ	New York Law Journal
NYULQ Rev	New York University Law Quarterly Review
OJ	Official Journal of the European Communities
QBD	Queen's Bench Division
Rev Arb	Revue de l'arbitrage
SPIL	Swiss Private International Law
Texas Int'l LJ	Texas International Law Journal
Tulane L Rev	Tulane Law Review
UN	United Nations
UNCITRAL Notes	UNCITRAL Notes Organizing Arbitral Proceedings
US	United States of America
YCA	Yearbook of Commercial Arbitration

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Introduction

Arbitration has flourished in the last few decades because it offers advantages over litigation. It is generally (although not invariably) quicker and cheaper.[1] It is private and usually confidential,[2] very important features for most parties,[3] who do not want their business secrets exposed in court.[4] Under the principle of party autonomy, parties may choose the seat of arbitration, the applicable laws and the arbitrators (thus allowing them to select individuals with the most relevant expertise). Such freedom gives parties greater control over the determination of their dispute, reducing the risk of an unwelcome decision. Finally, the flexibility of arbitration makes it easier to overcome the obstacles, which may attend international transactions[5] such as differing cultural approaches, political turmoil[6] and the unfamiliar formalities of national courts.

[1] Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 84.

[2] Ileana M. Smeureanu (ed), *Confidentiality in International Commercial Arbitration, International Arbitration Law Library*, Volume 22 (Kluwer Law International 2011).

[3] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; Departmental Advisory Committee on Arbitration Law, *Report on the English Arbitration Bill 1996* (DAC Report) para 12.

[4] Noah Rubins, *'In God We Trust, All Others Pay Cash Security for Costs in International Commercial Arbitration'* (2000) 11 Am. Rev. Int'l Arb. 307, para.354. The DAC Report para 12 stated that there is 'no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration.'

[5] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para 1.95.

[6] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 1.

Therefore, individuals, corporations, and jurists in many countries believe that the arbitration system is the natural means of settling conflicts resulting from international transactions.[7] Therefore, arbitration system is considered as a panacea for many ills in courts proceedings, such as the delays, uncertainties, the high costs, and publicity.[8]

The arbitration system has created tools to protect parties' rights from any potential damage pending an award, and to ensure expeditious decision-making by arbitral tribunals. The most significant of these ways are interim and conservatory measures, which provide parties with temporary protection until the final decision is rendered.[9] At present, the majority of legislative regimes governing arbitration recognize the arbitral tribunal's right to take interim measures in arbitration disputes.[10]

These measures have been accorded different names in different systems, e.g. provisional and protective measures, interim measures of protection, conservatory measures, preliminary

[7] Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press 2004) para 1-01, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) para 1-01.

[8] Noah Rubins, *'In God We Trust, All Others Pay Cash Security for Costs in International Commercial Arbitration'* (2000) 11 Am. Rev. Int'l Arb. 307, para.354.

[9] See William Wang, *'International Arbitration, the Need for Uniform Interim Measures of Relief'* (2003) 28 3 Brooklyn J.Int'l L. 1061, who stated 'Interim Measures are an absolute necessity to protect what is a stake in the arbitration. Regardless of whether evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo. Without the protection of such provisional remedies the outcome of the arbitration could become meaningless to the winning party.'

[10] See for example; American Federal Arbitration Act of 1925 and American Federal Arbitration Act of 1970; Belgian Judicial Code of 1985 Articles 1679 (2) and 1696 (1), Dutch Civil Procedural Law issued July 1st, 1986 Article 1022, British Columbia International Commercial Arbitration in Canada of 1988 Article 17(1), Swiss Private International Law of 1987 Article 183.

measures, provisional remedies, interlocutory orders.[11] Yet, whatever the names given to these measures, they are to be found in most legal systems,[12] and remain one of the most important devices in ensuring the effectiveness of international arbitration.[13] Nevertheless, these measures are not self-enforceable, which means that unless there is a voluntary compliance from the parties, the arbitral tribunal cannot take any procedure against a recalcitrant party.[14]

Unlike a court, an arbitral tribunal lacks the coercive power directly to enforce its decisions or compel parties and *a fortiori* third parties to comply with its orders,[15] which makes court intervention necessary[16] to help enforce them.[17] Therefore, many parties prefer to resort

[11] For example under the Belgian Act Article 1696 speaks of 'provisional and protective measures' while the Dutch Civil Procedure Law Article 1022, the British Columbia International Commercial Arbitration Act Article 17(1) and the German Arbitration Law 1998 Article 1041 refer to 'interim measures of protection'. The Yemen Arbitration Act No. 22-1992 Article 30 speaks of a 'provisional or conservatory measure'.

[12] Collins, Lawrence, *Provisional and Protective Measures in International Litigation* (3rd edn, Maritnus Nijhoff Puplishers 1992) 23.

[13] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 586, Axel Bösch (ED.), *Provisional Remedies in International Commercial Arbitration* (Berlin; Walter de Gruyter, 1994) 4, Collins, Lawrence, *Provisional and Protective Measures in International Litigation* (3rd edn, Maritnus Nijhoff Puplishers 1992) 23.

[14] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)356.

[15] Donald Francis Donovan, '*The Allocation of Authority between Courts and Arbitral Tribunals to Order Interim Measures: a Survey of jurisdictions, the Work of UNCITRAL and Model Proposal'* in Albert Jan van den Berg(ed), *New Horizons in International Commercial Arbitration and Beyond ICCA*, Congress Series 2004 Bejing 12 (Kluwer Law International 2005) 204-205, Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 8, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) para 7-01.

[16] Lira Goswami, '*Interim Relief: The Role of the Courts in International Arbitration and National Courts: The Never Ending Story*' ICCA Congress Series no. 10 (Kluwer Law International 2000) 111.

[17] See for example Egyptian Arbitration Act 27 of 1994 Article 37 'The president of the court referred to in Article 9 of this Law is competent, upon the request of the arbitral panel, to do the following: 'Condemn any

directly to the court to request the interim measures to save time.[18] Court intervention in arbitration proceedings is in many cases vital to rescuing the arbitration process itself.[19] Lord Mustill in *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* stated that:

> It is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering, and the only court which possesses these powers is the municipal court of an individual state. Whatever extreme positions may have been taken in the past there is, I believe, a broad consensus acknowledging that the local court can have a proper and beneficial part to play in the grant of supportive measures.[20]

One jurist said that 'National courts could exist without arbitration, but arbitration could not exist without the courts.'[21]

Hence, the success of the arbitration process relies in many cases on the balanced relationship between the court and the tribunal, in which the court should take into consideration that its role is merely to help the arbitral tribunal to conduct the arbitration process and to make the final award. Lord Mustill in *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* stated that '[The Court] should aim to be at the same time supportive but sparing in the use of its powers.'[22]

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witness who refrains from attending or declines to reply, by inflicting the sanction prescribed in Articles 78 and 80 of the Law of Evidence in Civil and Commercial Matters'.

[18] Alan Redfern, J.Martin H. Hunter, et., *Law and Practice of International Commercial Arbitration* (Thomson Sweet& Maxwell 2004) para 7-18.

[19] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) para 7.01.

[20] *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 All E.R. 449 at 460

[21] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) para 7.03.

[22] *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 All E.R. 449 at 460

The forgoing statement indicates the general approach towards interim measures in many arbitration laws and rules. What about Egypt? Is current Egyptian Law suitable for governing international arbitral procedures in general and interim measures in particular? The Egyptian Civil Procedures Law 13 of 1968 is the applicable procedural law relating to the conduct of international arbitration in Egypt, which means that interim measures will be governed by this law. Therefore, any shortcomings of this law will directly affect the tribunal's power to grant such measures, which in turn may limit the types of interim measures that might be available in the arbitration dispute, thus affecting negatively the tribunal's power to conduct the arbitration process and threatening the parties' rights.[23]

In this context, we should consider the decision of the Cairo Court of Appeal No.12 of 1995. On 25 December 1995 in its capacity as a court of urgent matters the court issued an interim judgement to stop the payment of letters of guarantee until the dispute was settled by an arbitral tribunal. The Soares Da Costa Construction Company had applied to the President of the Cairo Court of Appeal as a judge of urgent matters to order an original conservatory measure to stop the liquidation of letters of guarantee issued at the request of the Bank of Egypt and the Egyptian-British Bank for the Arab Company for Investment. The company further requested that until the dispute was resolved by an arbitral tribunal in accordance with Law No. 27 of 1994, and as a preservative measure, the value of these letters should be deposited in the treasury of the court pending arbitration of the case. In its statement, Soares Da Costa said that the Arab Company for Investment had contracted to carry out construction of the Hotel Hilton Hurghada and Soares Da Costa provided letters of guarantee against the final deposit plus a guarantee of payments made. The company (Soares Da Costa) had hardly

[23] Egyptian Civil Procedure Law Article 1, Egyptian Civil Law Article 22 both state that '[t]he law applicable to jurisdiction and all procedural matters is the law of the state where the litigation was commenced the or proceedings were held'.

started construction work when it was ordered by the Ministry of Investment to stop work because the Arab Company for Investment had violated provisions of the associated licence. Da Costa complied, stopped work, and sent the Ministry of Investment a notification to that effect. On the other side, the Arab Company for Investment tried to obtain the value of the letters of guarantee by fraud.

Because of the allegation of fraud and suspending of the contractual relationship, the president of the Cairo Court of Appeal – in his capacity as judge of urgent matters – issued an interim judgement preventing the payment of the value of the letters of guarantee and putting the value of two letters that had been withdrawn in the Egyptian-British Bank until the settlement of the dispute by an arbitral tribunal. The Arab Company for Investment appealed against this judgment to the Cairo Court of Appeal, which rejected the appeal. The Arab Company then filed a petition against this decision to the Court of Cassation (No 1975 for the judicial year 66). The Court of Cassation annulled the decision of the Cairo Court of Appeal on the ground that the latter issued its judgment on the basis of conditions other than those provided for in the Civil Procedures Law.

The Cairo Court of Appeal had grounded its decision on which stipulates 'In cases provided by the law, the claimant can submit a petition to the Judge of Urgent Matters or to the president of the court considering the substantive claim.'[24] The Court of Cassation annulled the Court of Appeal's judgment because stopping the payment of letters of guarantee, as an interim measure, is not one of the cases specified by Article 194.

[24] Author's translation. The cases that have been mentioned in Article 194 are miscellaneous in many different laws, such as: Article 376 in Egyptian Code of Civil Procedure which stipulates 'However, if the things seized are perishable or goods subject to price fluctuations, the judge may order the implementation of the sale on an hourly basis pursuant to a petition from a guard or a party concerned'.

Article 194 stipulates that;

> In those where the law allows the claimant to request a provisional order, the claimant may submit his application in petition form to the judge of urgent matters, or to the head of the court which considered the substantive claim. The petition shall take the form of two identical copies, and must identify the application merits, the evidence, and the claimant's address within the court's territorial jurisdiction.[25]

The Court of Cassation explained that the Court of Appeal could not apply the provisions of Article 14 of the Egypt Arbitration Act – "Upon request of either party to the arbitration, the court referred to in Article 9 may order the taking of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings" [26] – as the court's authority in this respect is conditional on the existence of a legal provision which allows the party to obtain particular sort of interim order needed in the arbitration. It felt that the conditions stipulated in Article 194 of the Code of Civil Procedures are exceptional; that they do not apply to general cases and their interpretation should not be generalized. Accordingly, and since there was no provision in the law specifically allowing the court to stop the liquidation of the letters of guarantee, the Court of Cassation was compelled to annul the order of the Cairo Court of Appeal.

Since the stopping of the liquidation of letters of guarantee is an important interim measure,[27] which maintains the *status quo*[28] and aims at ensuring the enforcement of the arbitral award after its issue, the Egyptian Court of Cassation seems to have handled the case very inflexibly, establishing a very dangerous new legal principle. It seems to be saying that the

[25] Author's translation.

[26] Egyptian Arbitration Law Article (14)

[27] Samir EL-Sharkawi, '*The Arab Perspective*' in: ICC (ed.), *Conservatory and Provisional Measures in International Arbitration* ICC Publication No. 519 (ICC Publishing 1993) 104, argues that Article 24(1) empowered arbitral tribunal the power to grant this measure.

[28] See later Chapter 3.

fact that a particular measure (in this case, stopping the liquidation of letters of guarantee) is not stipulated by Article 194 of the Civil Procedure Law means that no competent court can issue such a measure, and that if it does its award becomes flawed and subject to annulment on the grounds of violating Article 194. This could have very serious consequences for international commercial arbitration, namely:

1. Many interim measures are issued by arbitral tribunals outside Egypt require to be enforced inside Egypt. However, the Rule laid down by the Court of Cassation compels arbitral tribunals and opponents to study Egyptian law before requesting a measure even if it is not the law applicable to the dispute. Besides being too demanding, this Rule is incompatible with the arbitration system and the aim of prompt arbitration of cases relating to international trade.

2. The Rule contrasts with the authority of the arbitral tribunal to issue the measures which it may deem appropriate in the matter of the dispute, and offers only a limited number of measures that may not be relevant to the merits of the case.[29] This may tie the hands of the arbitral tribunal in the performance of the role entrusted to it by the parties, i.e., implementing the rules of justice and of law applicable to the arbitration agreement, including preserving the parties' assets pending a final decision in the case.

3. The decision of the Court of Cassation allows the competent court referred to in Article 9 of the Egyptian Arbitration Law[30] to refuse requests to enforce provisional

[29] This seems to totally contradict Article 24(1) of the Egyptian Arbitration. Law which states, 'The parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, those interim or conservatory measures considered necessary in respect of the subject matter of the dispute…'

[30] The Egyptian Arbitration Law Article 9 stipulates, 'Competence to review the arbitral matters referred to by this Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in

measures issued by the arbitral tribunal on the grounds that these measures are not stipulated in Article 194 of the Code of Civil Procedures.

4. The rejection of applications to enforce provisional measures issued by the arbitral tribunal may render its final award practically ineffective, as the main goal of some of these measures is to ensure enforcement of that award by conserving disputed assets.[31]

This threat to the arbitration system is doubly unfortunate since litigation in Egypt is bedevilled by slow procedures, a problem which has a negative effect both domestically and internationally.

This case stimulated my interest in interim measures in Egypt. Revisiting the few studies on interim measures in the Egyptian law,[32] I have found that they do not define those measures, classify their types or explain which legal rules apply to them. Yet a number of Egyptian scholars have identified the need to lay down new rules for organizing interim and

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the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt.'

[31] For example, an interim order to store goods in a warehouse, or appoint a guard to maintain the goods.

[32] Mohammad Abul-Einein, *Constitutional and Legal Foundations of Arbitration and the Role of the Judiciary* (Publication of Cairo Regional Centre for International Commercial Arbitration), Abul-Ela An-Nimr, *Legal System of Interim and Provisional Measures in Arbitration* (Cairo: Dar-un-Nahda Al-Arabia 2005), Hafiza Haddad, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Alexandria: Dar-ul-Fikr Al-Jame'i, 1996), Ahmed Abdul Kareem Salama, *Theory of Urgent Matters and Its Impact on Judicial Jurisdiction, Conflict of Laws and Enforcement of Foreign Awards* (Cairo: Dar-un-Nahda Al-Arabia 2008) Ahmed Abdul Kareem Salama, *Jurisprudence of the International Civil Procedures* (Cairo: Dar-un-Nahda Al-Arabia), and Ahmed Sawy, *Arbitration According to Law 27 of 1994 and International Arbitration Systems* (Cairo: Dar-un-Nahda Al-Arabia 2002).

conservatory measures in order to avoid the inconsistency between international arbitration and the Egyptian Civil Procedures Law.[33]

At the same time, exploring this subject in English works,[34] I have found it quite controversial. While some countries prohibit the arbitral tribunal from issuing provisional measures,[35] others empower the tribunal to do so, but subject to restrictions and conditions.[36] Despite the wealth of books on interim measures in English, most do not deal with the types of measure in detail, the rules which govern them, the nature of security for costs and anti-suit injunctions, the conditions for granting such measures, who can grant such measures, and procedural requirements. For these reasons and in light of the differences between national laws in the field of provisional measures, it is essential to study these measures in some detail in order to arrive at recommendations that may help reform the system of provisional measures in Egypt and ensure its effectiveness and consistency with the system of international commercial arbitration.

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[33] Ahmed Sedki Mahmoud, *The Provisional measures and Orders necessity for in Arbitral Litigation* (Cairo: Dar El-Nahda El-Arabia, 2005) 50-52.

[34] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press 2009), Alan Redfern, et al., *Law and Practice of International Commercial Arbitration* (4th edn, London: Sweet & Maxwell 2004), Axel Bösch (ed)., *Provisional Remedies in International Commercial Arbitration* (Berlin: Walter de Gruyter, 1994), Bond, Stephen R., *Conservatory and Provisional Measures in International Arbitration* (ICC Publishing Inc, 1993), Carolyn B Lamm, Hansel T. Pham, and Chiara Giorgetti, *'Interim Measures and Dismissal under the 2006 ICSID Rules'* in ,*The Future of Investment Arbitration* (Oxford University Press, 2009), Lawrence Collins, *Provisional and Protective Measures in International Litigation* (3rd edn, Maritnus Nijhoff Puplishers1992), Julian, D M Lew, Loukas A Mistelis and Stefan M, Kröll *Comparative International Commercial Arbitration* (Kluwer Law International 2003), Ali, Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), and Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd revised edn, Sweet & Maxwell 2006).

[35] See Italian Code of Civil Procedure No. 40 of 2006 Article 818, Argentina National Code of Civil and Commercial Procedure Law 17.454 of 1967 Article 753, Swiss Concordat Article 26, and Greece Code of Civil Procedure (as amended in 1995 and 2012) Article 889.

[36] See Arbitration (Scotland) Act 2010 Rule 46, English Arbitration Act 1996 s.44, Algerian Arbitration Law No:93-9 of 1993 Article 458(9), ICSID Rules Articles 39 and 41.

I1. Methodology

The method most suited for achieving the objective of this study is the comparative analytical approach in terms of analysing relevant legal texts to determine the optimal legal approach to the issue.[37] The purpose of the study is to address deficiencies in the Egyptian law – the Code of Civil Procedures and Egyptian Arbitration Law – by comparing that law with international arbitration laws, practices and conventions. The comparative methodology is – from the academic viewpoint – the best approach to achieve this goal, as it compares different legislative regimes, their formulation, application and practice, demonstrating the extent to which they perform the purpose for which they were designed. Having considered results of this comparison, the author will offer recommendations and solutions that may prove significant in addressing deficiencies that may be shown when Egyptian laws are compared with other legislations.

II1. Aims of Research

Many jurists in Egypt see the need to amend the Egyptian Civil Procedures Law and the Arbitration Act in order to repair the serious defects in the law, which has contributed to an increase in the number of cases before the Egyptian courts – a number that in 2004 reached 12 million cases, a rate of 1 case per 12 people.[38] Even though this number is not attributable to cases diverted from arbitration, it gives a brief idea about the problem that faces litigants before Egyptian courts.

[37] Patrick McNeill, and Steve Chapman have stated 'The comparative method has proved itself to be highly sustainable as a sociological research tool over the past one hundred years' Patrick McNeill, and Steve Chapman *Research Methods* (3rd edn, Routledge ,Taylor & Francis Group 2005) 87.

[38] See Egyptian ministry of Justice Report (2004) cited in Ahmed Sawy, *Arbitration According to Law 27 of 1994 and International Arbitration Systems* (Cairo: Dar-un-Nahda Al-Arabia 2002) 16.

The aim of this study is thus to examine the system of interim measures under Egyptian, Scottish, and English arbitration legislations, in order to fill gaps in current arbitration law, especially the provisions that regulate interim measures. It is hoped that the results of this study will help those interested in the reform of the Egyptian legal system in general and the Civil Procedure Law in particular, as it aims to highlight international practice in the area of interim measures. Those results may help in the development of a new legal system, which avoids the shortcomings of the present system and meets the needs of international trade, which is one of the pillars underlying economic and social progress within the state.

III1. Research Outline and Limitation

To achieve the fundamental aim of this study by using the above-mentioned methodology, I will examine the following:

Chapter 1: Definition of provisional measures in national legislation as well as the rules of international arbitration institutes, and rules that have been established by the United Nations in this regard in the form of the UNCITRAL Model Law 2006.

Chapter 2: Interim measures which are designed to preserve evidence,

Chapter 3: Interim measures which are designed to maintain the s*tatus quo*,

Chapter 4: Security for Costs,

Chapter 5: Provisional Payments,

Chapter 6: Anti-Suit Injunctions,

Chapter 7: Conditions for granting interim measures,

Chapter 8: Summary and conclusion.

The forgoing classification naturally excludes certain themes from this study. This study intends to cover the notion of the interim measures, their types, and the conditions for

granting them. Since the question of the enforcement of interim measures is logically posterior to the granting of such measures, it does not fall within the scope of this study.

Chapter 1

1.1 What Are Provisional Measures?

1.1.1 Definition

The importance of the definition of interim measures comes from the fact that it reflects, in an indirect way, the extent of arbitrators' power to issue such measures, in particular jurisdictions. For instance, if the law applicable to the arbitration procedure is Egyptian Arbitration Law, the arbitral tribunal has to choose from among the interim measures that are listed in Article 194. These measures have been exclusively stipulated in that provision. Hence, no tribunal is allowed to issue any measures not listed in this Article; otherwise, its order will be unenforceable and subject to appeal.

By contrast, if the law applicable to the arbitration is the Scottish or English Arbitration laws, the arbitral tribunal will have a wider scope in this regard. As the respective Arbitration Acts rules have adopted a broad approach, enumerating examples of measures that may be issued,[39] the arbitral tribunal has the power to issue any measures deemed necessary to preserve the parties' rights until the final award.

It may be difficult to find a comprehensive definition of interim, provisional and conservatory measures that comprises all characteristics and cases. Some writers do not recognize any difference between the terms interim measures, interim measures of protection,[40] preliminary

[39] Arbitration Scotland Act 2010 rr.35, 49, and 53, English Arbitration Act of 1996 ss.39 and 40.

[40] See for example, SCC Arbitration Rules 2010 Article 32, Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2011 Article 28, China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2012 Rule 21, Dutch Civil Procedural Law Article 1022; British Columbia International Commercial Arbitration Act in Canada Article 17(1); German Arbitration Law 1998

measures, provisional remedies, interlocutory orders, conservatory measures [41] and protective measures so tend to use them all like synonyms.[42] Others recognize some differences between interim or provisional measures and conservatory measures and have separate definitions for each category. Some maintain a single definition encompassing both categories: interim and conservatory.

The first group of jurists has not been able to lay down an exact definition[43] due to variations and differences between those different types of measures, but has only maintained the unity of purpose from these measures.[44] In the case of *Burlington Resources Inc. and others v*

Article 1041; UNCITRAL Arbitration Rules 2010 Article 26; UNCITRAL Model Law on International Commercial Arbitration, 2006 Article 17,
available at
http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

[41] Swiss Private International Law of 1987 Article 183.

[40] Republic of Yemen The Arbitration Act Article 30; see Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
586; Ahmad Abu Al-Wafa, *Arbitration by the judge's and the reconciliation* (Alexandria; Dar Monshaa Al-Maa'ref 1990) 843.

[43] Stewart J of the United States Supreme Court wrote 'I know it when I see it', mentioned in Stephen R. Bond, '*The Nature of Conservatory and Provisional Measures'* in ,*ICC Conservatory and Provisional Measures in International Arbitration* (Paris, ICC Publishing Inc 1993) 8.

[44] Advocate General Tesauro stated that 'the purpose of interim protection is to achieve that fundamental objective of every system, the effectiveness of judicial protection' cited in Lawrence Collins, *Provisional and Protective Measures in International Litigation* (London: Martinus Nijhoff 1992) 19. *Casado v Chile* [2001] 8 ICSID Rep.373 at (26) 'Provisional measures are principally aimed at preserving or protecting the efficiency of the decision that is given on the merits; they are intended to avoid prejudicing the execution of judgment, or prevent a party, by unilateral act or omission, infringing the rights of the opposing party' 104, *ETI Euro Telecom International NC v. Bolivia*.

Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador),[45] the arbitral tribunal stated that:

> In the tribunal's view the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the respondents but may extend to procedural rights including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

Those jurists have found that interim measures or provisional measures cannot have a single definition that combines all the characteristics of all cases to which they apply. This is due to their varying nature depending on the circumstances of each claim, the state and the legal system applicable there. Hence, a measure that may be enforceable in the seat of the arbitration may not be able to be enforced in the country where relevant assets are located. Most international treaties are keen to ascertain the importance of enforcement of arbitration awards and of not invoking national laws to obstruct their execution.[46] However, those jurists have found that, despite this difference and diversity of interim measures, they still share a number of common characteristics.[47]

On the other hand, some jurists [48] lay down a single definition for each measure. Interim or provisional measures are designed to meet the immediate interest of the applicant for the

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[45] *Burlington Resources Inc. and others V Republic of Ecuador* (2009) ICSID Case No. ARB/08/5 available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1110En&caseId=C300> accessed 28 Jun. 13

[46] The 1958 New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards did not include a special provision on the interim measures. See also the European Convention on International Commercial of Arbitration 1961, Arab Convention on Commercial Arbitration (Amman) 14 April 1987, Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards on 14 September 1952, ICSID Convention (Washington) on 18 March 1965, and Inter-American Convention on International Commercial Arbitration (Panama) on 30 January 1975.

[47] See later para 1.1.5 of this Chapter.

[48] Ali AL-Hadidi, *Provisional and protective measures in the Voluntary arbitration* (Cairo;Dar El-Nahda El-Arabia 1997) 18-20.

measure, e.g., interim payment, *référé-provision* until a final award in the case of maintenance, freezing order for the vessels in the dock, and sale of perishable goods. All these measures are aimed at the immediate protection of applicant. Conservatory measures, on the other hand, are aimed at the maintenance of the disputed right in order to secure its future when the final award is issued, rather than an immediate response to the needs of the applicant for the measure, e.g., attachment, sequestration, hearing a witness, proving the case of certain goods before they perish, and preservation of evidence in general. Thus, all these measures aim to guard against the risk or potential harm in the future.

Some jurists [49] have defined both interim and conservatory measures as the sum of measures quickly ordered at the request of a party to help preserve a particular right and ward off any imminent or irreparable harm as a step toward achieving this right in the future when demanding it before the competent court. Therefore, a definition of "interim" may change according to circumstances of each case.[50]

1.1.2 UNCITRAL Model Law 2006 definition

The recent amendment to the UNCITRAL Model Law on Commercial Arbitration on July 7, 2006 defined interim measures according to Article 17 (2) as follows:

[49] Wagdi Ragheb, '*Towards general idea to the interim awards in procedures law'* (1973) Journal of Legal and Economic Sciences, Ain Shams University, cited in Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 11-12.

[50] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 586.

> An interim measure is any temporary measures, whether in the form of an award or in another form, by which, any time prior to the issuance of the award by which the dispute is finally decided, the tribunal orders a party to,:
>
> (a) Maintain or restore the status quo pending determination of the dispute;
>
> (b) Take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
>
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.[51]

According to this definition, interim measures are measures, which intend to protect parties' rights until the final decision is issued, and at the same time protect the continuity of the arbitral process.[52] It seems the UNCITRAL Model Law has divided these measures into two types: one to protect the parties' rights and another to protect the arbitral process.

The importance of this definition derives from the fact that the UNCITRAL Model Law represents the best practice in the field of arbitration. It was the United Nations General Assembly, advised by its Commission on International Trade Law (UNCITRAL), which established this law and in 1985 recommended it to all world states for adoption.[53] Hence, a

[51] Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>

[52] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 101.

[53] The General Assembly 'Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice' United Nations General Assembly resolution 40/72 of 11 December 1985, A/40/17,
available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>
see United Nations General Assembly Resolution 61/33 of 18 December 2006, A/RES/61/33,
available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf>

large number of states have adopted the UNCITRAL Model Law when enacting their arbitration laws.[54]

Thus, the adoption of the UNCITRAL Model Law's new definition of interim measures could be considered as a step towards ensuring greater uniformity of arbitration law by having a single definition of these measures in a large number of countries,[55] which in turn would ensure expeditious procedures and implementation of these measures in these countries.[56] In any country that adopts the 2006 version of the Model Law the arbitral tribunal operating under the umbrella of this legislation will have a clear vision of its authority to issue such measures. This act will create a kind of compatibility between many arbitration laws particularly in these countries that have adopted the Model Law, contributing to harmony and understanding in international practice in this subject. Hence, it seems the UNCITRAL Model Law definition is the most appropriate for interim measures as it addresses all arbitration cases in which these measures are likely to be issued, and would create a kind of uniform practice on the international level for these measures.

Article 17(2)(a) protects the *status quo* by empowering the arbitral tribunal to issue any orders or measures that preclude one party from doing any act that may be irreparable, e.g.,

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[54] See for example, Egyptian Arbitration Act 27 of 1994, The Danish Arbitration Act 2005, Scotland Arbitration Act 1990, The Indian Arbitration and Conciliation Act, No. 26 of 1996, Japanese Arbitration Law, No. 138 of 2003, Omani Arbitration Law No. 47/1997, Tunisian Arbitration Law (Majalat Al Tahkim) No. 42/1993, Bahraini Arbitration Law No. 9/19941, More than 50 countries have adopted a version of the Model Law.

[55] The General Assembly has a function to do initial studies and make recommendations to the member states, and these recommendations have a moral obligation value, and the United Nations members should work accordingly. See Charter of the United Nation, Chapter IV Article 13.

Available at<http://www.un.org/en/documents/charter>

[56] Some States have adopted the UNCITRAL Model Law in their new legislation e.g., the Arbitration Amendment Act 2007 in New Zealand, New Arbitration Act in Ireland (9 March 2010), New Arbitration Legislative Decree Ne. 1071 in Peru, New Arbitration Act in Slovenia (25 April 2008), and New International Arbitration Act No. 37 of 2008 in Mauritius. See <www.kluwerarbitration.com/countries.aspx>.

by making a *Mareva* or 'freezing' injunction, [57] preventing the debtor from disposing of or removing his assets from the court's jurisdiction in order to frustrate the enforcement of the award. Another example is an order to continue or to stop certain works such as stopping a TV advert dealing with the subject of dispute before the arbitral tribunal investigates it, the prevention of any party from using an intellectual property licence in a way that would devalue the licensor's interest, an order to stop the payment of a letter of guarantee,[58] or an order to a manufacturer to continue to supply a distributer with goods until the dispute is finally adjudicated.[59]

Article 17(2) (b) deals with any act that may cause current or imminent harm or prejudice to the arbitral process itself, allowing the arbitral tribunal to take any action or procedure to prevent the parties from harming the arbitration process, e.g. granting an anti-suit

[57] It was introduced by the English court in two cases in the 1970s, cited in Alan Redfern, '*Arbitration and the Courts: Interim Measures of Protection-is the Tide about to Turn'* (1995) 30 (1) Tex.Int'l L.J. 77. The *Mareva* Injunction does not, however, exist in Scotland, and is known under France law as a 'freezing order' - V. V. Veeder, '*The Need for Cross-border Enforcement of Interim Measures Ordered By a State Court in Support of International Arbitral Process*' in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Bejing 12 (Kluwer Law International 2005) 243.

[58] Ali AL-Hadidi, *Provisional and Protective Measures in the Voluntary Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 21. Omar Al Jazy, *Some Aspects of Jurisdiction in International Commercial Arbitration*, (PhD thesis, University of Kent at Canterbury 2000) Samir EL-Sharkawi *'The Arab Perspective'* in, *ICC (ed.), Conservatory and Provisional Measures in International Arbitration* (ICC Publishing, ICC Publication, 1993) 104 stated 'the order addressed to the defendant on the request of the plaintiff to refrain from calling a letter of guarantee submitted by the plaintiff to the defendant in construction contracts to guarantee the proper performance of the contractual obligation, is one of the most important measures in international commercial arbitration'.See also Margaret L**.** Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 100

[59] Robert L. C. Hunter WS, FCIARB, *The Law of Arbitration in Scotland*, (T&T Clark Edinburgh 1987) 272, Nael G. Bunni, '*Interim Measures in international Commercial Arbitration: A Commentary on the Report by Luis Enrique graham*' In Albert Jan Van Den Berg(ed), '*Years of the New York Convention*, ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin 14 (Kluwer Law International 2009) 588-589.

injunction,[60] an order to refrain from holding a press conference or making a press release, an order not to make public certain information or not to breach the confidentiality of an amicable dispute resolution forum, and an order to stop TV adverts dealing with the subject of dispute before the arbitration is concluded.[61]

Article 17(2)(c) gives the arbitral tribunal powers to issue conservatory measures to preserve assets out of which a subsequent award may be satisfied e.g., ordering their deposit with a third person or the sale of perishable goods, ordering a party not to dispose of or relocate certain assets, and ordering appointment of an expert.[62]

Finally, Article 17(2)(d) gives the arbitral tribunal the power to issue any measures to preserve the evidence in respect of the subject matter, especially that which may disappear or fade away during the arbitration process. For example, if the dispute is over the quality of a consignment of coffee or cocoa beans, then some measurement of that quality must be made before the consignment is either sold or perishes. If, for example, the dispute is over the number or quality of reinforcing bars used in the concrete foundation of a road, bridge or dam, some record must be preserved, preferably by independent experts, before those foundations are covered, and witnesses and experts who may not be present during the arbitration process must be heard.[63]

Many countries that have adopted the UNCITRAL Model Law have addressed the arbitral tribunal's power to request from the court assistance in taking evidence, and order the

[60] The Anti-suit injunction is a Controversial topic. See Chapter 6.

[61] These measures aim to preserve the impartiality and integrity of the arbitrators.

[62] UNCITRAL Arbitration Rules Article 26.

[63] Redfern Alan. Hunter, Martin. et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004). 402-403.

witnesses to give oral testimony or produce documents or other material evidence despite the fact that in most cases witnesses are not parties to the arbitration agreement.[64] For example, German Arbitration Act 1998 section 1050 stipulates;

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out.

Article 37 of the Egyptian Arbitration Law 1994 also allows the arbitral tribunal to request the president of the competent court to order witnesses to testify before the tribunal. It stipulates;

> The president of the court referred to in Article 9 of this Law is competent, upon the request of the arbitral panel, to do the following: a) Condemn any witness who refrains from attending or declines to reply, by inflicting the sanction prescribed in Articles 78 and 80 of the Law of Evidence in Civil and Commercial Matters.[65]

It is worth mentioning that some states give the arbitral tribunal wider powers than those in the UNCITRAL Model Law. For example, Section 7 of the US Federal Arbitration Act (FAA) stipulates that;

> The power to subpoena witnesses within the jurisdiction either to appear to give evidence or to disclose relevant evidence in their possession… The arbitrators… may summon in writing any person to attend before them or any of them as witness and in a proper case to bring with him or them any book, record, documents or paper which may be deemed material as evidence in the case.[66]

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[64] See for example, New Zealand Arbitration Act 1996 Article 27 (2), Ireland Arbitration Act 2010 (No. 1 of 2010) Article 14, German Arbitration Law 1998 section 1050, Hong Kong Arbitration Ordinance (Cap. 609) 2010 Articles 35-55, and The Netherlands Arbitration Act 2004 Article 1041.

[65] See also English Arbitration Act 1996 Section 43; Belgian Judicial Code Section 2(3); French Code of Civil Procedure Article 1460; German Arbitration Law 1998 Section 1041.

[66] Available at http://www.ilr.cornell.edu/alliance/resources/Legal/federal_arbitration_act.html

Although the definition of the UNCITRAL Model Law on Commercial Arbitration of interim measures has addressed all cases and situations in which interim measures may be issued, the United Nations Working Group on Arbitration and Conciliation in 2006 decided against amending the UNCITRAL Arbitration Rules to exactly reflect the changes in the Model Law.[67] It seems that the Working Group did so out of their desire to provide greater opportunity for arbitration clients, states or individuals, to choose between more than one rules of arbitration. States could adopt the Model Law so that it becomes their national law and individuals can choose to apply the UNCITRAL Arbitration Rules to their disputes like the ICC Arbitration Rules or LCIA Arbitration Rules.[68]

The drafters of the 2006 version of the UNCITRAL Model Law may have been misguided in making an inventory of cases of issuance of interim measures, especially with regard to circumstances that may require the issuance of non-finite measures as well as renewed circumstances. That may have been the reason why the second Working Group (on Arbitration and Conciliation) devised a new definition of interim measures. In February 2010, the second Working Group developed a draft-revised version of the Arbitration Rules and, in the proposed text of Article 26, defined interim measures as:

> An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to, including, without limitation:
>
> (a) Maintain or restore the status quo pending determination of the dispute;

[67] *Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session* (Vienna, 11-15 September 2006),
available at < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/575/26/PDF/V0657526.pdf?OpenElement>

[68] Yang Ing Loong, *'Provisional Measures'* In Albert Jan Van Den Berg (ed), *Years of the New York Convention* ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin 14 (Kluwer Law International 2009) 606-607.

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.[69]

The above definition is closely analogous to the definition in the UNCITRAL Model Law, but might be better because it does not limit the cases in which interim measures may be issued as does the Model Law, while it further multiplies examples of interim measures that can be issued by the arbitral tribunal. This is the only difference between the UNCITRAL Model Law definition and the UNCITRAL Arbitration Rules definition.

1.1.3 Interim or Provisional

The UNCITRAL Model Law chose the term 'interim' rather than 'provisional' in describing these protective measures, and many arbitration rules and laws followed the Model Law in using the term 'interim' to refer to such measures.[70] On the other hand, some arbitration law and rules use term 'provisional' to refer to such measures. [71]

[69] Un Doc A/CN.9/WG.II/WP.157/Add.1
available at < http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V09/890/01/PDF/V0989001.pdf?OpenElement>

[70] AAA Commercial Arbitration Rules 2007 Rule 34, Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2010 Article 32, Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2011 Article 28, China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2012 Rule 21, ICC Arbitration Rules 2012 Article 28, Dutch Civil Procedural Law Article 1022; British Columbia International Commercial Arbitration Act in Canada Article 17(1); German Arbitration Law 1998 Section 1041

[71] ICSID Arbitration (Additional Facility) Rules 2006, Article 46, English Arbitration Act Section 39, Chamber of Arbitration of Milan (CAM) Arbitration Rules 2010 Article 22 (2)

In arbitration practice these terms are used interchangeably as synonyms,[72] and terms like 'partial' and 'award' are used to distinguish between such measures and other of the tribunal's decisions that use the same description. For example, Rule53 of the Arbitration (Scotland) Act 2010 uses the term 'Provisional Award' to refer to any kind of pre-final award and the drafters of the Act refused to use term 'interim' in order to remove any misunderstanding regarding this measure.[73]

Hence, consistently with the majority of the arbitration laws and rules, the expression 'interim' will be used in this study to refer to protective measures.

1.1.4 Order or Award

The expressions used by the arbitral tribunals to describe their decisions vary from case to case. Sometimes they use the term interim awards and sometimes the term interim order.[74] So are these expressions synonyms, or do they have different meanings? The legal nature of the interim measures and whether they are orders or awards is one of the dialectical topics in international arbitration area. The determination of the legal nature for such measures is a very important question, because it may determine whether these measures would be enforceable, and whether they would be subject to legal challenge.

On 29 October 1993, the Supreme Court of Queensland considered these questions[75] in *Resort Condominiums International Inc. v. Bolwell*,[76] in particular the meaning and definition

[72] Emmanuel Gaillard, John Savage (eds), *Fouchard Gallard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 709.

[73] Policy of Memorandum 2009 para 173.

[74] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) papa 9.14.

[75] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 699.

[76] *Resort Condominiums International Inc v Bolwell* [Mot. 389/1993].

of an 'award' for the purposes of enforcement under the New York Convention.[77] The applicant, Resort Condominiums International Inc. (''RCI'') obtained an "Interim Arbitration Order and Award" from an arbitral tribunal seated in the USA ordering the respondents; Resort Condominiums International Australasia (''RCI Aust'') and Ray Bolwell (''Bolwell'') not to directly or indirectly operate or enter into any agreement with any exchange entity other than RCI, or be involved in any way in the exchange of timeshare interests, until a final award was rendered. The applicant resorted to the Australian court to enforce the interim order.

Mr. Justice Lee of the Supreme Court examined whether the orders made by the arbitrators constitute 'foreign awards' within section 8(2) of the Australian International Arbitration Act 1974 which would make these orders enforceable in Queensland.[78] Regarding the nature of the interim orders, the court held that;

> These orders are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes or any of them referred by RCI for decision or to finally resolve the legal rights of the parties. They are provisional only and liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced them.

The court found that the orders issued by the arbitrators were just procedural orders concerned with the conduct of the arbitration,[79] which did not address the merits of dispute. These orders just dealt with such matters as the exchange of the annual audits and monthly reports, the production of records or data, and enjoined the respondent from disseminating

[77] Michael Pryles, *'Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell'* (1994) 10 (4) Arb Intl. 385.

[78] *Resort Condominiums International Inc v Bolwell* [Mot. 389/1993] para 11-25.

[79] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) papa 9.09.

any confidential information. Lord Goff J in *SL Sethia Liners Ltd v. Naviagro Maritime Corporation (The Kostas Melas)* held that;

> The jurisdiction of an arbitrator was to decide disputes and that an award, interim or final, can only be an award in respect of matters referred for decision. Thus, the power to make an interim award was the power to decide matters in dispute between the parties and that an arbitrator when making an interim award had to specify the issues, claim, or part of a claim, which was a subject matter of that award.[80]

Accordingly, the court found that the orders made by the foreign tribunal in aid of a foreign arbitration did not fall within the definition of an 'arbitral award' in Article I of the Convention, and so could not be enforced under the Australian Act. Article I (1)(2) of the Convention stipulates;

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.[81]

The court found that the New York Convention does not cover the interim orders, because they do not determine any of the matters in dispute. Mr Justice Lee held that;

> I conclude that the ''Interim Arbitration Order and Award'' made by the arbitrator on 16 July 1993 is not an ''arbitral award'' within the meaning of the Convention nor a ''foreign award'' within the meaning of the Act. It does not take on that character simply because it is said to be so.

Hence, the Supreme Court of Queensland established an important principle that a tribunal decision could not be an award unless it finally determined an issue between the parties,

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[80] *SL Sethia Liners v Naviagro Maritime Corp (The Kostas Melas)* [1981] 1 Lloyd's Rep.18; [1980] Com. L.R. 3

[81] New York Convention 1958 Article (I),
available at < http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>

regardless of how the tribunal described its decision.[82] Therefore, some jurists insist that the finality of the decision should be the defining factor in this question.[83]

In the same vein, the United States Court of Appeals in *Publicis Communications and Publicis SA v True North Communications Inc* held that;

> The tribunal's order was final was grounded on the decision's substantive intent to create immediate action. If the tribunal's decision wasn't final, if the tribunal didn't really intend to finalize it until eons later, if True North had to wait to enforce this urgent matter until all the other issues were arbitrated to finality, then the October 30 decision was a meaningless waste of time. Despite some possible superficial technical flaws, and despite its designation as an "order" instead of an "award," the arbitration tribunal's decision--as to this chunk of the case--was final. And this is our final judgment.[84]

Moreover, if a decision is considered to be an award, it will potentially be subject to the sorts of legal challenge that can be made against awards, while if it is considered to be an interim order it is not an award and thus not subject to such challenge.[85]

Hence, the term "award" should be reserved for a final decision[86] that adjudicates on the substantive matters of the dispute,[87] regardless of whether it determines the whole merits of the dispute or just part of them. In this context, if a tribunal's decision determines part of a

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[82] The US Federal Court of Appeal's decision in *True North* held that 'The finality of a decision is the key to its recognition or enforcement under the New York Convention' cited is Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) papa 9.16, Michael Pryles, *'Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell'* (1994) 10 (4) Arb Intl. 394.

[83] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 699.

[84] *Publicis Communications and Publicis SA v True North Communications Inc* 206 F.3d 725 (7th Cir. 2000) available at < https://bulk.resource.org/courts.gov/c/F3/206/206.F3d.725.99-3424.99-1199.html>

[85] *Resort Condominiums International Inc v Bolwell* [Mot. 389/1993]

[86] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) papa 9.09.

[87] David St John Sutton; Judith Gill; Matthew Gearing, *Russell on Arbitration* (23rd Rev edn, Sweet & Maxwell 2007) para 32-130

dispute, this is called a partial award [88] or an interim award.[89] In contrast, if a decision facilitates and regulates the arbitration process and does not affect the subject matter of the dispute in a permanent way, this should be described as an 'order.'

Therefore, while Section 39 of the English Arbitration Act 1996 is headed 'Power to Make Provisional Awards',[90] the section employs the term 'order' which more accurately describes a tribunal's decisions under this section.

Consequently, the most accurate description of interim measures made by tribunals is the term 'Interim Order'.

1.1.5 Characteristics of Interim Measures

Not all interim measures share the same characteristics, since some derived from the need for urgent justice, while others do not, but this does not preclude this study from mentioning the most common characteristics of such measures in international arbitration.

1. Interim measures are based on factual cases not legal principles and therefore cannot be limited. Facts vary according to time and place and actually produce new scenarios every day.[91]

In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* the claimants having requested interim measures in their request

[88] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para 9.19.

[89] David St John Sutton; Judith Gill; Matthew Gearing, *Russell on Arbitration* (23rd Rev edn, Sweet & Maxwell 2007) para 32-130.

[90] English Arbitration Act 1996 s.39.

[91] UNCITRAL Model Law Article 17 D 'arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative' available at < *http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf*>.

ICSID Arbitration Rules rule 39(3) (4), UNCITRAL Arbitration Rules 2010 Article 26(5).

for arbitration in May 2006, amended that request for interim measures at least three times on the 18th of October 2006, the 2-3rd of May 2007 and the 25th of May 2007.[92]

Thus, if circumstances change during the arbitral proceedings, parties may amend their requests to reflect the new circumstances. In addition, the arbitral tribunal has the right to modify, suspend, or terminate an interim measure it has granted[93] if conditions which justified the interim measures no longer operate.[94]

2. Interim measures have no specific form in which they must be issued. Sometimes they come in the form of court order; sometimes in the form of an order from the arbitral tribunal.[95]
3. Interim measures have no necessary bearing on the merits of the dispute, so while they may be issued for the benefit of one party, the final award may be in favour of the other party. Therefore, interim measures are temporary because they will be issued prior to confirmation of the rights of the parties and to ensure the enforcement of the final award.[96]
4. Interim measures may derogate from the freedom of parties to dispose of their assets and therefore the arbitrator should be circumspect about ordering such measures and only do so where appropriate.[97] Lord Mustill In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* held that:

> I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the

[92] ICSID case No; ARB/06/11(Decision on provisional measures of 17 August 2007) para 89.

[93] UNCITRAL Model Law 2006 Article 17D, UNCITRAL Arbitration Rules 2010 Article 26(5).

[93] See Chapter 7.

[95] UNCITRAL Model Law 2006 Article 17(2).

[96] UNCITRAL Model Law 2006 Article 17A(b).

[97] UNCITRAL Model Law 2006 Article 17A(1).

court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief.[98]

5. The Party requesting an interim measure would be responsible for any damage consequent on the taking of such interim measures if the tribunal later decides that the measure should not be granted.[99]

1.1.6 Types of Interim Measures

The arbitration agreement is the backbone of the arbitration process. It regulates the whole process including the arbitrator's power to issue or grant any interim measures in the arbitration case,[100] even those measures that are not listed in the law of the arbitration seat.

However, this principle could collide with the law of the seat if this law precludes certain measures. For example, Article 1468 of the French Code of Civil Procedure stipulates 'Only courts may order conservatory attachments and judicial security.'[101] In such case, while an arbitral tribunal's attachment order cannot be enforced in France, it may be enforceable outside France, depend on the other State's law and whether it allows the enforcement of such measures within its territory.[102] Accordingly, the types of interim measures rely on the arbitration agreement and party autonomy as this agreement decides what types of interim measures arbitrators can grant.[103]

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[98] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334 at 367.

[99] UNCITRAL Model Law 2006 Article 17G, UNCITRAL Arbitration Rules 2010 Article 26(8).

[100] *Kastner v Jason* [2004] EWHC 592 (Ch).

[101] The same limitations apply in Italian Code of Civil Procedure Article 818.

[102] Nigel Blackaby, Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para 11.27.

[103] Egyptian Arbitration Law Article 14, Ahmed Al-Sayyid Sawy, *Arbitration According to Law 27 of 1994 and International Arbitration Systems* (Cairo: Dar-un-Nahda Al-Arabia 2002) 138-139.

In addition, arbitration laws and rules provide the arbitrators with a big variety of types of interim measures, which vary from one state to another and from one institute or chamber to another. Although most of these laws and rules have a common factor, namely the liberty of the arbitral tribunal to take any measures deemed necessary to protect the parties' rights,[104] it is difficult to restrict interim measures to a number of types or categories [105] as they serve many and varied purposes.[106] However, some measures are commonplace, while others are still controversial like anti-suit injunctions.[107] Apart from this fact, some writers divide it various types,[108] each type encompassing several kinds of these measures.[109]

The next chapters are mainly concerned with the types of interim measures and the rules, which govern them. The types of the interim measures generally fall into these categorised;

- Measures for taking/preserving evidence
- Measures for preserving the *status quo* to secure enforcement of the award

[104] Egyptian Arbitration Law 27 of 1994 Article 24(1), Arbitration (Scotland) Act 2010 Rule 35, ICC Rules Articles 25 and 29, UNCITRAL Model Law 2006 Article 17, ICSID Convention Article 47, ICSID Arbitration Rules Article 39, ICDR/AAA's International Rules Article 21, English Arbitration Act 1996 ss.37, 38, 39, 42 and 44, German Arbitration Law 1998 Section 1041, Oman Arbitration Law Article 14, Jordanian Arbitration Law Article 13. Many of these provisions have given the arbitral tribunal the power to grant; for example, a seizure order, appointment of experts, cessation or resumption of construction work, sale of perishable goods, sale of assets at risk of loss.

[105] Alan Redfern suggests that 'it would be unwise to regard the categories of interim measures as being in any sense closed' see Alan Redfern, Martin Hunter, et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 77-78.

[106] Adrian Zukerman, *Zukerman on Civil Procedure: Principles and Practice* (2nd edn, Sweet & Maxwell 2006) 296; Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003).595.

[107] See Chapter 6.

[108] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 595; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 204-219.

[109] Piero Bernardind, *'The Power of the Arbitrators'* in *Conservatory and Provisional Measures in International Arbitration* (ICC Publishing Inc 1993) 23; Adrian Zukerman, *Zukerman on Civil Procedure: Principles and Practice* (2nd edn, Sweet & Maxwell 2006) 297.

- Measures for providing security for costs
- Measures of interim payment
- Anti-Suit injunctions

Chapter 2

2.1 Measures for Taking/Preserving Evidence

Preserving evidence represents one of the most important types of interim measures in international commercial arbitration. Such measures broadly comprise instruments that may be required urgently to preserve the parties' rights, such as obtaining a witness affidavit before he passes away, appointing an expert to ascertain the quality of goods before they perish, or obtaining documents from a non-party that may be related to the dispute. Most arbitration laws have dealt with such issues via provisions that address the tribunal's power to obtain evidence during the arbitral process.[110]

The authority of arbitrators in respect of evidence that may be required during the arbitration process generally relates to two possibilities:

- Preserving evidence related to witnesses and documents
- Preserving evidence by appointment of experts

2.1.1 Preserving Evidence under Egyptian Laws

In the administration of evidence, there are broadly two systems: common law and civil law.[111] Egypt is considered to be a civil law system in the treatment of evidence in legal

[110] See German Arbitration Act 1998 ss.1049 and 1050, Sweden Arbitration Act of 1999 ss.25 and 26, Swiss Rules of International Arbitration of 2004 Articles 24-27, USA Federal Rules of Civil Procedure 2003 rules 43-45, AAA International Arbitration Rules Articles 17-22, Cairo Regional Centre for International Commercial Arbitration 'CRCICA' Articles 26-27, ICSID Arbitration Rules rr.33-36, ICSID Convention 1966 (Washington) Article 43 ICC Arbitration Rules Articles 24-26

[111] William Tetley, *'Mixed jurisdictions: common law vs. civil law (codified and uncodified)'* (1999) 4 Unif.L.Rev. 877-907 available at<http://www.unidroit.org/English/publications/review/Articles/1999-4-tetley2-e.pdf> accessed 28th June 2013.

proceedings. Therefore, this means that the plaintiff must prove the grounds of his claim and provide the proper evidence supporting this claim,[112] as no help may be obtained from the other party in this matter.[113] The court has the full right to evaluate and investigate this evidence before it makes a decision and it also has the full right to set aside any proof it considers dubious without any supervision from the High Court.[114] Conversely, in the common law system, the parties may be obliged to disclose any evidence they have relating to the dispute.[115]

2.1.1.1 Arbitral Tribunals and Preserving Evidence

The UNCITRAL Model Law 2006 is heavily based on the principle of party autonomy.[116] Thus the parties may, subject to mandatory provisions of the Model Law, choose the law that governs the arbitral procedure, including the rules of evidence.[117] In addition, where the

[112] The Egyptian Evidence Law in Civil and Commercial Matters Article 25 states 'The burden of proof is on the plaintiff', Appeal No. 5469 judicial year 54; Appeals numbers 1799, 2097 and 2243 of judicial year 62 BC; See Abdel Razek Ahmed Sanhoori, *Al-Waseet to Explain the Civil Law* (the Evidence) (1982) 19, Solomon Marks, *The Origins of Proof in Civil Law* (Alam Al-Kotob 1998) 14, Mahmoud Gamal El Din Zaki, *Summary of the General Theory of Obligations in the Egyptian Civil Law* (3rd edn) 1017; Tawfiq Hassan Faraj, *Rules of Evidence in Civil and Commercial* (1981) 25, Fathi Waly, *The Mediator in the Law of Civil Justice* (1980) 554, Izz al-Din Al-Dnasore and, Hamid Okaz, *Comment on the Law of Evidence* (1984) 3.

[113] Appeals No 1799, 2097, and 2243 of judicial year 62 BC. On 17June 1993.

[114] Appeal No. 3935 of judicial year 60 BC on 4 January 1996; Appeal No. 1682 of judicial year 49 BC 3 December 1986; Appeal No. 3705 of judicial year 59 BC on 10 April 1994.

[115] Roberto Ceccon, *'UNCITRAL notes on organizing arbitral Proceedings and the conduct of evidence - A new approach to international arbitration'* (1997) 14 (2) J Int'l Arb, 68.

[116] Ahmad Abu Al-Wafa, *Voluntary and compulsory arbitration* (Alexandria Dar Monshaa Al-Maa'ref 1983) 28; Ahmed Ibrahim, *Private international arbitration* (Cairo; Dar El-Nahda El-Arabia 1997) 14; Abd El-Hamid .R. Sayyid, *Judicial involvement in arbitration by assistance and supervision* (Cairo: Dar El-Nahda El-Arabia, 2002) 9, Abdul Hamid El-Ahdab, *Arbitration in the Arab countries and international arbitration* (Cairo; Dar Al-Maref 1998) 419.

[117] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (2nd edn, Kluwer Law International 1999) 157

parties have not agreed on rules of evidence, the arbitrators can choose the most suitable rules.[118] The Egyptian Arbitration Law provides that,

> The two parties to the arbitration are free to agree on the procedure to be followed by the arbitral panel, including the right to submit the arbitral proceedings to the rules prevailing under the auspices of any arbitral organization or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral panel may, subject to the provisions of this Law, adopt the arbitration procedures it considers appropriate.[119]

However, where the parties or the arbitral tribunal have agreed to choose the Egyptian Arbitration Law or the seat of arbitration in Egypt, the Egyptian Evidence Law in Civil and Commercial Matters (hereinafter EEL) promulgated in 1968 will govern evidential matters,[120] with the result that any violation of the rules of evidence will render the final awards void.[121]

Based on this, evidential matters in respect of international commercial arbitration in Egypt are regulated by two laws. The first law is the Egyptian Arbitration Law 27 of 1994, which addresses the arbitrator's authority to determine the arbitration procedures to be followed, including the means of obtaining and preserving evidence.[122] The second is the Evidence Law

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[118] Appeal No. 86 of judicial year 70 BC, the session 26/11/2002.

[119] Egyptian Arbitration Law Article 25, UNCITRAL Model Law 2006 Article 19.

[120] Egyptian Law of Evidence in Civil and Commercial Matters No. 25 of 1968; Act 23 of 1992; Act No. 18 of 1999.

[121] Article 71 in Egyptian Evidence Law of 1968. Under this provision the Cairo Court of Appeal has held that 'Although the ICC rules were applicable to the dispute under the arbitration agreement, the award had to indicate that the subject matter of the dispute can be proven by testimony of witnesses, as required by Article 71, otherwise it would be void.' Cairo Court of Appeal circle 7(D) Commercial Arbitration, case No.49 of judicial year (117 BC).

[122] These Articles are; Article 30(3)

> "...This does not prejudice the right of the arbitral panel, at any stage of the proceedings, to request the submission of the originals of the documents or materials invoked by either party to support its case"

(EEL), which is considered the general guideline governing all evidence matters in Egypt.[123] In addition to these laws, the Civil Procedures Law governs all procedures relating to the obtaining of evidence.

Regarding the Arbitration Law, the preserving of evidence related to witnesses and documents is dealt with tacitly by Article 24(1) of the EAL, which regulates the arbitrator's power to grant interim measures in the dispute. This stipulates that:

> Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject

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Article 33/4

> "...The hearing of witnesses and experts shall be conducted without taking an oath"

Article 35

> "If either party fails to appear at any of the meetings or to submit the documents required from it, the arbitral panel may continue the arbitral proceedings and make the award on the dispute based upon the elements of evidence before it"

Article 36

> "The arbitral panel may appoint one or more experts to submit on specific issues determined by the arbitral panel a written report or an oral report to be included in the procès-verbal of the meeting. A copy of the terms of reference regarding the mission entrusted to the expert shall be sent to each party...The arbitral panel may decide, after the submission of the expert's report, whether on its own initiative or upon request of a party to the arbitration, to hold a meeting to hear the expert and to provide for both parties the opportunity to hear him and to put questions to him about what is contained in his report. Each of the parties may present one or more expert witnesses in order to give testimony on the issues raised in the report of the expert appointed by the arbitral panel, unless otherwise agreed by the parties to the arbitration"

And Article 37(A) "The president of the court referred to in Article 9 of this Law is competent, upon the request of the arbitral panel, to do the following:

Condemn any of the witnesses who refrain from attending or decline to reply, by inflicting the sanction prescribed in Articles 78 and 80 of the Law of Evidence in Civil and Commercial Matters..."

[123] As regards international commercial arbitration, the Egyptian courts apply this law if it is not in conflict with the arbitration agreement or, when the arbitral tribunal requests court intervention, in order to oblige a witness to give his testimony. Article 37 of the Egyptian Arbitration Law clearly contemplates a kind of cooperation between the Egyptian judiciary and the arbitral tribunal.

matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered.[124]

Therefore, this section illustrates the preservation of evidence in the shadow of these laws.

2.1.1.1.1 Preserving Witness Testimony

In order for the arbitral tribunal have the right to preserve evidence, the parties must have agreed in writing to confer on the tribunal the power to make interim or conservatory measures.[125] Thus, unless the parties agree to confer this power, the tribunal has no such power. Therefore, the tribunal cannot take any measures of its own motion, even if it is found during the process that such measures are urgently required.[126]

Furthermore, Article 24(1) gives the arbitral tribunal the power to take any measures deemed necessary, even if such measures are not available to the court, as arbitration can create its own regime and the means it uses to support the process may differ from those competent in judicial proceedings.[127] In *Amal Tourism Complex v. Minister of Tourism* the Court of

[124] This Article resembles Article 17 of the UNCITRAL Model law 1985, Article 23 of the ICC Rules of Arbitration and Rule 39 of the ICSID Arbitration Rules.

[125] Article 12 of the EAL, Appeal No. 86 of judicial year 70 BC, the session 26/11/2002, held that the arbitration agreement must determines the subjects which will cover, otherwise it will be voidable. Some Egyptian jurists argue that it is not enough to state that "the arbitral tribunal is competent to adjudicate in all disputes arising out of this contract", as this is ambiguous. To be sure that the arbitral tribunal has power to take such measures, an explicit provision in the arbitration agreement is required. See Abd El-Hamid .R. Sayyid, *The Arbitration According to the Egyptian law 27 of 1994 and the Systems of International Arbitration* (Dar El-Nahda El-Arabia, Cairo 2002) 68.

[126] One clearly established legal principle is that a judge may not make any order not requested of him, nor direct the parties to take any action Civil Cassation 16/10/1961 judicial year 12, 797.

[127] Case No 55/122, Cairo Court of Appeal, Seventh Commercial Division 7 April 2009, cited in Jalal El Ahdab (ed), (2009) 1 (4) International Journal of Arab Arbitration. 141.

Cassation stated that 'Arbitration is an exception to the jurisdiction of national courts.' The Arbitration Law No. 27 of 1994 was meant to stand as a self-sufficient regulation of the arbitral process from beginning to end and excludes all reference to the rules of procedure followed before the courts.

A party who is afraid of losing potential witness testimony because of future events has the right to request from the arbitral tribunal a hearing with the prospective witness or to take any measures to safeguard his/her testimony,[128] e.g. summoning the witness to give an affidavit or visiting the witness to record his/her testimony.[129] There is no limit to the measures that the arbitral tribunal can take to gather the evidence to protect the parties' rights.[130]

However, the tribunal has to take into account factors such as the mandatory rules of Egyptian Law governing the arbitration,[131] and the law of the place where the order will be enforced,[132] since if a measure is not known to these laws its enforcement is doubtful.[133] Nevertheless, in emergency cases as where a witness certainly will not be present during the

[128] In the same context some arbitration rules such Rule 39 of the ICSID Arbitration Rules permit parties to request provisional measures immediately after the request for the arbitration, Carolyn B. Lamm , Hansel T. Pham, *'Interim Measures and Dismissal under the 2006 ICSID Rules'* in Catherine A. Rogers, Roger P. Alford, *The future of investment arbitration* (Oxford University Press 2009) 91.

[129] Article 134 of the EEL

[130] Case No 55/122, Cairo Court of Appeal, Seventh Commercial Division 7 April 2009, cited in Jalal El Ahdab (ed), (2009) 1 (4) International Journal of Arab Arbitration. 141

[131] As some arbitration rules do not allow the arbitral tribunal to take certain provisional measures, see for example, Article 818 of Italian Code of Civil Procedure 2006 which prevents the tribunal granting attachment orders.

[132] Egyptian law does not recognise anti-suit injunctions, so such orders will not be enforceable in Egypt.

[133] Case No 55/122, Cairo Court of Appeal, Seventh Commercial Division 7 April 2009, cited in Jalal El Ahdab (ed), (2009) 1 (4) International Journal of Arab Arbitration. 141.

hearing because he will soon leave or pass away, the tribunal can delegate an expert[134] or anyone else to record his testimony. This need not be done on oath,[135] as Article 33(4) of the EAL states "...The hearing of witnesses and experts shall be conducted without taking an oath."[136] It is noteworthy that this Article contradicts Article 86 in the Egyptian Evidence Law which stipulates that "witnesses shall swear the oath."

This contradiction could be justified in Egyptian law on the basis that arbitration is a kind of voluntary adjudication between parties. Their contract gives the arbitrators power to adjudicate on the dispute and to govern only the relationship between the parties. Yet the arbitral tribunal has no power to impose its decision on the contractors if one of them refuses to obey its decision. Only the national court can force this party to obey the tribunal's decision. Therefore, it is unacceptable in Egyptian law to put any witness under oath before a voluntary umpire whose power derives merely from an agreement between two parties, when he/she is not a party to that this agreement. In the same context, the oath is religious, and religion is a personal matter that should not be invoked except when necessary. Therefore, it seems that the Egyptian legislator wants to only to demand an oath in obligatory adjudication

[134] The Law No. 96 of 1952 on Expertise matters. In Egypt, there is an Administration of Experts in the Ministry of Justice to help courts in any technical issues or in any case needing special skill. The experts have to swear an oath before the court before exercising their duties (art 139 of EEL). However, the law allows the parties to choose any expert they wish, and the court must respect that choice - Article 136 of the EEL.

[135] EEL 134 Article. Arbitration in various legal systems differs widely on this point. "English arbitrators tend to give little weight to the written testimony of a party's witness, while in many civil law systems (like Egypt) sworn declarations can only be made before a court". Cited in IBA Working Party "*Commentary on the New IBA Rules of Evidence in international Commercial Arbitration"* B.L.I issue 2 (2000), International Bar Association.

[136] Egyptian Arbitration Law Article 33(4), IBA Rules Rule 4(5) D on the Taking of Evidence in International Arbitration 2010 requires witness to confirm that his or her statement is true to the best of his /her knowledge and belief.

Available at<http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> See also Rule 35 of the ICSID Arbitration Rules.

before a court, so that the oath is administered by a competent judge. In voluntary adjudication (Arbitration), it is not vital that the oath is administered. Therefore, the ICC Therefore, the ICC court just requested the affirmations from the witnesses that they will tell the truth with the assertion that they will not be heard under the oath. It was said in an ICC case:

> Witnesses of fact will not be heard under the oath but the chairman shall draw to the fact that the Tribunal requests them to tell the truth, the entire truth and nothing but the truth and shall ask them to confirm that they will comply with this request.[137]

Nevertheless, the power of the arbitral tribunal to take interim measures to hear witnesses works best if the parties have control over the witnesses so as to force them to testify, or where it is in the interest of the witnesses to comply with the tribunal's directions voluntarily.[138] The problem arises when the witness is truly a third party, as the tribunal has no power except over the parties.[139] Therefore, the parties have the right to resort to the court[140] referred to in Article 9 in the EAL,[141] whether before the commencement of the

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[137] *Dutch and Swiss companies V. Danish company and citizen*, (2004) ICC case 13046, ICC ICArb. Bull.-2010 Special Supplement.

[138] It seems this is the reason why an arbitral tribunal may not place much weight on such testimony; as the fact that a witness has an interest in the outcome disinclines it to rely on his statements. Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 6.136.

[139] EAL Article 4 (1). Hafiza Haddad, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Alexandria: Dar-El-Fikr Al-Jame'i, 1996) 223. This problem has been solved in English Law by Lord Reid in the House of Lords decision in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All E.R. 943, as the court issued a discovery order against a third party.

[140] Article 27 of UNCITRAL Model Law 2006, IBA Rule Article 4(9). Also, the French courts consider that their jurisdiction will be justified if the situation is urgent "where a state of urgency has been duly established, the existence of an arbitration agreement cannot prevent the exercise of the powers of the courts to grant interim relief" (CA Paris 12 December 1990, Bull. Joly 1991) 595.

[141] Egyptian Arbitration Law does not know the *pre-arbitral* interim relief system. The only source of pre-arbitral interim relief under Egyptian law is the court. However, the *pre-arbitral* interim relief system has been widely adopted by arbitration bodies such as the International Chamber of Commerce (ICC) Article 29, International Centre for Dispute Resolution (ICDR; international division of the American Arbitration

arbitral proceedings or during the said proceedings,[142] in its capacity as the judge of urgent matters to take any measures to preserve the witnesses' testimonies.[143] Accordingly, the Court of Appeal could – upon the party's request – summon any witness to give their testimony[144] and, if this happens after the requirements of the urgent judge are satisfied,[145] then the court could order bringing the witness to give his affidavit.[146]

However, Article 96 of the EEL has not determined which tribunal the witness should give his testimony before. Therefore, the question is whether the court should compel the witness testifying before it or before the arbitral tribunal. Article 72 of the EEL seems to have answered this question, stipulating that 'investigations have to be before the court.'[147] Yet

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Association) Section O-1, Administered Arbitration Rules 2013 of International Institute for Conflict Prevention and Resolution (CPR) Rule 14, and Emergency Arbitrator Appendix II of Arbitration Institute of the Stockholm Chamber of Commerce (SCC) 2010.

[142] Some arbitration bodies such as the Netherlands Arbitration Institute provides for the appointment of a single arbitrator promptly for the purpose of taking interim measures prior to the constitution of the arbitral tribunal. See Arbitration Rules of the Netherlands Arbitration Institute, Art 42f. In the same context some arbitration rules such as Rule 39 (5) of the ICSID arbitration rules permits parties to request provisional measures immediately after the request for the arbitration from the Secretary-General, who in his turn shall fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution. See Carolyn B. Lamm , Hansel T. Pham, *'Interim Measures and Dismissal under the 2006 ICSID Rules'* in Catherine A. Rogers, Roger P. Alford, *The future of investment arbitration* (Oxford University Press 2009) 91.

[143] EEL Article 96 stipulates 'A party, who fears losing evidence or witness testimony, has the right to request the competent court to hear the witness affidavit...and may submit this request to the Urgent judge...' The Egyptian Civil Procedure Law will be the law that governs these measures. This point will be clarified when we study the jurisdiction of the court of urgency in respect of the arbitration.

[144] EEL Article 70.

[145] Article 45 of Egyptian Civil Procedure Law requires two conditions to be met before the court is competent to take such measures, firstly urgency, secondly that the action requested must not affect the substantive rights in the case.

[146] ECPL Article 78.

[147] EEL Article 72.

this Article has just dealt with the normal case when the court has jurisdiction over the whole case, all witness will testify before it, and the court will investigate and decide the dispute.

Therefore, there must be an argument that witnesses should testify before the arbitral tribunal, which will determine the substantive dispute, and which must determine the weight of this testimony. In addition, the tribunal or the other party may need to examine the witness,[148] so it seems reasonable that the court's role should be restricted to obliging the witness to stand before the arbitral tribunal to give their testimony. However, if the party requested such an order before the formation of the arbitral tribunal, the court should take the witness's affidavit without any investigation of his testimony, as the arbitration clause deprives it of jurisdiction over the dispute. Thus, the court shall keep any statement until the formation of the arbitral tribunal, and then deliver it to the tribunal. The court should take into account that its role is just to take the witness's testimony without any estimation of that testimony.[149]

Moreover, if the witness disregards the court order or does not show a valid reason for his absence, the court may punish him by inflicting the sanction prescribed in Articles 78 and 80 of the EEL.[150] It is noteworthy that the court upon request of an arbitral tribunal may similarly condemn any witness who refrains from attending or declines to reply to its orders.[151]

Yet the penalty mentioned in Articles 78 and 80 – a fine equivalent to £20 - is very insignificant, and may have little impact in of forcing the witness to obey the court's orders,

[148] EAL Article 36(4).

[149] Rateb, .M. Kamel, .M, *Judicial Treatment of Urgent matters* (Cairo: Dar Alam Al-Kotob, 1985) 611-613.

[150] EEL Articles 78, 80 (the penalty is a fine which not more than 200 Egyptian pounds).

[151] EAL Article 37(a).

especially in cases related to international commercial disputes where enormous amounts of money may be involved. It is suggested that the amount should be increased so that the penalty to might perform its function of encouraging witnesses to testify. Finally, a request for interim measures shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.[152]

2.1.1.1.2 Preserving Documents [153]

In international arbitration proceedings, it is often argued that documentary evidence constitutes the best evidence.[154] This is because these documents include the paperwork and correspondence between the parties, whether by regular communication or electronic means,[155] such as the internet, electronic, magnetic, optical or similar means like electronic data interchange, electronic mail, telegram, and telex or telecopy.[156]

[152] UNCITRAL Arbitration Rules 2010 Article 26(9), ICC Rules Arbitration Rule 23(2), LCIA Arbitration Rules Article 25, AAA International Arbitration Rules Article 21(3).

[153] Any document which is presented and allowed as evidence in a trial or hearing, as distinguished from oral testimony. Available at <http://dictionary.law.com/Default.aspx?selected=567>

[154] Nigel Blackaby, Constantine Partasides, et al. *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 389.

[155] IBA Rules Article 1, known generically as electronically stored information, abbreviated to 'ESI'. Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 396.

[156] UNCITRAL United Nations Convention on the Use of Electronic Communications in International 2005 Contracts Article 4

Available at< http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>

Therefore, these documents sometimes determine who wins the arbitration[157] because they include a lot of information about the subject matter of the dispute and a lot of specific details about the contract. For instance, bills of lading must contain particular information concerning the general nature of the goods, leading marks, number of packages or pieces, and the quantity and the gross weight of the goods.[158] So, for example, when a dispute arises about quantity, such documents are very important in helping the arbitral tribunal resolve the dispute.[159]

In spite of this importance of this point, many Egyptian scholars have not dealt clearly with it in their writing, only mentioning it briefly in their discussions about preservation measures.[160] They have neither indicated how to preserve particular documents nor have they differentiated between the case where a document is in the possession of a party and the case where a document is in the possession of a third party.

In order to understand the power of the arbitral tribunal to take measures to preserve documents under Egyptian law, we have to distinguish between two groups of measures:

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[157] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 389.

[158] Article 8(1) of United Nations Convention on International Multimodal Transport of Goods in Pieter Sanders (ed), Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation, ICCA Congress Series, 1988 Tokyo (Volume 4, Kluwer Law International 1989) 388.

[159] *AGIP S.p.A.* v. *People's Republic of the Congo* (ICSID Case No. ARB/77/1) cited in Christopher. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) para 55-56.

[160] Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 23; Ali AL-Hadidi, *Provisional and Protective Measures in the Voluntary Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 21; Hafiza Haddad, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Dar-El-Fikr Al-Jame'i, Alexandria 1996) 188, Ali Baraket, *Arbitration Dispute in Egyptian Law* (Ph.D. thesis, Cairo University 1996) 406, Abd El-Hamid R. Sayyid, *Arbitration Law 27 of 1994 in the Balance* (Dar El-Nahda El-Arabia, Cairo 2004) 65.

interim orders or awards and orders on petitions. There are two main questions to consider here: where are these documents kept and are they in a party's hands or in a third party's possession?

The general principle in Egyptian law is that the arbitral tribunal can take any measures to preserve any evidence, including documents,[161] as it has the entitlement – under the arbitration agreement – to order any party (or third party who is joined to the arbitral proceedings) to disclose any documents in his possession that may be useful to the case, such as the corporation's balance sheet.[162] However, if a third party refuses to cooperate with the arbitral tribunal, the tribunal may decide to proceed with the arbitration without relying on these documents, which will then have no impact to on the arbitration.[163]

Since the arbitral tribunal has no coercive power to force a third party to comply with its orders,[164] a party who wishes to secure documents held by a third party could request the arbitral tribunal to allow him/her to ask to the court is stipulated in Article 9 of the EAL (the Court of Appeal)[165] to order the third party to disclose any documents under his/her control.

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[161] *Amal Tourism Complex v. Minister of Tourism* Case No; 4721. Article 14 of EAL.

[162] *Amal Tourism Complex v. Minister of Tourism.* EAL Article 24, IBA Rules Article 3.

[163] EAL Article 46.

[164] Ahmad Abu Al-Wafa, *Arbitration by the Judge's and the Reconciliation* (Dar Monshaa Al-Maa'ref, Alexandria 1990) 27-33, Haddad, Hafiza, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Dar-El-Fikr Al-Jame'i, Alexandria 1996) 20-21, Ali Baraket, *Arbitration Dispute in Egyptian Law* (Ph.D. thesis, Cairo University 1996) 414, Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (2nd edn, Kluwer Law International 1999) 179.

[165] Certain Egyptian jurists have argued that the Court of Appeal, which is mentioned in Article 9 of (EAL) in capacity of urgent judge is not competent to take these measures, as they cannot be granted urgently, since the basis for granting them needs to be investigated, and such investigation is the exclusive right of the arbitral tribunal. See Rateb M. Kamel M, *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 201, Ali AL-Hadidi, *Provisional and Protective Measures in the Voluntary Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 56-65, Salah EL-Din Gamal El-Din ,*The Newest in Judicial Enforcement and Urgent matters*, (Cairo: Dar

However, the arbitral tribunal can refuse this request if it considers such measures unnecessary or not required to avoid irreparable harm.[166]

The problem with the arbitral tribunal taking preservation measures in Egyptian law is not with the tribunal's authority to grant such measures, but with the enforcement of these measures if parties refuse to disclose these documents or comply with the tribunal orders voluntarily. In this situation, court intervention would be necessary to rescue the arbitration proceedings and help the arbitral tribunal to resolve the dispute, and at this point, the problem begins.

In order to comprehend this problem, we should study the court's authority to issue interim measures related to obtaining documents in Egyptian law. Here, a distinction should be made between two groups of court decisions: interim orders and orders on petitions.

2.1.1.2 The Egyptian Courts' Powers regarding the Preservation of Evidence

Article 45 of the Egyptian Civil Procedures Law (ECPL) is considered to be the main source of the court's power to make any interim order, urgent order and order on petition. Under this the court can issue any interim order to protect the parties' rights from any predictable damage that may happen in the future. The parties can request the court, whether before or after the commencement of the arbitration proceedings, to issue an interim order to preserve

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El-Nahda El-Arabia, 2007) p.13, Abd El-Aziz T. Gomaa, *Temporary and provisional measures in arbitration and the relationship between arbitration and the judiciary* (1999) 23 The Lawyer 118, Ahmed Abd-Lkarim Slama, *Urgency in the International Civil Procedures* (Cairo: Dar El-Nahda El-Arabia, 1988) 187-202, Abd-Lkarim Slama, *Theory of Urgent matters, and its impact on the jurisdiction and conflict of laws and enforcement of foreign judgments* (Cairo: Dar El-Nahda El-Arabia, 2008) pp. 68-88.

[166] Karim Hafez, *'National Report for Egypt (2013)'* in Jan Paulsson (ed), *International Handbook on Commercial Arbitration* (Kluwer Law International 1984 Last updated: March 2013 Supplement No. 73) 21.

any evidence crucial for resolving their dispute.[167] In order for the court to be empowered to do so, a request should take the form of a lawsuit, and the court should verify that the claim has met the conditions for it to have lawsuit to issue these measures, namely urgency and the fact that it will not prejudice the substantive case, which is subject to arbitration.[168] If the claim has not met these conditions, the court would be incompetent to deal with it whatever the damage that may ensue.[169]

A party to the arbitration must to file a suit before at the same time as submitting a petition to the registrar of the court to appoint a date for hearings and pleadings. Therefore, the petition has to contain the details stipulated in Article 63 of the ECPL,[170] and Article 58 of the Advocacy Law 17 of 1983,[171] as well as the details stated in Article 9 of the ECPL.[172] When these requirements met, the registrar will subpoena the defendant at his address to come before the urgent judge to rebuff the plaintiff's allegations during the 24 hours following the petition's registration. If the defendant received and signed the subpoena in person, the judge may reduce that 24 hours period.[173] When all these prerequisites are satisfied, the court can issue any measures to preserve the evidence, including documentary evidence, and may exercise its coercive power to order the parties and third parties to disclose the relevant documents in their possession. However, the main question here is whether the Egyptian

[167] EAL Article 14.

[168] ECPL Article 45.

[169] Rateb, M. Kamel, .M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985)12.

[170] ECPL Article 63 stipulates 'any lawsuit petitions should contain such details (the name of plaintiff, surname, home address, his work, the opponent name, surname, home address, work, and the date of the petition, the name of the court, the facts of litigation, the plaintiff's demands, and his evidence…'.

[171] Article 58 of Advocacy Law mentioned that lawsuit petitions must signed by a lawyer who is registered before the court.

[172] Article 9 requires details such as the date of the petition, the name of plaintiff, the opponent's name and home address, the name of legal officer, the name of the court, and the date of the hearing…).

[173] ECPL Article 66.

courts can make inspection orders regarding the property of third parties in order to seize any documents related to the arbitration dispute before or after the dispute arose.

Unlike the practice in Scotland and England, the Egyptian Civil Procedures Law and the EEL have no precise provisions addressing the power of the court to take inspection measures,[174] whether against a party or non-party. Meanwhile England addresses such matters in Rule 25(I) (j) of the Civil Procedures Rules and s.38 (4) of the Arbitration Act 1996. Scotland follows suit in Rule 28(2) (iii) of the Arbitration (Scotland) Act 2010, and the Administration of Justice (Scotland) Act 1972 s.1.[175]

Article 45 of the Egyptian Civil Procedure Law merely allows the court to take any interim measures to protect the parties' rights, but the interpretation and implementation of this Article does not refer to any inspection measures that may apply in preserving documents.[176] The Cairo Court of Appeal in Case No. 55/122 on the 7th April 2009 rejected the petitioner's request to annul an arbitration award because the tribunal had inspected a sample of the goods on ground that this procedure was not stipulated in neither the Egyptian Civil Procedure Law or the Egyptian Evidence Law, and so in breach of these laws. The Court of Appeal observed:

> Arbitration proceedings are part of a settlement system which is distinct from the court proceedings. Arbitration has its own rules and concepts, which might differ from judicial proceedings… such

[174] These measures are mostly accepted now in the vast majority of countries in the world, as they have adopted the IBA Rules on the Taking of Evidence 2010. See Article 7 of the IBA Rules available at < http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>

[175] The Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on 26 April 1999 rule 25, and Administration of Justice (Scotland) Act 1972.

[176] Rateb M. Kamel, .M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 489.

> arbitrators-experts, are not bound by any judicial rules and more specifically by the Law of Evidence and the Code of Civil and Commercial Procedure.[177]

This judgment indirectly indicates that inspection measures were not stipulated upon in the Egyptian law, so that if such an order was issued by any court, its judgment could be set aside. Consequently, courts may not make any interim order to inspect a party's property.

On the other hand, Article 20 of the EEL regulates a party's right to request from the court an order to force his opponent to disclose any documents in his possession. This Article, however, is only applicable when there is already a lawsuit before the court, one of the parties has already relied on these documents in litigation, and these documents must be shared between him and his opponent, e.g. copies of contracts, statement of payments, and bills…,[178] Therefore, Article 20 of EEL cannot be used as a basis for requesting interim measures. In arbitration the application of Article 20 only allows the court to order a party to disclose any documents in his/her possession. However, if this party refuses or denies that these documents are in his/her possession, the court can impose the 'Threatening Fine' which is an amount of money decided by the judge for each day of delay in the implementation of its decisions, although in practice judges have no power to enforce such fines.[179] The last resort available to the court is that it can just put the party in question under oath. If that party swore that -under oath- he did not have the documents, the court would accept his word. However if a party refused to take the oath, the court could proceed on the basis of photocopies offered by the opponent. If the opponent had no documents to offer, the court may accept his

[177] Cairo Court of Appeal – Seventh Commercial Division – Case No. 55/122 – 7 April 2009, cited in Jalal El Ahdab (ed), '*Not Indicated v. Not Indicated, Supreme Court ("Court of Cassation"), Commercial Division,* 9736/65, 11 March 2008*'* (2009) 1 (4) International Journal of Arab Arbitration 141-142.

[178] EEL Article 20.

[179] Ali AL-Hadidi, *The Procedural Aspects of the Fine of Threatening as a Means of Enforcement in the Egyptian Law and Comparative* (Cairo: Dar El-Nahda El-Arabia 1999) 28-33.

testimony about the content of the documents on which s/he wants to rely – those, which the party refused to reveal.[180]

Notwithstanding, the court has jurisdiction over the documents as evidence if these documents have already been submitted to the court by the parties or have been in a public authority's hands. Then the court could take this material into custody, order this institution to offer these documents to arbitration parties, present them to an expert who is appointed by the arbitral tribunal, put them in a guardian's possession, or keep them in a secure place.[181]

2.1.1.2.1 Petition orders

Petition orders are characterized as an easy way to get a quick protection of rights. The plaintiff submits two copies of an application for a petition order to the president of the court accompanied by evidence supporting the request.[182] The president of the court, after considering the petition, shall issue on one copy of the application a reasoned judgment explaining the grounds of the judgment and how he reached his conclusion, whether against or in favour of the applicant, and must do this on the second day after submission.[183] The court officer has to provide the plaintiff with the order, including a warrant for execution

[180] EEL Article 23-24.

[181] Ibrahim Ahmed Ibrahim, *Private International Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 14, Abd El-Hamid .R. Sayyid, *Judicial Involvement in Arbitration by Assistance and Supervision* (Dar El-Nahda El-Arabia, Cairo 2002) 9, Ali AL-Hadidi, *Provisional and Protective Measures in the Voluntary Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 6; Hafiza Haddad, Haddad, Hafiza, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Dar-El-Fikr Al-Jame'i, Alexandria 1996) 10; Ahmed Al-Sayyid Sawy, *The Arbitration According to the Egyptian law 27 of 1994 and the Systems of International Arbitration* (Dar El-Nahda El-Arabia, Cairo 2002)14.

[182] ECPL Article 194.

[183] Ibid Article 195.

where appropriate, no later than the second day after the judgment [184] since 'the executive bodies shall help in the enforcement of this order using all available legal means'[185]. Any affected party may challenge this order before the competent court or before the same judge within ten days from the date of (a) its issuance, or (b) its enforcement, or (c) its intimation to the party concerned.[186]

Despite the facility of the system of petition orders, the Cairo Court of Cassation in 1996 established a very important legal principle by holding that that 'courts may not issue any orders outside of Article 194 of the ECPL; otherwise their judgments will be annullable.[187] This principle effectively made petition orders unavailable, as it treated Article 194 as definitive, and meant that courts could not issue any orders outside the cases stipulated in this Article.[188]

Nonetheless, Egyptian lawmakers adopted the system of petition orders in Article 179 of the New Egyptian Intellectual Property Protection Act No 82 of 2002. Article 179 gives the court the power to take any protective measure via petition orders in case of any breach of intellectual property rights,[189] upon a party request. In addition, this Article provides several examples of how the court can take such potential measures without limits. Thus, if the

[184] ECPL Article 196.

[185] Ibid Article 280.

[186] Ibid Article 197.

[187] Appeal No 1975 for the year 66 BC. On December 12 of 1996, for more explain, see earlier the Introduction of the Thesis.

[188] Appeal No 1975 for the year 66 BC. On December 12 of 1996, for more explain, see earlier the Introduction of the Thesis

[189] Egyptian Intellectual Property Protection Act No. 82/2002 Article 179

arbitration dispute is in any way related to intellectual property, the Cairo Court of Appeal can take any measures via a petition order to protect the parties' rights.[190]

Accordingly, it seems that this distinction will lead to a contradictory legal situation, possibly in the same case. For instance, the court could take a interim measure, including making a petition order, to prevent a party from using an intellectual property license in a way that would devalue the licensor's interest,[191] or it could take any measures – exclusive of inspection property measures – to preserve documents of the dispute, as long as these measures are related to intellectual property law. On the other hand, the court cannot adopt a petition order if the dispute is related to project assets or project documents that clarify the parties' rights, e.g. contracts, bills, and correspondence letters, as these requests do not relate to intellectual property disputes.

Therefore, a party who seeks measures to protect evidential documents should use another process before the same court, despite the unity of the parties and the subject matter of the dispute. There is now a difference between the protection of parties' rights in an intellectual property dispute or any other dispute. It seems to the author that the legislator should intervene to modify Article 194 of the ECPL to allow the court to issue petition orders in any case, as long as the relevant conditions are satisfied, especially as it is the easiest and fastest way to get protection of the parties' rights.

[190] Egyptian Intellectual Property Protection Act No. 82/2002 Article 179

[191] Margaret L. Moses, *The Principles and Practice of International commercial Arbitration* (Cambridge University press, 2008)100.

2.1.1.2.2 Third party possession of documents

Regarding documents in the possession of third parties, an arbitral tribunal cannot take any measures against someone who is not a party to the arbitration agreement as Egyptian Law does not allow a tribunal to issue a *Norwich Pharmacal* Order.[192] Thus, the only way to get documents in the possession of a third party is to request the competent court to order the third party to disclose such documents, as Article 27 of the EEL gives the court the power to order a non-party to exhibit any documents in their possession:

> Anyone who possesses any material the right to which is claimed by another is compelled to show it to that other party whenever examination is required… The judge may order the material to be shown to those concerned and to be submitted before the court.[193]

This Article illustrates that anyone who possesses any documents or materials related to an ongoing dispute or one that may be arise in the future has to expose them to anyone who alleges rights to them, even if there is no existing claim before the court. The court also has the right to order the holder to show this data to those concerned. In cases of necessity, the court has the right to order bringing this data before it, and may request a security from s/he

[192] Appeal 26/11/2002 No.86 judicial year 70. This approach has been changed in some leading cases in the English Courts, see *Norwich Pharmacal co v Customs and Excise Commissioners* [1974] A.C. 133, HL, *Bankers Trust Co v Shapira* 10 LDAB 235, and *United Co Rusal plc v HSBC Bank plc*) [2011] EWHC 404 (QB). The English courts have adopted the approach that they may take interim measures against a third party if s/he has in his possession any information or documents maybe help a party to vindicatet his rights, Lord Reid opined in *Norwich Pharmacal* that a third party 'comes under a duty to assist the person who has been wronged by giving him full information...' But this power is not unqualified. Lord Reid observed that "This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it...for instance when the customer has got the money by fraud".

[193] EEL Article 27.

who wants to examine this data as a kind of compensation for any potential harm to the data.[194]

In conclusion, the issuance of interim measures by courts for preserving evidential documents, whether in arbitration disputes or in the general case, has not been well regulated by the Egyptian law. Even though Article 45 of the ECPL allows the court to take any interim measures to protect the parties' rights, the interpretations and applications of this Article do not address these measures to the preservation of documents.[195] Moreover, one of the applications of this Article is judicial receivership,[196] but this measure only applies to a party's assets as a means of protecting and administering property which is considered a guarantee of the enforceability of the final award – and a measure applicable only if certain conditions have been met, e.g. the existence of a dispute, urgency, the danger of dissipation, and the possibility that these assets may be administered by a third party.[197]

Therefore, it seems that the Egyptian legislator should intervene to plug this loophole in the Civil Procedure Law and the Egyptian Arbitration Law by introducing clear provisions allowing the court to issue interim orders such as orders allowing property inspection, attachment on banks accounts, and detention of a party's electronic devices (computers and electronic data storage facilities). The latest amendments of in the UNCITRAL Model Law (2006) have treated the subject of interim measures in a comprehensive manner, and a lot of countries around the world have adopted these amendments. It is suggested that the adoption of Article 17 of the UNCITRAL Model Law by Egyptian lawmakers would lead to the uniformity of practice regarding these measures, and will make such measures more efficient,

[194] EEL Article 27.

[195] Rateb, .M. Kamel, .M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 489

[196] Egyptian Civil Law Article 730

[197] Rateb, .M. Kamel, .M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 1003 Civil Cassation 22/11/1983; No, 195 judicial year 50,cited in Yahya Ismail ,*The guide in Law of Evidence*, (1995) 182

since they will be more enforceable. Without such adjustments the interim measures regime will lose much of its effectiveness and will hardly assist international arbitration.

2.1.1.3 Preserving evidence by appointment of experts

Evidential matters are considered among the most important elements in determining disputes. Therefore, it might be supposed that parties to arbitration disputes may request the national courts or arbitral tribunal to take any interim measures necessary to secure such evidence.[198]

National courts might be considered the obvious bodies to take measures to secure evidence or to assist arbitral tribunals in doing so.[199] Arbitral tribunals can also by virtue of the arbitration agreement take any measures deemed necessary to preserve evidence.[200] However, interim measures have a dual nature. Sometimes they are legal and sometimes technical.[201] For instance, some measures need specific legal actions, such as taking a witness's testimony, ordering a party to disclose any documents in their possession; or obtaining documents in a third party's possession. All these measures have a legal nature.

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[198] Most arbitration Rules and Laws allow the parties to do so, see for example: UNCITRAL Model Law Article 17, ICC Rules of Arbitration 2012 Articles 25 and 28, AAA Commercial Arbitration Rules rule 34 LCIA Arbitration Rules 1998 Article 25, Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Article 32 (5), Cairo Regional Centre For International Commercial Arbitration (CRCICA) Article 26, Egyptian Arbitration Law Article 24, English Arbitration Act 1996 Sections 39 and 44, German Arbitration Law 1998 section 1041, Indian Arbitration and Conciliation Act, 1996 Article 17.

[199] *Pac Rim Cayman LLC v Republic of El Salvador,* Award 2 August 2010, ICSID Case No. ARB/09/12, *Suez, S G, V Universal, AWG Group v Argentine Republic*, Award 30 July 2010, ICSID Case No. ARB/03/19, s.44 of the English Arbitration Act 1996.

[200] Ibid.

[201] Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 24.

Considering that the arbitral tribunal may be constituted from engineers,[202] scientists, or other experts with no legal knowledge, rather than itself immediately taking measures to safeguard evidence and protect parties' rights by using their own experience in their own fields [203] it may choose to appoint legal advisers to determine which measures should be taken in the dispute.[204]

The protection of particular kinds of evidence may further require a specialist who knows how to deal with such evidence, how to take samples from it and how to preserve it – knowledge which is sometimes lacking in the arbitral tribunal. Moreover, some interim measures have purely technical characteristics and need special knowledge in some areas such as mathematics, geography, construction engineering, etc.[205] These matters may be known before the start of proceedings or may arise during the arbitration process: e.g., in disputes related to bills of exchange, liquidation, bank reports or bankruptcy. Resolving such issues may require financial and accounting experts to help the tribunal understand these matters.[206]

Disputes dealing with cargos and maritime transaction may also need an expert in engineering of vessels who is able to correctly calculate the weight of the vessel and the

[202] In most construction disputes the arbitral tribunal is composed of engineers see, <http://www1.fidic.org/bookshop/default_contracts.asp>

[203] Cairo Court of Appeal – Seventh Commercial Division – Case No. 55/122 – 7 April 2009, held that "*The arbitrators are technical experts who can inspect and evaluate any evidence, and render an arbitral award*" cited in Jalal El Ahdab (ed), (International Journal of Arab Arbitration, Volume 1 Issue 4, 2009) pp.141-142.

[204] English Arbitration Act 1996 s.37.

[205] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 575, Fiona Raitt, *Evidence-Principles, Policy and Practice* (Thomson, W. Green, 2008) 55, Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 1860.

[206] The experts mostly are financial experts or chartered accountants, see Christopher. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 661.

weight of the cargo it can carry during its voyage.[207] In such situations, the work of experts becomes indispensable [208] and expert reports to the arbitral tribunal in these cases become the cutting edge in resolving a lot of arbitration disputes.[209] Therefore, the arbitration process often needs the work of experts to preserve evidence and determine the facts of the dispute.

The importance of the experts' work has pushed a lot of arbitration laws to recognise the arbitral tribunal's power to appoint one or more experts to make a decision on technical or other issues beyond the arbitral tribunal's expertise.[210] In addition, some institutional rules have adopted special rules to regulate the work of experts in international arbitration disputes. Examples are the Code of Practice for Experts and the Protocols for the use of experts.[211] Furthermore, there is the process of Expert Determination by virtue of an expert determines

[207] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 406, *German Company v Portuguese company*, this dispute needed an expert in construction of vessels to determine the net weight that the vessel could carry on its voyage, so that the tribunal could determine who was the responsible for the shortage in its cargo. Award 20 November 1985, cited in Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 26.

[208] Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009)1860; Nigel Blackaby said that (arbitral tribunal needs expert technical assistance in order to understand complex technical matters, and it needs to understand these matters in order to arrive at a proper decision) Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 407.

[209] Pieter Sanders, *QUO Vadis arbitration? Sixty years of Arbitration practice, a comparative Study* (Kluwer Law International, 1999) 264. *German Company v Portuguese company*, cited in Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 26.

[210] Article 36 of the EAL, Rule 34 of the Scottish Arbitration Act 2010, s.37 of the English Arbitration Act 1996, Section 1049 of the Germen Arbitration Law 1998.

[211] See The Academy of Experts "Code of Practice for Experts" available at <http://www.academy-experts.org/codeofpractice.htm> last visited in May 2011, Chartered Institute of Arbitrators (CIArb), Protocol for the use of Party-Appointed Expert Witnesses in International Arbitration, available at <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/> last visited in May 2011, ICC Rules for Expertise 2003.

the resolution of the dispute question – a decision binding on the parties unless they agree otherwise.[212]

2.1.1.4 Expert appointments in Egyptian Law

The Egyptian Arbitration Law has addressed the appointment of experts in Article 36 which stipulates that:

> 1. The arbitral panel may appoint one or more experts to submit on specific issues determined by the arbitral panel a written report or an oral report to be included in the procès-verbal of the meeting. A copy of the terms of reference regarding the mission entrusted to the expert shall be sent to each party.
>
> 2. Each party shall provide the expert with all relevant information concerning the dispute or produce or provide access to relevant documents, goods or other property for his inspection. The arbitral panel shall decide on any controversy arising in this respect between the expert and one of the parties.
>
> 3. The arbitral panel shall send to each party a copy of the expert's report immediately after its submission, granting each party the opportunity to express its opinion thereon. Each of the two parties is entitled to review and examine the documents upon which the expert relied in his report.
>
> 4. The arbitral panel may decide, after the submission of the expert's report, whether on its own initiative or upon request of a party to the arbitration, to hold a meeting to hear the expert and to provide for both parties the opportunity to hear him and to put questions to him about what is contained in his report. Each of the parties may present one or more expert witnesses in order to give testimony on the issues raised in the report of the expert appointed by the arbitral panel, unless otherwise agreed by the parties to the arbitration."[213]

This Article shows that the Egyptian arbitration law has adopted both ways found in arbitration laws for using experts in arbitration disputes - the tribunal-appointed expert 'the

[212] This approach is mentioned in Article 16(f) WIPO Expert Determination Rules, available at < http://www.wipo.int/amc/en/expert-determination/rules/#art13>

[213] UNCITRAL Model Law Article 26, Dutch Arbitration Act 1986 Article 1042, English Arbitration Act 1996 s. 37, Association of Arbitrators (Southern Africa) Arbitration Rules 2009 Rule 30.

arbitral panel may appoint one or more experts [214] and the party-appointed expert 'Each of the parties may present one or more expert witnesses.'[215] The expert presents a report to the arbitral tribunal about specific issues determined by the arbitral tribunal in the terms of reference of the expert's appointment. Whether written or oral, this report is to be included in the minutes of the hearing, and the arbitral tribunal shall rapidly communicate a copy of it to the parties immediately after its submission and in advance of the hearing.[216] In this way, the arbitral tribunal gives the parties a proper opportunity to examine the expert's report and study any materials that the expert has relied on in his/her report.[217] Following the submission of the expert's report, the arbitral tribunal may hold a hearing – whether of its own initiative or upon the parties' request – to hear the expert's opinions, and shall allow the arbitration parties or their expert to examine the expert's opinions or his report.

It is worth mentioning here that the Egyptian Arbitration Law does not determine the form of expert examination, so the arbitral tribunal can use any common means to examine expert testimonies in international arbitration such as Expert Conferencing,[218] as this method is commonly used in international arbitration and can save a lot of time.[219] Thus, the parties'

[214] EAL Article 36.

[215] Ibid.

[216] EAL Article 36.

[217] EAL Article 36(3).

[218] Expert Conferencing like witness Conferencing is an evidentiary process in which the (Expert) witnesses testifying on a common issue sit together and give evidence in a panel discussion led by the tribunal, see Michael Hwang, *'Witness Conferencing'* in *The 2008 Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration*, (James McKay, ed. 2008)
available at < http://www.arbitration-icca.org/media/0/12232964943740/witness_conferencing.pdf>

[219] The experts in (Expert Conferencing) should meet before the hearing to prepare two lists, one for matters on which there is consensus and one for controversial matters, giving them to the tribunal so that it might organize the discussion. Nigel Blackaby, Constantine Partasides, et al.,(n 2) para 6.222. In one case, Professor Raeschke-Kessler took over as sole arbitrator from another arbitrator in a multi-party arbitration where the evidentiary hearing had lasted six days with cross-examination still to be completed. Professor Raeschke-Kessler brought in

advocates are usually permitted to use it when they want to accelerate the arbitration process.[220]

The parties should provide the tribunal-appointed expert with any documents or information s/he may need in his/her mission. They should also allow the expert to access any sites or properties s/he wishes to visit and to take any samples deems necessary.[221] The arbitral tribunal is competent to adjudicate on any controversy arising between the parties and the expert. [222] As regards the scope of cooperation between the parties and the tribunal-appointed expert, Egyptian Arbitration Law has not addressed the issue where one of the parties refuses to cooperate with the expert. Article 36 of this law does not grant the arbitral tribunal any discretion to resort to the court to oblige the recalcitrant party to cooperate with the tribunal-appointed expert. If a party refuses to allow the expert to inspect his/her properties, or refuses to disclose any information or documents in his/her possession to be examined by the expert, the arbitral tribunal cannot force this party to comply with its decisions as it does not have coercive power to do so and, according to Article 36, it cannot resort to the court to intervene to enforce its decision.[223]

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witness-conferencing, and the entire process of taking evidence was completed in two-and-a-half days, Cited in Michael Hwang, *'Witness Conferencing'* in James McKay (ed), *The 2008 Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration* (2008) 4.

[220] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para 6.222

[221] *Amal Tourism Complex v. Minister of Tourism*, Case No; 4721 of judicial year 73 of 27 December 2007, cited in Karim Youssef, *Egyptian Court of Cassation, A contribution by the ITA Board of Reporters* (Kluwer Law International)

[222] Cairo Court of Cassation held that 'the arbitral tribunal it is the only competent venue to adjudicate in all matters in the arbitration' dispute' (author translation) Appeal No; 86 of judicial year 70 on 26/11/2002.

[223] EAL Article 36, Abd El-Hamid R. Sayyid, *Issues in the Arbitration* (Cairo: Dar El-Nahda El-Arabia, 2003) 63.

Furthermore, Article 36 does not impose any sanction on a party's refusal to cooperate, does not discuss this rejection of the tribunal's decision and does not allow the arbitral tribunal to continue the arbitration procedures to issue a final award. Yet this defect is remedied by Article 35 which grants the arbitral tribunal power to continue the arbitration process and issue a final award regardless of the missing documents which the party refused to submit to the tribunal:

> If either party fails to appear at any of the meetings or to submit the documents required from it, the arbitral panel may continue the arbitral proceedings and make the award on the dispute based upon the elements of evidence before it.[224]

The issue of access to the court to request its help to oblige the party to cooperate with the an expert in his/her mission is different in the EEL where Article 148 stipulates 'The expert can ask the court impose on a party who does not comply with his requests one of the sanctions provided in Article 99 of the Civil Procedure Law.' The sanctions listed in Article 99 are:

> If one of litigants did not comply the court orders to submit any documents or reject its orders to attend before the court or refused to comply with expert requests which caused some delay to its mission or made it difficult to do so, that the court may impose on him a fine of not more than 1000 Egyptian pound or may suspension the litigation procedures for 3 months.

Hence, Articles 148 and 99 have addressed this gap in the arbitration law if the seat of arbitration was in Egypt. In this case, Egyptian law including both the Egyptian Arbitration Law and the EEL Law would be the applicable laws, so this defect in the appointment of experts in Egyptian Arbitration Law no longer exists. The problem would still stand, though, if the seat of arbitration was out of Egypt but the Egyptian Arbitration Law was to apply to the dispute as a result of the agreement of the parties.

[224] EAL Article 35.

Clearly, Article 36 has addressed the general Rule of using experts in normal circumstances but not as an interim measure. If the use of experts was an interim measure in urgent circumstances to preserve evidence, according to the wording of Article 36 the arbitral tribunal could either resort to the court of its own initiative or allow the party in favour of whom it has issued this measure to oblige his opponent to comply with the tribunal's decision. This is based on Article 24 of the Egyptian Arbitration Law which gives the tribunal the power to permit any party to take the necessary procedures to enforce tribunal decisions, including his right to resort to the 'Article 9 court' to help in enforcing the tribunal's decision. However, if the arbitral tribunal has, in normal circumstances, appointed an expert under Article 36, the arbitral tribunal would then be incompetent to permit the parties or even itself to resort to the court to enforce its decisions. If it did, its procedure would be void, as it is not competent under the law that governs the arbitration procedure.

2.1.1.5 Conclusion

There are two issues that should be modified in Article 36 of the Egyptian Arbitration Law. Firstly, regarding the appointment of experts in urgent circumstances as an interim measure or the appointment of experts in normal circumstances as a normal procedure, this point needs clarification by adding the following clause to Article 36:

> If the appointment of experts is in urgent circumstances, the arbitral tribunal is competent to estimate this case as an interim measure and is free to consult with parties as regards this appointment. If this order is challenged by one of the arbitration parties, this shall not affect the expert's continued work, nor shall it affect the arbitral tribunal's right to take any security in connection with this measure.[225]

[225] UNCITRAL Model Law Article 17E.

It would thus be possible to preserve evidence of the dispute and at the same time prevent any attempt to frustrate or delay the arbitration process. The possibility of requiring security further protects the opponent from any damage that may occur due to these measures.

Secondly, concerning the arbitral tribunal's power to request from the court – or even to permit the parties to resort to the court – to use its power to enforce the non-compliant party to co-operate, this issue, it is suggested, becomes insignificant when the place of arbitration is Egypt. As the procedural law of the arbitration would be Egyptian, the EEL would be the law governing the expert work in Egypt, and this law gives the tribunal the power to request from the court to oblige the non-compliant party to cooperate with the expert in his/her mission. The problem resurfaces, however, when the Egyptian Arbitration Law is the applicable law in arbitrations seated outside Egypt, for Article 36 as it stands now does not grant the tribunal the power to have recourse to the court for help to enforce the arbitral tribunal's decisions.

It seems that Article 36 should be amended by adding another clause that gives the arbitral tribunal the power to resort to the court in any way, which would secure the enforceability of its decisions and protect the continuity of the arbitration process. The amendment should at least consider a party's refusal to cooperate as creating an evidential presumption against that party. Otherwise, the power to resort to an expert could be rendered meaningless if a party could with impunity refuse to cooperate with the tribunal-appointed expert.

2.1.2 Preserving Evidence in the Scottish Arbitration Act

2.1.2.1 Outline of the Scotland (Arbitration) Act 2010

In June 2010 the new Arbitration (Scotland) Act 2010 [226] was enacted to create a single statutory framework for arbitration in Scotland, and to remove all the inadequacies and lacunae in the previous statutes.[227] The Act integrated most arbitration law in one statute. Before the enactment of this law, arbitration in Scotland was governed by different Scottish laws, both common law and a variety of statutes such as Article 25 of the Articles of Regulation of 1695,[228] the Arbitration Scotland Act of 1894,[229] and s.3 of the Scotland Administration of Justice Act of 1972.[230] Moreover, the old arbitration laws did not cover some important areas in the field of arbitration, such as privacy and confidentiality, as well as the relationship between court rules of evidence [231] and the arbitration procedures.[232] Because arbitration law was often unclear to both arbitrators and parties, a lot of arbitrators felt compelled to employ clerks, normally solicitors experienced in Scots arbitration law,[233] to advise and assist them in understanding the arbitration process in Scotland. This, unsurprisingly, tended to increase the cost of arbitration there. Thus, the complexity of procedures and the unjustified costs often forced arbitrating parties to reject Scotland as a

[226] The New Act was enacted on 5 January 2010 and came in force on 7 June 2010.

[227] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 1.

[228] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 1, Hong-Lin Yu, *Commercial Arbitration the Scottish and International Perspectives* (Dundee University Press 2011) 1. Hew R Dundas *'The Arbitration (Scotland) Act 2010: Converting Vision into* Reality' (2010) 76 Arbitration 2-15, available at http://www.ciarb.org/scotland/downloads/Hew_Dundas_Article.pdf

[229] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 1.

[230] Ibid.

[231] Civil Evidence (Scotland) Act 1988.

[232] Hew R Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into* Reality'(2010) 76 Arbitration 7.

[233] Hew R Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into* Reality'(2010) 76 Arbitration 7.

venue to resolve their disputes.[234] All these reasons spurred the Scottish legislator to pass the new Act to cover all arbitration issues in one law, thus facilitating the use of arbitration in Scotland.[235]

The new Act echoes the fundamental principles of the UNCITRAL Model Law in most of its rules.[236] Therefore, the general principle which governs arbitration procedures is party autonomy.[237] This means that the Act lays down most provisions dealing with procedural matters as default rules,[238] and gives parties the freedom to modify, add to or even exclude such rules.[239] Another aspect of the Act is that provisional measures are considered one of the important means to protect arbitration parties during the course of arbitration, and the first type of these measures aims to preserve the dispute evidence.

2.1.2.2 Preserving Evidence under the Scottish Arbitration Act

Before examining the preservation of evidence under the Arbitration (Scotland) Act 2010, it is useful to mention the rules dealing with or related to these measures. As regards preserving

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[234] Steven P. Walker, '*The Renaissance of the Scottish international Arbitration'* (2010) Scots Law Times 3.

[235] Hong-Lin Yu, '*A Departure from the UNCITRAL Model Law – The Arbitration (Scotland) Act 2010 and Some Related Issues*' (2010) 3 (2) Contemporary Asia Arbitration Journal, 287, Brandon Nolan, Chairman CIArb Scottish Branch said that 'The new Act provides a great spring board for using arbitration as means of determining disputes and the CIArb Scottish Branch fully intends vigorously to promote arbitration in Scotland, both domestically and also with the aim of attracting international arbitration to Scotland'

[236] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 2-4, Hew R Dundas, '*The Arbitration (Scotland) Act 2010 - A Giant Leap for [Scots] Mankind*' (2010) 28 (1) ASA Bulletin, 152. There was a highly controversial debate around the adoption of the UNCITRAL Model Law in the new Act – see Policy Memorandum para 49-59.

[237] Arbitration (Scotland) Act 2010 s.9 and Rule 28, Hew R. Dundas stated that 'this principle is one of three principles which govern arbitration operations in this Act' (The international Journal of Arbitration, Mediation and dispute management (CIAer), (Sweet& Maxwell Volume 67 No 1 Feb 2010) 10.

[238] Arbitration (Scotland) Act 2010. The mandatory rules are mentioned in s.8. These are compulsory rules, and any violation of their provisions makes the final award subject to challenge - see Rule 68(2).

[239] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 175.

evidence as a type of provisional measure, the Arbitration (Scotland) Act 2010 has come up with six rules to govern such matters Rules 28, 31, 35, 38, 39, and 53. They read as follows,

Rule 28: Procedure and evidence

(1) It is for the tribunal to determine—

(a) the procedure to be followed in the arbitration, and

(b) the admissibility, relevance, materiality and weight of any evidence.

(2) In particular, the tribunal may determine

(a) When and where the arbitration is to be conducted,

(b) Whether parties are to submit claims or defences and, if so, when they should do so and the extent to which claims or defences may be amended,

(c) Whether any documents or other evidence should be disclosed by or to any party and, if so, when such disclosures are to be made and to whom copies of disclosed documents and information are to be given,

(d) Whether any and, if so, what questions are to be put to and answered by the parties,

(e) Whether and, if so, to what extent the tribunal should take the initiative in ascertaining the facts and the law,

(f) The extent to which the arbitration is to proceed by way of

(i) Hearings for the questioning of parties,

(ii) Written or oral argument,

(iii) Presentation or inspection of documents or other evidence, or

(iv) Submission of documents or other evidence,

(g) The language to be used in the arbitration (and whether a party is to supply translations of any document or other evidence),

(h) Whether to apply rules of evidence used in legal proceedings or any other rules of evidence.

Rule 31: Tribunal directions

(1) The tribunal may give such directions to the parties as it considers appropriate for the purposes of conducting the arbitration.

(2) A party must comply with such a direction by such time as the tribunal specifies.

Rule 35: Powers relating to property

The tribunal may direct a party—

(a) to allow the tribunal, an expert or another party—

(i) to inspect, photograph, preserve or take custody of any property which that party owns or possesses which is the subject of the arbitration (or as to which any question arises in the arbitration), or

(ii) to take samples from, or conduct an experiment on, any such property, or

(b) to preserve any document or other evidence which the party possesses or controls.[240]

Rule 38: Failure to attend hearing or provide evidence

Where—

(a) a party fails—

(i) to attend a hearing which the tribunal requested the party to attend a reasonable period in advance of the hearing, or

(ii) to produce any document or other evidence requested by the tribunal, and

(b) the tribunal considers that there is no good reason for the failure, the tribunal may proceed with the arbitration, and make its award, on the basis of the evidence (if any) before it.

Rule 39: Failure to comply with tribunal direction or arbitration agreement

(1) Where a party fails to comply with—

(a) any direction made by the tribunal, or

(b) any obligation imposed by—

(i) the arbitration agreement,

(ii) these rules (in so far as they apply), or

(iii) any other agreement by the parties relating to conduct of the arbitration, the tribunal may order the party to so comply.

(2) Where a party fails to comply with an order made under this rule, the tribunal may do any of the following—

[240] The Policy Memorandum para 163 for the Act believes this rule give the tribunal the power to take any protective measures relating to property including securing evidence.

(a) direct that the party is not entitled to rely on any allegation or material which was the subject-matter of the order,

(b) draw adverse inferences from the non-compliance,

(c) proceed with the arbitration and make its award,

(d) make such provisional award (including an award on expenses) as it considers appropriate in consequence of the non-compliance

Rule 53: Provisional awards

The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently.

The aforementioned rules show that the Arbitration (Scotland) Act 2010 has distinguished between three kinds of power that the arbitral tribunal can use to preserve evidence:

1. Power to give directions to the parties
2. Power to issue a provisional award under Rule 39(2)(d) as a sanction for non-compliance
3. Power to issue a provisional award as a protective measure.

Furthermore, the Arbitration (Scotland) Act 2010 has recognized the principle of concurrent jurisdiction [241] between arbitral tribunal and courts to aid arbitration to reach to the final award. Every one of the following categories has some function to preserve evidence.

[241] For more information about the Principle of Concurrent Jurisdiction see Emmanuel Gaillard, John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 709-734.

2.1.2.2.1 The power of the tribunal to preserve evidence by directions and orders

The Arbitration (Scotland) Act 2010 empowers the arbitral tribunal to preserve evidence by giving directions to the parties to refrain from taking certain actions e.g. moving their evidence in the form of documents or property out of the tribunal's jurisdiction, or to perform certain actions, such as allowing a tribunal appointed expert to carry out inspections, take samples or access properties. It is noteworthy that the Act uses the term 'direction' as a synonym of 'order', so any directions issued by the arbitral tribunal should be treated as orders.

The first Rule in the Arbitration (Scotland) Act 2010 dealing with this power is Rule 28(2) which regulates the arbitrator's power to conduct the arbitration proceedings and regulates evidence whether documentary or otherwise.[242] Rule 28 does not deal directly with the preservation of evidence as a provisional measure, even though it addresses some issues that may be related to the evidence in the arbitration, such as documents that may be disclosed during the arbitration process or documents that need inspection,[243] but these issues are related to the arrangement of proceedings more than the topic of provisional measure.[244]

The second Rule in the Arbitration (Scotland) Act 2010 that deals with this issue is Rule 31, which expressly indicates that the arbitral tribunal can give directions or orders as to conducting the arbitration process. This rule, however, uses a broad language that may encompass any issues whether related to management of the case,[245] the preservation of

[242] This rule is equivalent to Articles 19-24 of the UNCITRAL Model Law.

[243] Rule 28(2)(c),(f).

[244] Lew D M Julian, Mistelis A Loukas and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) para 24-5.

[245] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 191.

evidence by procedural orders [246] or matters related to the purpose of conducting the arbitration. Therefore, this Rule implicitly gives the arbitral tribunal power to preserve evidence by directing parties to take measures considered appropriate for the purposes of conducting the arbitration.[247] Rule 31(2) also requires the parties to comply with its directions within the time specified in these directions to avoid any delay or unnecessary cost in the arbitration process.[248]

The most important Rule in relation to preservation of evidence is Rule 35, which is the main Rule in the Arbitration (Scotland) Act 2010 addressing preservation of evidence as a provisional measure. This Rule gives the arbitral tribunal power to give directions and take measures to protect parties' property,[249] a term with a broad interpretation.[250] It may give directions regarding the inspection, photographing, custody of property, or directions designed to preserve evidence or documents in the party's possession or under his/her control.

Rule 35 is nearly equivalent to Article 17(c)(d) of the UNCITRAL Model Law as it covers many interim or protective measures related to property and evidence.[251] Therefore, Rule 35 is considered the main source of arbitral tribunal power to take any measures to preserve

[246] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 191

[247] Ibid.

[248] Rule 24 obliges parties to ensure that the arbitration is conducted without delay and unnecessary cost.

[249] The Policy Memorandum para 163 states 'Rule 35 gives arbitrators default powers in relation to protective measures relating to property which may constitute evidence in the arbitration. One of the features of arbitration in Scotland will be an arbitrator's ability to make orders for the preservation etc. of property owned or possessed by a party as a protective measure pending the outcome of an arbitration and also for the purpose of being used as evidence during the proceedings.'

[250] *Cetelem SA v Roust Holdings Ltd*, [2005] EWCA Civ 618.

[251] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010)198. UNCITRAL Model Law Article 17 covers all types of interim measures, but rule 35 seems more detailed on the topic of evidence preservation.

evidence, e.g. issuing a disclosure order for some specific documents [252] or a freezing order (known in England as a *Mareva injunction*) [253] regarding custody of disputed property,[254] or an order to sell perishable goods. Generally speaking, the arbitral tribunal under this Rule has nearly the same power mentioned in Article 17 of the UNCITRAL Model Law.

However, the title of this Rule is 'Powers Relating to Property'. Does that mean that the arbitral tribunal is entitled to take preservation measures related only to property, or may it take any measures deemed necessary in the course of the arbitration? The answer to this question is important, considering that some protective measures are not related to property – measures like taking testimony from a witness who may be dying or moving out of the tribunal's jurisdiction during the process; security for costs, making an interim payment that may be required during the arbitration process or resumption of project works. Does the arbitral tribunal's power under Rule 35 include these measures or not?

[252] *Emmott v Michael Wilson & Partners Ltd* - [2008] EWCA Civ 184 (Jan), *Cetelem SA v Roust Holdings Ltd*, [2005] EWCA Civ 618.

[253] There is no explicit reference in rule 35 to the freezing order, or the sale of perishable goods, but this rule indicates that it is designed to preserve property. That means that the arbitral tribunal can take any appropriate measures to preserve property. One such measure is restraining a party from moving their property or disposing of it by any means way, and this order would constitute a freezing order or *Mareva injunction*. On the other hand, a party who won the arbitration could yet lose the subject matter of the dispute (the value of goods), if these goods were allowed to perish. It is neither rational nor acceptable to keep goods until they perish. Therefore the arbitral tribunal can only preserve this property by ordering its sale. Moreover, the arbitral tribunal under this rule can make a custody order. This goes further than a freezing order, which just deprives a party from disposing of its property, the party remaining in possession of his property. A custody order by contrast may remove the property and entrust its possession to a third party. It is suggested that Rule 35 has impliedly empowered the arbitral tribunal to make freezing orders and orders for the sale of perishable goods.

[254] *Mobile Telesystems Finance SA v Nomihold Securities Inc*, [2011] EWCA Civ 1040; *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 303; (Comm), *Kastner v Jason*, [2005] 1 Lloyd's Rep. 397.

It seems Rule 35 of the Act just covers two kinds of measures; one related to property and the other related to evidence. The Policy Memorandum states that:

> One of the features of arbitration in Scotland will be an arbitrator's ability to make orders for the preservation etc. of property owned or possessed by a party as a protective measure pending the outcome of an arbitration and also for the purpose of being used as evidence during the proceedings.[255]

Accordingly, the arbitral tribunal can take a witness's testimony and can order resumption of works as these measures go under both categories. The tribunal can further take any measures to preserve evidence to secure the outcome of the arbitration (the final award related to property) based on this rule. Moreover, this Rule is equivalent to Article 17(c)-(d) of the UNCITRAL Model Law, which covers these kinds of measures.[256] Thus, the arbitral tribunal under this Rule is entitled to take all kinds of protective measures whether related to evidence or property under dispute by giving directions to the parties to do so.

Considering security for costs, interim payments or any measures related to finance that may be required during the course of arbitration, it is doubtful that the arbitral tribunal under Rule 35 can make any directions or orders to regulate these issues, as these measures are not related to protective measures regarding property or evidence. In addition, there is no reference to such kind of measures either in the text of Rule 35 or in the Policy Memorandum. Therefore, the arbitral tribunal cannot take these measures under Rule 35 of the Act, but may be able to do so under other rules. For example, an interim payment could be the subject of a provisional award under Rule 53.[257]

[255] Policy Memorandum para 163.

[256] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 198.

[257] See later Chapter 5

2.1.2.2.2 Tribunal's power to preserve evidence by provisional awards

It is obvious that Rule 35 relies on voluntary party compliance with the tribunal's directions, and in turn the preservation of evidence according to this Rule relies on the parties' cooperation with the arbitral tribunal. However, in case of party failure to comply with the tribunal's directions or party refusal to cooperate with it regarding evidence, for example, if the party refuses to disclose documents in his possession or if the party refuses to allow the tribunal's experts to access, inspect or take samples from the subject matters of the dispute (goods) in the party's property and persists in his intransigence, the arbitral tribunal can make a new order based on Rule 39 to induce this party to comply with its directions, and if he fails to comply with this new order, the tribunal can go to the next level of by:

> (a) Directing that the party is not entitled to rely on any allegation or material which was the subject-matter of the order,
>
> (b) Drawing adverse inferences from the non-compliance,
>
> (c) Proceeding with the arbitration and making its award,
>
> (d) Making such provisional award (including an award on expenses) as it considers appropriate in consequence of the non-compliance.

Rule 39(2)(d) clearly considers a provisional award as a sanction,[258] and the arbitral tribunal may only revert to it in face of non-compliance with its direction. What is the nature of provisional awards under this rule?

[258] The Policy Memorandum para 165 stated that 'Rule 35 gives the arbitrators further powers to deal with failure on the part of the parties, this time in relation to failure to comply with an arbitrator's direction or the arbitration agreement itself. An arbitrator will be able to order a party to comply and will have a range of sanctions in the event of non-compliance.'

2.1.2.2.2.1 The concept of a provisional award under Rule 39(2)(d)

First of all there is no equivalent provision to Rule 39(2)(d) in the UNCITRAL Model Law, the Egyptian Arbitration Law 27 of 1994, or English Arbitration Act of 1996.[259] There is no further reference to the term 'provisional award' in the whole Act – except in Rule 53 which stipulates 'The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently.' Therefore, a provisional award under this Rule deals with a particular issue by granting relief for only a short period of time on a provisional basis until the final determination of the dispute by the final award.[260] For example, the tribunal may issue a provisional award to make an interim payment to one party who needs a quick financial relief or else will face bankruptcy.[261] This example illustrates that provisional awards deal with temporary issues that may arise during the course of arbitration and need swift responses in order to protect the arbitration process. Such provisional awards may be confirmed or reversed by the final award.

There are two approaches to the subject of provisional awards in the Act: Rule 39(2)(d) treats such an award as a sanction, while Rule53 sees a provisional award as a form of relief. With regard to Rule 39(2)(d), there is a need for a precise treatment or definition of provisional awards as a sanction. In most cases, provisional awards or orders are used to protect a variety

[259] Some arbitration laws, instead of resorting to provisional awards, give the arbitral tribunal power impose penalties in the case of party non-compliance with its orders. Thus Article 1468 of the new French Arbitration Law No. 2011-48 of 13 January 2011 stipulates 'The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate…and, if necessary, attach penalties to such order…'.

[260] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 198, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 275, Margarat L. Moses, *The Principles and Practice of International commercial Arbitration* (Cambridge University press, 2008) 100.

[261] See *Apollo Engineering Limited v James Scott Limited*, [2009] CSIH 39.

of rights.[262] What, sanction is envisaged by empowering the tribunal to make a provisional award? The arbitral tribunal has no power to fine or expropriate a party. It can only impose procedural sanctions such as those stipulated upon in, for instance, Rule 39(2)(a),(b) and (c) of the Act, and s.41(5),(6) and (7) of the English Arbitration Act 1996. Thus, the tribunal may, for example, ignore the documents, which a party refuses to disclose, continue the arbitration proceedings, or make its award, drawing adverse inferences from the non-compliance when deciding upon the award. This description of provisional measures as a sanction might cause some misunderstanding among arbitration users in Scotland, as they might think that imposing a sanction is one of the aims of provisional measures. However, none of the above sanctions need be imposed in the form of a provisional award.[263] They should fall within the tribunal's normal power to conduct the arbitration proceedings.

Moreover, according to Rule 71(3), no appeal may be made against a provisional award.[264] Hence, a provisional award (including an award imposing a sanction) would not be subject to judicial review. This situation may lead to frustrate the provisional measures system, as parties may refrain from conferring the power to issue provisional awards on the arbitral tribunal in case it uses that power to impose sanctions without them having the potential to challenge it.[265] Moreover, the issue of provisional awards is considered controversial even in Scotland,[266] and it is desirable to avoid any bifurcation of this idea which may cause

[262] See e.g.*Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and another* (Case C-391/95) [1998] All ER (D) 591.

[263] Arbitration (Scotland) Act 2010 Rule 39(2)(a), (b), (c).

[264] Arbitration (Scotland) Act 2010 Rule 71(3) Challenging an award: supplementary 'No appeal may be made against a provisional award'.

[265] Arbitration (Scotland) Act 2010 Rule 71(3).

[266] The Law Society of Scotland's Supplementary Memorandum on Arbitration (Scotland) Bill 2009 para 19 stated that '…There has been no tradition of arbitrators in Scotland making provisional or interim awards because arbitrators have no power at common law to do so and, in practice parties have been very reluctant to

problems in arbitration practice and lead to misunderstanding to the meaning of the concept of provisional measures.

In conclusion, it seems the use of provisional awards as a sanction conflicts with the purpose and nature of these measures as a relief. These measures were created to protect parties' rights during the arbitration process and to guarantee the continuity of that process, not for use as unchallengeable sanctions against the parties. Thus Rule 39(2)(d) causes inconsistency and overlap of functions of provisional measures in the Act. It would surely make more sense if it were rephrased, especially since this will not impact on the consistency and coherence of the rest of Rule 39. Indeed, it may rather increase the consistency between this Rule and other rules dealing with the topic of provisional measures, while at the same time maintaining the arbitrator's power at an acceptable level. Furthermore, this proposal would not affect arbitration parties' rights to resort to the Sheriff Court or Court of Session to seek measures to preserve evidence or protect the parties' rights under Rule 45.[267]

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confer such a power by agreement. There is no guidance as to how this wide power is to be operated in practice. There is no differentiation made between "provisional" remedies for example an urgent need to regulate possession of perishable goods which may be the subject of dispute and "interim" awards which would fall within 'provisional award…'

[267] Arbitration (Scotland) Act 2010 Rule 45(1), Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 221.

2.1.2.2.2.2 The concept of a provisional award under Rule 53 as procedural relief

In light of the previous explanation, a provisional award is an award that deals with a particular issue only for a short period of time until final determination by the final award.[268] An interim payment request, for example, is a temporary issue that may arise during the course of arbitration. Such situations may need a quick response to protect the weaker party who needs quick financial relief to avoid insolvency.[269] Such provisional measures may be confirmed or reversed by the final award.

Rule 53 stipulates that 'The tribunal may make a provisional award granting any relief on a provisional basis which it has power to grant permanently.' This Rule gives the arbitral tribunal a wide power to make any provisional award deemed necessary during the arbitration proceedings.[270] The Policy Memorandum paragraph 173, states that 'The arbitrator is able to make provisional awards for relief. It is considered that this may in practice protect the weaker party financially during the arbitration process.' While the Policy Memorandum suggests that the term 'relief' in Rule 53 might be interpreted to mean financial relief exclusively, on the plain words of the Rule the power is not limited in this way, even if in

[268] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 275, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 513-583, Margarat L. Moses, *The Principles and Practice of International commercial Arbitration* (Cambridge University press, 2008) 100.

[269] In the *The Kostas Melas* [1981] 1 Lloyd's Rep.18 at 26, Goff J, "made clear that it was no part of an arbitrator's function to make temporary or provisional financial arrangements between the parties" see Departmental Advisory Committee on Arbitration Law (the DAC) Report on Arbitration Bill 1996 Para 201, available at < http://arbitration.practicallaw.com/5-205-4994#sect1pos1res1>

[270] *Apollo Engineering Limited v James Scott Limited,* [2009] CSIH 39.

practice financial relief is most likely to be granted under this rule.[271] Therefore, it is submitted that an arbitral tribunal may grant a provisional award to preserve evidence.

It is noteworthy that Rule 53 has dealt with some ambiguous issues in the topic of provisional measures:

a. Rule 53 has solved the terminological confusion in this area by choosing the term 'provisional' rather than the term 'interim' used in Article 17 of the UNCITRAL Model Law [272] and in the old Scottish arbitration laws.[273] This step makes the provisional measures system under the 2010 Act more understandable, since the term 'provisional' will mean an award which is binding till the final award is issued.[274] Whatever the chosen term, this step provides arbitration practitioners and clienteles with a definite legal treatment for their requested measures, which helps them to request the proper measures to protect their rights in the future.
b. Rule 53 considers these measures as awards, not as orders. Hence, will be treated as awards, and will be enforceable in Scotland under s.12 of the Act whether issued within or outside the territory. However, if a provisional award is sought to be enforced in Scotland the rules that will apply to such enforcement will depend on where the award is made. Therefore, a provisional award made in Scotland or anywhere else in the UK will be subject to enforcement under s.12 of the Act which stipulates that: "The court may, on an application by any party, order that a tribunal's

[271] Fraser Davidson, Arbitration (2nd edn, W Green, Edinburgh, 2012) 610

[272] The UNCITRAL Model Law has used the term interim measures in the 2006 version having used the term interim measures of protection in the 1985 version.

[273] Scottish Arbitration Code (1999 and 2007), sees Hew R. Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into Reality* (2010) 67 Arbitration 6-14.

[274] Ibid, 14

award may be enforced as if it were an extract registered decree bearing a warrant for execution granted by the court…"

Yet a provisional award made outwith the UK it will normally be enforceable under the New York Convention and thus enforced s.19 of the Act which stipulates that:

> Recognition and enforcement of New York Convention awards; (1) A Convention award is to be recognised as binding on the persons as between whom it was made (and may accordingly be relied on by those persons in any legal proceedings in Scotland) (2) The court may order that a Convention award may be enforced as if it were an extract registered decree bearing a warrant for execution granted by the court.

However, the capability of provisional awards to be enforced under New York Convention remains uncertain in international arbitration practice [275] as this Convention does not define what an award is [276] and just addresses the recognition and enforcement of the final and binding awards [277] without any definition of the term 'award'.

c. Rule 53 is a default Rule and arbitration parties are free to modify, add to, or exclude it.[278]

[275] Most International conventions related to the recognition and enforcement of the arbitral award are silent on the subject of provisional relief. Tijana Kojović *'Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?'* (J.Int'l Arb, Volume 18, Issue 5, 2001) p.520, *Resort Condominiums International, Inc v Ray Bolwell and others*, XX YBCA 628 (1995) (Supreme Court of Queensland, 29 October 1993).

[276] Tijana Kojović, *'Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?*' (2001) 18 (5) J.Int'l Arb.520. This ambiguous situation has led to contradictory judgments in some countries, for example, *McCreary Tire & Rubber Co v. Seat SpA*, 501 F.2d 1032 (1987)*; Cooper v. Ateliers De La Motobecane*, S.A., 57 N.Y. 2d 208 (1982).

[277] *Resort Condominiums International, Inc v Ray Bolwell and others*, XX YBCA 628 (1995) (Supreme Court of Queensland, 29 October 1993).

[278] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 259.

2.1.2.3 Court power to preserve evidence under the Arbitration (Scotland) Act 2010

Court intervention in arbitration process is sometimes very important to assist the arbitral tribunal to do its job whether that assistance is rendered before or after the constitution of the arbitral tribunal, during the arbitration proceedings, or even after the issue of the final award.[279]

As regards preserving evidence, court intervention is sometimes essential to preserving such evidence as "documents, information, deeds, or any material evidence" if this evidence is in third-party possession.[280] Court intervention may also be vital for securing the attendance of witnesses at the arbitration [281] or for enforcing tribunal directions if they are not respected by one party.[282] Generally speaking, the court's intervention is required in any measure that needs to be enforced, e.g. the sale of property,[283] detention orders,[284] or the appointment of a guardian.[285]

In a number of its rules, the Scotland (Arbitration) Act 2010 has addressed court power to aid the arbitral tribunal. As regards provisional measures, it has regulated this power in Rules 45 and 46 of Arbitration (Scotland) Act, and Section 1 of the Administration of Justice (Scotland) Act 1972:

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[279] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 709–734, Julian M. Lew, Loukas A. Mistelis, and Stefan M Kröll et al., *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) para 15-45.

[280] *Emmott v Michael Wilson & Partners Ltd* - [2008] EWCA Civ 184.

[281] Rule 45(1)(a).

[282] Ibid.

[283] Rule 46(1)(b).

[284] Administration of Justice (Scotland) Act 1972 Section 1(1) .

[285] Rule 46(1)(a).

Rule 45 Court's power to order attendance of witnesses and disclosure of evidence

(1) The court may, on an application by the tribunal or any party, order any person—

(a) To attend a hearing for the purposes of giving evidence to the tribunal, or

(b) To disclose documents or other material evidence to the tribunal.

(2) But the court may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in civil proceedings.

(3) The tribunal may continue with the arbitration pending determination of an application.

(4) The court's decision on whether to make an order is final.

Rule 46 Court's other powers in relation to arbitration

(1) The court has the same power in arbitration as it has in civil proceedings—

(a) To appoint a person to safeguard the interests of any party lacking capacity,

(b) To order the sale of any property in dispute in the arbitration,

(c) To make an order securing any amount in dispute in the arbitration,

(d) To make an order under section 1 of the Administration of Justice (Scotland) Act 1972 (c.59),

(e) To grant warrant for arrestment or inhibition,

(f) To grant interdict (or interim interdict), or

(g) To grant any other interim or permanent order.

(2) But the court may take such action only—

(a) On an application by any party, and

(b) If the arbitration has begun—

(i) With the consent of the tribunal, or

(ii) Where the court is satisfied that the case is one of urgency.

(3) The tribunal may continue with the arbitration pending determination of the application.

(4) This Rule applies—

(a) To arbitrations which have begun,

(b) Where the court is satisfied—

(i) That a dispute has arisen or might arise, and

(ii) That an arbitration agreement provides that such a dispute is to be resolved by arbitration.

(5) This Rule does not affect—

(a) Any other powers which the court has under any enactment or Rule of law in relation to arbitrations, or

(b) The tribunal's powers.

Section 1 of the Administration of Justice (Scotland) Act 1972:

Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order-

(1) the inspection, photographing, preservation, custody and detention of documents and other property (including, where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought,

(2) the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith.

(3) any person to disclose such information as he has as to the identity of any persons who appear to the court to be persons who—

(a) might be witnesses in any existing civil proceedings before that court or in civil proceedings which are likely to be brought; or

(b) might be defenders in any civil proceedings which appear to the court to be likely to be brought.

Other rules recognize the right of arbitral tribunal and the parties to resort to the courts (Sheriff Court and Court of Session) to support the arbitration process.

2.1.2.3.1 Court intervention to preserve evidence under Rule 45

Rule 45(1) aims to secure evidence and protect the arbitration process from any non-compliance, whether by the parties or a third party, by making Rule 45 mandatory. Thus, the parties cannot modify this Rule or exclude it.[286] In addition, no one can disrupt the arbitration process because Rule 45(1), upon a request from the arbitral tribunal or from a party, gives

[286] Arbitration (Scotland) Act 2010 s.8.

the court the power to order any person to testify or present any documents or material in his possession. The use of the term 'any material' in the Rule gives the court a wide discretion to include anything it considers evidence, such as electronic data storage, electronic mail and the like.

It may be noted that Rule 45 does not require previous permission from the arbitral tribunal to allow the parties to resort to court,[287] a provision that totally contrasts with Article 24(2) of Egyptian Arbitration Act. The Rule considers that the parties have an inherent right to request the court's help, if there are an appropriate circumstances that justify this intervention.[288]

2.1.2.3.1.1 Application Procedures

Court intervention may be requested by the arbitral tribunal or the parties in three ways: petition, note, or summary application form. Application to the Court of Session may be by petition [289] or note,[290] employing the appropriate court application forms. Such applications should be lodged in the Court of Session, fulfilling the requirements of r.14.4 and the requirements of r.15.2.and Ch.99 for notes. An application submitted to the Sheriff Court [291] should be in summary application form.[292]

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[287] Arbitration (Scotland) Act 2010 Rule 45.

[288] Section 1(C) of the Act states that 'the court should not intervene in an arbitration except as provided by this Act' Therefore, some jurists argue that the parties should seek first arbitral tribunal directions before resort to the court, and the court may refuse the application where this has not happened Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 221.

[289] Rules of The Court of Session Chapter 14.2(h) and in the form of Rules of The Court of Session Forms (Petition Form 14.4) available at < http://www.scotcourts.gov.uk/session/rules/forms/index.asp>

[290] Rules of The Court of Session Forms 15.2 (Form of notice of Note).

[291] Sheriff Court (Scotland) Act 1907 s.6.

[292] Form 1 of Act of Sederunt (Summary Application, Statutory Application and Appeals ETC Rules) 1999 (SASAR).

At the same time, Rule 45(2) has made it clear that the court may not order any prospective witnesses who are under a legal duty of confidentiality, e.g. solicitors, to disclose any information in their possession, and the court must apply rules of confidentiality or privilege.[293] Yet there are several exceptions to this rule, for example, where fraud or other illegality is alleged against a party in relation to a transaction in which the solicitor was concerned.[294] However, the court's decisions under Rule45 are unchallengeable and final.[295]

2.1.2.3.2 Court intervention to preserve evidence under Rule 46

Rule 46 is a spare provision dealing with the need for a provisional measure, whether before arbitral tribunal formation upon a party's application[296] or after the start of arbitration process with tribunal permission.[297]Rule 46 also emphasises the court's general jurisdiction to intervene in all cases of urgency whether before or after the tribunal's constitution, and with or without tribunal's permission.[298] Rule 46 covers all types of provisional measures that the court may grant in the course of arbitration. For example, Rule 46(1)(a), (b) and (f) regulate the *status quo*, Rule 46(1)(c), (e), (f) and (g) look to stabilize legal relations between parties and regulate security for costs and interim payments, while Rule 46(1)(d) and (g) cover preservation of evidence. However, Rule 46(1)(d) and (g) address the court power to take

[293] Fraser P. Davidson, *Evidence* (Thomson W. Green 2007) 627-639, Margaret Ross, James Chalmers, *Walker and Walker- The Law of Evidence in Scotland* (Tottel Publishing 2009) 177-198, *Greens Annotated Rules of the Court of Session*, (W. Green- The Scottish Law Publisher, Thomson Reuters 2010) para 35.2.7.

[294] *Conoco (UK) Ltd v Commercial Law Practice,* 1997 S.L.T.372.

[295] Arbitration (Scotland) Act 2010 Rule 45(4). It seems that the Scottish legislators wanted to keep the arbitration process on the track without being delayed by disputes regarding subsidiary issues.

[296] Arbitration (Scotland) Act 2010 Rule 46(2)(a).

[297] Arbitration (Scotland) Act 2010 Rule 46(2)(b).

[298] Arbitration (Scotland) Act 2010 Rule 46(2)(b)(ii).

measures in nearly the same way as Rule 35 addressed tribunal powers relating to property. Rule 46 has, nonetheless, put a few conditions to the court's exercise of this power.

2.1.2.3.2.1 Conditions for court intervention under Rule 46

Rule 46(2) addresses the conditions that should be satisfied before the court can exercise its powers under Rule 46. If the arbitration has not started, a party should submit an application requesting the court's intervention. Without this application, the court cannot intervene in the arbitration process.[299] A party may submit the application to the court by any means, and the court should, before examining the application, ascertain that the dispute has been agreed to be resolved by arbitration.[300] If the court is satisfied on this issue, it may exercise its power to take any measures to secure the evidence. It may be added that, quite apart from the 2010 Act, a party may seek the assistance of the court under s.1 of the Administration of Justice (Scotland) Act 1972, which allows the court to offer assistance in civil proceedings, civil being defined so as to include both litigation and arbitration tribunal.[301] Consequently, arbitration parties may rely on either s.1 of the 1972 Act or Rule 46 of the 2010 Act in their applications.[302]

It may also be suggested that, in extraordinary circumstances,[303] the parties may apply to Court of Session to use its power under the *nobile officium* [304] to obtain any measures (as

[299] Arbitration (Scotland) Act 2010 s.1(c).

[300] Arbitration (Scotland) Act 2010 Rule 46(4)(b).

[301] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green 2010) 229.

[302] Ibid.

[303] Ibid.

[304] *Nobile Officium* is literally noble office or power. The High Court of Justiciary or the Court of Session may use this ultimate equitable power to modify the rigorous application of the common law or to give proper relief

there is no limit to what the court may do) [305] to face any unpredictable difficulties before the start of the arbitration process.

Secondly: If the arbitration has started, there are two further conditions for court intervention:

1. The Arbitral tribunal's consent, or
2. The case is urgent.

If these conditions are met, the court's intervention would be justified. However, if the arbitral tribunal refuses permission to resort to the court, or the case is not urgent, the court cannot take any measures.[306]

2.1.2.4 Conclusions

In the 2010 Act, the preservation of evidence by the arbitral tribunal is dealt with in Rules 28, 31, 35, 38, 39 and 53, while the preservation of evidence by the court is dealt with in Rules 45 and 46.

A comparison between Scottish provisions and Egyptian Arbitration Law 27 of 1994 provisions reveals the following:

1. Preservation of evidence measures in the Scottish Act are governed by five rules while in the Egyptian Arbitration Act they are governed by two rules: 14 and 24. That means the Scottish Arbitration Act is more detailed as regards the kinds of preservation measures available, whether related to property, documents or other kinds of evidence, the fact which facilitates arbitral tribunal's mission. This area in Egyptian Arbitration Law is dealt with in a very limited way. There are no

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in a situation for which the law makes no provision, See Scots Law debt dictionary, available at < http://www.govanlc.com/debtdictionary.htm>

[305] *Hoekstra v HM Advocate (NO 1)* 2000.J.C 387.

[306] Section 1(c) of the Act.

explanations or examples of preservation measures, which renders the preservation of evidence very difficult, especially if the arbitral tribunal is constituted from non-legal experts. This, in turn, may require court intervention – an intervention that may undermine the autonomy of the arbitration process.

2. The Scottish Act has explicitly covered on the court's role in the preservation of evidence in Rules 45 and 46, going into instances and conditions in some detail. The Egyptian Arbitration Act addresses the court's role in a concise manner, without proper explanation of this role as regards the preservation of evidence, and avoiding any indication of instances or even specification of its conditions. In addition, Article 14 of the EAL does not illustrate the kind of procedures to be followed in party applications for provisional measures and only refers to the competent court: "The court referred to in Article 9 may order the taking of an interim or conservatory measure".[307]

The Scottish Arbitration Act has clearly treated preservation of evidence – whether by the arbitral tribunal or by the court – in a better way than the Egyptian Arbitration Law 27 of 1994. Therefore, Egyptian legislators should modify Articles 14 and 24 by doing the following:

1. Defining precisely the kind of measures – whether related to property or evidence – the arbitral tribunal can take in the arbitration process, adding examples of these measures, e.g. inspection and disclosure orders, orders for the custody of property or the sale of perishable goods. This should keep arbitral tribunal well informed about the nature of provisional measures, especially if the arbitrators are inexperienced in these legal issues.

[307] EAL Article 14.

2. Add a new Article to Egyptian Arbitration Law that addresses the court's role in preservation of evidence and determines this role separately in arbitration process to avoid any overlap between court's role in civil litigation and its role in arbitration claims, and to avoid any misunderstanding between court's powers in both subjects. The proposed Article should further specify the conditions under which the court may intervene to facilitate preservation of evidence, both before and after the formation of the arbitral tribunal, as in the Scottish Arbitration Act 2010.

Finally, the UNCITRAL Model Law 2006 has addressed the topic of provisional measures (Interim Measures) in Article 17, so Egyptian legislators may rely on this Article as a starting point to reform the subject of provisional measures in Egyptian Arbitration Law.

2.1.3 Preserving Evidence in the English Arbitration Act 1996 (EAA)

2.1.3.1 Outline of the English Arbitration Act

In June 1985, the UNCITRAL Model Law came into being.[308] Despite England playing a significant role in drafting the Model Law, in 1989, the Departmental Advisory Committee's (DAC) report recommended that England should not adopt it.[309] Instead, it proposed an alternative reform of its somewhat fragmentary arbitration law [310] by enacting a new Act encompassing all important principles embodied in both English law [311] and the Model Law.[312] After seven years of work, deliberations, and debates around the question role of the Model Law legislation appeared in the form of the English Arbitration Act 1996 (hereinafter the 1996 Act).[313] The new Act received Royal Assent on the 17th of June and came into force on 31st of January 1997.

The 1996 Act responded to the recommendations of the1989 DAC report [314] that any new Act should feature user-friendly language and be free from technicalities in order to be

[308] General Assembly Resolution 40/72 (11 December 1985) available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement

[309] DAC Report (1989) para 108.

[310] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: a commentary* (Blackwell Science 1996) 2.

[311] DAC Report 1996 paras 1-9.

[312] Ibid para 19.

[313] For more information See, Robert Merkin, *Arbitration Law* (Lloyd's of London Press LTD 2001) 1.8

[314] The DAC report of 1989 under the chairmanship of Lord Mustill recommended that "the new act should following these features (Paragraph 108): (1) It should comprise a statement in statutory form of the more important principles of the English law of arbitration, statutory and (to the extent practicable) common law.
(2) It should be limited to those principles whose existence and effect are uncontroversial.
(3)It should be set out in a logical order, and expressed in language that is sufficiently clear and free from technicalities to be readily comprehensible to the layman.

comprehensible to the user.[315] In *Seabridge Shipping AB v AC Orssleff EFTS A/S*, Thomas J noted that:

> One of the major purposes of the Arbitration Act 1996 was to set out most of the important principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be 'in user friendly language.[316]

Woolf M.R in *Patel v Patel* Lord opined that 'I would accept that the Act was intended to make the law of arbitration clear and more straightforward. Furthermore, the Act makes the law less technical than it has been hitherto.'[317] The 1996 Act replaced the Arbitration Acts of 1950-1979 and governs both domestic and international arbitration disputes.[318]

The 1996 Act contains two kinds of provisions: mandatory and non-mandatory.[319] The first category comprises 21 sections, which are applicable when the seat of arbitration is in England, Wales, or Northern Ireland, whether or not the parties agree to their application. Examples of these provisions include ss.9-11 governing court proceedings, s.13 on limitation and s.43 on the parties' right to resort to court to secure a witness's attendance.[320] These

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(4)It should in general apply to domestic and international arbitrations alike, although there may have to be exceptions to take account of treaty obligations.

(5)It should not be limited to the subject-matter of the Model Law.

(6)It should embody such of our proposals for legislation as have by then been enacted: see paragraph 100 [of the 1989 Report].

(7)Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.

[315] DAC Report 1996 paras 1-3.

[316] *Seabridge Shipping A.B. v AC Orssleff's Eftf's A/S* [2000] CLC 656 at 663.

[317] *Patel v Patel* [1999] 1 All E.R. (Comm) 923 at 927.

[318] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] C.L.C. 1757.

[319] This is the same situation as in the Arbitration (Scotland) Act 2010, but the non-mandatory provisions in the Scottish Act are called default rules.

[320] The mandatory rules are listed in Schedule 1 of the Act.

provisions require no prior agreement between parties to apply and cannot be excluded or overridden by the parties.[321]

Non-mandatory provisions [322] are the exact opposite of the first category and represent the vast majority of the 1996 Act's provisions. Parties are free to adopt, modify, or even exclude non-mandatory provisions.[323] For example, parties are free to exclude s.39 which addresses the subject of the making of provisional awards or orders.

The 1996 Act adopted a very different new approach from that of the 1950 Arbitration Act.[324] The latter did not grant the arbitral tribunal much power in questions of evidence, limiting it to issues such as examining witnesses under oath and demanding that parties come forward with any evidence or documents in their possession. The 1950 Act did not give the arbitral tribunal any power to take action against a non-compliant party, and s.12(1) left issues like disclosure and inspection orders undecided.

By contrast, the 1996 Act adopts the principle of party autonomy [325] and sets the arbitration agreement as the foundation stone in arbitration process.[326] It has reduced the power of the

[321] DAC Report Feb 1996 para 28.

[322] The non-mandatory rules are considered fallback rules to meet complete any lack in the provisions of the arbitration agreement. In most arbitration, the parties agree to settle their dispute by arbitration without any reference to the rules that should govern the arbitration process. Therefore, the role of fullback rules is very important in governing the arbitration process.

[323] DAC Report Feb 1996, para 28

[324] Robert Merkin, *Arbitration Law* (Lloyd's of London Press LTD 2001) Ch,13

[325] English Arbitration Act 1996 s.1(b).

[326] Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 155.

court to intervene to minimal levels,[327] limiting its role to helping the arbitral tribunal to act when it has no power to act or is unable to act effectively,[328] e.g. when documents or evidence are in third party possession,[329] or when the tribunal needs to secure a witness's attendance to testify or disclose any evidence under his control.[330] To achieve this aim, the 1996 Act only allows court intervention subject to pre-conditions, e.g. permission from the arbitral tribunal for parties to resort to court, or agreement between the parties for such intervention.[331]

Provisional measures are one of the topics addressed in detail by the 1996 Act – their types and methods of operation whether via the tribunal or the court. The first type of provisional measure relates to the preservation of evidence, first by the arbitral tribunal and secondly by the court.[332]

2.1.3.2 The Arbitral Tribunal's Power to Preserve Dispute Evidence

Evidential matters mostly encompass three subjects; witness testimony, documents and the appointment of experts. To avoid repetition it is proposed to examine the first two points together under the preservation of evidence, and the appointment of experts separately. It is

[327] Section 1(c) of the 1996 Act, Professor Merkin, said that 'the court no longer exercises a general supervisory jurisdiction over the arbitration' see Robert Merkin, *Arbitration Law* (Lloyd's of London Press LTD 2001) 1.26.

[328] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd,* [2004] 2 Lloyd's Rep. 438.

[329] English Arbitration Act 1996 s.44.

[330] Ibid s.43.

[331] Ibid ss.42(b), 43(2), and 44(4).

[332] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 207, Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para.7-23, Julian M. Lew, Mistelis A Loukas and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 595, Jean-Franðcois Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para.614.

helpful to start with all the provisions dealing with or related to these measures, whether implicitly or explicitly, in the 1996 Act.

The provisions covering the types of provisional measures in the 1996 Act are ss.34, 37, 38, 39, 41, and 48. Section 34: 'Procedural and evidential matters', stipulates that:

> (1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
>
> (2) Procedural and evidential matters include-
>
> (a)when and where any part of the proceedings is to be held
>
> (b)the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied
>
> (c)whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended
>
> (d)whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage; page "17"
>
> (e)whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done
>
> (f)whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented
>
> (g)whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;
>
> (h)whether and to what extent there should be oral or written evidence or submissions.
>
> (3)The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

Section 37: 'Power to appoint expert, legal advisor or assessor', stipulates that:

> (1) Unless otherwise agreed by the parties-
>
> (a) the tribunal may-

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

Section 38: 'General power exercisable by the tribunal', stipulates that:

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following power

(3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is-

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings-

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

Section 39: 'Power to make a provisional award', stipulates that:

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

(2) This includes, for instance, making-

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power. This does not affect its powers under section 47 (awards on different issues, &c.).

Section 41: 'Power of the tribunal in case of party's default', stipulates that:

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.

(4) If without showing sufficient cause a party-

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

(7) If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following-

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order

(b) draw such adverse inferences from the act of non-compliance as the circumstances justify

(c) proceed to an award on the basis of such materials as have been properly provided to it

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Section 48: 'Remedies', stipulates that:

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court-

(a) to order a party to do or refrain from doing anything

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document.

Based on these provisions, under the English Arbitration Act 1996 the arbitral tribunal clearly has power to award two kinds of orders:

1. Tribunal's directions in the form of an interim protection order and – in the case of non-compliance – a peremptory order;
2. A provisional award or order.

2.1.3.2.1 Arbitral Tribunal Directions (Interim Protection Order)[333] to Preserve Dispute Evidence

The 1996 Act has dropped all technicalities used in earlier legislation, which may have led to some misunderstanding among arbitration users.[334] One of these dropped technicalities

[333] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) 191.

[334] DAC Report 1996 para 1.

is the term 'interim order'.[335] The 1996 Act does not use the term 'interim order' probably to prevent any potential confusion regarding the meaning and function of this term and the term 'provisional award' (order). Instead, it has used the terms 'directions' or 'orders.'[336] In spite of this, some jurists use the term 'interim order' to refer to tribunal directions or orders.[337]

In ss.34 and 38 the 1996 Act has further organized all evidential matters whether related to documents, witness testimony or property. Section 34[338] generally addresses all procedural and evidential matters in the arbitration. Hence, it does not deal directly with preservation of evidence measures even though it organizes a number of its topics. This section mostly addresses the tribunal's power to conduct the arbitration proceedings, e.g. the tribunal's decisions on which documents or classes of documents should be disclosed between parties,[339] on the admissibility, relevance, and weight of evidence or whether the submissions should be written or oral. Section 34(2)(b) also empowers the tribunal to determine the language of the arbitral proceedings.

Obviously, s.34 regulates the tribunal's power to manage arbitration procedures.[340] The tribunal's power in this regard is not absolute and is restricted by s. 33 which lays down

[335] David ST. John Sutton, Judith Gill, *Russell on Arbitration*, (22nd edn, Sweet & Maxwell, 2003) para.5-095, p.186, Jean-Franðcois Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) 633.

[336] DAC Report 1996 para 1(3).

[337] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 186, Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 7-24.

[338] Section 34 is equivalent to Rule 28 of the Scottish Act.

[339] Section 34(2)(d).

[340] See Rule 28 of the Scottish Act.

duties that should be respected by the tribunal during the arbitration process.[341] Though it seems that s.34 deals with some evidential matters, it clearly has no direct connection with preservation of evidence as a provisional measure.

Section 38 of the 1996 Act is the cornerstone of the subject of preservation of evidence, as it is equivalent to Article 17 of the UNCITRAL Model Law 1985.[342] This section covers most conservatory and protective measures such as preservation of evidence (s.38 (6)) and security for costs (s. 38(3)). Section 38(4) (a) and (b) cover all property preservation measures such as goods, sites or land, electronic devices, documents and the like. The arbitral tribunal may, accordingly, direct that goods and vessels be taken into custody, that sites or land be inspected, that samples or photographs be taken, or that observations or experiments be carried out in relation to any kinds of property or evidence.

In addition, s.38 (6) empowers the arbitral tribunal to direct the parties to take any measures for preservation purposes (interim protection orders)[343] for evidence in their custody or control. Under s.38 (5) the tribunal may also direct parties or witnesses testify

[341] Section 33 states;

(1) The tribunal shall-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2)The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

[342] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: a commentary,* (Blackwell Science, 2006) 157.

[343] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) 191, David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 186.

under oath or affirmation.[344] Nonetheless, if a witness refuses to appear before the tribunal or to produce any documents or material in his possession, a party may under s. 43, with the permission of the tribunal or the agreement of the other parties, request from the court to secure the attendance of the witness to give oral testimony or produce any documents other evidence under his control.[345]

2.1.3.2.1.1 *Mareva* Injunctions and *Anton Piller* Relief under Section 38

May the arbitral tribunal under s.38 issue freezing injunctions *(Mareva injunctions)* or search orders (*Anton Piller* relief) [346] seeking to preserve evidence, especially evidence in the form of property? The answer is simply "no".[347] The arbitral tribunal under s.38 can neither issue a *Mareva Injunction* [348] nor *Anton Piller* relief, whether for preservation purposes or any other

[344] Some authors suggest that, the arbitrators should arm themselves with the necessary equipment for the taking of an oath, like the New Testament, the Bible, and the Holy Koran. See Margaret Rutherford, John Sims, *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London, 1996) 139. But the taking of witness testimony under oath or affirmations is very rare in England; see David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 207.

[345] See *Emmott v Michael Wilson & Partners Ltd* – [2008] EWCA Civ 184, *Cetelem SA v Roust Holdings Ltd*, [2005] 1 C.L.C. 821.

[346] An *Anton Piller* order is an order allowing one party to search premises for the purpose of obtaining evidence in proceedings, see County Court Remedies Regulations 1991/1222 Explanatory Note, or an order requiring a party to permit another to come on to his property to carry out an inspection, see Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th edn, Sweet & Maxwell, 1998) 2. Or an order for preservation of evidence, see Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) footnote 9, 315.

[347] Mark Cato, *Arbitration Practice and Procedure; Interlocutory and Hearing Problems* (2nd edn, LLP London 1997) 940.

[348] See s.44(2)(e.)

objective, even though the parties have agreed to transfer this power to the tribunal.[349] The DAC Report has confirmed this, when it said that "These Draconian powers are best left to be applied by the Courts, and the provisions of the Bill with respect to such powers have been adjusted accordingly."[350] Thus, such remedies are exclusively within the power of the court. However, with all due respect to the DAC, it seems to the author that the arbitral tribunal's power under s.38 is broadly enough drawn to encompass *Mareva* injunctions and *Anton Piller* relief.

2.1.3.2.1.1.1 Mareva Injunction

Section 38 might include power to issue *Mareva* injunctions for a number of reasons. Firstly, the logic used to justify giving power to the tribunal to take any measures and exercise any power in arbitration proceedings is the principle of party autonomy.[351] Section 38(1) stipulates that 'the parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.' So any restriction on the powers which may be conferred by the parties undermines the principle of party autonomy, and may circumvent the parties' agreement, especially if they have agreed expressly to confer such power on the tribunal. A corollary to this principle is that the arbitral tribunal should be empowered to issue *Mareva* injunctions when the parties so agree, and lack such power in the absence of such agreement,[352] like the power to make provisional awards under s.39(4). According to Lord Mustill,

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[349] Robert Merkin, *Arbitration Law* (Lloyd's of London Press LTD 2001) para 12.53(c); Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) 330.

[350] DAC Report 1996 para 201.

[351] See s.1(b) and the DAC Report 1996, para 19.

[352] Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th edn, Sweet & Maxwell, 1998).166.

> Unfortunately the passage in the DAC Report of February 1996 paragraphs 201-203 does not make it clear whether or not it was intended that these powers should be excluded altogether or whether they were to be excluded unless the parties agreed that the tribunal should have the power to order them.[353]

The DAC Report states in Paragraphs 215 and 216 that

> we have stipulated that except in cases of urgency with regard to the preservation of assets or evidence, the Court can only act with the agreement of the parties or the permission of the tribunal" [354]and "… if a given power could possibly be exercised by a tribunal, then it should be, and parties should not be allowed to make unilateral applications to the Court.[355]

Secondly, gathering all provisional measures in the arbitral tribunal's rather than the court's hands would better preserve the confidentiality of arbitration proceedings, as a jurist states that "confidentiality would typically be lost when a party turns to a court of law".[356] This would also accelerate the arbitration process and increase the effectiveness of the arbitral award due to the bilateral protection of evidence.[357]

Thirdly, while Lord Mustill believes that the granting of a *Mareva* injunction is not within a tribunal's power, but nonetheless admits that a *Mareva* injunction is always followed by further orders, judgment, or execution, and is designed to aid the execution of the final

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[353] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) 315.

[354] DAC Report 1996 para 215.

[355] Ibid para 216.

[356] See Kaj Hobér, '*The Trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim*' in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004, Bejing 12 (Kluwer Law International, 2005) 274

[357] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd*, [2004] 2 Lloyd's Rep 438.

award.[358] So, if a *Mareva* injunction is not final,[359] and if its main characteristic is that it is followed by a further order, why should the tribunal be unable to grant it?

Lord Bingham in *Fourie v Le Roux* stated that;

> Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign'[360]

It seems there is no major difference between a freezing injunction and a number of measures that have the same aims.[361] A freezing injunction is an order that restrains one of the parties to the arbitration from disposing of or dealing with his assets.[362] This prohibition may extend to all his assets or be confined to some of them.[363] Custody or detention orders do the same job. They deprive a party from his right to dispose of or deal with some of his property. Freezing injunctions and detention or custody orders share another common feature in that both measures are followed by a further order or decision. Custody orders may appear stricter

[358] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Companion Butterworths, London and Edinburgh, 2001) 330-331.

[359] Ibid.

[360] *Fourie v Le Roux* [2007] 1 All E.R. (Comm) 571 at 575.

[361] *Cretanor Maritime Co Ltd v Irish Marine Management Ltd, The Cretan Harmony*, [1978] 1 W.L.R. 966; *Iraqi Ministry of Defence v Arcepey* [1981] Q.B. 65; *Technocrats International Inc v Fredic Limited* [2004] EWHC 2674 (QB) In the latter case Jack J stated at [13] "It stands as security simply against the risk that the defendant may remove or dissipate his assets. For if a sufficient sum is in court, or otherwise stands as security in that sense, the danger of the claimant being unable to satisfy his judgment because assets have been removed from the jurisdiction or dissipated within the jurisdiction has gone".

[362] Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th edn, Sweet & Maxwell, 1998) 13.

[363] *Mayor and Burgesses of the London Borough of Lambeth v Clarke and others,* Court of Appeal (Civil Division), [Official Transcripts (1990-1997)] 22 December 1993.

than freezing injunctions as the former keeps property out of a party's possession [364] while the latter allows a party to retain possession of property [365] and indeed may be substituted by providing security of equal value,[366] although this of course does not include any property that constitutes evidence.

Thus if an arbitral tribunal has power to grant some measures that share key features with the freezing injunction, why then can it not grant that measure? In addition, freezing injunctions are sometimes used for preservation purposes and the tribunal is already empowered to take such measures.[367]

Fourthly, the Court of Appeal in *Kastner v Janson* did not deny the tribunal's power to issue a freezing order and refrained from commenting on its ability to do so.[368]If the Court of Appeal had believed that the tribunal had no power to issue freezing injunctions, should have revoked tribunal's order. Since it did not do this, the court must then believe under the party autonomy principle the tribunal may be empowered by the agreement of the parties to grant any provisional remedies, including freezing injunctions. Rix opined that:

> [I]n the absence of parties agreeing to confer such power on arbitrators, there would normally be no jurisdiction in an arbitration held under English law for the arbitrators to make a freezing order at an interim stage prior to a final award.[369]

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[364] *Burlington Resources Inc. and others V Republic of Ecuador* (2009) ICSID Case No. ARB/08/5 see <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1110_En&caseId=C300>

[365] *Cretanor Maritime Co Ltd v Irish Marine Management Ltd, The Cretan Harmony* [1978] 3 All E.R. 164; *Iraqi Ministry of Defence v Arcepey* [1981] Q.B. 65; *Technocrats International Inc v Fredic Limited* [2004] EWHC 2674 (QB).

[366] Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th edn, Sweet & Maxwell, 1998) 53.

[367] Lord Donaldson said in *Jet West Ltd v Haddican* [1992] 2 All E.R. 545 at 547 that 'The *Mareva injunction* was introduced in the 1970s because the courts held that they must necessarily have jurisdiction and did have jurisdiction to prevent parties to actions frustrating their orders by moving assets out of the jurisdiction, or dissipating assets in one way or another, with a view to making themselves proof against a future judgment'.

[368] *Kastner v Jason* [2004] EWCA Civ 1599 at para 15.

[369] Cited in Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa London 2008) 94.

He added that '[I]f the tribunal was empowered to grant freezing injunction, then the English law would strive to give effect to its orders.'

Fifthly, the tribunal is the original forum for seeking protective and preservative measures during arbitral proceedings, and court intervention in this regard should be minimized.[370]

In conclusion, it seems that the view of Professor Steven Gee that the arbitral tribunal under s.38 has power 'to preserve property which is the subject of proceedings or as to which any question arise'[371] should be followed. The arbitral tribunal should be empowered to grant any freezing injunction to preserve evidence [372] especially when the language used in s.38(1) is broad enough to carry this generous interpretation, and this injunction is normally suspended where a the security is provided by the claimant.[373]

2.1.3.2.1.1.2 Anton Piller Relief [374]

An *Anton Piller* order is an *ex parte* search order made to safeguard vital evidence needed to prove the claim.[375] Such an order is used to obtain evidence and information from a party's property by carrying out inspections, taking copies, photographs, or samples of it, and even

[370] English Arbitration Act 1996 s. 1(c), see also DAC Report 1996 para 20.

[371] Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th edn, Sweet & Maxwell, 1998) 71.

[372] Steven Gee, *Commercial Injunctions* (5th edn, London, Sweet & Maxwell, 2004) 166.

[373] Robert Merkin, *Arbitration Law* (Lloyd's of London Press LTD 2001) 12-48, see UNCITRAL Working Group II about the common features to the interim measures in international arbitration available at < http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V02/509/53/PDF/V0250953.pdf?OpenElement>

[374] *Anton Piller* relief is regulated by s.7 of the Civil Procedure Act 1997.

[375] Steven Gee, *Commercial Injunctions* (5th edn, London, Sweet & Maxwell, 2004) 29.

taking it away to safekeeping. Moreover, it extends to giving information about passwords to computer systems and electronic data.[376]

Section 38(4) gives the arbitral tribunal the power to take any measures related to property, whether related to evidential matters, 'inspection, taking samples'[377] or for preservation purposes 'custody or detention of property'. Hence, the granting of an *Anton Piller* order seems to be within the tribunal's power under s.38(4). However, there are two difficulties related to *Anton Piller* relief; one related to making such an order against a third party, and the other related to its *ex parte* nature.

It is universally acknowledged in the field of arbitration that a tribunal has no power over and cannot take any measures against someone who is not a party to the arbitration agreement derives no benefits or rights from it,[378] even when the third party possesses key property or holds evidence.[379] Therefore, if the tribunal wants to involve a third party in the proceedings, e.g. by taking his testimony or obtaining documents in his possession, it must ask the court to order the third party cooperate.[380]

Regarding an *ex parte* order, whether related to *Anton Piller* or not, this is a controversial topic in arbitration, especially in the area of provisional measures.[381] However, the *ex parte* feature of an *Anton Piller* order, is considered a very important element in achieving the preservation of evidence by surprising the party and preventing him from taking any action

[376] Steven Gee, *Commercial Injunctions* (5th edn, London, Sweet & Maxwell, 2004) 29.

[377] English Arbitration Act 1996 s. 38(4)(a)-(b).

[378] Contracts (Rights of Third Parties) Act 1999 s.1.

[379] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 266.

[380] English Arbitration Act 1996 s.43.

[381] Kaj Hobér (n 421) 272. Hans van Houtte. '*Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration'* (2004) 20(1) Arb Intl. 85.

that may destroy it. This feature – the element of surprise – is very important in evidential matters and urgent cases to secure evidence of the claim.[382] Why then should the arbitral tribunal not be able to take advantage of this?

In a similar context, the Working Group on the UNCITRAL Model Law II did not totally reject this idea, instead recommending that an extra precaution should be taken in exercising this power:

> A strong view was expressed that, given the *ex parte* nature of the order and the potentially serious negative impact on the party against whom such a measure was taken, it was important to include certain safeguards in the provision. Such safeguards might include the requirement that the party seeking such a measure should provide appropriate financial security to avoid frivolous claims and that such an order should only be made in exceptional or urgent circumstances.[383]

Although the UNCITRAL Model Law 2006 did not adopt the above view and did not allow the arbitral tribunal to grant *ex parte* interim measures, it recognized the arbitral tribunal's power to grant *ex parte* preliminary orders.[384] Article 17(b) of the UNCITRAL Model Law allows any of the arbitration parties to submit a dual application before the tribunal: an application for an *ex parte* preliminary order and a request for an interim measure.[385] The application should satisfy the whole conditions for granting interim measures in Article

[382] Buhler, W. Michael and Jarvin, Sigvard, '*The Arbitration Rules of the ICC'* para 15.884 in Weigand, Frank-Bernd (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press, 2009).

[383]Report of the Working Group on Arbitration on the work of its thirty-fourth session (New York, 21 May – 1 June 2001) A/CN.9/487.

available at < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/848/88/PDF/V0184888.pdf?OpenElement>

[384] UNCITRAL Model Law 2006 Article 17(b).

[385] Ibid.

17(A). The main distinction between preliminary orders and interim measures is that only an interim measure is subject to court enforcement.[386]

However, the enforceability of the tribunal's orders is not the question here, but the ability of the tribunal to make such orders. The Model law has answered this question and empowered it to take preliminary orders, specifically *ex parte* preliminary orders, but its application needs to expand to encompass *ex parte* interim measures. Therefore, the Court of Arbitration for Sport (the 'CAS') in Lausanne, Switzerland, conditionally adopted this view in Rule37 of its Arbitration Rules, allowing the arbitral tribunal to make *ex parte* orders in urgent cases:

> In case of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is heard subsequently.[387]

Additionally, the 1995 July draft of the English Arbitration Act 1996 adopted this view, allowing the arbitral tribunal to order *ex parte Mareva* Injunctions and *Anton Piller* relief.[388] It is true this view was dropped in the final draft, but the view seems to this author to be more consistent with the principle of party autonomy and s.38(1) of the Act. Lastly, it seems to this author that the same justifications that the author used to support the tribunal's power to issue freezing injunctions in arbitration disputes, especially those justifications related to principles of party autonomy, confidentiality of proceedings and the right of parties to confer such power to the arbitral tribunal,[389] are equally valid here in supporting its power to make *ex parte Anton Piller* orders.

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[386] UNCITRAL Model Law 2006 Article 17C(5).

[387] Rule 37 of the Court of Arbitration for Sport (the "CAS") in Lausanne, Switzerland, available at <http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.12.pdf>

[388] DAC Report Feb 1996 para 201.

[389] To Avoid repetition see these arguments under the heading Freezing Injunction under s.38.

In conclusion, s.38 should be applied and interpreted in the shadow of the principle of party autonomy, so as to allow the parties to agree on the tribunal's powers over them as long as it does not conflict with the public interest.[390]

2.1.3.2.1.2 Preservation of Evidence by the Tribunal's Peremptory Orders

The English Arbitration Act 1996 s.41 deals with the possibility of non-compliance by any of the parties by allowing the tribunal to issue a peremptory order [391] against any party who fails to comply with its directions.[392] Such failure could be inadvertent or deliberate, and the tribunal may act where the party concerned fails to show a sufficient cause for non-compliance.[393] However, the arbitral tribunal cannot resort directly to a peremptory order in the first place to deal with preservation of evidence. It needs first to make a direction or order against one of the parties and then find that this party continues to disobey its directions.[394] According to the DAC Report:

> It will be noted that a peremptory order must be 'to the same effect' as the preceding order which was disobeyed (subsection 5)). It could be quite unfair for an arbitrator to be able to make any type of peremptory order, on any matter, regardless of its connection with the default in question. [395]

[390] Section 1(b).

[391] Section 82(1) defines this as an order made under s. 41(5) or made in exercise of any corresponding power conferred by the parties.

[392] Section 41(5).

[393] Ibid Section 41(5), see Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 320.

[394] Keren Tweeddale, Andrew Tweeddale, *A practical approach to Arbitration Law* (Blackstone Press Limited 1999) 144.

[395] The DAC Report 1996 para 209.

If a party continues to defy the tribunal's directions even after being given a time limit within which to for comply,[396] the arbitral tribunal has two choices. Firstly, resort can be made to the court to enforce the relevant order under s.42. The court may act on an application by the tribunal itself or on an application by a party where the tribunal has given its permission, or where the parties have agreed the court should have this power.[397] The court must also be satisfied that the applicant has exhausted all the available arbitral remedies[398] and that the recalcitrant party has failed to comply with the tribunal's order within the time prescribed in the order (or within a reasonable time if the order prescribed no time limit).[399] If these conditions have been satisfied, the court may make an order requiring the non-compliant party to comply with tribunal's orders.[400] If the party does not obey the court order, he will be in contempt of court, and may be punished with a fine, sequestration of assets, or even a prison term.[401] According to the DAC Report in Paragraph 212:

> In our view there may well be circumstances where in the interests of justice, the fact that the Court has sanctions which in the nature of things cannot be given to arbitrators (e.g. committal to prison for contempt) will assist the proper functioning of the arbitral process.

[396] Section 41(5). In this regard some jurists suggest that the arbitral tribunal should indicate that its order is a peremptory order, or make reference to s.41(5), to thwart any attempt to hinder this order by claiming it is not peremptory. See Bruce Harris, Rowan Planterose. Jonathan Tecks, *The Arbitration Act 1996: a commentary* (Blackwell Science, 2006) 170-171.

[397] Section 42(2). The DAC Report para 212 said that 'Although in Clause 41 we have provided the tribunal with powers in relation to peremptory orders, it seemed to us that the Court should have power to order compliance with such orders.'

[398] Section 42(3).

[399] Section 42(4).

[400] Section 42(1).

[401] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 322.

However, if the peremptory order was for the security for costs and the party did not provide such security, the arbitral tribunal may make an award dismissing the claim.[402]

Secondly, in addition to the tribunal's power to resort to court to enforce its orders, the tribunal under s.41(7) has power to take a number of steps [403] to induce the reluctant party to comply with its directions. It could state that the party may not be entitled to rely upon any allegation or material which was the subject matter of the order, or draw adverse inferences from the act of non-compliance, proceed to issue its award by relying on the materials that have been provided to it, or make an order for payment costs incurred in consequence of the non-compliance.[404]

2.1.3.2.1.3 Preservation of Evidence by an Provisional Award or Order [405]

Section 39 of the 1996 Act creates via the provisional order system a kind of financial relief should this be required during the arbitration proceedings.[406] This is clearly shown in Paragraph 21 of the 1996 DAC Report:

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[402] Section 41(6). Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 320, David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 218. It seems that the 1996 Act intended to stop the proceedings at this stage to avoid any increase in the arbitration expenses.

[403] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 321. Section 41 is nearly equivalent to Article 25 of the UNCITRAL Model Law, Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: a commentary* (Blackwell Science, 2006) 171.

[404] These remedies are echoed in Rule 39(2) of the Arbitration (Scotland) Act 2010

[405] The heading of s.39 (Provisional Awards) is misleading and confuses orders and awards. Despite the DAC Report's warning to take care when using provisional relief tool, 'and enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice', the formulation of this section did not avoid this misconception. In any case the meaning of this section is well understood by English arbitration users. See Per Runeland and Gordon Blanke, *'On Provisional Measures in English Arbitration: A Brief Overview'* Chartered Institute of Arbitrators CIArb (2007) 73 Arbitration, Sweet & Maxwell, 196, Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer Law International 2003) 123.

> In The *Kostas Melas* [1981] 1 Lloyd's Rep. 18, 26, Goff J, as he then was, made clear that it was no part of an arbitrator's function to make temporary or provisional financial arrangements between the parties…We should note in passing that the July 1995 draft would arguably (and inadvertently) have allowed arbitrators to order ex parte Mareva or even Anton Piller relief. These Draconian powers are best left to be applied by the Courts, and the provisions of the Bill with respect to such powers have been adjusted accordingly".[407] "We envisage that this enlargement of the traditional jurisdiction of arbitrators could serve a very useful purpose, e.g. in trades and industries where cash-flow is of particular importance.[408]

The DAC Report illustrates that the system of provisional orders under s.39 has only been designed to address and govern 'financial arrangements' or organize 'cash-flow' requests. Therefore, s.39 regulates the maintenance of the *status quo* more than it does the preservation of evidence.[409] Furthermore, s.39(1) stipulates 'The tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.' The phrase 'grant in final award' and the reliefs set out in s.48 indicate that the final awards mostly deal with financial issues,[410] including damages, interest [411] and costs.[412] Moreover, s.39(2) confirms this view by giving two examples of a financial nature:

> (a) A provisional order for the payment of money or the disposition of property as between the parties, or

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[406] Robert Merkin stated that 'section 39 is intended typically to grant interim financial relief in order to preserve the claimant's cash flow in a case which he is ultimately bound to win' Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para16.6.

[407] DAC Report 1996 para 201.

[408] Ibid para 203.

[409] DAC Report 1996 para 203

[410] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 651.

[411] Section 49.

[412] Section 61.

(b) An order to make an interim payment on account of the costs of the arbitration

These examples clearly show that provisional orders aim merely to address the financial relationship between parties during the arbitration process. Therefore, only the arbitral tribunal under s.39 [413] can decide provisionally on financial affairs, and these reliefs would be subject to review in the final award.[414] Hence, s.39 does not regulate evidential matters or any other measures of a non-financial nature like freezing injunctions or search orders.[415]

It is worth noting that s.39 is not a default provision[416] but an '*opt in*' provision,[417] which means the arbitral tribunal has no power to take these measures unless the parties so empower it by written.[418] Without such agreement,[419] the tribunal has no such power.[420] The conclusion then is that the tribunal cannot make provisional orders to preserve evidence under s.39.

2.1.3.2.1.4 Preservation of Evidence under Section 48

Section 48 has lists the remedies[421] that the tribunal can grant in the award. Section 48 is just one of a number of sections grouped under the heading 'The Award'.[422] Therefore, the

[413] Lord Mustill stated that 'Section 39(2) refers only to three types of final relief… they are the payment of money, the disposition of property, and the award of costs', Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 315.

[414] Section 39(3).

[415] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 236.

[416] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 16.6.

[417] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 235.

[418]Section 39(4).

[419] Section 5(1).

[420] Section 39(4), Steven Gee, *Commercial Injunctions* (formerly Mareva Injunctions and Anton Piller Relief) (5th edn, Sweet & Maxwell, 2004)166.

[421] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 120.

remedies mentioned in s.48 do not cover the preservation of evidence or any other provisional measure.[423]

2.1.3.2.2 Court Power to Preserve Evidence in the English Arbitration Act 1996

Section 1(3) establishes the governing principle of court intervention in the English Arbitration Act in stating that *'in matters governed by this Part the court should not intervene except as provided by this Part.*' Generally intervention is only contemplated where it is necessary to assist arbitral tribunal to carry out its task. Court intervention in the arbitration process is addressed by ss.42- 44. These sections are:

42. Enforcement of Peremptory Orders of Tribunal

> (1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.
>
> (2) An application for an order under this section may be made-
>
> (a)by the tribunal (upon notice to the parties),
>
> (b)by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
>
> (c)where the parties have agreed that the powers of the court under this section shall be available.
>
> (3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.
>
> (4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.
>
> (5) The leave of the court is required for any appeal from a decision of the court under this section.

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[422] Lord Mustill, Stewart C. Boyd *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 315.

[423] Lord Mustill stated that 'Section 48 is not intended to deal with procedural powers, which are dealt with elsewhere, in the group of sections headed 'The Arbitral Proceedings'.Ibid. 330.

43. Securing the Attendance of Witnesses

(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if-

(a)the witness is in the United Kingdom, and

(b)the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

44. Court Power Exercisable in Support of Arbitral Proceedings

For the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are-

(a)the taking of the evidence of witnesses

(b)the preservation of evidence

(c)making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-

(i)for the inspection, photographing, preservation, custody or detention of the property, or

(ii)ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration

(d)the sale of any goods the subject of the proceedings

(e)the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

It is obvious that court intervention in arbitration proceedings is subject to conditions that should be fulfilled to justify it, whether or not this intervention is for preservation purposes.

2.1.3.2.2.1 Conditions for Court Intervention in Arbitration Proceedings

Court intervention in arbitration proceedings takes place in either of two cases: a non-urgent case when the tribunal cannot act effectively or needs the court's assistance to enforce its orders [424] and an urgent case that needs immediate action. The preconditions for court intervention vary from one case to another.

2.1.3.2.2.1.1 Court Intervention in Non-urgent Cases

Notwithstanding that the arbitral tribunal is the original forum for arbitration parties to seek any protective measures, there are many cases that need court intervention to render the tribunal's decisions effective, or where the court requires take some measures that the tribunal cannot take because it has not yet been constituted or because these measures are against a third party. Section 42 addresses one of the non-urgent cases. It is titled 'Enforcement of Peremptory Orders of Tribunal', which means that court intervention would give effectiveness to the tribunal's peremptory orders by giving and vesting them

[424] DAC Report 1996 para 215, Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 106, Lord Mustill, Stewart C. Boyd *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 324.

with the same authority as courts orders. In addition, it makes non-compliance with these orders a contempt of court.[425] Therefore, the court may impose sanctions on a recalcitrant party including fines or even imprisonment. To activate court intervention under this section, a party 'or the tribunal' should submit an application to the court in the form prescribed by the Civil Procedures Rules (CPR), Practice Direction (PD) 49G – Arbitrations.[426]

Section 43 of the Act addresses a key evidential matter, namely, the ability of parties to use the court to secure witnesses' attendance to present their affidavits or to disclose any documents or materials in their possessions. These procedures are set out in CPR Part 34[427] as applied by CPR PD 62,[428] and Order 38 Rule19 of the Rules of the Supreme Court that regulates the duration of subpoenas.[429]

Even though witness video-conferencing is commonly used to collect witness affidavits, it is not clear under CPR Part 34 whether or not the court can adopt it.[430] According to Professor R. Merkin 'The better view is that the court's power to order a witness to be

[425] See earlier Chapter 2 para 2.1.3.2.1.2. See Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (Blackwell Science, 2006) 172-173; Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 322.

[426] This Practice Direction (PD) Supplements CPR Part 49 and replace, with modification, Order 73 of the Rules of the Supreme Court.

[427] Available at < http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part34.htm#IDAKS0HC>

[428] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 103.

[429] Available at < http://app.supremecourt.gov.sg/data/doc/ManageHighlights/366/Rules%20of%20Court%202006%20Rev%20Ed.pdf>

[430] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008)104.

examined by VCF (video-conference) is available under section 44(2).'[431] However, in court proceedings, only the court determines what is the right way and proper place to take a witness's statements (before the judge or elsewhere, by cross-examination or video-conference).[432] Section 43(4) makes clear that the court shall not compel any prospective witnesses to produce any document or other evidential materials which he would not be compelled to produce in legal proceedings, thus preserving the rules of privilege and confidentiality.[433]

Most provisions regulating court intervention are laid down by s.44, coverings most instances where court intervention in the arbitration process may be needed. Section 44(2)(a)-(b) cover all kinds of preservation of evidence areas - witness testimony, documentary evidence and search orders. Section 44(2)(c) covers orders related to property - inspection, custody, detention, and taking samples. Section 44(2)(d) covers the sale of goods, and s.44(2)(e) covers the granting of interim injunctions (including freezing injunctions) and the appointment of receivers.

The court's powers in s.44 are wider than the tribunal's powers in s.38, being almost equivalent to the power in Rule 25.1(1) of the CPR and associated Practice Directions.[434]

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[431] [431] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008)104.

[432] CPR, PD rule 34.8.

[433] CPR, PD, rule 34.2(5)

[434] Rule 25.1 of the CPR covers all kind of interim measures that the court may issue in civil proceedings. R.25.1 states (Orders for interim remedies)

(1) The court may grant the following interim remedies –

(a) an interim injunction(GL);

(b) an interim declaration;

(c) an order –

(i) for the detention, custody or preservation of relevant property;

(ii) for the inspection of relevant property;

However, it is obvious that ss.38 and 44 work together. Therefore, parties are obliged to resort to a court in some instances measures and to a tribunal in others. Some measures lie within the exclusive province of the tribunal, e.g. security for costs order under s.38(3), while others lie within the exclusive province of the court, e.g. orders for sale of goods

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(iii) for the taking of a sample of relevant property;

(iv) for the carrying out of an experiment on or with relevant property;

(v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and

(vi) for the payment of income from relevant property until a claim is decided;

(d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);

(e) an order under section 4 of the Torts (Interference with Goods) Act 19771 to deliver up goods;

(f) an order (referred to as a 'freezing injunction(GL)') –

(i) restraining a party from removing from the jurisdiction assets located there; or

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction(GL);

(h) an order (referred to as a 'search order') under section 7 of the Civil Procedure Act 19972 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.);

(i) an order under section 33 of the Supreme Court Act 19813 or section 52 of the County Courts Act 19844 (order for disclosure of documents or inspection of property before a claim has been made);

(j) an order under section 34 of the Supreme Court Act 19815 or section 53 of the County Courts Act 19846 (order in certain proceedings for disclosure of documents or inspection of property against a non-party);

(k) an order (referred to as an order for interim payment) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;

(l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;

(m) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;

(n) an order directing a party to prepare and file accounts relating to the dispute;

(o) an order directing any account to be taken or inquiry to be made by the court; and

(p) an order under Article 9 of Council Directive (EC) 2004/48 on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees).

(Rule 34.2 provides for the court to issue a witness summons requiring a witness to produce documents to the court at the hearing or on such date as the court may direct)

under s.44(2)(d) or the appointment of a receiver under s.44(2)(e).[435] It is noteworthy that the court's power under s.25 of the Civil Jurisdiction and Judgements Act 1982 has no application to foreign arbitrations.[436] Hence, arbitration proceedings and the powers of both tribunals and courts relating thereto are regulated by the English Arbitration Act 1996. This can be contrasted with Egyptian Law, under which arbitration proceedings are regulated by several laws,[437] thus weakening the arbitration process, and leading to contradictory judgments.[438]

2.1.3.2.2.1.1.1 Conditions for Court Intervention in Non-urgent Cases

Sections 42, 43, and 44 tend to agree on certain conditions that should be satisfied before the court can act:

- The absence of agreement preventing court intervention (Sections 42 and 44);
- The arbitral tribunal requesting action or permitting an application for it;
- Written agreement of parties allowing court intervention.

2.1.3.2.2.1.1.1.1 Absence of Agreement to Prevent Court Intervention

Sections 42 and 44 of the Act are non-mandatory, which means parties can agree to exclude them and thus the court's power to intervene under those provisions.[439] Section 43,

[435] See CPR, r 25.1(1)(c)(v).

[436] *ETI Euro Telecom International NV v Republic of Bolivia and another*, [2008] EWCA Civ 880. See Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 107.

[437] Evidence Law, Civil Procedure Law, and Arbitration Law.

[438] See appeal No 1975 for the year 66 BC. On December 12 of 1996.

[439] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (Blackwell Science, 2006) 179.

however, is a mandatory provision [440] and arbitration parties cannot exclude or modify court's power under it.

2.1.3.2.2.1.1.1.2 Arbitral Tribunal's Permission or Request

In order to secure appropriate arbitration proceedings being carried out, ss.42(2)(b), 43(2), and 44(4) require prior permission from the tribunal before a party may have recourse to the court. The DAC Report shows the reason behind this in Paragraph 213:

> The reason for this is to make sure that this procedure is not used to override any procedural method adopted by the tribunal, or agreed by the parties, for the arbitration. Thus, for example, if the tribunal has decided that there shall be no oral evidence, then (unless all parties agree otherwise) this procedure cannot be used to get round that decision.

Therefore, the party should refer to the tribunal's permission in his application, under CPR, PD 49G, and should give notice to the other party of its application; otherwise, the application will not proceed.[441] Where the tribunal itself asks the court to enforce its order, the tribunal should give the parties notice of the application.[442]

[440] Section 4(1) and Schedule 1.

[441] Section 42(2)(b). Keren Tweeddale, Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press Limited, 1999) 229.

[442] Section 42(2)(a). See Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 102

2.1.3.2.2.1.1.1.3 Written Agreement of Parties Allowing Court Intervention

Under ss.42(2)(c), 43(2), and 44(4) the court can exercise its powers where the parties have conferred the authority to do so by written agreement.[443] This agreement will determine the extent of court power in such cases, so a party should refer to this agreement in the application. When the application, under CPR, PD 49G, fulfils this condition, the court may act. For example, if the application is made under Section 42, the court may issue an order requiring a party to comply with the tribunal's peremptory order. If the application is made under Section 43, the court may issue a witness summons. However, the court's support in arbitration proceedings should not constitute an interference in or usurpation of the arbitral process.[444]

2.1.3.2.2.1.2 Court Intervention in Urgent Cases

Section 44(3) stipulates 'If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.' Hence, in urgent cases, there are no preconditions for court intervention and even prior notification to the other party is not required. A court's power in emergency cases extends to responding to applications, whether *ex parte* or *inter parties*.

[443] Section 5(1).

[444] DAC Report 1996 para 215.

Therefore, the court may take any necessary measures to preserve evidence or assets.[445] It may, for instance, issue an *ex parte* injunction preventing the transfer of money or vessels, issue a search order for documents, or appoint a receiver.[446] Toulson J in *Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd* the court stated that:

> Unless giving notice would be impossible or impracticable, e.g., because of the urgency of the situation, an application for an injunction should only be made without notice to the respondent in circumstances where it would be likely to defeat the purpose of seeking the injunction if forewarning were given.[447]

Moreover, under s.44(3) the court may, in connection with s.44(2), take any necessary measures whether or not related to preservation of evidence. Clarke LJ In *Cetelem SA v Roust Holdings Limited* observed that:

> It is also important to note that s 44(3) is not restricted to orders for the preservation of evidence or assets. Under the subsection "the court may . . . make such orders as it thinks necessary for the purpose of preserving evidence or assets". As I see it, the effect of subsection (3) is that the court may make any order which it could make under subsection (1) provided that it thinks that it is necessary for that purpose. It may thus make an order about any of the matters set out in subsection (2), provided that it is "necessary for the purpose of preserving evidence or assets.[448]

The court construction of s.44(3) in *Cetelem* is consistent with Article 9 of the UNCITRAL Model Law, which allows the court to take any interim measures of protection during or after the arbitration process.

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[445] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618.

[446] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 324; Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 111.

[447] *Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd* [2001] All ER (D) 416 (Oct) at para 70.

[448] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618 at para 49.

However, s.44(5) requires in all cases that the court should be satisfied that the arbitral tribunal is unable to act effectively or has no power to act.[449] Moreover, the CPR, PD r.62.4(1)(f) requires that the applicant must show that the case is urgent, requiring immediate action to preserve evidence or assets, and needs to specify the grounds of his claim.[450]

2.1.3.2.2.1.3 Revision of Court Orders by Arbitral Tribunal

Section 44(6) stipulates:

> If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

This provision shows clearly that the arbitral tribunal or any person empowered by the parties may terminate the effect of a court order, modify it, or even set them aside, if the court has so stipulated.[451] But can an arbitral tribunal terminate or modify an order without its leave? Does a tribunal have inherent power to terminate court orders when it is able to act? The answer to this question is important because it determines who is in charge of conducting the arbitration process. It also draws the line between court intervention to help the arbitral tribunal to do its job, and its intervention that may negatively affect the tribunal's power to manage proceedings.

The DAC Report in Paragraph 216 states that ‘The Court, after making an order, can in effect hand over to the tribunal the task of deciding whether or not that order should cease

[449] See *Pacific Maritime (Asia) Ltd v Holystone Overseas* Ltd [2007] EWHC 2319 (Comm).

[450] CPR, PD r 62.4(1)(f).

[451] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 112.

to have effect.'[452] According to Professor Robert Merkin, 'Section 44(6) is a novel power which allows the court to stipulate in any order made by it that the order may be varied or set aside by the arbitrators themselves.'[453] Lord Mustill maintains:

> 'In any case the court has power to order that its order shall cease to have effect in whole or in part on the order of the tribunal," and "The court is not empowered to usurp the functions of the agreed tribunal.'[454]

The foregoing texts suggest that the arbitral tribunal cannot modify or set aside the court's order unless the court so provides in its decision. Otherwise, the arbitral tribunal has no power or right to modify or set aside the court's order; even after its constitution or even if it can act effectively in the proceedings. It seems that this approach leads to unfortunate results. It prevents the arbitral tribunal from looking into a question that the court has already dealt with.[455] It further makes the tribunal's power to deal with a particular issue dependent on the court's permission. Such restrictions leave the tribunal's hands tied in the proceedings, which may constitute a breach of the arbitration agreement and the principle of party autonomy.[456]

Moreover, s. 44(5) makes court intervention in the arbitration process conditional on the absence of the tribunal or its inability to act effectively in the dispute. Lord Mustill maintains that the court "should only act where the tribunal's powers are absent or ineffective,"[457] which means the court only acts on behalf of the tribunal or during its

[452] DAC Report 1996 para 216.

[453] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008) 112.

[454] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 324.

[455] DAC Report 1996 para 19.

[456] Ibid para 216

[457] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 324.

absence. Thus, when the tribunal is constituted or can act effectively, court intervention should terminate and full power should return to the tribunal to deal with all matters, whether or not they have previously been dealt with by the court,[458] otherwise, the court's role in the arbitration process will usurp the tribunal's power.

Hence, it seems it is only appropriate to give the tribunal inherent power to review the court's orders, especially those relating to issues which arose before the existence of the tribunal. Of course, the tribunal would never have power to review orders relating to third parties.

In conclusion, the English Arbitration Act 1996 has carefully drawn the lines between the powers of the tribunal and the court regarding the preservation of evidence as a type of provisional measure. The English Act, like the Scottish Act, deals with such preservation whether by the tribunal [459] or the court [460] in detail. In addition, the Act has clearly takes the view that the provisional awards are designed only for financial relief. Preservation of evidence as a type of provisional measure in the English Act is characterized by two features. It features a clear provision that the tribunal has power to make a peremptory order as a kind of sanction against a non-compliant party, which order can be enforced by the court.[461] It also took a step towards giving the arbitral tribunal more control and independence during arbitration proceedings by giving it the right to review a court order (even if this is dependent the court's permission).[462]

[458] DAC Report 1996 para 216.

[459] Section 38(4).

[460] Section 44(2).

[461] Section 43(1).

[462]Section 44(6).

2.1.3.2.3 Appointment of Experts, Legal Adviser or Assessors in English Arbitration Act 1996

Section 37 of the Act addresses the tribunal's power to appoint experts, legal advisers, or assessors. It stipulates that:

> (1)Unless otherwise agreed by the parties- (a) the tribunal may-
>
> (i) Appoint experts or legal advisers to report to it and the parties, or
>
> (ii) Appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and
>
> (b) The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.
>
> (2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

Accordingly, the tribunal can, unless otherwise agreed by the parties, appoint an *expert*, legal adviser [463] or assessor 'a tribunal appointed expert' to report to it and the parties on any matters, whether relating to evidence or any technical issue outwith of the tribunal's expertise.[464] The parties should also have a reasonable opportunity to comment on this report. Therefore, the tribunal should deliver the report once it receives it, and should not conduct any meeting with the expert without the parties' attendance or consent.[465]

On the other hand, the parties may use their own experts to refute what has been mentioned in the tribunal-appointed expert report.[466] The tribunal under s.34 may decide how this

[463] *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co & Ors* [2000] 2 Lloyd's Rep. 83.

[464] See Article 26 of the UNCITRAL Model Law, Article 6 of the IBA Rules.

[465] A meeting between the tribunal and the expert in the absence of the parties may not constitute serious irregularity that allows the final award to be challenged, but it may inflame a difficult situation. See *How Engineering Services Limited v Lindner Ceilings Floors Partitions Plc* [1999] 2 All E.R. (Comm) 374, *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co & Ors* [2000] 2 Lloyd's Rep. 83, David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 209.

[466] See IBA Rules Article 5.

procedure should be done: by cross-examination or expert conferencing (hot tube), or by even by creating its own unique technique.[467] However, the appointment of experts in the English Arbitration Act does not properly belong to the system of provisional measures.

2.1.3.2.4 Conclusion

Based on the previous study, the best treatment of preservation of evidence as the first type of provisional measures can be found in the English and Scottish Arbitration Acts for the following reasons:

1. The English and Scottish Acts contain unambiguous provisions regulating preservation of evidence whether by the tribunal or by the court. The Egyptian Arbitration Act does not contain any separate provision dealing individually with this subject. Instead, it regulates provisional measures in only two Articles.
2. The English and Scottish Arbitration Acts address all the potential forms of evidence - property, documents, and witness testimony. They describe the tribunal's power over this evidence by giving many examples illustrating the power, e.g., inspection, photocopying, and custody. The Egyptian Arbitration Act does not contain any example or explanations. It only mentions the tribunal has power to take such measures without any further elucidation.
3. The court's role is well defined in the English and Scottish Acts in terms of cases, conditions, limitations on intervention, and the practical requirements for making application. Egyptian Law does not regulate court intervention in the Arbitration Law but in the Civil Procedure Law of 1968. This loophole has led to significant

[467] Alan Redfern, J.Martin H. Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 6-94.

confusion between the court's role in assisting the tribunal to do its job by applying arbitration law and its role to support it by applying the Civil Procedure Law. This has led to unacceptable results and judgments in arbitration in Egypt.[468]

The foregoing reasons show that a new prospective Egyptian law can plug all these loopholes by doing the following:

1. Adopt a new version of arbitration law that prevents any confusion between the various laws dealing with the preservation of evidence in arbitration proceedings, especially the Civil Procedure Law, Arbitration Law, and Evidence Law. In this regard, the new law could adopt the same approach used in the English and Scottish Acts that have mixed the philosophy of the UNCITRAL Model Law with their own judicial traditions. The Egyptian legislator could incorporate modern provisions from the UNCITRAL Model Law and the English and Scottish Acts, e.g. rules of confidentiality and interest, while at the same time retaining important authentic provisions of the Egyptian law, e.g. excluding any Rule that may contradict with Islamic Law (Shari' a).[469]
2. Modify the Egyptian Civil Procedures Law by adding provisions to govern evidential matters in arbitration disputes and making sure these provisions are connected to the new arbitration law regulating all arbitration matters. Such proposal should help facilitate the parties' recourse to the court without confusion the rules of civil procedure and arbitration law. It should further grant the court flexible powers to deal with arbitration issues and face any uncommon requests from arbitration parties.

[468] See Cairo Court of Cassation, appeal No 1975 for the year 66 BC, on December 12 of 1996.

[469] For example, Article 20 of the Saudi Arabia Arbitration Law 1983 refuses to enforce any arbitration award contradicts with the Islamic Law (Sharia).

Adopting these suggestions should, in the author's view, secure the ability of the tribunal to conduct arbitration proceedings in an effective manner by granting it independence from the courts. It should further increase the ability of arbitration parties to secure and preserve evidence by facilitating the procedures for courts to assist in the taking of provisional me

Chapter 3

3.1. Measures to maintain the *status quo* and prevent irreparable harm.[470]

Many arbitration rules and laws determine the time limit in which the arbitration process must be concluded, usually between six to twelve months.[471] To avoid any damage or loss that may happen during the process, rules may give the arbitral tribunal power to take interim measures to prevent any harm. These measures aim to preserve the *status quo* and prevent any irreparable damage to the parties' contractual rights,[472] or any aggravation of the dispute between them.[473]

These kinds of measures come in many shapes. Sometimes they come in the form of an order and affect the subject matter of the dispute. Sometimes they take the form of an injunction[474] affecting parties' right to dispose of property or act as they wish.[475] For example, the tribunal

[470] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 721. Some jurists calls this "Injunctions" see Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 208; Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 596.

[471] See New France Arbitration Law, Decree No.2011-48 of 13 Jan 2011Article 1463 (six months); Italian Code of Civil Procedure (Arbitration) Article 820 (two hundred and forty days); Egyptian Arbitration Law 27 of 1994 Article 45 and Article 37 of Jordan Arbitration Law 31 of 2001 (twelve months), ICC Arbitration Rules 2012 Article 30 (six months).

[472] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 596.

[473] ICC Interlocutory Award No. 10596, Yearbook of Commercial Arbitration, Vol. XXX (2005), 66-76; *French Construction Co v. Iranian Government Organization*, Partial Award, ICC Case No. 3896, 23 Dec 1982.

[474] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 208.

[475] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 596.

may give an order to safeguard goods, e.g. to take specific safety measures, to sell perishable goods or to appoint an administrator of assets, or store an asset for maintenance purposes.[476] In addition, it may order a party to deposit money in a bank account,[477] or order him not to obtain the value of a letter of guarantee, which threatens to lose his opponent money and aggravates the harm,[478] or not to dispose of property to preserve the *status quo*,[479] till the final award is rendered. In addition, the tribunal may order the continued performance of a contract during the arbitral proceedings e.g., ordering a contractor to continues construction work despite its claim that it is entitled to suspend this work.[480]

In the foregoing examples, the tribunal's orders have directly dealt with and affected the subject matter of the dispute, and the main types of these measures (sale, storage, deposit) may affect parties' rights to use this money or these goods.

An injunction is an order that prevents someone from acting in a particular way.[481] Injunctions may be used to prevent any action, which may threaten the *status quo*, and thus help secure the enforcement of the final award.[482] In addition, they are used to protect the arbitration process itself by preventing parties from taking steps that could violate the

[476] UNCITRAL Working Group on Arbitration, 32nd session, Vienna, 20-31 March 2000, para 63, available at < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/530/64/PDF/V0053064.pdf?OpenElement>

[477] *Sperry International Trade, Inc. v. Government of Israel,* (S.D.N.Y.1982) 532 F.Supp. 901.

[478] Buhler W. Michael and Jarvin, Sigvard, *'The Arbitration Rules of the ICC'* in Weigand, Frank-Bernd (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press, 2009) 15.876 .

[479] *Emilio Agustín Maffezini v Kingdom of Spain,* ICSID Case No. ARB/97/7 - Procedural Order No. 2, October 28, 1999.

[480] *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] 1 All E.R. 664.

[481] *Occidental Petroleum Corporation v Republic of Ecuador.* ICSID Case No. ARB/06/11, *Meiki Co. Ltd., Licensor (Japan) v Bucher-Guyer S.A., Licensee (Switzerland),* ICC Award No. 2114.

[482] *Kastner v Jason and others Sherman and another v Kastner* [2004] EWHC 592 (Ch).

arbitration agreement.[483] For example, the tribunal could order a party to continue paying the fees necessary to extend the validity of an intellectual property right. On the other hand, it could order him to stop using intellectual property for a specified period or until the final award is rendered.[484]

Thus, the arbitral tribunal aims by these measures to preserve the *status quo*, keeping the parties' rights stable and safe, by taking an appropriate step whether by preventing or ordering some action.

The UNCITRAL Model Law has emphasized the importance of preserving the *status quo* in Article 17(2)(a) and (b) which allow the arbitral tribunal to order a party to '(a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself'. In addition, Article 17(B) creates an analogous method to the interim measures system in order to preserve the *status quo* - the preliminary order system that may be requested without notice to any other party (*ex parte*).[485] Moreover, the parties may use this process at the same time as requesting interim measures.[486] However, interim measures that are used to preserve the *status quo* are still of vital importance in the arbitration field.

[483] Such as anti-suit injunctions, see Chapter 6.

[484] *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428-32; (Supreme Court of Queensland (Lee J.) 29 October 1993); see UNCITRAL Working Group on Arbitration, 32nd session, Vienna, 20-31 March 2000, para 63(b).

Available at < http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V00/501/85/PDF/V0050185.pdf?OpenElement>

[485] UNCITRAL Model Law 2006Article 17B(1).

[486] Schwartz, Ira M, *'Interim and Emergency Relief in Arbitration Proceedings'* (2008) 63 (1) Disp.Resol.J.58.

3.1.1. Measures to regulate the *status quo* and prevent irreparable harm in Egyptian Arbitration Law

3.1.1.1. The arbitral tribunal preserving the *status quo.*

Interim measures in Egyptian Arbitration Law 27 of 1994 are addressed by two provisions, Articles 14 and 24. The former stipulates:

> 'Upon request of either party to the arbitration, the court referred to in Article 9 may order the taking of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings'

While Article 24(1) stipulates:

> Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered

Neither Articles explains or defines the concept of interim measures in arbitration law.[487] However, Article 24 refers to the parties' agreement as a criterion to determine the extent of the tribunal's power regarding these measures. Article 24 is a default provision, so if the parties did not exclude or modify this Article, the arbitral tribunal's power will be very wide.

The arbitral tribunal in accordance with this Article has a wide discretion to take any measures to preserve the *status quo* and prevent any irreparable harm.[488] For instance, it might issue a freezing order over a party's assets preventing him from disposing of his

[487] Abdul Hamid El-Ahdab and Jalal El Ahdab, *Arbitration with the Arab countries* (Kluwer Law International 2011) 189.

[488] Ibid.

property.[489] Moreover, it can order continuance of production, the storage of goods in a warehouse, or their deposit with a third party.[490] Or it could order sub-contractors to continue construction works,[491] or the suppliers to continue to supply goods.[492] Furthermore, the tribunal may restrain a party from withdrawing or liquidating a letter of guarantee before the final award,[493] or may order him to stop licensing the use of intellectual property, or order non-disclosure of trade secrets.[494]

Some scholars argue that the arbitral tribunal under Article 24 has implied power to take any measures and does not need any prior agreement or permission from the parties to take such measures. Moreover, the tribunal can grant any measures it deems necessary from its own motion [495] as long as these measures do not invoke power of the state.[496] Yet the plain words of Article 24 contradict this view, as it is clear that the tribunal's power to take interim measures is an *opt-in* power, and it has no such power unless the parties so agree.[497] For this reason other Egyptian jurists prefer to stipulate clearly that the power to take provisional

[489] If this order is not heeded, it will need court intervention to be enforced, and there is some doubt as to whether the Egyptian courts would be prepared to enforce such an order.

[490] Abdul Hamid .R. Sayyid, *Arbitration Law 27 of 1994 in the Balance* (Dar El-Nahda El-Arabia, Cairo 2004) 65; Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 25-50.

[491] *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All E.R. 664.

[492] Alan Redfern, J.Martin H. Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para7-28.

[493] *Soares Da Costa Construction Company v Arab Company for Investment*, Cairo Court of Cassation, appeal No 1975 for the year 66 BC. On December 12 of 1996.

[494] M. E. I. Alam Eldin, *The Platform of International Commercial Arbitration III* (Cairo: Dar El-Nahda El-Arabia, 2000) 68-72.

[495] Abdul Hamid El-Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011) 189.

[496] Ibid.

[497] Abd El-Hamid R. Sayyid, *Arbitration Law 27 of 1994 in the Balance* (Dar El-Nahda El-Arabia, Cairo 2004) 68; Mukhtar Prairie, *International Commercial Arbitration* (Cairo: Dar El-Nahda El-Arabia, 2004) 175.

measures under Article 24 needs prior agreement, in the same way as s.39(4) of the English Arbitration Act.[498]

3.1.1.2. The court and preserving the *status quo*

Article 14 talks of the Article 9 courts taking an interim or conservatory measures in the arbitration. Article 9 confers jurisdiction on the Cairo Court of Appeal in international disputes, and confers jurisdiction on any Court of Appeal having original jurisdiction over the dispute in domestic arbitration. The Court of Appeal in this regard is bound to apply the provisions of the Civil Procedures Law. Article 45 of this law authorises the Court of Appeal, in the capacity of the urgent judge, to take any urgent measures whether before, during or after the arbitration process. Consequently, the Court of Appeal in arbitration disputes can take any measures to preserve the *status quo* or to prevent any irreparable harm. Therefore, the Court of Appeal under Article 45 of the ECPL can order, for example, freezing or sequestration order in relation the subject matter of the dispute,[499] or prevent the liquidation of a letter of guarantee. Furthermore, it can order the sale or storage of goods, or the cessation of licensing the use of intellectual property, etc.[500]

In order for the Court of Appeal to exercise its power, it should first ascertain that the parties' application has satisfied the claim that is required before the judge of urgent matters.[501] These

[498] Fathy Waly, *Arbitration Law in the Theory and Practice* (1st edn, Monshaa Al-Maa'ref, 2007) 402.

[499] Dubai Court of Cassation, appeals No. 91 of 1991 Hearing of 23/10/1993, mentioned in Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 31.

[500] It can also rely on Articles 115, 197, and 204 of Egyptian Intellectual Property Law 82 of 2002.

[501] ECPL Article 45, Fathi Waly, *Arbitration Law in the Theory and Practice* (1st edn, Dar. Monshaa Al-Maa'ref, 2007) 188.

are the existence of an urgent case and that the measure that requested is provisional.[502] Moreover, the court's power in this regard would depend on the way a party resorted to it. If the party raised a lawsuit, the court could exercise its power under Article 45 of the ECPL, which gives it wide powers to take any measure to preserve the *status quo*. If he presented a petition, the court's power would be restricted to the instances mentioned in Article 194 of the ECPL [503], and thus it could not, for example, order a party not to realise the value of a letter of credit or guarantee.[504]

3.1.1.2.1. Lawsuit

Article 45 of the ECPL gives the Court of Appeal, in its capacity as urgent judge, a general power by lawsuit to take any measures to preserve the *status quo* or to prevent any potential harm. The court, for instance, may order sale of perishable goods, freeze property, determine the custody or order the detention of a party's vessels in harbour, order the deposit of money in an escrow account, or stop the liquidation of a letter of guarantee.[505]

In addition to Article 45, there are many provisions in Egyptian laws, which confer such jurisdiction on the judge of urgent matters or on any authorized court. This means that the president of the Court of Appeal can rely on Article 45 or any other provision stipulated in Egyptian laws as a ground for any protective measure to be issued in the dispute. For example, Article 316 of the ECPL allows a creditor to request a freeze and the attachment of

[502] ECPL Article 45.

[503] See Chapter 2 para 2.1.1.2.1

[504] *Soares Da Costa Construction Company v Arab Company for Investment*, Appeal No 1975 for the year 66 BC. On December 12 of 1996.

[505] Ibid.

the debtor's assets in case of a threat to his rights.[506] Article 859(2) of the Civil Law No.131 of 1948 stipulates, 'In any case, the judge of urgent matters may order the execution of urgent repairs.'[507] Article 1119 of the same law stipulates that:

> [I]f the thing pledged appears to be in danger of perishing, deteriorating or diminishing in value, to such an extent that there is a danger that it will not suffice to secure the claim of the pledgee, and the pledger does not apply for the restitution of the thing in exchange for another thing, either the pledgee or the pledger may apply to the judge for authority to sell the thing pledged by public auction or at its value at the time on the stock exchange or on the market.[508]

The judge shall make an order for the deposit of the price, and in such a case, the creditor's right is transferred from the thing concerned to the money so deposited. In addition, Article 226 of the Egyptian Commercial and Maritime Law No. 17 of 1999 stipulates that 'the seller may by petition request from the judge of urgent matters permission to sell perishable stuffs if the buyer refused to accept that.' A party must refer in his application to court to the existence of the arbitral proceedings, or to the existence of the arbitration agreement if the issue arises before the commencement of such proceedings.

3.1.1.2.2. Petitions

Although the petition system is easier and quicker [509] than a lawsuit,[510] the provisions governing it are scattered across various branches of Egyptian law, such as Family Law, Civil

[506] Heba Badr Ahmed Al-Sadiq, *The Interim Protection in Arbitration; Comparative Study* (Ph.D Thesis, Ain Shams University, 2009) 83.

[507] Egyptian Civil Law No.131 of 1948 Article 852(2).

[508] Ibid Article 1119.

[509] Ahmed Melegy, *Orders on the Petitions and Orders of Performance* (Cairo: Dar El-Nahda El-Arabia, 2005) 89.

[510] See Chapter 2 para 2.1.1.2.1

Law, and Civil Procedure Law.[511] Therefore, resorting to a petition in order to preserve the *status quo* in arbitration is very exhausting and highly risky, as it requires detailed knowledge of Egyptian law to ascertain that the application would fall within those cases where petitions are competent.[512]

Egyptian laws deal with the petition system as an exceptional approach to be used in special cases. Hence, the power of the Court of Appeal, as a judge of urgent matters, is restricted to these limited cases. For example, a party cannot have recourse to a petition to request the court to stop the liquidation of a letter of guarantee, because it is not listed among the cases covered. Thus if the court wrongly grants a petition in such an instance, its judgment will be susceptible to annulment.[513] The difficulties attendant on petitions could drive arbitration parties away from petitions order, despite their simplicity, towards lawsuits, despite their complexity,[514] which may affect negatively on the arbitration process.[515]

In conclusion, the petition system in Egyptian Law, especially when related to arbitration, needs to be more flexible to correspond to the needs and nature of arbitration. In addition, the scope of the system should be expanded to cover any applications, while judges should be given a general power to grant any measures regardless of the form of the application that a party has used, as long as the arbitration agreement does not prevent this.

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[511] See for example, Article 182 (power to request a copy of the judgement) and Article 358 (on the appointment of an appraiser of jewellery).

[512] *Soares Da Costa Construction Company v Arab Company for Investment*, Cairo Court of Cassation, appeal No 1975 for the year 66 BC 12 December 1996.

[513] Ibid.

[514] Ahmed Melegy, *Orders on the Petitions and Orders of Performance* (Cairo: Dar El-Nahda El-Arabia, 2005) 89.

[515] Lawsuits before Egyptian courts take several years even in urgent cases, and this tends to undermine the arbitration process and costs a lot of money, see Ahmed Al-Sayyid Sawy, *The Arbitration According to the Egyptian law 27 of 1994 and the Systems of International Arbitration* (Dar El-Nahda El-Arabia, Cairo 2002) 22-24.

3.1.2. Measures to regulate the *status quo* and prevent irreparable harm in the Arbitration (Scotland) Act 2010

The arbitration agreement may indicate the types of interim measures that may be available during the proceedings.[516] However, in the absence of such agreement it is the procedural law of the arbitration that determines tribunal power regarding such measures. Certain such measures may aim to preserve the *status quo* in order to prevent any possible harm that occurs or happen during the arbitration.[517]

3.1.2.1. Preservation of the *status quo* by the arbitral tribunal

The contract between the arbitration parties generates many mutual obligations some of which must be carried out at a particular time, and sometimes of which need to be carried out on a continuing basis.[518] Rule 35 of the Arbitration (Scotland) Act 2010 gives the tribunal power to manage and protect parties' obligations and rights. The tribunal under term 'preserve' in this Rule can take interim measures such as providing for the custody of or detaining property.[519] Moreover, the tribunal can order that money be deposited in a bank account, that the licensing of intellectual property should cease, or that the liquidation of a letter of guarantee be stopped, as long as such property is involved in the dispute, and the measures taken are preservative in nature.

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[516] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 298.

[517] ICC Case No.3896 in Jarvine & Derains "*Collection of Arbitral Awards 1974- 1985"* 161; mentioned in Alan Redfern, J.Martin H. Hunter, et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 405, footnote 61.

[518] Ibid. 405.

[519] In the author's humble view, the tribunal's power embraces the issue of a freezing injunction.

However, some measures have not been mentioned in Rule 35, even though they are specified in other rules, like the power of the court to sell property under Rule 46(1)(b). This raises the question whether the measures available under Rule 35 are limited to those, which have been listed, or whether those listed are just examples, so that the powers of the arbitral are more extensive. For example, could the arbitral tribunal under Rule 35 grant an order directing a party to sell certain goods?

According to Rule 35(a), the arbitral tribunal can take any of the measures listed regarding property to preserve the *status quo*. For example, it can inspect, photograph, preserve, or take custody of land, vessels, sites etc. On the other hand, the sale of property is only mentioned explicitly in Rule 46, addressing the court's power in the arbitration proceedings. Imposing a literal interpretation approach, and based on the difference in the expressions used in the two rules, it would seem that the sale of property is a measure exclusive to the court and lies outwith the tribunal's power.

Yet it may be argued that a purposive interpretation approach should be adopted where it is more compatible with Paragraph 163 of the Policy of Memorandum, which states,

> One of the features of arbitration in Scotland will be an arbitrator's ability to make orders for the preservation etc. of property owned or possessed by a party as a protective measure pending the outcome of an arbitration and also for the purpose of being used as evidence during the proceedings…Rule 35 will promote the smooth running of the arbitral process because it will no longer be necessary for parties to go to court to obtain orders presently available from arbitrators.

Moreover, Professor Fraser Davidson comments,

> Recourse may be had to the court either when Rule 35 has been excluded or restricted, or when the property concerned is in the ownership or possession of a third party, since the power of the tribunal extends only to the parties.[520]

[520] Fraser Davidson, *Arbitration* (2nd edn, W Green 2012) 393.

Consequently, it is submitted that the arbitral tribunal should be empowered to give order to the party to sell property for the following reasons. Firstly, the Policy Memorandum[521] indicates that the tribunal has been given a wide power to take any protective measures in order to minimize the need for court intervention (known as a subsidiary principle of the court intervention).[522] Hence, saying that the arbitral tribunal is not empowered to order a party to sell property totally contradicts the words of Paragraph 163. Moreover, Paragraph 163 has equated the powers of the tribunal and the court in saying 'these are similar to the powers of the court', so any diminution in the tribunal's power would threaten this similarity. One Scottish legal institution sees that a great difficulty will be avoided if the provision in relation to "provisional award" could be expanded to encompass the sale of perishable goods.[523]

One may argue that empowering the tribunal to order the sale of property undermines the arbitral process if the power is inappropriately used. Therefore, the Scottish Act prefers to confine this power to the court in Rule 46(1) (b). Yet this author is not persuaded by this view. Rule 53 allows the tribunal to make a provisional award to order an interim payment, although this *"bold"* [524] step might well deprive the final award of effect, if the power was misused. Nevertheless, most arbitration rules and laws recognise the tribunal's right to take such a measure, even with the danger involved. The only thing that scholars call for in this regard is that special care should be taken when granting this relief.[525] Therefore, it seems to this author that granting the tribunal power to order the sale of property is no more dangerous

[521] Policy Memorandum para 163.

[522] Jean-Franðcois Poudret, Sebastien Besson *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) 513. This principle appears in Article 25 (3) of the LCIA Arbitration Rules.

[523] The Law Society of Scotland's Supplementary Memorandum of Evidence June 2009, para.19.

[524] Fraser Davidson, Hew R. Dundas, David Bartos, *(Scotland) Act 2010* (W.Green Thomson Reuters 2010) 258.

[525] Ibid.

than empowering it to order interim payment under Rule 53. Thus, what considerations would prevent the arbitral tribunal granting the former measure while allowing it to order interim payment?

Secondly, Rule 35 is equivalent to Article 17 of the UNCITRAL Model Law 2006, which covers most types of interim measure.[526] Article 17(2)(b) gives the tribunal broad authority to grant the parties the necessary means to maintain and preserve their assets by such steps as the sale of perishable goods.[527] Rule 35(a)(i) stipulates;

> The tribunal may direct a party (a) to allow the tribunal, an expert or another party (i) to inspect, photograph, preserve or take custody of any property which that party owns or possesses which is the subject of the arbitration'

The use of the term 'preserve' in Rule 35 could be construed in the light of Article 17 as allowing protection of the parties' assets, whether they are preserved in their original form (e.g. by depositing them with a third person), or preserved in the form of their value by selling them.[528] Consequently, the sale of property falls within the arbitral tribunal's power in under Rule 35 to preserve the *status quo* and the parties' assets.

Thirdly, Article 17(E)(1) of the UNCITRAL Model Law 'Provision of security' stipulates, 'The arbitral tribunal may require the party requesting an interim measure to provide

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[526] Ibid. 198; Hew R Dundas, Hew R Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into* Reality' (2010) 76 Arbitration 13.

[527] Marianne Roth, '*UNCITRAL Model Law on International Commercial Arbitration'* in Weigand, Frank-Bernd (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, OUP 2009) para 14.285.

[528] *United Technologies International, Inc. v. Islamic Republic of Iran,* Case No. 114, Dec. No. 53-114-3 (10 December, 1986) 13 Iran-U.S.C.T.R. 254.

appropriate security in connection with the measure.'[529] This Article assumes that the arbitral tribunal has power to request an applicant party to provide appropriate security as a guarantee to cover his opponent's loss, in case the final award went against him.[530]

Rule 64(1) 'Security for expenses' of Arbitration (Scotland) Act 2010 stipulates that:

> The tribunal may;
>
> (a) Order a party making a claim to provide security for the recoverable arbitration expenses or any part of them, and
>
> (b) If that order is not complied with, make an award dismissing any claim made by that party.

Hence, the arbitral tribunal, should it shrink from ordering the sale of goods, can under Rule 64 require a party to provide security to guarantee the recovery of the value of the goods. Some may argue that Rule64 just regulates 'Security for expenses', so that the requested security does not fall within its ambit. Yet Rule 59(c) defines 'arbitration expenses' as mentioned in Rule 64(1)(a) as 'the parties' legal and other expenses', hence, the arbitral tribunal's power under 'other expenses' would cover this kind of security.[531]

Moreover, the arbitral tribunal under Rule 31 has a wide power to make any directions deemed appropriate for the purposes of conducting the arbitration. Thus, by linking these rules we can infer that the tribunal can request a party to provide security as a guarantee to cover any damage or loss that might happen due to his request.[532]

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[529] See for example, Egyptian Arbitration Law Article 24 (1), German Arbitration Act 1998 Section 1041, Australian Commercial Arbitration Act 201 Division 3 (17) (E), Malaysian Arbitration Act, 2005 Article 19(2); ICC Arbitration Rules Article 31; ICSID Arbitration Rules Article 28.

[530] The Commission Report on the UNCITRAL Model Law stated that 'security covers not only the costs of such interim measure, but also any possible or foreseeable damage to a party', UN DOC A/40/17, para.165, available at < http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf>

[531] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 159.

[532] Commission Report, UN DOC A/40/17, para 185.

Fourthly, many arbitration disputes require special knowledge and skill among the arbitrators panel to understand the nature of the dispute and to reach to the proper decision.[533] Therefore, the possession by the arbitrators of specific qualifications and expertise, often-legal knowledge or a special knowledge in a particular field such as grain, are common conditions in arbitration laws and rules.[534] In such cases, the arbitrator will be the best-qualified person to make a right decision on the necessity for the sale of property. Moreover, arbitrators would have expertise in such matters as conditions, prices and sale proceedings, which would prevents any tampering with property by the parties, which expertise may not available to the court. Hence, the arbitral tribunal would be the most appropriate body to decide whether to grant such measures.

Fifthly, according to the Policy Memorandum the assumption is that the arbitral tribunal is the primary resource for any relief, rather than the court, which should only intervene in cases of urgency and when the tribunal is unable to act. Thus, the view that the arbitral tribunal has no power to order a party to sale the property makes the authority of the tribunal meaningless or at least incomplete. In addition, resorting to the court would threaten the principle of the confidentiality of arbitration mentioned in Rule 26.[535]

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[533] It has been suggested stated that it may be better for the parties to agree that each of them will appoint, say, an engineer or an economist and that the presiding arbitrator will be a lawyer - Redfern Alan. Hunter, Martin. et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 196.

[534] The Grain And Feed Trade Association (GAFTA) Arbitration Rules 2003 Article 3.7 stipulates that 'An arbitrator appointed under these Rules shall be a GAFTA Qualified Arbitrator. The Arbitration Law of The People's Republic of China Article 13 stipulates 'the arbitrator shall meet one of these conditions, should be knowledgeable on arbitration work, law, or be a lawyer or judge or one of who engaged with legal research or legal education'.

[535] Kaj Hobér, *'The Trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim'* in Van den Berg, Albert (ed), *New Horizons in International Commercial Arbitration and Beyond* (ICCA Congress Series, Kluwer Law International 2005, Bejing 2004) 274.

In conclusion, the foregoing arguments illustrate that the interim measures that have been mentioned in Rule 35 of the Act are surely just examples of what the arbitral tribunal can do regarding the sale of property falling within the tribunal's power. Therefore, on a purposive interpretation the arbitral tribunal's power extends to encompass the order for selling of any property as long as it is subject of the arbitration.

In this regard, Article 25(b) of the LCIA Arbitration Rules takes the same approach by stipulating "The Arbitral Tribunal shall have the power…to order the preservation, storage, sale, or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration."

However, alongside the arbitral tribunal the court may have the same or even a broader power to preserve the *status quo*.

3.1.2.2. Preservation of the *status quo* by the court

3.1.2.2.1. Sale of property order

Rule 46(1) of the Scottish Arbitration Act in a number of instances gives the court the same power as it has in civil proceedings. Therefore, the court's powers in preserving the *status quo* are undoubtedly wider than the tribunal's. The court can for example; order the sale of any property preserve its value even if was in the possession of a third party's hand.[536] In addition, the court can make an order securing any amount in dispute,[537] by ordering the

[536] See Rule 46(1)(b).

[537] See Rule 46(1)(c).

applicant party to provide caution for his claim or by lodging part or the whole of the disputed sum with the court.[538]

3.1.2.2.2. Warrants for arrestment or inhibition orders

The most powerful measure that the court can take to preserve the *status quo* is the warrant for arrestment or inhibition, which is known as diligence on the dependence. These kinds of warrants are normally used against the party who risk being insolvent [539] or who are likely to dispose of or disburden themselves of some or all of their assets.[540] The court's power here is very wide as it could grant this remedy *ex parte* [541] or suspend until the hearing.[542]

The effect of the warrant in preserving the *status quo* from the date of its registration.[543] Therefore, the pursuer, after this date is authorized to freeze all or some of the respondent's property to satisfy the outcome of the arbitration from it.[544] Therefore, any transactions involving the assets covered by the warrant for arrestment may be revoked in favour of the pursuer.

It is obvious that a warrant for an arrestment or inhibition order is very rigid, as it may freeze all the respondent's assets and prevents him from using them. Therefore, the respondent

[538] *Scottish Power Generation Ltd v British Energy Generation (UK) Ltd,* 2002 S.C. 517, *George Cohen, Sons & Company v. Jamieson & Paterson*, 1963 S.C. 289.

[539] Debtors (Scotland) Act 1987 s. 15E(2)(i).

[540] Section 15E(2)(ii).

[541] Section 15E(1).

[542] Section 15F(1).

[543] Bankruptcy and Diligence etc. (Scotland) Act 2007 s.149(1).

[544] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 230.

could apply to the court under s.15K(2) of the Debtors (Scotland) Act 1987 to recall the warrant or restrict it to certain assets, releasing the rest. In addition, s/he can request the court to allow to him to provide caution[545] such as a bond from insurance company to cover the alleged sum.[546] It is obvious that the warrant of arrestment is a kind of freezing order to preserve the *status quo* till the final award is rendered.

3.1.2.2.3. Interdict

In the same context, Rule 46(1)(f) gives the court a power to grant an interdict or interim interdict. An interdict is an order from the court prohibiting particular conduct.[547] This order preserves the *status quo* by preventing the respondent from taking any action could breach his obligations. Therefore, this order could be permanent or interim.[548] Nevertheless, in the scope of arbitration, the court is empowered only to issue an interim interdict since a permanent interdict would effectively adjudicate upon the subject of the dispute, which is within the exclusive power of the arbitral tribunal under Rule 49(b). Moreover, the court should bear in mind before granting an interdict where the balance of convenience between the arbitration parties lies.[549]

The role of the interim interdict is very important in preserving the *status quo*, as any breach of this order would amount to a contempt of court.

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[545] Debtors (Scotland) Act 1987, Section 15K(2)

[546] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 231.

[547] Stanley Scott Robinson, *The Law of Interdict* (London/ Edinburgh: Butterworth & Co 1987) 1.

[548] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 231.

[549] *WAC Ltd and others v. Whillock* [1990] IRLR 23.

3.1.2.2.4. Interim or permanent orders

Rule 46(1) (g) gives the court a wide power to make 'any other' interim or permanent order whether to preserve the *status quo* or for any other purpose. This is a *"catch-all"*[550] provision. Therefore, the court could easily ground any of its interim measures on this rule. This provision is equivalent to s.44(3) of the English Arbitration Act 1996, which gives the court the power to make any interim order it thinks necessary for preserving evidence or a party's assets.[551]

In conclusion, after considering the previous provisions, the court under Rule 46 has a very wide power to take any measures in arbitration disputes. Correspondingly, the arbitration party should be careful in using Rule 46, when applying for an interim measure. In this regard, Rule 46(1)(g) could be properly invoked if a party is uncertain of his case and cannot decide which provision is most suitable for his application. It is obvious that the Scottish Act 2010 has tended to favour of the court rather than the arbitral tribunal in helping to preserve the *status quo* contrary to our understanding of previous provisions.

3.1.3. Preserving the *status quo* in the English Arbitration Act 1996

The 1996 Act made parties' agreement the decisive element as regards the types of interim measures that can be made available in arbitration.[552] In the case of lack of agreement on this

[550] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 234.

[551] *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618.

[552] English Arbitration Act 1996 s.38(1).

question, the arbitral tribunal under the Act has a default power to take such measures.[553] However, what is this default power? The preservation of the *status quo* under the 1996 Act could be achieved by the arbitral tribunal or the court.

3.1.3.1. Preservation of the *status quo* by the arbitral tribunal.

Section 38 of the 1996 Act is quite similar to Rule35 of the Scottish Act and the expressions used are largely the same. Therefore, studying measures for the preservation of the *status quo* in the English Act will not go far from what has been addressed in relation to the Scottish Act.[554] Accordingly, the arbitral tribunal can take measures to preserve the *status quo* such as ordering a party to deposit money in an escrow bank account.[555] Regarding performance, the tribunal can order a contractor to continue construction works,[556] or order him to stop using the licensing the use of intellectual property,[557] or order a supplier to continue provide the products at the agreed time,[558] or order a party not to dispose of or alienate property or take it out of the tribunal's jurisdiction.[559] Regarding *Mareva* injunctions, it is submitted that the arbitral tribunal cannot take this measure to preserve the *status quo.*[560]

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[553] Section 38(2)-(6)

[554] See Preserving the *Status Quo* under Scottish Arbitration Act.

[555] *Sperry International Trade, Inc. v. Government of Israel,* (S.D.N.Y.1982) 532 F.Supp. 901.

[556] *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] 1 All ER 664.

[557] *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428-32; (Supreme Court of Queensland (Lee J.), 29 October 1993), see UNCITRAL Working Group on Arbitration, 32nd session, Vienna, 20-31 March 2000, para 63(b).

Available at < http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V00/501/85/PDF/V0050185.pdf?OpenElement>

[558] Alan Redfern, J.Martin H. Hunter, et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 405.

[559] *Emilio Agustín Maffezini v Kingdom of Spain,* ICSID Case No. ARB/97/7 - Procedural Order No. 2, October 28, 1999.

[560] To avoid repetition see the previous discussions of this subject under English Arbitration Act para. 2.1.3.2.1.1

It is worth mentioning that some scholars believe that the arbitral tribunal under s.38(3), 'security for costs', could demand security from the requesting party as a condition for granting interim measure of protection.[561] This view considers that the definition of costs under s.59 of the Act [562] is broad enough to cover security for this kind of cost.[563] This view is consistent with Article 17E(1) of the UNCITRAL Model Law 2006.

However, the DAC Report says nothing about the tribunal's powers in relation to preserving the *status quo's* as it was considered that possession of such powers was self-evident.[564] In addition, it says nothing about the question of whether the tribunal can order the sale of goods. This question has been addressed in relation to Rule 35 of the Scottish. Therefore, one should refer to that discussion to avoid the repetition since the points made seem equally applicable to the 1996 Act.[565]

3.1.3.2. Preservation of the *status quo* by the Court.

Section 44 of the 1996 Act gives the court a wide power to preserve the *status quo.* The most significant provisions in this regard are ss.44(2) and 44(3). Under these provisions, the court

[561] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 161.

[562]Section 59 stipulates;

(1) References in this Part to the costs of the arbitration are to- (a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63)

[563] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 161.

[564] DAC Report 1996 para 199.

[565] See above para 3.1.2.1.

can sell goods [566] and make custody or detention orders in relation to property whether in possession of the parties or a third party.[567] In addition, s. 44(2)(e) gives the court unlimited power [568] to issue *'Mareva'* injunctions,[569] anti-suit injunctions,[570] or interim injunctions [571] whether to preserve the *status quo* or to secure the arbitration outcome.[572] For example, it can take an injunction to stop a call for a performance bond [573] or letter of guarantee, stop the operation of an intellectual property or product distribution license,[574] or restraining a party from withdrawing equipment.[575]

However, *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [576] held that the court can, by virtue of s.44(3), issue an injunctions even if this is not otherwise authorised by s.44(2)(e), as long as the case is one of urgency. However, in the absence urgency the ability of the court to intervene in the arbitration procedures will depend on the parties' agreement or tribunal permission.[577]

[566]Section 44(2)(d).

[567] Section 44(2)(c)(i).

[568] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm).

[569] *Kastner v Jason* [2004] EWHC 592 (Ch).

[570] Robert Merkin, Louis Flannery, *Arbitration Act 1996* (4th edn, Informa, London 2008)107.

[571]Section 44(2)(e).

[572] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 354.

[573] *Permasteelisa Japan UK v Bouygesstroi*, [2007] All ER (D) 97 (Nov).

[574] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618.

[575] *LauritzenCool AB v Lady Navigation Inc*, [2004] EWHC 2607 (Comm).

[576] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm).

[577] Section 44(4).

3.1.4. Conclusion

After careful consideration of the subject of preserving the *status quo* under Egyptian, Scottish, and English law, it can be seen that the treatment of this subject under these systems suffers from some loopholes:

- Regarding the situation under Egyptian Law, whether the Arbitration Law or Civil Procedure Law, there are no separate provisions governing preservation of the *status quo* or describing the tribunal's power in this regard. Such ambiguity threatens the parties' contractual rights and even their assets during the arbitration process.
- Moreover, the generality of Article 24 of the Arbitration Law and the disorganization of provisions dedicated to preserving the *status quo* in the Civil Procedure Law may lead to contradictory interpretations, which may lead eventually to contradictory awards and judgments.[578]

In this regard, the Egyptian law should adopt new provisions regulating in a clear way the question of maintaining the parties' rights by preserving the *status quo*. It seems the adoption of the UNCITRAL Model Law 2006, especially Article 17, could be useful as a starting point.

Regarding the Scotland and England Arbitration Acts, the situation under these systems is more developed than the position in Egypt Law. Nonetheless:

- There is no explicit provision under these Acts regulates this point like Article 17(2)(a) of the UNCITRAL Model Law.
- Moreover, the exclusion of certain measures from the tribunal's power, e.g. power to order the sale of goods, may detract from its efficacy in preserving the *status quo*, and may encourage parties to divert from arbitration to the court.

[578] See *Soares Da Costa Construction Company v Arab Company for Investment*, Cairo Court of Cassation, appeal No 1975 for the year 66 BC on 12 December 1996.

Therefore, it would be proper to include in both laws a clear provision outlining the range of whole measures that may be used in preserving the *status quo*, without excluding any measures from the tribunal's power.

Chapter 4

4.1 Security for Costs Measure

4.1.1 Preamble

Arbitration, whether *ad hoc* or institutional, is a private mechanism that contains very complex procedures. It is a process encompassing many elements that work simultaneously, and its procedures are sometimes conducted in different countries. This, of course, consumes much time and money. The cost of an arbitration in some cases could exceed US$1 million, divided among fees of arbitrators; experts, witnesses, officers, interpreters, translators, the costs of travel and accommodation, the places of hearing, and many other administrative matters.[579] The traditions of arbitration practice indicate that the losing party is responsible for all arbitration costs,[580] so that and the successful party can retrieve his costs from his opponent.[581] Expenses arising from the successful bringing or defence of an arbitration claim [582] should be compensated [583] otherwise the party concerned will suffer an unjustified loss.

[579] Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para 9.88.

[580] Alastair Henderson, '*Security for Costs in Arbitration in Singapore'* (2011) 7 (1) A.I.A.J. 66.

[581] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) para 23-52.

[582] Wendy Miles and Duncan Speller, *'Security for costs in international arbitration – emerging consensus or continuing difference?'* (2007) European Arbitration Review, 32, available at < http://www.wilmerhale.com/files/Publication/64e9b608-aea1-4758-90f1-1b80cdfc14ce/Presentation/PublicationAttachment/017fec65-f865-492e-a576-213e563d47d2/Security_costs_internationalarbitration.pdf>

[583] Weixia Gu, *'Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 167.

Security for (legal) costs is often determined by the parties' agreement,[584] which may for example divide liability between them equally.[585] Alternatively, the parties may agree that each should take care of his own costs.[586]

However, in arbitration the claimant is usually the party responsible for providing security for costs whether to the court or the tribunal.[587] Nonetheless, if both parties submit a claim in the arbitration, both may seek security for costs, because each is both a claimant and defendant at the same time.[588] In addition, a third party may seek security for costs when he is joined as a party to the arbitration.[589] It is also the case that under some arbitration laws, the arbitral tribunal may make an award to dismiss the claim [590] if a party failed to comply with an order to provide security for costs. Alternatively, it may terminate the arbitration without prejudice to the parties' rights. [591]

[584] ICC Case No. 7289. Rev. arb. 2002, 1001.

[585] ICC Case No. 7289. Rev. arb. 2002, 1001. In this case, the court recognized the arbitral tribunal's power to oblige the respondent to pay half of the arbitration costs in advance, and held that 'the arbitration agreement implies an obligation of the parties to contribute equally to costs.

[586] Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 7-39.

[587] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 12.65, Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 307.

[588] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 12.65.

[589] Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International, 2012) 642.

[590] See for example, English Arbitration Act 1996 s.41(6).

[591] Jean-Franðcois Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) 512.

4.1.2 Security for Costs: Definition

Security for (legal) costs in basic legal language is a sum payable by a claimant as a condition of being permitted to continue with the proceedings.[592] In other words, it is a sum of money that should be furnished by the plaintiff when there is a reason to believe that s\he will be unable to pay the defendant's cost if ordered to do so.[593] These definitions illustrate that security for costs is a financial precondition for hearing the applicant's claim. Security for costs thus could be used to preclude or impede the claimant from submitting or continuing his claim, which could form a kind of denial of justice,[594] especially if the claimant faces financial problems and cannot comply with this condition.[595] For that reason, the countries that recognise the power to demand security for costs, in order to avoid any misuse of this measure by the defendant tend to set some conditions that should be satisfied before such an order is made.[596]

Hence, the tribunal or court should strike a balance between the defendant's right to request security for costs and the plaintiff's right to have access to justice. In *Re Unisoft Group Ltd (No 2)* [597], Sir Donald Nicholls noted that:

> In exercising its discretion, the court had to balance the threat that an impecunious company could put unfair pressure on a defendant against the wrong that would be caused to a company which was successful and should not have borne any costs at all'

[592] *Glafki Shipping Co SA v Pinios Shipping Co* No.1 (The Maira) [1982] 1 Lloyd's Rep. 257.

[593] P.H. Richards,L.B.Curzon, *Longman Dictionary of Law* (8th edn, Pearson Education 2011).

[594] Daniel Brawn, *'Security for Costs in England and Wales'* (2003) 6 (6) Int. A.L.R. 195.

[595] *Porzelack KG v Porzelack (UK) Ltd,* [1987] 1 All E.R. 1074.

[596] See for example the English Arbitration Act 1996 s.38(3)(a)-(b).

[597] *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 at 533

For example, the claimant's financial circumstances, such as impecuniosity or insolvency, should be taken into account when determining the application. Nonetheless,[598] the case of insolvency is not easy to prove since the main point is the inability of the claimant to repay the defendant's cost if he lost the claim. Thus, in *Bank Mellat v Helliniki Techniki SA*, Robert Goff L.J. felt that the evidence of insolvency offered fell short of establishing the basis for an order for security for costs and so agreed with the other members of the court in dismissing the appeal.'[599] Moreover, in *Porzelack KG v Porzelack (UK) Ltd*, Sir Nicolas Browne dismissed the application for security for costs observing that:

> I have little doubt that the plaintiff organisation would be unable to provide security for costs if I were to order it on this application. I also have little doubt that there may be great difficulty in recovering the costs against the plaintiff, not by reason of its residence in West Germany, but by reason of its lack of funds to meet the order…Weighing all these factors and all the circumstances of the case, subject to one point I do not think that it is right to grant security for costs.[600]

However, some scholars consider that the financial circumstance of the claimant and the availability of his assets within the tribunal's jurisdiction should be decisive elements in the response to security for costs applications.[601] Nonetheless, a security for costs order needs real facts to support it and, at the same time, justify the use of such power. Therefore, Lord Slynn of Hadley, in *Coppee-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd* opined that 'there must be other factors indicating that the justice of the case requires that security should be ordered.'[602]

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[598] Daniel Brawn, *'Security for Costs in England and Wales'* (2003) 6 (6) Int. A.L.R. 194.

[599] *Bank Mellat v Helliniki Techniki SA* [1984] Q.B. 291.

[600] *Porzelack KG v Porzelack (UK) Ltd,* [1987] 1 All E.R. 1074 at 1077

[601] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 159.

[602] *Coppee-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liquidation)* [1994] 2 All E.R. 449 at 471.

Since there are no universal standards governing security for costs applications, a few arbitration institutions have issued guidelines on security for costs. These guidelines contain a set of norms and criteria that the arbitral tribunal could take into account to help in deciding on applications.[603] These criteria may include, for example, a party's nationality or residence, financial circumstances and good (or bad) faith, while the timing of such an application may also be of significance.[604] Such norms that could be helpful to the arbitral tribunal when it considers such applications.

However, security for costs is a controversial subject,[605] as it is a double-edged sword,[606] since it may be a tool used to safeguard a party' rights, or a means of aborting the arbitration. Therefore, there are two views regarding this measure. The first believes that security for costs ensures the seriousness of any claim, prevents any evasive behaviour, and finally secures the rights of the parties.[607] Thus, the power to order that a party provides such security is recognised by such provisions as Article 17(2)(c) of the UNCITRAL Model Law 2006,[608] s.38(3) of the English Arbitration Act 1996, s.38 of the Swedish Arbitration Act of

[603] See for example, Chartered Institute of Arbitrators (CIArb) Guideline on Security for Costs, available at http://www.ciarb.org/information-and-resources/PracticeGuideline11.pdf

[604] Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International 2012) 649-651.

[605] Christopher Kee, *'International Arbitration and Security for Costs- A Brief Report on Two Developments'* (2006) 17 Am. Rev. Int'l Arb 280.

[606] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. para 364.

[607] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. para 377.

[608] The report of Working Group II stated that 'The Working Group agreed that security for costs was encompassed by the words "preserving assets out of which a subsequent award may be satisfied.' Report of Working Group *II (Arbitration and Conciliation)*, U.N. Commission on International Trade Law (UNCITRAL), 47th Sess., at U.N. Doc. A/CN.9/641 (2007), available at
< http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/870/53/PDF/V0787053.pdf?OpenElement>

1999,[609] Articles 182 and 183 of the Swiss Private International Law Act [610] and s.1041 of the German Arbitration Act of 1998. In institutional arbitration the power is also conferred by Article 25(1) (a) of the LCIA Arbitration Rules.[611]

On the other hand, many arbitration laws and rules are still reluctant to grant this power to the arbitral tribunal. This is because it is feared that measure might cause much delay in the arbitration process, increases its cost, and violates the confidentiality [612] and neutrality of arbitration.[613] Moreover, if a party has to resort to the court to obtain such a measure, he will need to expose a lot of documents and evidence to the court, which further threatens the confidentiality of the process. This view sees that this kind of measure as potentially hindering the arbitration process and shutting the door of the arbitration before the claimant.

4.1.3 Different Aspects for Security for Costs

The objective of security for costs is to protect the defendant by enabling him to recover his costs if he won the case.[614] It guards against the bad effects that could face the defendant if the losing claimant resisted meeting the costs by hiding his assets, or where his assets are

[609] This stipulates that the 'The arbitrators may request security for the compensation.'

[610] Bernhard Berger, '*Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law'* (2010) 28 (1) ASA Bulletin 9.

[611] The LCIA Arbitration Rules Article 25.2 stipulates 'The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate.'

[612] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. para 354.

[613] Weixia Gu, *'Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 177.

[614] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) para 23-52.

located beyond the jurisdiction of tribunal or court.[615] This measure is a kind of guarantee of protection following success in arbitration proceedings.[616] It may be expedient to consider the arguments for and against security for costs before examining how the issue is treated under Egyptian, English, and Scottish arbitration laws.

4.1.3.1 Objections and Answers on Security for Costs

Key characteristics of arbitration are the confidentiality of the proceedings and economical and speedy processes.[617] The author submits that ordering the provision of security for a party's legal costs is a good tool that protects parties from frivolous claims. Nevertheless, there are some arguments against the granting of such a measure. Therefore, this part will discuss these arguments in some detail.

The defects of security for costs, which could stifle the arbitration process, may be summarized as follows:

- It violates confidentiality of arbitration.
- It violates party's right to access justice.
- There are rarely clear rules or criteria governing the exercise of such power.
- It increases the cost of arbitration and thereby causes the loss of investment opportunities.

[615] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. para 314.

[616] Christopher. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 208-212.

[617] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. para 353.

4.1.3.1.1 Violation of Confidentiality

One of the most decisive grounds for granting security for costs is the inability of the claimant to pay the defendant's cost if the latter won the litigation.[618] To consider whether or not to grant an order, the tribunal may need to assess the claimant's financial circumstances,[619] and to do this it probably needs to analyse his financial situation and review the annual accounts of his business. These procedures may require this party to disclose highly confidential material [620] such as bank statements and the percentage of his share of a commercial market, to demonstrate whether or not he is insolvent or impecunious.[621]

Moreover, if a court is invited to enforce or review the arbitral tribunal's decision, this will violate the principle of confidentiality, as the documents that have been used to evaluate the claimant's financial circumstances will be exposed to the court.[622]

4.1.3.1.1.1 Answer

There is no doubt that the principle of confidentiality of arbitration proceedings is one of the most important characteristics of the arbitration system,[623] whether or not it has been mentioned explicitly in the arbitration agreement, since it is tacitly understood. Parker LJ in *Dolling-Baker v Merrett* held that:

> Although the [Arbitration] proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties

[618] Weixia Gu, *'Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 190.

[619] *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* [1987] 2 Lloyd's Rep 445.

[620] Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International 2012) 644.

[621] *Bank Mellat v Helliniki Techniki SA* [1984] Q.B. 291.

[622] Kaj Hobér, *'The Trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim'* in Van den Berg, Albert (ed), *New Horizons in International Commercial Arbitration and Beyond* (ICCA Congress Series, Kluwer Law International 2005, Bejing 2004) 274.

[623] Hong-Lin Yu, *'Duty of confidentiality: myth and reality'* (2012) 31 C.J.Q. 68.

> not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award—and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration—save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary just as it is in the case of the implied obligation of secrecy between banker and customer.[624]

Moreover, most recent arbitration laws and rules prescribe a duty of confidentiality in arbitration.[625] Such laws and rules look to protect any information or documents disclosed to the tribunal, and the tribunal is obliged to maintain the confidentiality of such materials.

Yet the possibility of violating confidentiality via a security for costs order is minimal, because it is a self-enforcing measure,[626] which, unlike many interim measures,[627] does not need court assistance to activate it. The plaintiff facing a security for costs order has only one option - to comply with the order and furnish the sum demanded - otherwise, the tribunal may make an award to dismissing his claim.[628]

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[624] *Dolling-Baker v Merret and others* [1991] 2 All E.R. 890 at 900

[625] See for example, Arbitration (Scotland) Act 2010 Rule 26; Portuguese Arbitration Law, N° 63/2011 Article 30(5); Dubai International Financial Centre (DIFC) Arbitration Law No.1 of 2008 Article 14; Spain's Consolidated Arbitration Law 2012 Article 24; UNCITRAL Arbitration Rules 2010 Article 34(5); Australian Centre for International Commercial Arbitration (ACICA) Article 18; Milan Chamber of Arbitration Rules 2010 (CEPANI) Article 8; Dubai International Arbitration Centre Rules 2007 (DIAC) Article 41(1); LCIA Arbitration Rules 1998 Article 30; Singapore International Arbitration Centre Rules 2007 (SIAC) Article 34.

[626] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 367.

[627] Weixia Gu, *'Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 167.

[628] See English Arbitration Act 1996 s.41(6).

Indeed, a security for costs order may help protect the confidentiality of arbitration parties, particularly the defendant, as it may mean that he need not disclose documents or other materials in defending a frivolous and unmeritorious claim.

4.1.3.1.2 Security for Costs and Access to Justice (Justice Denied)

It might be said that a claimant's right to a fair hearing should not depend on any conditions, particularly financial ones. A demand that a claimant provides security for costs might be said to constitute a kind of human rights violation [629] because it entails a deprivation of the claimant's right to access justice and thus sees justice denied.[630]

Is it right that, if the claimant cannot comply with the tribunal's order, the claim should be dismissed, or indeed that the right to submit the claim again should be forever lost? [631] The defendant may use this means to abort the arbitration process,[632] especially if acts in bad faith in the knowledge that the claimant is suffering from financial problems, or is a small or new company that cannot respond to the tribunal's order.[633] This approach could well undermine the arbitration system as an instrument for dispute resolution, or at least render it a private tool for resolving huge commercial disputes between multi-national firms.[634] Moreover, the

[629] Alastair Henderson, *'Security for Costs in Arbitration in Singapore'* (2011) 7(1) A I A J. 70.

[630] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 362.

[631] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 12.72.

[632] Sir Nicolas Browne in *Porzelack KG v Porzelack (UK) Ltd* observed that 'I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings' [1987] 1 All E.R. 1074 at 1080

[633] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 191.

[634] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 373; Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 191.

tribunal's consideration of the strength of a claim prior to any hearing [635] may lead it to reach an initial opinion against one party without any real examination of merits, which arguably violates its duty to act fairly and impartially towards all parties.[636]

4.1.3.1.2.1 The Answer

An individual's right to access justice is, no doubt, one of the most important principles in law, which is indeed recognized by leading international treaties.[637] Nevertheless, there should be some instrument that prevents the misuse of the right of access to justice by bringing frivolous or nuisance claims,[638] which may leave a defendant unfairly out of pocket.[639] This tool is the security for costs order. A security for costs order serves the laudable aim of protecting both parties by guaranteeing a fair and just hearing for them. It is only fair that a claimant should show his ability and willingness to pay his opponent's costs if he loses the claim. There need be no prescribed form for the security. It might be a bond, a bank guarantees a payment into escrow account [640] or even take the form of a cautionary obligation.[641]

Moreover, in certain jurisdictions the inability of a claimant to provide security for costs will not be a sufficient ground to dismiss his claim in all cases. Kerr L.J. in *Bank Mellat v.*

[635] Daniel Brawn, *'Security for Costs in Arbitration in England and Wales'* (2003) 6 (6) Int A L R 195.

[636] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.197.

[637] European Convention on Human Rights Article 6, Universal Declaration of Human Rights (UDHR) 1948 Article 10.

[638] Noah Rubins, ibid. 313.

[639] *Tolstoy Miloslavsky v United Kingdom* [1995] ECHR 18139/91.

[640] Noah Rubins, ibid. 322.

[641] Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) 32 European Arbitration Review 32.

Hellinki Techniki S.A opined that, 'I would also regard it as wrong in principle to make any such order on the-ground that the claimant may be unable to pay the other party's costs if the award requires him to do so.'[642] The arbitral tribunal should take into account the considerations of justice when determining a security request. Sir Nicolas Browne, in *Porzelack KG v Porzelack (UK) Ltd*, remarked that:

> It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings.[643]

Therefore, the dominant view on this question is that the arbitral tribunal should consider all parties' circumstances and balance them well. Moreover, the tribunal should base its evaluation of the security request on all relevant factors [644] such as the claimant's financial position, whether past or present,[645] the location of his assets, etc. In such cases, it will not be a sufficient ground to challenge the tribunal's order to say that justice has been denied.[646]
Regarding the defendant who acts in bad faith, the tribunal in certain systems has a wide discretion whether or not to grant his application. Hence, if the tribunal determines that the application for security for costs has merely been made to hinder the arbitration and that, the defendant was well aware of the claimant's circumstances before signing the arbitration agreement; [647] the tribunal should reject the request to prevent the defendant from benefiting from his ill intentions. Butler J in *Jackson v Hamer* stated that:

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[642] *Bank Mellat v. Hellinki Techniki S.A* [1984] Q.B. 291 page 294

[643] *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All E.R. 1074 at 1080

[644] *Tolstoy Miloslavsky v United Kingdom*, [1995] ECHR 18139/91

[645] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.190

[646] Margaret Rutherford and John Sims, *Arbitration Act 1996: A Practical Guide* (FT Law & Tax 1996) 138

[647] ICC Case No. 7047/JJA of 28 February 1994, ASA Bulletin, 13 Issue 2 (1995).

> It is of essential importance to consider as far as possible whether the plaintiff's shortage of funds has been brought about as a consequence of the defendant's conduct of which the plaintiff complains. If so, it would be unfair to require the plaintiff to provide security for the defendant's costs.[648]

The tribunal might further oblige the defendant to show good faith by also providing such security.[649]

Thus, the security for costs does not contradict or violate parties' right to access justice; on the contrary, it ensures a proper and efficient use of this right.

Regarding the potential violation of the arbitrators' duty by considering in advance the merits of the dispute, the arbitral tribunal, in considering a security request, should rely on its evaluation on factors such as claimant's insolvency or inability to meet an award of costs.[650]

In such cases, it will not need to examine the merits of the dispute, and need only look briefly at the material presented to it by the parties. Therefore, Rix J, in *Renel v Gulf Petroleum* noted that:

> Having looked briefly at the pleadings in the arbitration and at some essential documents which Mr Brodie has brought to my attention, I will say nothing further than that I put out of account for the purpose of this application any question of the merits in the arbitration and I say nothing whatsoever about them.[651]

Moreover, some arbitration practitioners [652] argue that the parties, if they see this issue as a potential problem, can appoint another arbitrator to decide on any application for security for

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[648] *Jackson v Hamer* [1993] 113 FLR 216 at 222.

[649] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 375; Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International 2012) 651.

[650] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.190.

[651] *Renel v Gulf Petroleum* [1996] 2 All E.R. 319.

[652] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.198; Daniel Brawn, *'Security for Costs in Arbitration in England and Wales'* (2003) 6 (6) Int A L R. 195.

costs.[653]Although this will increase the cost of arbitration, this solution avoids the risk that the tribunal may be seen to have prejudged the merits of the dispute,[654] while simultaneously allowing the tribunal to concentrate on the substantive issues in the arbitration.

4.1.3.1.3 The Absence of Clear Rules or Criteria Addressing This Measure

Security for costs should be a good tool to safeguard a defendant's rights against loss arising from a vexatious claim.[655] Nevertheless, the absence of uniform norms governing the use of this measure may lead to its mismanagement whether by the tribunal, the court or even the lawyers involved.[656]

This fear explains why many arbitrators hesitate to grant security for costs orders.[657] They are reluctant simply because there are no standards or rules that explain or indicate how arbitrators (especially those from a civil law background) should exercise this power.[658] In this regard, Professor Robert Merkin, in his comment on s.38(3) of the English Arbitration Act 1996, says that:

> Section 38(3) of the 1996 Act in its final form does not, with the exception of the removal of the residence principle, contain any restrictions on the grounds for the making of an order or the criteria which the arbitrators might take into account in exercising their discretion.'[659]

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[653] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.198

[654] Ibid.

[655] Ibid.169.

[656] Alastair Henderson, *'Security for Costs in Arbitration in Singapore'* (2011) 7(1) A I A J. 54, Weixia Gu, ibid. 202.

[657] Weixia Gu, ibid. 185.

[658] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 169.

[659] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 12.72.

For these reasons, some would argue that security for costs should not be ordered in international arbitration.

4.1.3.1.3.1 The Answer

One of the key principles of the modern arbitration process is that the arbitral tribunal often has a wide and unfettered discretion to Rule on any application,[660] whether related to security for costs or any other interim measure.[661] In many of these applications the arbitral tribunal relies on its evaluation of conditions of the case, and sometimes takes the initiative to issue measures that support the arbitration proceedings. The tribunal in all these cases is obliged to act fairly and impartially towards the parties.[662]

The tribunal in all cases will be fettered by mandatory arbitration law of the *lex fori*.[663] For example, a tribunal seated in London would be able to grant security for costs because the English judicial system supports such kind of order.[664] On the other hand, if Egypt was the seat of arbitration *lex fori*, the arbitral tribunal would be reluctant to grant such measures, because the Egyptian judicial system does not recognise the arbitral tribunal as having such power.[665]

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[660] Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) European Arbitration Review 32.

[661] Margaret Rutherford and John Sims, *Arbitration Act 1996: A Practical Guide* (FT Law & Tax, London 1996)137-138.

[662] See for example, Egyptian Arbitration Law Article 26; English Arbitration Act 1996 s.33; Arbitration (Scotland) Act 2010 Rule 24.

[663] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 366.

[664] Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) European Arbitration Review 34.

[665] See Security for Cost under Egyptian Law.

There may be many considerations accepted in arbitration as criteria for granting a security for costs order,[666] but the following tend to be the key grounds for such an order:

- The financial circumstances of the claimant (inability to repay),
- The place of residence and nationality of the claimant,
- The *bona* or *mala fides* of the parties,
- The enforceability of the arbitration award,
- The prospects of success of the arbitral claim.

The court in *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* was mainly prompted by the claimant's financial circumstances in making a security for costs order.[667] Kerr J in *Mavani v Ralli Bros Ltd* was influenced by the place of residence and nationality of the claimant plus the potentials enforceability of a security for costs order, observing that:

> I unhesitatingly accept the evidence that an order for costs would be difficult to enforce against him in Pakistan and that there would be considerable difficulty in securing the remission of the proceeds of such enforcement.'[668]

Moreover, the tribunal in ICC Case No. 7047 rejected a security for costs application because it considered the defendant in bad faith.[669]

Thus, allegations that the making of security for costs orders is subject to no clear criteria have no basis in reality. Rather the non-codification of rules on security for costs has made this tool more flexible and assisted tribunals in evaluating every case individually. This

[666] See for example, Chartered Institute of Arbitrators (CIArb) Guideline on Security for Costs, available at <http://www.ciarb.org/information-and-resources/PracticeGuideline11.pdf>

[667] *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* [1987] 2 Lloyd's Rep 445.

[668] *Mavani v Ralli Bros Ltd* [1973] 1 All E.R. 555 at 562.

[669] ICC Case No. 7047/JJA of 28 February 1994, ASA Bulletin, 13 Issue 2 (1995).

flexibility could further influence tribunals to look for new considerations, which may help develop arbitration practice.

4.1.3.1.4 Security for Costs Increases Arbitration Cost and Causes Financial Damage

The last criticism directed at security for cost orders is that they undermine one of the most important features of the arbitration system, i.e. its economy.[670] It is a measure that increases the cost of arbitration. Time must be taken to examine applications, to exchange of memorandums, and to hear the parties.[671] Moreover, the parties who will need further expensive assistance from lawyers or advisers, whether to support or resist such an application. Furthermore, an order could cause the claimant damage because he is obliged to set aside for an unspecified time, a fact that weakens his financial capacity to take up new investment opportunities.[672]

4.1.3.1.4.1 The Answer

A security for costs order guarantees the seriousness of the arbitration claim, preventing any frivolous or malicious claim,[673] which means that only worthy claims which truly deserve to

[670] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 319.

[671] Ibid 355.

[672] Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International 2012) 644.

[673] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 312.

be arbitrated will proceed. Hence, in one way, the device of a security for costs ordered may be considered as a means of avoiding unnecessary expenditure.

In most cases security for costs applications depend on fairly straightforward facts, which rarely need a lot of time to be evaluated, and do not involve witness testimony or legal pleadings, e.g. whether the claimant is insolvent,[674] whether he resides outside the tribunal or court's jurisdiction, and whether his assets are located in a country that is not a party to the New York Convention.[675] The tribunal just has to evaluate the necessity of an order in light of these factors, which task rarely involves a lot of work or time.

Moreover, much tribunal time can be lost in deliberating over the question whether it has the power to grant security for costs or not.[676] Therefore, if there was a clear provision addressing this issue, time might actually be saved. The problem is not in security for costs as a measure but in the absence of clear rules governing to the measure.[677]

Regarding the loss of investment opportunities, this is an argument which can be directed at involvement in to the whole arbitration process or any litigation process. Since involvement in any claim tends to cost money, the risk of losing investment opportunities is an inherent feature of any adjudicative process. Hence, the security for costs measure does not itself cause this loss, involvement in the process does. Indeed the ability to order security for costs may be regarded as one of the most important pillars of international field,[678] because the

[674] *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* [1987] 2 Lloyd's Rep 445.

[675] *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159, *Mavani v Ralli Bros Ltd* [1973] 1 All E.R. 555.

[676] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 378.

[677] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 202.

[678] Ibid.

inherent risk of cross border transactions demands some means of ensuring the seriousness of any arbitration claim.[679]

4.1.4 Conclusion

After a careful consideration of all aspects of orders for security for costs, the previous discussion shows that their advantages far outweigh the disadvantages. Such orders ensure the seriousness of arbitration claims by protecting the parties and the arbitral tribunal from being involved in frivolous or malicious claims.[680]

The advantages of orders for security for costs no doubt lie behind the recent change in addressing this topic in many arbitration laws. For example, before 1990, the Swiss doctrine showed the highest level of hostility towards such orders, as it violates the neutrality principle as it favours defendant over the claimant.[681] However, this situation changed dramatically between 2003 and 2009, as many arbitration cases recognized the tribunal's power to grant security for costs.[682] The same sort of process can be seen in Singapore. Before 1994, such orders could only be granted by the court, but after the 2009 Arbitration Amendment Act such an order became lay within the exclusive jurisdiction of the arbitral tribunal in international arbitrations, and lay within the tribunal's competence in domestic arbitrations.[683]

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[679] The tribunal in *Société Casa v Société Cambior* ICC Case No. 6697 insisted that 'We [must] preserve the reputation of international arbitration, which is truly needed by the societies mercatorum, the world of business." Cited in Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 203.

[680] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 312.

[681] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 177.

[682] Bernhard Berger, *'The Use of Anti-Suit Injunctions in International Litigation'* (1990) 28 Colum J Transnat'l L. 9.

[683] Alastair Henderson, *'Security for Costs in Arbitration in Singapore'* (2011) 7(1) A I A J. 55-56.

Moreover, the report of UNCITRAL Working Group II stated that 'The Working Group agreed that security for costs was encompassed by the words "preserving assets out of which a subsequent award may be satisfied."[684]

It appears that in spite of the fact that orders for security for costs serve a worthwhile aim – especially considering that the arbitral tribunal will always consider all relevant circumstances before granting such a measure – there still seems to be some concern about the misuse of this tool, especially arising from the defendant's ill faith. Nevertheless, it is submitted that it is a vital tool in arbitrations. Perhaps in order to reconcile the two views the author of this thesis submits that the tribunal's power to grant an order for security for costs should be opt in power. This means that there must be a very clear provision – whether in the arbitration agreement or in arbitration law or rules – that addresses the tribunal's power to do so. Otherwise, the arbitral tribunal has no such power. Or this power could be listed in arbitration laws as a default power and the parties, if wish, can exclude it. If adopted, this proposal could defeat any problem that could face security for costs in the future.

These concerns may explain arbitrators' hesitation to grant this measure,[685] and explain why some scholars classify this measure as exceptional – one that should only be taken in unusual circumstances.[686]

[684] U.N. Doc. A/CN.9/641 (2007) para 48

[685] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb. 185.

[686] Marc D. Veit, *'Note - Procedural Order No. 14 of 27 November 2002 - Security for Costs in International Arbitration – Some Comments to Procedural Order No. 14 of 27 November 2002'* (2005) 23 (1) ASA Bulletin, 116.

4.1.5 Egyptian Arbitration Law and Security for Costs

Article 17 of the old version of the UNCITRAL Model Law 1985 reads:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection, as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.[687]

Article 24 of Egyptian Arbitration Law stipulates that:

> Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered.

The approach of the Egyptian Law and the UNCITRAL Model Law differs in that the Model Law confers the power if the parties do not exclude it, while Egyptian law merely allows the parties to confer the power by agreement.

However, it is obvious that Article 17 of the Model Law has given the arbitral tribunal a fettered power in taking interim measures.[688] The restriction mentioned in Article 17 is that any interim measures that may be taken in the arbitration process must relate to the subject matter of the dispute.

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[687] Available at < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf>

[688] Simon Greenberg and Christopher Kee, *'Can you seek security for costs in international arbitration in Australia?'* (2005) 26 (1) Aust Bar Rev. 3.1.

Since the cost of arbitration relates to procedural matters [689] and is determined separately from the substantive matters in the arbitration award, it is, therefore, a volatile subject [690] the assessment of which depends on many changing factors,[691] such as the length of the arbitration process, that are not related to the substance of the dispute. This makes the cost subject to re-estimation and review, whether upwards or downwards, during the arbitration process.[692]

Hence, security for costs as a procedural measure is not covered by Article 17 of the old version of the UNCITRAL Model Law,[693] and the tribunal under that version is not entitled to order such a measure. Since the Egyptian Arbitration Law is based on the UNCITRAL Model Law 1985,[694] the arbitral tribunal under the current Egyptian law is not entitled to grant security for costs. Yet while the tribunal has no power to grant a security for costs order under the Egyptian Arbitration Law, could the Egyptian courts grant such an order in arbitral proceedings?

4.1.5.1 Egyptian Court and Security for Costs

Article 45 of the Egyptian Civil Procedure Law No. 13 of 1968 gives the court of urgent matters a wide power to take any provisional or interim measures which are urgently

[689] Christopher Kee, *'International Arbitration and Security for Costs- A Brief Report on Two Developments'* (2006) 17 (273) Am Rev Int'l Arb. 274.

[690] Noah Rubins, Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb. 321.

[691] Alan Redfern, Martin Hunter, et., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 8-93.

[692] Jeff Waincymer, *Procedure and Evidence in International Arbitration (*Kluwer Law International 2012) 652.

[693] Simon Greenberg and Christopher Kee, *'Can you seek security for costs in international arbitration in Australia?'* (2005) 26 (1) Aust Bar Rev. 3.2.

[694]Abdel Moneim Zamzam, *Provisional and Conservatory Measures: before, during and after Arbitration Dispute* (Cairo, Dar El-Nahda El-Arabia, 2007) 23.

required.[695] The Article only allows the court to act if two conditions are satisfied: the case should be urgent, and the measure required should be provisional and should not affect the substantive matters of the dispute.[696] Does security for costs meet these conditions so as to justify court involvement in arbitration proceedings?

First, the idea of security for costs originated in the common law system,[697] while the Egyptian legal system belongs to the civilian tradition. Therefore, there is no particular Rule or provision in either the Civil Procedures Law or Egyptian Arbitration Law addressing security for costs. Secondly, the Egyptian Arbitration Law has adopted the principle of party autonomy, so parties can agree to empower the arbitral tribunal to take any measure, including ordering security for costs. In such case, the court will *prima facie* assist to enforce such an order as a matter of the law of the contract.[698]

However, in the absence of such a clear provision in the arbitration agreement, the claimant has the right to resort to the court only under Article 45 of the Civil Procedures Law. As mentioned above, Article 45 indicates that provisional measures will be ordered where urgency is established, without such urgency the court has no power to act.[699] Since the assessment of the urgency of the case is within the exclusive discretion of the court, it would be entirely up to the court of urgent matters to decide whether to grant security for costs or not.[700] It may thus be that the court decides that the application has not satisfied the conditions of Article 45, and dismisses the defendant's request. It seems more probable that a

[695] ECPL Article 45.

[696] Rateb, M. Kamel, M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 11.

[697] David, Altaras, *Security for Costs*, (2003) 69 (2) Arbitration 81.

[698] EAL Article 25.

[699] Rateb, .M. Kamel, M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 12.

[700] Ahmed Sedki, Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 56.

request will be rejected than accepted because Article 45 requires an immediate risk to the parties' rights, while a security for costs application is based on a potential risk. Moreover, since Egyptian courts lack experience in handling security for costs orders, and given the uncertainty of the considerations which might be used to justify such an order, the Egyptian courts would be especially reluctant to grant such measures.

4.1.5.2 Conclusion

Given the absence of provisions addressing security for costs orders in Egyptian law, despite the growing importance of such measures in the field of arbitration,[701] the following proposals might be made.

4.1.5.2.1 Regarding Egyptian Arbitration Law

It might be reasonable if Egyptian Arbitration Law adopted the possibility that orders for security for costs could be made, particularly in relation to securing the costs of the arbitration, in order to ensure that arbitration proceedings actually start. Otherwise, Egyptian laws do not provide an effective means of securing such costs. Arbitrators who were left unpaid would have to bring a normal lawsuit, which takes a very long time.[702] This powerful disincentive diminishes the attraction of Egypt as an arbitral seat.

[701] Weixia Gu, '*Security for Costs in International Commercial Arbitration'* (2005) 22 (3) J.Int'l Arb.184.

[702] Ahmed Al-Sayyid Sawy, *The Arbitration According to the Egyptian law 27 of 1994 and the Systems of International Arbitration* (Dar El-Nahda El-Arabia, Cairo 2002)16.

Due to the increasing use of security for costs, the Egyptian Arbitration Law should introduce a clear provision addressing this measure to clarify:

- The tribunal's power to order security for costs in the absence of agreement between the parties;
- The grounds for granting such orders, in order to prevent any misuse of this tool. In this regard, s.38(3) of the English Arbitration Act 1996, or Article 17 of the 2006 version of the UNCITRAL Model Law could provide a model such a provision.

Allowing tribunals to order security for costs would make Egyptian arbitration law modern and consistent with recent trends in arbitration laws such as the UNCITRAL Model Law 2006. This in turn should help and make Egypt a leading centre for international arbitration, especially in the Middle East.

4.1.5.2.2 Regarding Egyptian Civil Procedure Law

Civil procedures law suffers from many shortcomings in supporting both domestic and international arbitration level. In the shadow of the rising international use of security for costs, this law should adopt a set of rules for securing smooth court intervention in the arbitration process to assist the arbitral tribunal to achieve its aim. In particular, these proposed rules should include a clear provision addressing the court's power to issue a security for costs order. Regardless of whether provisions relating to security for costs orders are introduced, the law should feature clear rules allowing non-parties involved in the arbitration process (e.g. arbitrators) to recover their fees without unnecessary delay. This proposal facilitates the arbitration process, since it avoids the normal procedures which cause

enormous delay in civil litigation,[703] while inspiring confidence in third parties that they will obtain payment quickly.

4.1.6 Security for Costs under Scottish and English Arbitration Laws

The British legal systems have paid more attention to security for costs orders than any other systems,[704] the discussion of this measure in case law going back many years.[705] Therefore, many leading cases, which have helped establish and develop the security for costs system, are English.[706] Section 38(3) of the English Arbitration Act 1996 and Rule64 of the Arbitration (Scotland) Act 2010 also empower tribunals to order security for costs. The language used in these provisions is nearly the same identical save that Rule64 speaks of security for expenses rather than costs.

The granting of a security for costs order under both Acts is within the exclusive power of the arbitral tribunal.[707] Nevertheless, the court under s.70(6)(7) of the English Act can order the

[703] Ahmed Al-Sayyid Sawy, *The Arbitration According to the Egyptian law 27 of 1994 and the Systems of International Arbitration* (Dar El-Nahda El-Arabia, Cairo 2002) 16.

[704] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb.310; David Altaras, *'Security for Costs'* (2003) 69(2) Arbitration (81) Journal of the Chartered Institute of Arbitrators (CIArb) 81, Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) 32 European Arbitration Review 32.

[705] DAC Report para191, David Altaras, *Security for Costs*, (2003) 69 (2) Arbitration 81.

[706] See for example, *Bank Mellat v Helliniki Techniki SA* [1984] Q.B. 291; *Coppee-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liquidation)* [1994] 2 All E.R. 449; *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* [1987] 2 Lloyd's Rep 445; *Tolstoy Miloslavsky v United Kingdom*[1995] ECHR 18139/91.

[707] English Arbitration Act 1996 s.38(3), see Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 158, Peter Fitzpatrick, *'Security for costs under the Arbitration Act 1996'* (1998) Int. A.L.R, 140.

appellant to provide security for the costs of an application to challenge or appeal against the arbitration award.[708]

However, the rules addressing the tribunal's power to make security for costs orders have set some restrictions on limit this power.[709] Section 38(3) of English Arbitration Act 1996 stipulates that:

> (3) The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is-
>
> (a) An individual ordinarily resident outside the United Kingdom, or
>
> (b) A corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

And Rule 64 of the Scottish Arbitration Act 2010 stipulates that:

> (1) The tribunal may—
>
> (a) Order a party making a claim to provide security for the recoverable arbitration expenses or any part of them, and
>
> (b) If that order is not complied with, make an award dismissing any claim made by that party.
>
> (2) But such an order may not be made only on the ground that the party
>
> (a) Is an individual who ordinarily resides outwith the United Kingdom, or
>
> (b) Is a body which is—
>
> (i) Incorporated or formed under the law of a country outwith the United Kingdom, or
>
> (ii) Managed or controlled from outwith the United Kingdom.

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[708] *A v B* [2011**]** All E.R. (D) 184 (Jan), *Dardana Ltd v Yukos Oil Company* [2002] 1 All E.R. (Comm) 81. Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 260.

[709] Peter Fitzpatrick *'Security for Costs under the Arbitration Act 1996'* (1998) Int A L R.141, Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) 32 European Arbitration Review 32.

To some extent, these restrictions echo the prior common law. Thus Lord Slynn of Hadley, in *Coppee-Lavalin SA/NV v Ken-Ren Chemicals*, opined that:

> It is plainly not sufficient to justify an order that one or both of the parties is not ordinarily resident in the jurisdiction. There must be other factors indicating that the justice of the case requires that security should be ordered.'[710]

Nevertheless, Longmore J in *Azov Shipping Co v Baltic Shipping Co (No 2)*, considered that 'there is no formal fetter on my discretion in relation to security for costs beyond paragraphs (a) (b) of Section 38(3).[711] However, the arbitral tribunal or the court could rely on granting security for costs order on real factors that indicate that the justice of the case is at stake.[712] For example, the location of a party's assets can still be a crucial element when security for costs is requested, simply because it bears on the possibility of the enforcement of an award of costs, particularly in the defendant's favour.[713] In addition, the claimant's financial circumstances must be a vital element in considering whether to make an order.[714]

When the tribunal issues a security for costs order, the claimant is expected to comply with it. If the claimant does not comply with this order, s.41(6) of the English Act allows the arbitral tribunal may make an award dismissing his claim, and in that case he will not be able to appeal this decision till providing the required security. However, the tribunal in the

[710] *Coppee-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liquidation)* [1994] 2 All E.R. 449.

[711] *Azov Shipping Co v Baltic Shipping Co (No 2)* [1999] 1 All E.R. (Comm) 716; see Wendy Miles and Duncan Speller, *'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference?'* (2007) 32 European Arbitration Review 32.

[712] See Chartered Institute of Arbitrators (CIArb) Guidelines on Security for Costs.

[713] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 160, David Altaras, *'Security for Costs'* (2003) 69(2) Arbitration (81) Journal of the Chartered Institute of Arbitrators (CIArb) 86-87.

[714] Daniel Brawn, *'Security for Costs in Arbitration in England and Wales'* (2003) 6 (6) Int A L R 195; Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb.326.

exercising of this power should be careful to adhere to its duty under s. 33 to treat the parties fairly and impartially.

4.1.7 Conclusion

The issue of security for costs has been addressed very carefully by the English legal system, which makes it the cornerstone in understanding this measure. In addition, English case law has played a substantial role in the development of arbitration practice.[715]

Hence, the Egyptian lawmaker could benefit by using s.38(3) of the English Arbitration Act 1996 as a model for a new provision regulating security for costs. The extensive English case law on s.38(3) would then be a useful resource for Egyptian practitioners in understanding the legal nature of this measure. Egyptian Arbitration law would also be brought in line with contemporary international practice in this area, this measure now being seen as highly desirable in arbitration.[716]

[715] Noah Rubins, *'In God we Trust, All Others Pay cash: Security for Costs in International Commercial Arbitration'* (2000) 11(307) Am Rev Int'l Arb.323.

[716] Bernhard Berger, *'Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law'* (2010) 28(1) ASA Bulletin 7.

Chapter 5

5 Provisional Payment Measure

5.1 Preamble

In the world of construction, many contractors arrange their financial obligations towards workers, suppliers and sub-contractors based on the monies that they earn from the employer or project owner. These payments secure the cash flow,[717] which in turn ensures the contractors' capability to continue to fulfil their contractual and financial obligations.[718] Therefore, any imbalance in the dates of these payments might cause significant damage to their work and reputation. Nonetheless, it is natural in any dispute between two parties that mutual obligations are suspended until a competent tribunal adjudicates on the merits of such disputes.

To avoid any harm that may happen during arbitration, a party may request from the arbitral tribunal some sort of financial relief, such as a provisional payment order,[719] this money being placed in his own account or an account controlled or supervised by the tribunal.[720] There is, however, no limit to the forms of relief that may be given to prevent the kind of financial loss.[721]

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[717] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 16.6, Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 602.

[718] W.L. Craig, W.W. Park and J. Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, New York, Oceana Publications, 2000) 463.

[719] See English Arbitration Act 1996 s.39.

[720] Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, 2009) 573.

[721] Robert Merkin, *Arbitration Law* (Lloyd's of London Press, 2001) para 16.6.

A provisional payment measure is an order directing a party to pay a sum of money into an escrow account controlled by the arbitral tribunal [722] to prevent irreparable harm to one of the arbitration parties.[723] However, only a few arbitration laws and rules mention such measures explicitly, e.g. s.39 of the English Arbitration Act 1996 [724] and Article 25(1)(c) of the LCIA Arbitration Rules 1998. Yet many arbitration rules and laws recognize this measure implicitly, it being recognised that it falls within the authority of the arbitral tribunal to take such measures. Thus, Article 183(1) of the Private International Law Act in Switzerland [725] stipulates 'the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.' In the same vein, Article 17(2) of the UNCITRAL Model Law 2006 and Article 26(1) of the UNCITRAL Arbitration Rules state that "the arbitral tribunal may, at the request of a party, grant interim measures" to allow the arbitral tribunal to take any measure.[726] Also, Article 28(1) of the ICC Arbitration Rules stipulates the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate', and ICC case No. 7544 emphasised that this allowed the arbitral tribunal to order a party to set up an interim payment.[727]

[722] Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 573.

[723] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 605.

[724] *BMBF (No 12) Ltd v Harland and Wolff Shipbuilding and Heavy Industries Ltd* [2001] All E.R. (D) 51 (Jun)

[725] Markus Wirth, *'Interim or Preventive Measures in Support of International Arbitration in Switzerland'* (2000) 18 (1) ASA Bulletin 32.

[726] Peter Binder, *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions,* (3rd edn, Sweet & Maxwell 2010) 245, Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 2008.

[727] Julian M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 602.

It is worth mentioning that a provisional or interim payment measure may seem a comparable with an *Astreint*, which is a sum of money to be paid if the principal order of the court is not complied with.[728] This tool has been created by French Judicial system as a means of making a party comply with the court's decisions without need to resort to enforcement procedures.[729] It is obvious that this is a judicial penalty in the form of a payment to be made in respect of each day of delay in fulfilling the court or tribunal's orders.[730] Thus, Article 1467 of the French Code of Civil Procedure 2012 stipulates that "... If a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction."[731] It is obvious that interim payments and *astreintes* are very different. While both measures deal with monetary issues, a provisional payment measure offers a party financial relief, while an *astreinte* is a financial penalty against a non-cooperating party.[732] As the issue of the *astreinte* falls within the realm of enforcement, which lies beyond the scope of this thesis, it will not be considered further.

[728] *Palmaz v Boston Scientific BV* [1998] F.S.R. 199

[729] Laurent Lévy, '*Les astreintes et l'arbitrage international en Suisse*' (2001) 19 (1) ASA Bulletin, (Association Suisse de l'Arbitrage) 21-36

[730] Guido Carducci, '*The Arbitration Reform in France: Domestic and International Arbitration Law'* 28 (1) Arb Intl, 141-142.

[731] Article 1467 of the French Civil Procedures Code 2012 (Arbitration).

[732] Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 1170

5.2 **Some aspects of Provisional Payment Measures**

In the French Law, a provisional payment measure is called a *référé-provision,*[733] and the interim relief judge, *juge des référé*, is empowered to grant this measure for either the whole or part of the amount in dispute [734] as long as the request has fulfilled the conditions set by the law.[735] These conditions are the existence of an urgent case and the application being submitted to the court before the constitution of the arbitral tribunal.[736] Articles 809(2) and 873(2) of the French Code of Civil Procedure (CPC) stipulate that:

> The president may always…in cases where the existence of the obligation is not seriously challenged, he may award an interim payment to the creditor or order the mandatory performance of the obligation even where it is an obligation to do a particular thing.

However, some scholars argue a provisional payment order, whether made by a tribunal or court, should not be able to cover the whole sum in dispute subjects, but should only include undisputed sums, otherwise it risks undermining the final award.[737] Therefore, the Iran-US Claims Tribunal refused to grant an order covering the whole of the goods which were the

[733] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 728-734.

[734] *Cour de Cassation* judgement cited in Jean-Louis Delvolvé, Gerald H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Kluwer Law International. 2009) 118.

[736] *Société Buzzichelli v. S.a.r.l. S.E.R.M.I, M. Michel Hennion*, Cour de Cassation (2 Chambre civile), 18 June 1986, Jean-Louis Delvolvé, Gerald H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Kluwer Law International, 2009) 121, Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 731-734.

[737] Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 2008.

subject of dispute, because such an order could affect the outcome of the case.[738] Similarly, the tribunal in ICC case No.9984 noted that "the amount was, in fact, seriously contested" so shrank from granting the measure requested as it was "too closely linked with the solution of whole dispute."[739] In addition, granting such a measure, even in relation to undisputed sums, might require examining the merits of the dispute, which is the exclusive right of the arbitral tribunal. Therefore, the provisional payment measure might sometimes conflict with the purpose of arbitration.[740]

Accordingly, some scholars [741] argue that a provisional payment order is not really a provisional measure, because it requires the tribunal to examine the merits of the dispute to determine whether it will grant the application.[742] This process is totally opposed to the notion of provisional measures – a system based on the idea that the arbitral tribunal should not examine the merits of the dispute in the absence of any party. These scholars view a provisional payment measure as a provisional remedy that may be granted by a partial award. It is an opinion that certainly has some logic and it may be the reason why some scholars do not count this measure among the types of provisional measures.[743]

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[738] *Behring International, Inc v Iranian Air Force*, 8 Iran-US CTR 44, cited in Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 605.

[739] ICC Partial Award 9984 of 1999 cited in Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 219, footnote 255.

[740] Heba Badr Al-Sadiq, *'The Interim Protection in Arbitration; Comparative Study'* (Ph.D Ain Shams University(Egypt) 2009) 57.

[741] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 218.

[742] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 729.

[743] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 7-23.

A provisional payment order may thus affect the dispute, especially if the final award finds against the party who benefited from this measure during the arbitration process. The winning party may be in a difficult position, particularly if the losing party has become insolvent, in which case the prospects of the winner recovering his money will hugely diminished, transforming the provisional payment order from a protective measure to a means of undermining the arbitral award. In an attempt to avoid negative consequences of such measures, the European Court of Justice in *Van Uden Maritime BV Africa Line v Kommanditgesellschaft in Firma Deco-Line* has adopted a new principle allowing the court to insist

on the provision of a guarantee as a pre-condition for granting a provisional payment order. The European Court observed that:

> Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim, and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.[744]

Article 24 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters stipulated:

[744] *Van Uden Maritime BV, v Kommanditgesellschaft in Firma Deco-Line and Another,* C-391/95 on 17 November 1998, para 48.
Available at;
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dddb72c2a11492437f92aec767e296c1cf.e34KaxiLc3qMb40Rch0SaxqTbxb0?text=&docid=100754&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=99617

> Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.[745]

The approach used by the European Court of Justice seems more practical since while it does not prevent the court from taking such measures, it nonetheless secures the effectiveness of the final judgment, and protects a winning party from any loss that may happen due to this measure. Even though the ECJ's decision only addressed the powers of national courts, it has created a very important approach that could easily be applied in arbitration. This approach is totally consistent with Article 17(E)(1) of the UNCITRAL Model Law 2006, which stipulates that the 'arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.'[746]

The success of the system of provisional measures relies on the arbitrators' experience in conducting the arbitration process.[747] Therefore, if arbitrators succeed in ordering an interim payment without affecting the subject matter of the dispute and without violating the duty of acting fairly and impartially, the interim payment will be a kind of interim measure rather than a provisional remedy. However, if the tribunal feels obliged to examine the merits of the dispute in order to reach a decision such an application, its order could be considered a partial award because it was partly adjudicated on the dispute. Such an order may be regarded as a type of remedy, as under s.48(4) of the English Arbitration Act 1996.[748]

In conclusion, while a provisional payment order is a very important measure that supports an arbitration party and secures his need for cash flow during arbitration; nonetheless the

[745] Brussels Convention available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm

[746] UNCITRAL Model Law 2006 Article 17(E)(1.)

[747] Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 246.

[748] Section 48 is entitled 'Remedies' and s.48(4) stipulates that 'The tribunal may order the payment of a sum of money, in any currency'.

tribunal should always be very careful about prejudicing the merits of the dispute by granting such an order.[749]

5.3 Provisional Payment Measures under the Egyptian Arbitration Law of 1994

5.3.1 Arbitral Tribunal Provisional Payment Order

Article 24 of the Egyptian Arbitration Law says nothing about the arbitral tribunal's power to take provisional payment measures in the arbitration process and does not contain any classifications of such measures.[750] The tribunal under Article 24 has no competence to take any measures unless the parties so agree. Once the jurisdiction is established by that agreement, the tribunal can grant any measures deemed necessary in the dispute including an interim payment order for any amount. In this vein, the free language of Article 24 is similar to Article 809 of the French Code of Civil Procedure that allows the judge *(juge des référés)* to grant interim measures where the parties have so agreed, without any explanation or limitation of such power.[751]

Therefore, the current phrasing of Article 24 could lead to many unfortunate consequences, since it could be understood as giving the tribunal a wide power to take any measures without any limitations. Thus, the tribunal might grant a provisional payment order covering the

[749] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 219, Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 2008.

[750] Ahmed Sedki, Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 15.

[751] Abou Aloula Ali Abou Aloula, *The judicial system of interim and conservatory measures in arbitration* (1st edn, Dar Al Nahda Al Arabiah, 2005) 28, Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011) 189; Jean-Louis Delvolvé, Gerald H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Kluwer Law International, 2009) 118-121.

whole amount of the dispute, which may in turn affect the outcome of the dispute.[752] Moreover, the imprecise expression of Article 24 might lead a lack of uniformity in arbitration practice in Egypt, as arbitrators vary in their experience and knowledge, which could leads to many different interpretations of their power under this Article.

Therefore, due to its importance and complexity, the subject of provisional payment orders demands special attention in Egyptian law, and might need to be addressed in more detail by a separate provision, as in s.39 of the English Arbitration Act 1996. Such a provision should empower the tribunal to make such orders (subject to the contrary agreement of the parties), make provision for the applicant to be asked to offer appropriate guarantees as a condition for granting an order, and describe the form this measure should take. It could further determine that the sum ordered to be paid cannot exceed, e.g. 30% or 50%, of the whole sum in dispute. This should clarify the matter saving much debate between tribunals and parties, and helping to achieve more uniformity in arbitration practice in this area.

5.3.2 The Provisional Payment Measure (Provisional Expenses) before the Egyptian Court

Article 45 of the Egyptian Civil Procedure Law 13 of 1968 authorizes the President of the Court of Appeal (responsible for arbitration matters) in the capacity of the urgent judge to take any urgent measures in arbitration disputes. Consequently, the court can grant a provisional payment order if the request has fulfilled the conditions for such a claim. The jurisdiction of the urgent judge to grant provisional expenses or an allowance order (as it is known under Egyptian Law) stands if three conditions have been met.[753] The case must be

[752] See previous debate under the French Law in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 729-730.

[753] See later Chapter 7.

urgent, the required measure must be provisional and the claim should not be seriously disputable.[754] These conditions are nearly the same in Article 809 (*référé*-provision) of the French Code of Civil Procedure.

Such a request may be submitted to the Egyptian court in two ways.[755] The first one is the traditional method of lodging the application with the court registry accompanied by the evidence supporting the request.[756] The second is by submitting a subsidiary request to the executive judge when challenging the enforcement of a garnishment resolution.[757] The stage of the arbitration process will determine how a party will choose to submit his request. In this vein, a court decision on an urgent claim in Egyptian law has only temporary authority, which means that the court could change its judgement if the circumstances upon which the request was been based have changed, or when it considers the substantive claim.[758]

Article 288 of the Egyptian Civil Procedure Law 13 of 1968 states that "the expedited execution system is compulsory without any guarantee to all urgent judgements, whatever the court that issued them…"[759] This means that the court's decision on a provisional payment request would be executed promptly, even if the party against whom the order was issued has challenged it in court.

In conclusion, Article 24 of the Egyptian Arbitration Law does not prevent the arbitral tribunal from ordering a provisional payment upon a party's request, and does not limit its power to do so. Similarly, the Egyptian Civil Procedure Law has granted the court, in the

[754] Egyptian Civil Procedure Law Article 45.

[755] Rateb, M. Kamel, *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 975-984.

[756] Egyptian Civil Procedure Law Article 63.

[757] Egyptian Civil Procedure Law Article 275 stipulates 'The Executor judge is exclusively competent to adjudicate in all enforcement disputes, the substantive and the interim…".

[758] Rateb, M. Kamel .M, *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 987-991.

[759] Egyptian Civil Procedure Law Article 288.

capacity of an urgent judge, power to take such measures as long as the case is urgent and it has not considered the subject matter of the dispute.

5.4 Provisional Payment Orders under the Arbitration (Scotland) Act 2010

5.4.1 Orders Issued by the Arbitral Tribunal

The Arbitration (Scotland) Act 2010 addresses the subject provisional payments in Rule 53, which stipulates, "The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently." Consequently, the tribunal under the Scottish Act is empowered to order a provisional payment to protect the applicant financially during the arbitration.[760] Rule 53 is a default provision,[761] which means that the tribunal has this power unless the parties have agreed otherwise.[762] By contrast s.39(4) of the English Arbitration Act 1996 makes it clear that the tribunal has no power make a provisional award unless the parties agree that it should.

Unlike s.39, Rule 53 does not contain any examples explaining what provisional measures the tribunal can take, or outlining the extent of the tribunal's power regarding these measures. The Policy Memorandum does not indicate why this is so. Does the lawmaker want to leave the door open for the tribunal to take any provisional measure, or is it assumed that this power is naturally understood to be limited? In this regard, some scholars [763] argue that the provisional measures that the tribunal is entitled to take are naturally limited by remedies the

[760] Policy Memorandum para 173.

[761] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 258.

[762] Explanatory Notes para 195.

[763] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 258.

parties have agreed that the tribunal should have. Hence, there is no need to give any examples in this rule.

Yet it is submitted that the Scottish lawmaker, by leaving these measures undefined, wants to leave the door open, especially since Rule 53 could easily followed s.39 in giving examples. However, the tribunal should take special care in exercising such power so as not to prejudice the subject matter of the dispute.[764]

A further problem is that Rule 71(3) prohibits any challenge of a provisional award.[765] This Rule confers a kind of immunity on such an award, albeit that the award is only binding until superseded by a final or partial award.[766] Moreover, the prohibition of appealing against a provisional award might protect an award which is arrived unfairly in breach of the duty under Rule 24(1)(b) to treat the parties fairly, in that a party may have no right to appeal against an award issued at a hearing at which he was not present.[767]

The final question here is whether the lawmaker used the term "award" to stress the intention that a provisional award was a true award and could be enforced as such.[768] Indeed, there is no indication in the Act or the Policy Memorandum suggesting otherwise, which means that a provisional award under the Act is intended to be recognized and enforced as an award. Presumably, it should be so regarded if its enforcement is sought under s.12 of the Arbitration (Scotland) Act 2010, but there is no guarantee that this award will be regarded as an award

[764] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 258.

[765] Arbitration (Scotland) Act 2010 Rule 71(3).

[766] Hew R. Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into Reality* (2010) 67 Arbitration 14.

[767] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 259.

[768] Ibid. 259.

under New York Convention if it required to be enforced elsewhere.[769] The Queensland Supreme Court refused to enforce a provisional award in *Resort Condominiums International Inc. v. Ray Bolwell* noting that:

> [T]he "arbitral award'' in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties; i.e. one in which the arbitrator has already ''considered'' those matters and reflected his views in an award. There is no... reference to an interim award in the Act or the Convention. [770]

In this vein, Article 17(2) of the UNCITRAL Model Law 2006 does not stipulate a particular form for the tribunal's decision in this respect. Article 17(H)(1) merely states that, "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court…".[771] That means the UNCITRAL Model Law has left the door open for every state to insert its own enforcement rules.

5.4.2 Provisional Payments ordered by the Scottish Courts

The Arbitration (Scotland) Act 2010 grants arbitration parties conditional access to the national courts, the Sheriff Court or the Court of Session,[772] to support arbitration seated in

[769] Dirk Otto, Article IV in Herbert Kronke, Patricia Nacimiento, et al.(eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 155-157, Jean-Paul Beraudo, '*Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*' (2005) 22 (3) J.Int'l Arb. 245.

[770] *Resort Condominiums International Inc. v. Ray Bolwell*, 118 ALR (1993), 644 (at 655) (decided 1993) YCA XX (1995), 628 (at 641) (Supreme Court of Queensland, Australia).

[771] UNCITRAL Model Law 2006 Article 17.

[772] See later Chapter 7.

Scotland.[773] In this context Rule 46(1)(g) stipulates that the "court has the same power in arbitrations as it has in civil proceedings to grant any other interim or permanent order." It is obvious that Rule 46(1)(g) uses wide language [774] probably to cover any unforeseen measures that have not been specifically covered elsewhere in Rule 46. Might this embrace an order for provisional payment?

Accordingly, a party can resort to the court to request a provisional payment order under Rule 46(1)(g) of Arbitration Act. However if the application is made once the arbitration has begun, the case must be considered urgent or the tribunal must consent to the application.[775] There are no restrictions under Rule 46 regarding the amount of the payment order. Hence the court has a wide discretionary power and may order the payment of the whole sum in dispute.[776] In dealing with s.44 of the English Arbitration Act 1996, Clarke L.J observed in *Cetelem SA v Roust Holdings Limited* held 'I cannot see that there is anything in the subsection or the Act which deprives the court of the power to make an order which it thinks is necessary for the purpose of preserving evidence or assets.'[777] Since Rule 46 is the counterpart of s.44, the *Cetelem*'s decision is persuasive in a Scottish context.

However, Rule 46 of the Act does not address whether the court could request any guarantees from a party before acceding to his requests.[778] Yet there is nothing in Rule 46 that prevents

[773] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 225.

[774] Ibid. 234.

[775] Arbitration (Scotland) Act 2010 Rule 46 (2)

[776] *Cetelem SA v Roust Holdings Limited,* [2005] EWCA Civ 618, Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 234.

[777] *Cetelem SA v Roust Holdings Limited,* [2005] EWCA Civ 618 at para 62

[778] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 233.

the court from seeking caution to secure the effectiveness of the final award, or to protect a winning party's right to reimbursement.[779]

In conclusion, the arbitral tribunal under Rule 53 and the court under Rule 46 can grant an interim payment order upon a party's request.

5.5 Provisional Payment Orders under the English Arbitration Act 1996

5.5.1 Provisional Payment Ordered by the Arbitral Tribunal

Section 39 of the English Arbitration Act gives the arbitral tribunal the power to order provisional payment if the arbitration parties have agreed to confer such power on it.[780] Unless the parties so agree, the arbitral tribunal has no such power.[781] Section 39 clearly addresses grey areas previously surrounding provisional payment orders. Firstly, it has recognised the tribunal's power to grant provisional measures – when previously it was incompetent to take such measures –[782] as long as arbitration parties have so agreed. Secondly, it gives several examples of provisional measures that may be taken in arbitration disputes to show the tribunal's limits in this regard, the clearest indication of the limits of its power being the parties' agreement.[783]

[779] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters, 2010) 233

[780] Section 39(2)(4).

[781] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 235.

[782] DAC Report Feb 1996 para 201.

[783] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 164.

Thirdly, s.39 has accentuated the temporary nature of the measure pending the making of the final award [784] by providing that "any such order shall be subject to the tribunal's final adjudication."[785] Fourthly, even though the heading of s. 39 is titled "Provisional Award", the DAC Report [786] and the rest of s.39 make it clear that provisional measures would be treated as orders not awards.[787] In this regard, it is unclear whether such provisional orders subject to appeal or challenge.[788] Since only awards are open to challenge, if such measures are truly orders, they cannot be challenged. Nothing in ss.67, 68, 69 or 70(2) (the provisions dealing with challenges) relate to such orders. Therefore, some scholars argue that any appeal in such cases should be submitted to the tribunal itself.[789] This suggestion seems more practical as the party will go directly to the tribunal that issued the order to review it, which means the tribunal will have another chance to review its order with more care.[790] This will also save time. Moreover, this proposal seems more consistent with the tribunal's duty under s.33(1)(a) to give "each party a reasonable opportunity of putting his case and dealing with that of his opponent".

In conclusion, the arbitral tribunal under the English Arbitration Act can order a provisional payment upon a party's request. Moreover, the limit of the amount of the order under s.39

[784] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, 2003) 236, Keren Tweeddale, Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press Limited, 1999) 135.

[785] Section 39(3).

[786] DAC Report Feb 1996 paras 200-203.

[787] Keren Tweeddale, Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press Limited, 1999) 135; Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer Law International, 2003) 123.

[788] Keren Tweeddale, Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press Limited, 1999) 136.

[789] Ibid

[790] The DAC Report para 201 suggested 'enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice', so this form of appeal could help to achieve this goal.

will rely on the agreement of the parties, and the tribunal is obliged not to exceed it. Hence, the tribunal is free to grant any amount in its order – even the whole amount in dispute – as long as it is empowered to do so.

5.5.2 Provisional Payment Ordered by the English Court

Section 44 of the English Arbitration Act 1996 gives the court wide powers to take provisional measures including ordering the interim payments. Section 44(1) gives the court the same power to make orders in the matters that listed in s.44 (2) as it has in legal proceedings.

Section 44 does not contain any direct mention of power to order provisional payment. Yet s. 44(3) provides that: "If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets." That means that a party can apply for a provisional payment order on the basis of urgency, and the court can grant such measure as long as it thinks it is necessary. Moreover, a party could rely on Rule 25(1)(k) of the CPR, which stipulates:

> The court may grant the following interim remedies-… an order (referred to as an order for interim payment) under Rule25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay.

The English Arbitration Act 1996 has allowed arbitration parties to resort to the court, but has made this facility exceptional, available in very limited cases.[791] Hence, if the court is satisfied that the application has met its conditions of jurisdiction, it will grant the provisional payment order; otherwise it will not do so.

[791] DAC Report Feb 1996, para 215.

Yet the final determination on a provisional payment order may be for the arbitral tribunal, as the court may allow it to decide whether the order should cease to have effect.[792] Section 44(6) of the Act stipulates that:

> If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

It is submitted that this is one of the most interesting provision of the Act 1996. It solved the problem of the overlap of powers between the arbitral tribunal and the court in respect of provisional measures in a smooth way. This section is clearly premised on the idea that court intervention in arbitration is exceptional, and the main power should remain in the tribunal. Thus, wherever possible, the final adjudication of any issues should be by the arbitral tribunal.[793]

In conclusion, the subject of the Provisional Payment Order has been more carefully addressed in the English Arbitration Act, which has clearly illustrated the basis of such power and has clearly designated it as an *opt in* power. It has given many examples of such measures, and has finally described the tribunal's decision as an order to forestall debates in this regard. Furthermore, s.44 has made clear that the arbitral tribunal has the final word in any procedures related to the subject matter of the dispute.

5.6 Conclusion

After a careful consideration of provisional payment orders under Egyptian, Scottish, and English arbitration law, it can be concluded that:

[792] DAC Report Feb 1996, para 216.

[793] DAC Report Feb 1996, para 216

5.6.1 Egyptian Law

- There is no particular provision under this law addressing this measure, which means that there are no rules or examples illustrating the tribunal's power in respect of the amount of such order.
- There is no indication of the legal nature of the tribunal's order. Should it be classified and enforced as an order or as an award?
- It is not clear under this law whether the tribunal can look over the court's order (reviewing or set it aside), does tribunal provisional payment orders subject to challenge? And if so, does the challenge would be before the tribunal or before the court?

In this regard, Article 52 (1) of EAL stipulates that 'Arbitral awards rendered in accordance with the provisions of this Law may not be challenged by any of the means of recourse provided for in the Code of Civil and Commercial Procedures.'[794]

There is no answer for these questions under the law. For such reasons, Egyptian Arbitration Law needs to adopt a new provision that clarifies such issues. In this vein, s.39 of the English Arbitration Act 1996 would be a good model for such a provision because it has covers most of the above points.

5.6.2 The Arbitration (Scotland) Act 2010

Although the text of Rule 53 of the Arbitration (Scotland) Act 2010 is better than the Egyptian law, it still leaves a few Arbitration doubts regarding provisional payment orders:

- There are no examples in Rule 53 illustrating the tribunal's power in this regard, which may cause some confusion about the meaning and limits of such power.

[794] Egyptian Arbitration Law Article 52(1).

- Rule 71(3) prevents the challenge of provisional awards – an immunization of a temporary action that could lead to a breach of the tribunal's duties under Rule 24 of the Act, especially because Rule 71 is mandatory, and cannot be excluded.
- Even though Scotland has recognised a provisional payment order as an award, there are some doubts about whether such a foreign provisional award 'order' would be enforced in Scotland as an award. In other words, What if the tribunal used expression 'order' rather than 'award'? What are the criteria that will make these decisions subject to enforcement? Do these criteria rely on the description applied to such decisions or do they rely on the subject of the decision regardless of the legal description?[795]

Therefore, it seems from the foregoing points that Scottish lawmakers may need to reconsider Rule 53 to clarify any grey areas that may cause problems for the future of arbitration in Scotland.

5.6.3 The English Arbitration Act

The only criticism that could be directed to the English Arbitration Act is that the title of s. 39 that uses the term "Award" but actually means 'order'. Hence, it would be better if this point were clarified to prevent any misunderstanding, especially for arbitration practitioners from non-common law backgrounds.

[795] The question here is whether such an 'award' would be enforced outside Scotland? The answer of such question will vary since it depends on the understanding of every state to New York Convention, and the meaning of the Arbitral Award under Article (I) of this convention. See earlier para 1.1.4 Order or Award in Chapter 1.

Chapter 6

6.1 Anti-Suit Injunctions

6.1.1 Preamble

Do anti-suit injunctions properly fall to be regarded as interim measures? This author suggests that they do. Article 17 of the UNCITRAL Model law 2006 lists many interim measures that the arbitral tribunal can take in arbitration disputes. An anti-suit injunction is one of the measures that has been investigated very carefully by the Working Groups.[796] The UNCITRAL Working Group II (Arbitration) in its Forty-first session stated that:

> The Working Group heard diverging views on the question of whether paragraph (2) of Article 17 could be interpreted as encompassing the power of an arbitral tribunal to order an anti-suit injunction (A/CN.9/547, paras. 75-83).After discussion, the Working Group agreed to amend subparagraph (b) of paragraph (2) to clarify that anti-suit injunctions were included in the definition of interim measures of protection.[797]

Thus after extensive discussions and deliberations, the UNCITRAL Working Group agreed that anti-suit injunctions were included in the definition of interim measures of protection.

Such injunctions forbid a party from pursuing litigation outside the arbitration.[798] Thus, it provides an urgent protection to the arbitration process like other interim measures.

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[796] United Nations documents A/CN.9/547, Report of the Working Group on Arbitration on the work of its fortieth session (New York, 23-27 February 2004) paragraphs 75-83 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/521/51/PDF/V0452151.pdf?OpenElement

[797] United Nations document A/CN.9 WG.II/WP.131 http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V04/566/07/PDF/V0456607.pdf?OpenElement

[798] Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 2010

It seems that the basis of this measure in urgency and its purpose of protecting the arbitration process[799] were the key elements in its adoption by the Model Law.

Recently, Article 17(2)(b) of the UNCITRAL Model Law 2006 has recognized the power of the arbitral tribunal itself to grant an anti-suit injunction and thus prevent action which could cause harm or prejudice to the arbitral process.[800] Article 26(2)(b) of the UNCITRAL Arbitration Rules 2010 is to the same effect. Consequently, many courts in civil law jurisdictions have showed their willingness to enforce anti-suit injunctions.[801] The French *Cour de Cassation* in *In Zone Brands International Inc v In Beverage International* opined that 'An anti-suit injunction the object of which, outside the scope of conventions or Community law, was only, as in the present case, to sanction the breach of a pre-existing contractual obligation, was not contrary to French international public policy.'[802]

Notwithstanding the recognition of the UNCITRAL Model Law 2006 that the anti-suit injunction is an interim measure, debates about whether it is an interim measure persist, in particular after the later decision of the European Court of Justice (ECJ) in *Allianz SpA v. West Tankers Inc*.[803] However, this chapter aims to examine the anti-suit injunction in some detail, in light of the ECJ's decisions, to reach a conclusion on whether this relief is an

[799] Sundaresh Menon and Elaine Chao, '*Reforming the Model Law Provisions on Interim Measures of Protection'* (2006) 2 (1) A.I.A.J. 1 - 31

[800] Thomas H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Models for UNCITRAL-based Arbitration Rules,* (Sweet & Maxwell, 2010) 360, United Nation Report of the Working Group on Arbitration and Conciliation No. A/CN.9/589, Para. 20-26, available at http://daccess-dds ny.un.org/doc/UNDOC/GEN/V05/894/78/PDF/V0589478.pdf?OpenElement

[801] Emmanuel Gaillard, *'Reflections on the Use of Anti-Suit Injunctions in International Arbitration'* in Loukas A. Mistelis and Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration,* (Kluwer Law Arbitration, 2006) 203.

[802] *In Zone Brands International Inc v In Beverage International* [2010] I.L.Pr. 30 at 60.

[803] See later para 6.1.4.1

interim measure. Yet, before doing so, an examination of the historical background of the measure could be of benefit.

6.1.2 Anti-Suit Injunction Historical Background

Arbitration system derives from the parties' agreement; therefore, any breach of the agreement to arbitrate would tend to undermine the whole arbitration regime. Consequently, any litigation on the substance of the dispute is impliedly forbidden or suspended until the final award is made. To secure the effectiveness of arbitration at least one legal system found it necessary to devise a tool that compels the parties to carry out their undertakings to arbitrate.[804] In *Bushby v Munday* [805] an English court has applied for the first time a new tool (known later as the Anti-Suit injunction) to preclude one party from litigating in the courts of another country (Scotland).[806] Sir John Leach stated that:

> This court has full authority to act upon them [the parties] personally with respect to the subject of the suit as the ends of justice require, and, with that view, to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in this country or in a foreign country…This authority is ordinarily found fully adequate to the purposes of justice.[807]

The use of the anti-suit injunction by the English courts increased gradually; particularly after the fusion of the English Courts of Law and Equity by the Jurisdiction Acts of 1873 and 1875.[808] The English courts' power to grant anti-suit injunctions was clearly recognised in

[804] *Pieters v Thompson* (1815) 35 ER 548. Cited in Jonathan R. C. Arkins, *'Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions'* (2001) 18 (6) J.Int'l Arb. 604.

[805] *Bushby v Munday* [1814-23] All E.R. Rep 304.

[806] Jonathan R. C. Arkins, *'Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions'* (2001) 18 (6) J.Int'l Arb. 604.

[807] *Bushby v Munday* [1814-23] All E.R. Rep 304.

[808] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, 2008) 47.

Cohen v. Rothfield.[809] The Court of Appeal considered that oppressive and vexatious litigation before a foreign authority was a suitable ground to grant an injunction to stop the proceedings,[810] although Scrutton L.J. emphasized that "this power should be exercised with great caution to avoid even the appearance of undue interference with another court."[811]

Scrutton L.J. clarified the basis for issuing such an injunction in *Ellerman Lines Ltd v Read*[812] where he observed that:

> The English courts ...of course they do not grant an injunction restraining the foreign court from acting; they have no possible power to grant such an injunction, but they can grant an injunction to restrain the British subject, who is fraudulently breaking his contract, and who is a party to an action before them, from making applications to a foreign court for the purpose of obtaining the fruits of a fraudulent breach of contract.

Over time, the usage of anti-suit injunction extended from England to Scotland, Northern Ireland,[813] and then many places around the world, particularly to common law systems.[814] For example, Lee Seiu Kin J.C., in the Singapore High Court in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* noted that:

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[809] *Cohen v. Rothfield* [1919] 1 K.B. 410.

[810] Jonathan R. C. Arkins, *'Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions'* (2001) 18 (6) J.Int'l Arb. 604.

[811] *Cohen v. Rothfield* [1919] 1 K.B. 410 at 414.

[812] *Ellerman Lines, Ltd v Read* [1928] All ER Rep 415 at 418.

[813] In Scotland see Civil Jurisdiction and Judgments Act 1982 Schedule 8 Rule 2(j). In England see Supreme Court Act 1981 (Senior Courts Act) section 37, English Arbitration Act 1996 Section 2.

[814] George Bermann, '*The Use of Anti-Suit Injunctions in International Litigation'* (1990) 28 Colum. J. Transnat'l L. 593, Emmanuel Gaillard, '*Anti-suit Injunctions Issued by Arbitrators'* in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICCA Congress Series, 2006 Montreal (Kluwer Law International, Vol 13 2007) 235. Sandrine Clavel, *'Anti-Suit Injunctions et arbitrage'* (2001) 2011 (4) Rev.l.Arb. Comité Français de l'Arbitrage. 670.

> Once this court is satisfied that there is an arbitration agreement, it has a duty to uphold that agreement and prevent any breach of it. Accordingly, I am of the opinion that the anti-suit injunction should be continued until further order.[815]

The English legal system developed the fundamental principles underpinning and the criteria for granting anti-suit injunctions through a great deal of case law and statutory provisions.[816] Section 37 of the Supreme Court Act 1981, as a main source of the courts' power, gives the court a general power to grant an injunction in all cases in which it appeared just and convenient to do so.[817] Moreover, the case law has played a significant role in the development of this remedy. One of the most important cases is *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak;* [818] where Lord Goff established the basic principles that govern the granting of anti-suit injunctions, saying:

> The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early nineteenth century. From an early stage certain basic principles emerged which are now beyond dispute.
>
> 1-The jurisdiction is to be exercised when the "ends of justice" required it.
>
> 2-the court's order is not directed the foreign court but it is against one of the parties.
>
> 3-An injunction may only be issued restraining a party who is amendable to the jurisdiction of the court, against whom an injunction would be an effective remedy.

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[815] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; [2002] SGHC 104, para 91, available at http://archive-sg.com/page/952187/2012-12-13/http://www.singaporelaw.sg/rss/judg/8340.html last accessed 2/6/2013.

[816] Julian D.M. Lew, *'Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings'* in, *Anti-Suit Injunctions in International Arbitration* IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) 27.

[817] English Supreme Court Act 1981 Section 37. An anti-suit injunction under this section is designed to protect the jurisdiction of the English courts. See para 16 in *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm). Thus, the court's power to grant anti-suit injunctions in arbitration disputes is governed by this section.

[818] *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] A.C. 871 at 893.

4-Since such an order indirectly affects the foreign court, the jurisdiction is one which has to be exercised with caution.

The English courts have continued to develop the governing principles of anti-suit injunctions cases such as *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [819] *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd*,[820] and *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC.*[821]

6.1.3 Definition of Anti-Suit Injunction

An anti-suit injunction is an order restraining a party from commencing or pursuing proceedings before a foreign court.[822] Some scholars define it as an order of the court requiring the defendant not to commence or to cease to pursue; or not to advance particular claims within, or take steps to terminate or suspend, court or arbitration proceedings in a foreign country.[823] In the arbitration arena, the anti-suit injunctions are defined as an order operating *in personam* which are aimed at preventing or restraining proceedings in courts in breach of an arbitration agreement.[824]

It is obvious that all these definitions have a common characteristic which is that the anti-suit injunction is an order to stop or suspend any proceedings before foreign courts in breach of

[819] *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87.

[820] *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm).

[821] *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647.

[822] Peter Gross, *'Anti-suit injunctions and arbitration'* (2005) 10 L.M.C.L.Q. 11; Steven Gee *Commercial Injunctions* (formerly Mareva Injunctions and Anton Piller Relief) (5th edn, Sweet & Maxwell, 2004) 394.

[823] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, 2008) 5.

[824] Julian D M. Lew, *'Does National Court Involvement Undermine the International Arbitration Processes?'* (2009) 24 (3) Am.U.Int'l L.Rev 514.

the parties' agreement. This remedy aims to reinforce the effectiveness of arbitration agreement,[825] by preventing a party from resorting to courts in breach of arbitral tribunal's jurisdiction to consider the dispute. Whatever the definition of such measure, its aim remains very important to protect arbitration process.[826] Yet the remedy has triggered a lot of debates between scholars, and engendered conflict between judgements.

6.1.4 Anti-Suit Injunction on Balance

The anti-suit injunction is one of the most controversial measures whether in the international commercial arbitration [827] or domestic law,[828] because it impinges on many sensitive issues, such as Public International Law and state sovereignty,[829] human rights, and the right of access to the court.[830]

There are many arguments that support the granting of the anti-suit injunction, and consider it a panacea for stopping any attempt to break an arbitration agreement.[831] On the other hand, some believe that the granting of such injunction considers a kind of infringement to the

[825] Koen Lenaerts, *'The contribution of the European Court of Justice to the area of freedom, security and justice'* (2010) 59 (2) ICLQ. 286.

[826] UN Report of the Working Group on Arbitration and Conciliation A/CN.9/589 Para 23, available at < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V05/894/78/PDF/V0589478.pdf?OpenElement>

[827] *Allianz SpA and another v West Tankers Inc* [2009] C-185/07.

[828] Professor Adrian Zuckerman stated that 'The anti-suit Injunction should govern by the rules of Private International Law not Civil Procedures rules' Adrian Zuckerman, *Zukerman on Civil Procedure Principles of Practice* (2nd edn, Sweet & Maxwell, 2006) 298.

[829] Alexander J. Belohlávek, *'West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958'* (2009) 27 (4) ASA Bulletin 652, Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, 2008) 36, Sandrine Clavel, *'Anti-Suit Injunctions et arbitrage'* (2001) (4) Revue de l'Arbitrage. 670.

[830] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, 2008) 28.

[831] *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87.

foreign court's jurisdiction to investigate the case before it. The author of this thesis submits that an anti-suit injunction is a good tool to protect arbitration process. However the way that this remedy is employed may need to be reconsidered in order to make it more acceptable in arbitration practice.

However, the current chapter will examine both views in detail to highlight the pros and cons of this remedy in order to come to a conclusion. Attention will be giving to the judgement of the European Court of Justice (ECJ) in *Allianz SpA v West Tankers,*[832] that especially as the ECJ's Advocate General (the A.G.) has discussed the key arguments regarding this remedy.

6.1.4.1 *Allianz SpA v West Tankers* Case

In August 2000 the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on the 30th July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

[832] *Allianz SpA v West Tankers* [2009] C-185/07.

In parallel, West Tankers brought proceedings, on the 10th September 2004, before the English High Court, seeking a declaration that the dispute was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').

The court granted the anti-suit injunction, a judgment confirmed by the Court of Appeal. However, Allianz and Generali appealed to the House of Lords, arguing that the grant of such an injunction was contrary to Brussels Regulation No 44/2001.[833] The House of Lords noted that the ECJ in the cases of *Gasser* [834] and *Turner* [835] had decided that an injunction restraining a party from commencing, or continuing proceedings in a court of a Member State of the European Union was not compatible with the system established by Brussels Regulation No 44/2001. That is because the regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States of the European Union, which must trust each other to apply those rules correctly. However, the House of Lords continued that that principle could not be extended to arbitration, which is completely excluded from the scope of the Regulation by virtue of Article 1(2) (d). Nonetheless, their Lordships decided to stay the proceedings and to refer the following question to the European Court of Justice for a preliminary ruling:

'Whether it is incompatible with Brussels Regulation No 44/2001 for a court of a Member State (European Union) to make an order to restrain a person from commencing or continuing

[833] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,
available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>

[834] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

[835] *Turner v Grovit*, ECJ 27.04.2004 C-159/02.

proceedings before the courts of another Member State (European Union) on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the Regulation excludes arbitration from the scope thereof.'

Before considering the ECJ's answer to that question, it looks more closely at two cases mentioned above - *Erich Gasser GmbH v MISAT Srl* [836] and *Turner v Grovit.*[837]

In *Gasser* the ECJ held that:

> The court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter… Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction [or no]…It must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust... which all the courts within the purview of the Convention are required to respect.[838]

The forgoing statement implicitly showed the reservations of the ECJ towards anti-suit injunctions, suggesting that the anti-suit injunction contradicts the principle of mutual trust between the courts of EU Member States.

The ECJ in *Turner v Grovit* was even more explicit in saying:

> The Brussels Convention precludes the court of a Contracting State from granting an injunction prohibiting a party to proceedings before it from commencing or continuing legal proceedings before a court in another Contracting State, even where that party is acting in bad faith in order to frustrate the existing proceedings.

[836] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

[837] *Turner v Grovit,* ECJ 27.04.2004 C-159/02.

[838] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

> The Convention is based on the trust which the Contracting States accord to one another's legal systems and judicial institutions, and does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State except in special circumstances which were not relevant in the present case. An injunction prohibiting a claimant from bringing an action in a foreign court constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. Such interference cannot be justified by the fact that it is intended to prevent an abuse of process. The judgment made as to the abusive nature of bringing proceedings before the court of another Member State implies an assessment as to the appropriateness of bringing proceedings before a court of another State which runs counter to the principle of mutual trust.[839]

The ECJ had thus clearly shown a tendency to reject anti-suit injunctions. This paved the way for the case of *Allianz SpA v West Tankers* where the ECJ ruled explicitly that;

> It is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.[840]

The court in this case examined the following arguments in favour of granting of anti-suit injunctions -

6.1.4.2 Arbitration matters fall outside the scope of Brussels Regulation No 44/2001.[841]

English courts have regarded anti-suit injunctions as not incompatible with Brussels Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application. Article 1(2)(d) stipulates:

> 1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

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[839] *Turner v Grovit,* ECJ 27.04.2004 C-159/02.

[840] *Allianz SpA v West Tankers* C-185/07.

[841] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,
available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>

> 2. The Regulation shall not apply to:
>
> (d) Arbitration.

Hence, the granting of an anti-suit injunction does not breach the rules allocating jurisdiction between the courts of the EU Member States. Lord Hoffmann opined in the House of Lords in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*:[842]

> The proceedings now before the House are entirely to protect the contractual right to have the dispute determined by arbitration. Accordingly, they fall outside the Regulation and cannot be inconsistent with its provisions. The arbitration agreement lies outside the system of allocation of court jurisdictions which the Regulation creates. There is no dispute that, under the Regulation.

6.1.4.2.1 ECJ's Answer

The ECJ took the view that, in order to determine whether a dispute falls within the scope of Regulation No, 44/2001 or not, reference must be made to the subject matter of the dispute rather than how the rights in the dispute are determined. Thus if the subject matter of the dispute was a claim for damages, it would fall within the scope of the Regulation No 44/2001, as would such subsidiary matters as the applicability and validity of an arbitration agreement. Consequently, the courts of member states have the right to examine the validity of an arbitration agreement as a preliminary issue to determine their jurisdiction.[843] The ECJ seems to have adopted an auxiliary norm to expand the scope of the Regulation to embrace arbitration disputes. It held:

> Even though proceedings do not come within the scope of Brussels Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings

[842] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4 at para 14.

[843] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

> prevent a court of another Member State from exercising the jurisdiction conferred on it by Brussels Regulation No 44/2001.

Hence, according to this justification, Regulation No 44/2001 applies to arbitration disputes.

6.1.4.3 The anti-suit injunction and the *personam* effect

Some scholars argue that the anti-suit injunction only targets *in personam* [844] a party who has started proceedings before a foreign court in breach of an arbitration agreement. Therefore, this remedy does not infringe the jurisdiction of the foreign court in any way. The Chancellor's Court in *Bushby v Munday* [845] in granting the remedy opined that 'this court has not, nor can pretend to have, any authority whatsoever' over a foreign court. More recently, the Privy Council in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* observed that that 'the court's approach is to be cautious in granting an injunction because it may interfere with a foreign process, although the injunction is directed against the particular party and not the foreign court.'[846] Nonetheless, it affirmed the right of an English court to grant such an injunction.

6.1.4.3.1 ECJ's Answer

The ECJ rejected this argument, taking the view that an anti-suit injunction, by its very nature, is a kind of interference with the jurisdiction of foreign courts. In relation to the courts

[844] *Bushby v Munday* [1814-23] All ER Rep 304, *Cohen v. Rothfield* [1919] 1 K.B. 410.

[845] *Bushby v Munday* [1814-23] All ER Rep 304 at 307.

[846] *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] A.C. 871 at 884.

of Member States, this is contrary to the general principle of the Brussels Convention [847] that the court first seised itself determines whether it has jurisdiction to resolve the dispute before it.[848] In addition, the ECJ added that there is no court of one Member State in a better position to determine whether the court of another Member State has jurisdiction to consider any dispute. The *in personam* argument is sheer sophistry; since barring a party from resort to a foreign court effectively determines whether the court will hear the case.[849] The English court themselves recognize that anti-suit injunctions affects in some way the jurisdiction of the foreign court.[850] The court in *Airbus Industrie GIE v Patel* remarked that "the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails."[851] One scholar has argued that 'by their nature and purposes, anti-suit injunctions are disruptive of the coexistence of, and cooperation between judicial and arbitral institutions around the globe.'[852]

[847] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of 27 September 1968, it amended by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.

Available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF>

[848] *Allianz SpA v West Tankers* C-185/07.

[849] Trevor C. Hartley, *'Comity and the Use of Anti-suit Injunctions in International Litigation'* (1987) 35 Am. J. Comp. L. 506.

[850] *Airbus Industries GIE v Patel* [1998] 2 All E.R. 257.

[851] *Airbus Industries GIE v Patel* [1998] 2 All ER 257 at 266

[852] Konstantinos D. Kerameus *'Anti-Suit Injunctions in ICSID Arbitration'* in, *Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) p.131.

6.1.4.4 Anti-Suit Injunctions and the Principle of Comity

Some English scholars insist that the notion of comity justifies such injunctions.[853] The Regulation's purpose is to facilitate cooperation between the EU Member States, which purpose was disregarded by the ECJ in the *West Tankers* case.[854] Longmore L.J. elucidated this approach in *OT Africa Line Ltd v Magic Sportswear Corporation* [855] in stating that:

> It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due.

6.1.4.4.1 Answer

The principle of comity in the international relationships should not be enforced by a unilateral order from a foreign court, even if the aim behind this order is protecting party autonomy in the shape of an arbitration agreement. In this regard, Sir Peter Gross has said that "English courts are not unaware of, or insensitive to, the potential for offence when granting anti-suit injunctions relating to the pursuit of proceedings in convention [Brussels] or regulation jurisdictions." [856]

Therefore, the principle of comity first requires mutual respect between different courts.[857] Such a question should be addressed by a bilateral treaty which outlines the basis and conditions for such judicial cooperation. Only under such a treaty will an anti-suit injunction

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[853] Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (13th edn, Sweet & Maxwell, 2000) para 1-011.

[854] Alexander J. Belohlávek, *'West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958'* (2009) 27(4) ASA Bulletin. 661.

[855] *OT Africa Line Ltd v Magic Sportswear Corporation* [2005] EWCA Civ 710 at para 32.

[856] Peter Gross, *'Anti-Suit Injunctions and Arbitration* (2005)(1) L M C L Q 10.14.

[857] *Credit Suisse Fides Trust SA v Cuoghi* [1998] Q.B. 818.

be acceptable to enforce by a foreign court.[858] The Court of Appeal said in *A Ltd v B Bank* that:

> Comity is observed in recognition of the mutuality of the obligations that states undertake towards each other. It is in the interests of comity that the courts of one state will abstain from sitting in judgement upon the internal affairs of another.[859]

Thus, the issue of an anti-suit injunction without the existence of such treaty can be considered as an infringement of the judicial sovereignty of the foreign court, which is difficult to reconcile with the principle of territorial sovereignty in Public International Law.[860] Taney C.J. opined in *Hilton v Guyot* [861] that '[comity] is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests'. Wheaton J added:

> No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another state.; and, if execution be sought by suit upon the judgment or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable.[862]

The absence of such a treaty between England and Germany may be the reason behind the refusal of a German court to notify the claimants of the anti-suit injunction that was issued by

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[858] For more discussion of this issue see Alexander J. Belohlávek, *'West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958'* (2009) 27(4) ASA Bulletin. 656-658, Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (13th edn, Sweet & Maxwell, 2000) 1-011.

[859] *A Ltd v B Bank* [1997] F.S.R. 165 at 167.

[860] Sandrine Clavel, *'Anti-Suit Injunctions et arbitrage'* (2001) (4) Revue de l'Arbitrage. 669.

[861] *Hilton v Guyot* 159 U.S. 113, at 166.
available at < http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=159&invol=113>

[862] *Hilton v Guyot* 159 U.S.113 at 167.

the English court in *Phillip Alexander Securities & Futures Ltd v Bamberger* case.[863] The German court held that:

> Such injunctions constitute a violation of the judicial sovereignty of the Federal Republic of Germany, because German courts themselves decide exclusively, on the basis of the law of procedure applicable to them and binding international treaties, whether they have jurisdiction to decide a case or whether they have to respect the jurisdiction of another German or foreign court (including arbitral tribunals). Foreign courts cannot give instructions, whether and to what extent a German court or may act in a given case.[864]

To avoid such situations Rix L.J. in *Star Reefers Pool Inc v JFC Group Co Ltd* advised that 'considerations of comity should have in any event caused the English Court to pause long and hard before granting an injunction in such a case.'[865]

6.1.4.5 An Anti-Suit Injunction is Consistent with Modern and International Law

Supporters of anti-suit injunctions argue that modern international law recognises that courts may exercise jurisdiction over the acts of foreigners in foreign states, as long as there is a sufficiently close connection which justifies this interference.[866] This view states that, as long as there is a strong connection between the originating court and the pursuit of litigation abroad the issue of an anti-suit injunction would be justified.[867] In addition, the notion of the infringement of the rules of Public International Law by anti-suit injunctions has been

[863] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] Times, 22 July.

[864] OLG (Superior Court) Düsseldorf, Order of 10 January 1996 – 3 VA 11/95, cited in Michael E. Schneider, '*Court Action in Defence Against Anti-Suit Injunction'* in *'Anti-Suit Injunctions in International Arbitration,* IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) pp.42-43.

[865] *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 at para 40.

[866] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP, 2008) 36-38.

[867] Ibid 38.

abandoned by many international bodies.[868] The French *Cour de Cassation* in *In Zone Brands International Inc v In Beverage International* overrode this principle and held that:

> An anti-suit injunction granted by an American court was enforceable in France where the American and French parties' agreement had given jurisdiction to the American court. Such an injunction was not contrary to French international public order when it was outside the scope of conventions or Community law and its object was only to sanction the breach of a pre-existing contractual obligation.[869]

6.1.4.5.1 The Answer

There is no doubt that the public international law recognises the principle of extraterritorial jurisdiction over certain foreign acts. Yet this is not an absolute right, and is in fact circumscribed by the rules of international law themselves. Indeed, this principle is relied on many international rules, such as the principle of Reciprocity, [870] or the existence of bilateral treaties providing for the basis of such cooperation between sovereign states. Moreover, for a Rule of customary international law to be binding, it must receive the consent of most members of the international community, which has not happened with anti-suit injunctions.[871]

6.1.4.6 Anti-Suit Injunctions and the Right to a Fair Trial (Denial of Justice)

Thomas Raphael argues that an anti-suit injunction does not infringe the right to access to the court mentioned in Article 6 (Right to a fair trial) of the European Convention on Human

[868] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP, 2008) 39.

[869] *In Zone Brands International Inc v In Beverage International* [2010] I.L.Pr. 30 at 60.

[870] Robert O. Keohane, *'Reciprocity in international relations'* (1986) 40 International Organization 1-27.

[871] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] Times, 22 July.

Rights (ECHR).[872] Rather it prevents a party from choosing a specific court (the state of the court of the proceedings restrained), while allowing the party to be heard in the courts of the state in which a court granted the injunction.[873] The Commercial Court in *O T Africa Line Ltd v Hijazy* [874] upheld this opinion and observed that **"**Article 6 of the Human Rights Convention did not provide that a person was to have an unfettered choice of tribunal in which to pursue or defend his civil rights." Moreover, the right of access to the court in Article 6 is open to contractual waiver by the parties. When they agree upon an exclusive forum clause an arbitration clause, they waive the right of access to certain courts.[875] Thus, there is no infringement of the right of access to the court.[876] The European Court of Human Rights in *Deweer v Belgium* [877] held that

> In the Contracting States' domestic legal systems, a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts…The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.

6.1.4.6.1 The Answer

Article 6 of the ECHR grants an individual the right to access to the courts without restriction. Thus, a person can resort to any court to protect his right, and restriction of that

[872] The European Convention on Human Rights (ECHR) entered into force on 3 September 1953. Article 6(1) stipulates that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[873] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP, 2008) 29.

[874] *O T Africa Line Ltd v Hijazy* [2000] All ER (D) 1571 at para 42.

[875] *Fili Shipping Co Ltd v Premium Nafta Products Ltd* on appeal from *Fiona Trust and Holding Corpn v Privalov* [2007] Bus. L.R. 1719.

[876] Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP, 2008) 32.

[877] *Deweer v Belgium* (1979-80) 2 E.H.R.R. 439 at 461.

right may be regarded as a violation of international public policy.[878] A.G. Kokott argued in the *Allianz* case that anti-suit injunctions contravene Article 6, while the ECJ in the same case noted that 'The litigant could be deprived of a form of judicial protection to which it is entitled…the litigant could be barred from access to the court.'[879] Moreover, why should the court issuing the injunction, the court second seised, consider the dispute rather than the court first seised? What gives it preference? Bowen L.J remarked in *Peruvian Guano Co. v. Bockwoldt* that,

> It seems to me that we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries why should this Court interfere and deprive him of it? [880]

Professor, Julian D.M. Lew says 'the main role of the national court is protecting the interests of the litigants, and it should never turn its back on its own nationals, because its main interest is to look after them.'[881]

Hence, on this view, anti-suit injunctions violate fundamental rights protected in international law, and any restriction on the right of access to the court under Article 6 could constitute a denial of justice.[882] So as not to empty the arbitration clause of impact, while preserving a party's right of from access to the court, these rights should be balanced by indicating that a

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[878] Stephen M. Schwebel, *'Anti-Suit Injunction in International Arbitration- An Overview'* in *'Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) 12-13.

[879] *Allianz SpA v West Tankers* C-185/07 at para 3.1

[880] *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch. D. 225 at 234, cited in Jonathan R. C. Arkins, *'Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions'* (2001) 18(6) J Int'l Arb.604.

[881] Julian D.M. Lew, *'Does National Court Involvement Undermine the International Arbitration Processes?'* (2009) 24 (3) Am.U.Int'l L.Rev 39.

[882] Stephen M. Schwebel, *'Anti-Suit Injunction in International Arbitration- An Overview'* in *'Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) 12-13.

party can resort to the courts only where there are allegations related to the existence or validity of the arbitration agreement.

6.1.4.7 Anti-suit Injunctions and the Principle of Mutual Trust

The EC Justice in *Erich Gasser GmbH v MISAT Srl* held that:

> The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all the courts within the purview of the Convention are required to observe…It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.[883]

The ECJ has assured that the right of the courts of Members States to examine their own jurisdiction without any interference from any other state will be upheld,[884] and has affirmed that anti-suit injunctions violate one of Brussels Convention principles, the principle of 'mutual trust' between Members States. How in this union can a second seised court think itself superior to the extent of telling a first seised court what its job is? [885]

[883] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02, *Turner v Grovit* [2004](C-159/02).

[884] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

[885] Koen Lenaerts, *'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice'* (2010) 59 (2) ICLQ 287.

Some argue that the anti-suit injunction is made against the party found be breaching its contract to arbitrate, not against the other court.[886] However, there is no doubt that the anti-suit injunction at least indirectly interferes with the jurisdiction of foreign courts.[887] Lord Brandon in *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provincien' NV* accepted this view noting that;

> The third basic principle is that among the forms of injunction which the High Court has power to grant is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned.[888]

Moreover, an anti-suit injunction makes the enjoining court appear that it knows better and that the foreign court cannot be trusted or is not qualified to consider the dispute.[889] Thus, anti-suit injunctions run counter to the principle of the mutual trust at the heart of the Brussels Convention and violate the jurisdiction of the foreign court.

6.1.4.8 Anti-Suit Injunction and New York Convention

Article II (3) of the New York Convention stipulates that:

> The court of a Contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, at the request of one of the parties, refer

[886] Philip Clifford and Oliver Browne, '*Lost at Sea or a Storm in a Teacup? Anti-Suit Injunctions after Allianz SpA (Formerly Riunione Adriatice Di Sicurta SPA) v West Tankers INC'* (2009) Int. A.L.R. 21.

[887] Patrizio Santomauro, *'Sense and Sensibility: Reviewing West Tankers and Dealing with its Implication in the Wake of the Reform of the EC Regulation* 44/2001' (2010) 6 (2) J Priv Int L. 293, Clare Ambrose, *'Can Anti-Suit Injunctions Survive European Community Law'* (2003) 52 ICLQ. 401.

[888] *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provincien' NV* [1986] 3 All ER 487 at 497.

[889] Michael E. Schneider, '*Court Action in Defence Against Anti-Suit Injunction'* in *‚Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) 41-42.

> the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Supporters of anti-suit injunctions regard Article II of the Convention as reinforcing their position, as it allows a court to grant an injunction to prevent any breach of the arbitration agreement by the parties.[890] Moreover, the granting of an anti-suit injunction may help the enforcement of arbitral awards, as any such award would surely be enforced in the jurisdiction of the enjoining court. Given that this court has already recognized the arbitration process, it will not later refuse what it has already recognized. Thus, the granting of this remedy will make this court more ready to enforce the award. If the second seised court refused to grant an anti-suit injunction, it is likely to refuse to enforce the arbitration award since a court judgment on the issue may well exist at the same time.[891] Therefore, the granting of anti-suit injunctions is consistent with the purposes of the New York Convention. In this regard, some jurists [892] believe that there is one case where an anti-suit injunction should always be granted to uphold the arbitration agreement – where the parties specify that the subject matter and validity of arbitration agreement will be governed by the law of the seat of arbitration. In this case, an anti-suit injunction will have minimal impact on foreign sovereignty.[893]

6.1.4.8.1 The Answer

The wording of Article II (3) of the New York Convention says nothing regarding provisional measures. It just deals with the arbitration agreement and the enforceability of the arbitration

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[890] Marco Stacher, *'You Don't Want to Go There - Anti-suit Injunctions in International Commercial Arbitration'* (2005) 23 (4) ASA Bulletin. 647.

[891] Grace Gunah Kim, *'After the ECJ's West Tankers the Clash of Civilizations on the Issue of an Anti-Suit Injunction'* (2011) 12 Cardozo J. Conflict Resol. 573.

[892] Ibid 581.

[893] Ibid.

award. Article II obliges contracting states to stay court proceedings in favour of arbitration, and asks them to refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[894] The provision does not empower a specific court to examine validity or scope of the arbitration agreement.[895] Therefore, it may be inferred that the court first seised deserves to be allowed to consider arguments related to the validity of the arbitration agreement, before deciding whether to refer the parties to an arbitral tribunal.[896] Should a conflict of jurisdiction arise between EU courts, Articles 27 and 28 of Regulation No. 44/2001 will solve this issue and ensure that there is coordination between these courts.[897]

As for the assumption an anti-suit injunction facilitates the enforcement of the arbitral award, this seems like a case where unlawful means are used to achieve a lawful end. Article V of New York Convention has determined explicitly the grounds on which enforcement of the arbitral award may be refused, and failure to grant an anti-suit injunction is not one of them. Any refusal of enforcement on grounds other than those mentioned in Article V would be a breach of the Convention. Therefore, some scholars think that anti-suit injunctions are inconsistent with the spirit of the New York Convention and with the obligations of States under this convention.[898]

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[894] Jean-Franðcois Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para.1030.

[895] Lew, Julian D. M., *'Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings'* in Gaillard Emmanual (ed), *Anti-Suit Injunctions in International Arbitration* (IAI Series on International Arbitration No. 2, Paris 2005) 31; Grace Gunah Kim, *'After the ECJ's West Tankers the Clash of Civilizations on the Issue of an Anti-Suit Injunction'* (2011) 12 Cardozo J. Conflict Resol. 580.

[896] *Allianz SpA v West Tankers* C-185/07 at para 33.

[897] Opinion of Advocate General Kokott in *Allianz SpA v West Tankers* Case C-185/07 para. 71

[898] Stephen M. Schwebel, *'Anti-Suit Injunction in International Arbitration- An Overview'* in *‚Anti-Suit Injunctions in International Arbitration,* IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005)10-11

6.1.4.9 Other Aspects of Anti-Suit Injunctions

6.1.4.9.1 Economic Interests

Lord Hoffmann in the House of Lords *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* obnserved that:

> Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies…Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.[899]

Lord Hoffmann is thus suggesting that a major benefit of anti-suit injunctions is the fostering of the economic interests of London and perhaps the EU in general. He believes that the availability of anti-suit injunctions is a significant element in persuading parties to arbitrate in London, and without the availability of this remedy London would lose its position as a leading centre in the settlement of arbitration disputes. Therefore, the protection of arbitration agreements is not the main reason for granting anti-suit injunctions. Rather it is a subsidiary issue used as excuse to override the sovereignty of foreign courts.

If that is so, should the economic interests of London be allowed to prevail over the sovereignty of foreign courts? The Advocate General's answer to this is that "aims of a

[899] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4 at para 20.

purely economic nature cannot justify infringements of Community law." [900] The ECJ has taken the view that the protection of the sovereignty of the courts of member states prevails over the agreement of the parties. Any violation of this principle is not acceptable no matter what the pretext. The ECJ has rejected the principle of *the end justifies the means*,[901] decided that the sovereignty of the courts of member states should be respected by outlawing anti-suit injunctions whatever their aim.

6.1.4.9.2 Anti-anti-suit injunction (Clash of Jurisdictions)

The granting of an anti-suit injunction could lead to a tragic situation, where two courts grant injunctions to prevent each party from bringing anti- suit proceedings in a foreign court.[902] In such case, there will be a clash between what could be called the anti-anti-suit injunctions, since each court suppose that it has jurisdiction to grant the injunction, leading to a conflict of injunctions. The *KBC v Pertamina*[903] case embodies the previous hypothesis and reflects the complex situation, which could arise due to the granting of such inunctions.[904] On the 28th November 1994, Karaha Bodas Company, L.L.C. (KBC), Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), the Indonesian state oil company, and PT. (Persero) Perusahaan Listruik Negara (PLN), a state owned electrical utility, agreed to jointly develop the 400 MW Karaha Bodas Geothermal Project in West Java, Indonesia. KBC and Pertamina concluded a Joint Operations Contract (JOC), which provided that Pertamina would manage the geothermal operations and KBC would be responsible for financing the Project and

[900] Opinion of Advocate General Kokott in *Allianz SpA v West Tankers* Case C-185/07 para. 66.

[901] Sandrine Clavel, *'Anti-Suit Injunctions et arbitrage'* (2001) (4) Revue de l'Arbitrage 671.

[902] Look Chan Ho, *'Anti-suit injunctions in cross border insolvency: a restatement'* (2003) 52(3) I.C.L.Q. 701.

[903] *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2002) *XXVII Yearbook Commercial Arbitration* 814 – 838.

[904] Emmanuel Gaillard, '*KBC v Pertamina, Landmark on Anti-Suit Injunctions'* (2003) N.Y.L.J. Oct.2

building, owning, and operating the generating facilities. KBC, Pertamina and PLN further entered into an Energy Sales Contract (ESC) under which PLN was to purchase from Pertamina the electricity generated by KBC's facilities for specified prices. Both the JOC and the ESC contained a clause for arbitration of disputes in Switzerland according to the UNCITRAL Rules.

On the 20th September 1997 and the 10th January 1998, the Government of Indonesia issued Presidential Decrees indefinitely postponing the Project. Pertamina and PLN became thus unable to purchase the energy to be generated by KBC's facilities. KBC commenced arbitration for breach of the contracts. On the 18th December 2000, the Tribunal rendered a Final Award in favor of KBC, directing Pertamina and PLN to pay KBC a total of US$ 261 million. KBC sought enforcement of the award in the United States. At the same time, Pertamina obtained an award from the Indonesian courts annulling the KBC arbitration award. Moreover, Pertamina has obtained an anti-suit injunction preventing KBC from commencing the enforcement process before U.S. courts.

The U.S. District Court for the Southern District of Texas issued an order to enforce the arbitration award. Moreover, it issued an anti-suit injunction requiring Pertamina to withdraw its Indonesian claim and to cease any proceedings before the Indonesians (an anti-anti-suit injunction). Unfortunately, Pertamina did not comply with U.S. court injunction, continued its claim and obtained another injunction preventing KBC from seeking to enforce the arbitral award.

In this case, the U.S. courts have issued more than seven injunctions against Pertamina,[905] while Indonesian courts have issued many contrasting injunctions and judgements against the

[905] Michael E. Schneider, *'Court Action in Defence Against Anti-Suit Injunction'* in Gaillard, Emmanual (ed), *Anti-Suit Injunction In international Arbitration* (Juris Publishing, Inc, Paris 2003) 47.

orders of the U.S. courts. Finally, the U.S Court of Appeal in 2004 annulled the U.S. injunctions, while emphasising that District courts have inherent authority to issue an Anti-suit injunction.[906]

Did the granting of an anti-suit-injunction in *KBC v Pertamina* impact positively or negatively on the arbitration process? It seems clear that the effects were very negative, and caused many clashes between national courts and harm to the arbitration process,[907] as well as leading to many contradictory orders and judgements.

It should be emphasised that the question of whether anti-suit injunctions should continue to be available is not merely academic. Apart from the fact that certain jurisdictions outwith the EU continue to grant them, although the ECJ has banned the granting of anti-suit injunction within the EU,[908] the English Courts continue to grant this measure to restrain legal proceedings outwith the EU.[909]

[906] Michael E. Schneider, *'Court Action in Defence Against Anti-Suit Injunction'* in Gaillard, Emmanual (ed), *Anti-Suit Injunction In international Arbitration* (Juris Publishing, Inc, Paris 2003) 49.

[907] Emmanuel Gaillard, *'KBC v Pertamina, Landmark on Anti-Suit Injunctions'* (2003) N.Y.L.J. Oct. 2; Emmanuel Gaillard, *'Reflections on the Use of Anti-Suit Injunctions in International Arbitration'* in Loukas A. Mistelis and Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer, 2006) 209.

[908] *Allianz SpA v West Tankers* C-185/07.

[909] *Shashoua and others v Sharma* [2009] EWHC 957 (Comm), *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm).

6.1.5 Anti-Suit Injunctions under Egyptian Law.

The Egyptian legal system, in common with other Civil Law systems, does not recognize the anti-suit injunction remedy. Therefore, the Egyptian laws that have links to arbitration proceedings, such as the Egyptian Arbitration Law 27 of 1994 or the Civil Procedures Law 13 of 1968 contain no provisions pertaining to this measure. The Egyptian courts do not grant anti-suit injunctions. However, could an Egyptian court enforce an anti-suit injunction issued by a foreign court or by an arbitral tribunal seated outside or inside Egypt? The answers to these questions need to be examined in light of the situation under both the Arbitration Law and the Civil Procedure Law.

6.1.5.1 Anti-Suit Injunction under Egyptian Arbitration Law

Egyptian Arbitration Law does not include any provision addressing anti-suit injunctions. This may be because this measure in unknown outside Common Law countries, or because Egypt adopted the old version of the UNCITRAL Model Law, which (unlike the 2006 version) did not encompass this measure. The nearest the law comes to an anti-suit injunction is Article 13(1), which provides.

> The court before which an action is brought concerning a disputed matter which is the subject of an arbitration agreement shall hold this action inadmissible provided that the respondent raises this objection before submitting any demand or defence on the substance of the dispute.

This provision aims to protect an arbitration clause from any attempt to breach it by resorting to the court. Additionally, this Article deprives the court of any discretionary power to consider the dispute,[910] by obliging it court to Rule that it is not competent to do so.[911] It is

[910] Fathi Wali, *Arbitration Law in the Theory and Practice* (1st edn, Monshaa Al-Maa'ref, 2007) 184.

worth mentioning that the court cannot raise the question of an arbitration clause of its own motion, since it raises no issue of public policy.[912] Therefore, if a party fails to raise the arbitration clause before any discussion of the merits of the case, his silence amounts to a waiver of his right to invoke the clause.[913] Article 13(1) is to some extent doing the same job as an anti-suit injunction, since it protects the arbitration process from any infringement by giving the parties the right to plead the existence of arbitration clause before the court, which must stay the judicial proceedings until the arbitral tribunal settles the dispute.[914] This Article is the only provision under Arbitration Law that protects the arbitration process, since the Egyptian legal system does not recognize the court's power to direct a party not to raise proceedings before a foreign court (the anti-suit injunction).

Hence, a party to an arbitration clause (regardless of the place of arbitration) who wants to stop proceedings before the Egyptian courts relating to any dispute that the parties have agreed should be resolved by arbitration, can simply present the arbitration agreement to the court and request it to cease the action. In this regard, even though it may be alleged that the arbitration clause is invalid or null, Egyptian Arbitration Law has adopted the principle of *competence-competence*; which means that the court will refer these allegations to the tribunal to consider them under Article 22, which stipulates;

1. The arbitral panel is competent to Rule on the objections related to its lack of jurisdiction, including objections claiming the non-existence of an arbitration agreement, its extinction, nullity of said agreement, or that it does not cover the subject matter in dispute.

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[911] Egyptian Arbitration Law Article 13 (1), see Rateb, M. Kamel .M, *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 168.

[912] The New French Arbitration Code Article 1448 stipulates explicitly that 'the arbitration clause is not related to Public Policy. A court may not decline jurisdiction of its own motion'.

[913] Abdul Hamid El Ahdab and Jalal El Ahdab, El Ahdab Abdul Hamid and El Ahdab Jalal, *Arbitration with the Arab Countries* (Kluwer Law International, 2011) 177.

[914] Amazu A. Asouzu, *'Egyptian Law concerning Arbitration in Civil and Commercial Matters'* (1996) 8 Afr. J. Int'l & Comp. L. 147. See English Arbitration Act 1996 s.9, German Arbitration Act 1998 s.1032.

2. …
3. The arbitral panel may Rule on the pleas referred to in paragraph 1 of this Article either as a preliminary question before ruling on the merits or adjoin them to the merits in order to be ruled upon together. If the arbitral panel rules to dismiss a plea, such motion may not be raised except through the institution of a recourse for the annulment of the arbitral award disposing of the whole dispute pursuant to Article 53 of this Law.

Hence, the Egyptian court has no jurisdiction to consider any dispute regarding the validity of the arbitration agreement, but must refer any such matter to the tribunal should a party raise it before the court. Article 13 of the Egyptian Arbitration Law is a suitable basis for dealing with any infringement of an arbitration clause, and thus has a similar effect to an anti-suit injunction.

However, the question remains whether an arbitral tribunal could grant an anti-suit injunction. Theoretically, Article 24 of the Egyptian Arbitration Law imposes no restrictions on the arbitral tribunal's power to grant any measures deemed necessary in the dispute,[915] so that an arbitral tribunal can grant an anti-suit injunction under this provision. Yet would the Egyptian courts enforce this injunction?

6.1.5.2 Anti-Suit Injunctions under Egyptian Civil Procedure Law

Article 1 of the Civil Procedure Law stipulates that 'The Egyptian Civil Procedure Rules shall apply to all pending litigations within Egyptian territory after the date of this law', while Article 32 in the same law states that the 'Egyptian courts are competent to adjudicate in all litigations within the Republic'. Thus, an anti-suit injunction whether issued in or outside

[915] Abd El-Hamid .R. Sayyid, *Arbitration law 27 of 1994 in the balance* (Cairo; Dar El-Nahda El-Arabia, 2004) 66.

Egypt, falls foul of these provisions, which give the Egyptian court's jurisdiction to consider all litigation within Egypt.[916] Nor it is inappropriate to invoke the Egyptian rules regarding the enforcement of foreign judgments to enforce an anti-suit injunction,[917] because Article 298 of these rules requires that the foreign judgments must be *res judicata*, and adjudicate on the substantive matters of the dispute. Moreover, it is unlikely an anti-suit injunction issued by an arbitral tribunal could be enforced under the umbrella of New York Convention, since it is not really an award but an order.[918]

Of course, it would still be possible to achieve the anti-suit injunction's aim by invoking the arbitration clause to dispute the jurisdiction of the court to consider the substantive claim.[919] Inability to enforce such injunctions in Egypt does not strip the arbitral tribunal of power to grant such injunctions as long as they are sought to be enforced outside Egypt.

6.1.5.3 Conclusion

It is obvious that Article 298 stands as a legal barrier to the enforcement of foreign orders in Egypt, whether such orders are related to anti-suit injunctions or not. Therefore, Article 298 should be modified by the addition of an exception which allows the enforcement of foreign arbitration orders, especially those orders which have been issued to deal with urgent circumstances,[920] regardless of the finality or the subject matter of these orders. Without such modification, anti-suit injunctions will remain unrecognized under Egyptian law.

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[916] Egyptian Civil Procedure Law Article 1.

[917] Egyptian Civil Procedures Law Articles 296-301.

[918] Jean-Franðcois Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para.639.

[919] Egyptian Arbitration Law Article 13(1).

[920] Heba Badr Al-Sadiq, *'The Interim Protection in Arbitration; Comparative Study'* (Ph.D Ain Shams University (Egypt) 2009) 270-271.

6.1.6 Anti-Suit Injunctions under Scottish Law

Anti-suit injunctions are not mentioned in the Arbitration Scotland Act 2010. Injunctions under the Scottish legal system are known as interdicts.[921] Interdict is a remedy granted by the Court of Session or Sheriff Court to restrain either a wrong in course of being done or an apprehended violation of a party's rights.[922] Interdict is not an exclusive tool of the arbitration process, but is rather a general remedy, which could be used against all manner of wrongs, e.g. trespass,[923] the protection of intellectual property rights,[924] in landlord and tenant disputes,[925] in industrial disputes and in many other types of litigation.[926] Thus, the Scots courts can grant interdict to restrain any actual or threatened violation of an applicant's legal rights that takes place in Scotland.[927] Hence, any attempt by a party to breach his undertaking to arbitrate by raising litigation would give the other party the right to request the court to issue an interim interdict to prevent his opponent from taking or continuing such procedures.[928] Nevertheless, there is no actual case where the Scottish courts have issued an interdict to prevent a person from pursuing litigation outside Scotland.[929]

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[921] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para17.17, Stanley Scott Robinson, *The Law of Interdict* (London/ Edinburgh: Butterworth & Co 1987) 1.

[922] David M. Walker, *The Law of Civil Remedies in Scotland* **(**Edinburgh: W. Green & Son Ltd, 1974) 215, Stanley Scott Robinson, *The Law of Interdict* (London/ Edinburgh: Butterworth & Co 1987) 1.

[923] *Allen v Thomson* 2010 S.L.T. (Sh Ct) 60, *Inverurie Magistrates v Sorrie* 1956 S.C. 175.

[924] *Schuh Limited v SHHH … Limited* [2011] CSOH 123.

[925] *Style Menswear Ltd, Petitioners* [2008] CSOH 149, *Church Commissioners for England v Abbey National Plc* 1994 S.C. 651.

[926] Stanley Scott Robinson, *The Law of Interdict* (London/ Edinburgh: Butterworth & Co, 1987) 51-112.

[927] David M. Walker, *The Law of Civil Remedies in Scotland* **(**Edinburgh: W. Green & Son Ltd, 1974) 227.

[928] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para 15.02.

[929] Ibid.

6.1.6.1 The situation after *West Tankers*

Of course, the ECJ's judgement in *Allianz SpA v West Tankers* has limited the powers of courts within the EU to grant anti-suit injunctions (interdict in Scotland).[930] As Scotland is part of the EU, its courts are affected. In light of the *West Tankers* judgment, the Scottish courts cannot grant an interdict restraining a party from bringing proceedings in the courts of any EU Member State, [931] although this prohibition does not extend outside the EU.[932]

The Scottish courts might still issue a declarator that there is an arbitration agreement and that the parties are obliged to resolve their disputes by arbitration.[933] However, obtaining a declarator is not an easy process, as it needs the court to determine first that there was a valid contract, which process might touch upon the substantive matters of the dispute,[934] thus disinclining the court to refuse to grant such declarator.[935] Moreover, any declarator would be ineffective within the EU, since and the court first seised will not be bound by it.[936]

According to the *West Tankers* judgment, the EU courts may not grant an anti-suit injunction to restrain proceedings before the courts of a member state, and of course the Scottish courts will not be bound to enforce such injunction if it has been issued.

[930] *Allianz SpA v West Tankers* C-185/07.

[931] *Allianz SpA v West Tankers* C-185/07.

[932] *Shashoua and others v Sharma* [2009] EWHC 957 (Comm), *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm).

[933] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para.15.05.

[934] *Meadows Indemnity Co Ltd v Insurance Co of Ireland plc* [1989] 2 Lloyd's Rep 298.

[935] *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Baosteel Ocean Shipping Co)* [2000] 2 All E.R. (Comm) 70.

[936] *Erich Gasser GmbH v MISAT Srl* ECJ 09.12.2003 C-116/02.

6.1.6.2 The power of arbitral tribunals to issue anti-suit interdicts under Scottish Law

6.1.6.2.1 Where there is no agreement to make such remedy available

The Arbitration (Scotland) Act 2010 addresses the arbitral tribunal's power to conduct the arbitral proceedings in Rules 28-40 of the Act. These rules do not mention anti-suit interdicts, which suggest that the tribunal has no power under the Act to grant such a measure. The only Rule that might be construed so as to empower the tribunal to do so is Rule 49(b), which provides that 'the tribunal's award may— (b) order a party to do or refrain from doing something (including ordering the performance of a contractual obligation)'. However, any suggestion that Rule 49(b)'s ambit could be extended to cover the issuing of anti-suit interdicts seems misguided for the following reasons:

1. Rule 49 regulates the tribunal's power to make final awards, a view confirmed by the fact that Rule 49 is located under part 6 of the Act, entitled 'Awards'. Moreover, Rule49 is clearly based on s.48 of the 1996 Act,[937] which regulates the arbitral tribunal's powers regarding the final award.[938] The Policy Memorandum Paragraph 170 emphasizes that the remedies mentioned in this Rule have a permanent nature and may only be granted in the final award.
2. Rule 49 regulates the tribunal's power to adjudicate upon the substantive issue of the dispute, while by contrast anti-suit interdicts have a provisional nature.

Therefore, unless there is an agreement between the parties to confer on the arbitral tribunal the power to issue an interdict, the arbitral tribunal has no power to do so.

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[937] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para 17.15.

[938] *Kastner v Jason* [2005] 1 Lloyd's Rep 397, Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 330, Steven *Gee, Commercial Injunctions* (formerly Mareva Injunctions and Anton Piller Relief) (5th edn, Sweet & Maxwell, 2004) paras 6.45-6.47.

6.1.6.2.2 The parties agree on this remedy

Section 1(b) of the Arbitration (Scotland) Act 2010 recognizes the principle of party autonomy, so that the parties can confer any power on the arbitral tribunal. Nonetheless, in the light of the *West Tankers* judgment, an anti-suit interdict issued by a tribunal would be unenforceable within the EU Member states.[939] Outside the EU enforcement would depend on whether the interpretation of the term 'Award' in the New York Convention extends to this type of remedy.

6.1.6.3 Conclusion

The Scottish courts and in certain circumstances arbitral tribunals operating under the Arbitration (Scotland) Act 2010 have the power to issue anti-suit interdicts. However such orders would be ineffective within the EU, as a result of the ECJ's judgment in *West Tankers*.

[939] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para 17.09.

6.1.7 Anti-suit Injunctions under English Law

The anti-suit injunction is a creature of English law[940] being used for the first time in *Bushby v Munday*[941] in the beginning of the 19th century. The English courts' jurisdiction to grant an anti-suit injunction is founded on s.37(1) of the Supreme Court Act 1981, which reads: 'The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so. The ECJ's judgment in *West Tankers* has of course limited the power to grant anti-suit injunctions within the EU.[942] Yet the English courts still grant such injunctions to restrain legal proceedings outside EU Members states,[943] on the grounds that the decision in *West Tankers* does not prohibit the granting of the anti-suit injunction but only limits its scope. Cooke J in *Shashoua and others v Sharma* [944] commented that:

> There was nothing in *Front Comor* [*Allianz SpA v West Tankers*]which impacted upon the law as developed in the UK in relation to anti suit injunctions which prevented parties from pursuing proceedings in the courts of a country which was not a member state of the European Community'

However, some argue that the grounds of the *West Tankers'* judgment might serve to ban the application of this measure outside the EU Member state as well. The arguments are as follows.

1. Advocate General Kokott in his opinion in *West Tankers* suggested that anti-suit injunctions infringes upon the sovereignty of foreign courts as regards their

[940] Marco Stacher, *'You Don't Want to Go There – Anti-suit Injunctions in International Commercial Arbitration'* (2005) 23(4) ASA Bulletin 642.

[941] *Bushby v Munday* [1814-23] All E.R. Rep 304.

[942] *Allianz SpA v West Tankers,* C-185/07, see the earlier discussion of this decision.

[943] *Shashoua and others v Sharma* [2009] EWHC 957 (Comm), *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm).

[944] *Shashoua and others v Sharma* [2009] EWHC 957 (Comm).

jurisdiction to examine the validity of arbitration agreement.[945] This principle should not be exclusive to EU courts; it is a common principle that should prevail between all national courts. Hence, the granting of a unilateral anti-suit injunction by the English courts considers a violation of a foreign court's jurisdiction, whether within or outside the EU. Why should there be a difference between the notion of sovereignty of EU and non-EU courts?

2. Moreover, the granting of anti-suit injunctions contravenes the New York convention, under which every court is entitled to examine its own jurisdiction under the doctrine of *Kompetenz-Kompetenz*).[946]

Thus the reasons which have obliged English courts to refrain from granting anti-suit injunctions also operate at the international level, which means that the English courts should stop issuing anti-suit injunctions altogether.

6.1.7.1 Arbitral Tribunal's Power to Grant an Anti-Suit Injunction

The Arbitral tribunal's powers to conduct arbitration proceedings under the English Act are organized by ss.38, 39 and 48.

6.1.7.1.1 Tribunal's Power under Section 48

Most commentators agree that s.48 of the 1996 Act addresses the arbitral tribunal's power regarding substantive final awards,[947] since it stipulates '1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies…5) The tribunal has the

[945] Opinion of Advocate General Kokott in *Allianz SpA v West Tankers* Case C-185/07. paras.34-58.

[946] Opinion of Advocate General Kokott in *Allianz SpA v West Tankers* Case C-185/07. paras.56-57.

[947] *Kastner v Jason* [2005] 1 Lloyd's Rep 397.

same powers as the court- (a) to order a party to do or refrain from doing anything.' It has been seen that after the *West Tankers* decision, English courts have no power to grant anti-suit injunctions within the EU. This means that the arbitral tribunal, even if the parties agree to do so,[948] would be similarly restricted, since its powers are expressly linked to those of the court by s.48(5).[949]

Moreover, the location of this section under the title of 'awards', and the provisional nature of anti-suit injunctions, are inconsistent with the final awards that intended by s.48.[950]

6.1.7.1.2 The Tribunal's Power under Section 38

Section 38(1) stipulates 'The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.' It is obvious that s.38 entitles the parties to confer on the tribunal the power to grant any remedy which will assist the conduct of the arbitration, including anti-suit injunctions.[951] However, how is this affected by the ECJ's judgment in *West Tankers*? There is no doubt that the judgment affected the tribunal's power to grant an anti-suit injunction. This decision narrowed the spatial scope of such injunctions, since EU Member states will not enforce them due to their incompatibility with Brussels Regulation No. 44/2001. Nevertheless, such injunctions may still have forced outside the EU, particularly in common law counties that recognize the anti-suit injunction.

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[948] See para 6.1.5.1.2 of this Chapter.

[949] Charles Debattista, *'Arbitrators' Powers to Order Interim Measures (Including Anti-Suit Injunctions)* (2008) 76 Arbitration, para 35 available at < http://www.lmaa.org.uk/uploads/documents/C50ArbitratorsPowers.pdf>

[950] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) 130.

[951] Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science, 1996) 158.

Professor Debattista draws attention to one of the main difficulties that may be encountered by an English court should a party refuse to comply with an injunction issued by the tribunal. Would an English court use its power under s.42(1) to enforce a peremptory order made by the tribunal? [952] The arbitral tribunal under s.41(5) has power to make a peremptory order demanding that a party comply with an order it has made within such time as it may prescribe, while s. 42(1) empowers the court to make an order requiring a party to comply with such a peremptory order that has been issued by the tribunal. It is suggested that, in the light of the *West Tankers* decision, an English court would not be able to make such order, at least in so far as it restricted access to the courts of any member state.[953] Thus an anti-suit injunction issued by an arbitral tribunal seated in England will not be supported by the English courts despite the terms of s.42(1) of the Arbitration Act 1996.

Nonetheless, the arbitral tribunal may be able to circumvent this difficulty by using the powers listed in s. 41(7), which states that if a party fails to comply with a peremptory order the tribunal may:

> (c) Proceed to an award on the basis of such materials as have been properly provided to it

Professor Debattista argues that if a party ignores an anti-suit injunction issued by the tribunal, it should seek to make an award as soon as possible, since the important thing is not who is first seised as much as who is first to judgment.[954]

[952] Charles Debattista, *Arbitrators' Powers to Order Interim Measures (Including Anti-Suit Injunctions)* (2008) 76 Arbitration, para 35.

[953] Ibid. para 36.

[954] Ibid. para 37.

6.1.7.1.3 The Tribunal's Power under Section 39

Section 39 is an *opt-in* provision, which means that the parties must agree to confer the power on the tribunal to make provisional awards; otherwise, the arbitral tribunal has no such power.[955] Hence, the application of s.39 needs clear agreement between the parties, although no particular form of words appears to be required. Yet the section does not speak of issuing injunctions. Secondly, the examples listed in s.39 regulate only to financial issues. By contrast an anti-suit injunction is an order directed at protecting the effectiveness of arbitration clause. Finally, s.39(3) stipulates that 'any such order shall be subject to the tribunal's final adjudication and the tribunal's final award…'. Since an anti-suit injunction is not subject to being reviewed by the final award, it would appear to fall outside this section.

To sum up, the English system has been affected by the *West Tankers* decision. This change needs the intervention of legislators to amendment the Act so that it is compatible with the new situation. For example, s. 42(1) should be amended so as to make clear that anti-suit injunctions are excluded from its scope, thus preventing any misunderstanding that its current general phrases may cause among arbitration users in England.

6.1.8 Conclusion

Anti-suit injunctions are not the safest way to protect arbitration clauses, and the problems they create may be very complicated, as in *KBC V Pertamina*. There is no doubt that the protection of arbitration clause is a noble aim, but achieving this goal must not be compromise state sovereignty or collide with the jurisdiction of foreign courts. The principle

[955] English Arbitration Act 1996 s.39(4).

of the *end justifies the means* has no place in international relations, and invoking the principle of comity is insufficient to justify such unilateral action.[956] However, one writer says;

> The unilateral attempt of the EU to regulate the practice of an anti-suit injunction through its own regional instruments is likely to fail because the problem of an anti-suit injunction is not a regional one, but a global one, requiring a global solution.[957]

And another scholar puts it even more strongly, 'I think it is fair to say that anyone interested in arbitration is not in favour of those injunctions.'[958] Yet the absence of clear provision in the New York Convention addressing anti-suit injunctions leads to a lack of the uniform rules governing practice in this area.

Yet anti-suit injunctions could be reconciled with the public international law and avoid interference with state sovereignty, if they were recognized by an international treaty or at least by bilateral conventions.[959] In this regard, the New York Convention is one of the most widely accepted international conventions. Accordingly, launching an international dialogue to modify the Convention by adding a new provision to recognise the use and enforcement of anti-suit injunctions would be a good start in finding an international solution to the problems

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[956] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] Times, 22 July, Peter Gross, *'Anti-Suit Injunctions and Arbitration* (2005)(1) L M C L Q 24

[957] Grace Gunah Kim, *'After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction'* (2011) 12 Cardozo J Conflict Resol. 574

[958] Axel H. Baum, *'Anti-Suit Injunction Issued by the National Courts to Permit Arbitration Proceedings'* in *‚Anti-Suit Injunctions in International Arbitration,* IAI Series on International Arbitration No. 2 (J. Gaillard ed., 2005) 19

[959] Peter Gross, *'Anti-Suit Injunctions and Arbitration* (2005)(1) L M C L Q 24, Briggs, Adrian, *'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice'* (2005) II (124) Zeitschrift fur Schweizerisches Rech. 23 Oxford Legal Studies Research Paper No. 11/2006. Available at <: http://ssrn.com/abstract=899689>

that currently surround this remedy.[960] Such proposals will protect the arbitration agreement and facilitate the issue and enforcement of such injunctions.[961] Until this happens, Egyptian law should continue to refuse to recognise this remedy.

[960] Guido Carducci, *'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention'* (2011) 27 (2) Arb Intl.196.

[961] Grace Gunah Kim, *'After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction'* (2011) 12 Cardozo J Conflict Resol. 607.

Chapter 7

7.1 The Conditions for Granting Provisional Measures

Since the nature of interim measures involves many restrictions that could affect the subject matter of a dispute and limit a party's right to deal with his property or assets, it is necessary to set some conditions and prerequisites to prevent their misuse.[962] Several Arbitration Laws and Rules address the conditions for granting interim measures.[963] Most rules just recognise generally the arbitral tribunal's power to grant interim measures without setting any conditions for such measures to be granted.[964] Some arbitration rules give examples of what might be considered interim measures and sometimes give the tribunal the power to set its own conditions.[965]

On the other hand, certain arbitration laws set conditions inspired by territoriality. For example, the English Arbitration Act 1996 s.43(3) stipulates that 'The court procedures may only be used if- (a)the witness is in the United Kingdom, and (b)the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.' Moreover, Kerr L.J. observed in *Bank Mellat v. Helliniki Techniki S.A* that;

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[962] Bernardo M. Cremades, '*The Need for Conservatory and Preliminary Measures'* (1999) 27 Int.Bus.Lawy, 227.

[963] Georg von Segesser, *'Vorsorgliche Massnahmen im Internationalen Schiedsprozess'* (2007) 25 (3) ASA Bulletin, 476.

[964] For example, the ICC Arbitration Rules 2012 Article 28 stipulates 'The arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate'. This Article does not set any conditions for granting interim measures beyond the tribunal's view of what is appropriate. See also LCIA Arbitration Rules Article 25; NAI Arbitration Rules 2010 Article 38.

[965] See LCIA Arbitration Rules Article 25(1)(b).

> The grant or refusal of an order for security in international arbitrations must depend upon all the circumstances of each case. However, particular regard would, I think, be given to the degree of connection that the parties or the arbitration have with this country and its legal system.[966]

Hence, the conditions for granting interim measures may differ between arbitration laws and arbitration rules.

However, the most significant legal regime in the arbitration arena is the UNCITRAL Model Law 2006. Article 17(A) of the Model Law lays down conditions for granting interim measures, which conditions are echoed in many arbitration laws and rules.

> (1) The party requesting an interim measure under Article 17(2) *(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:
>
> *(a)* Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> *(b)* There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
>
> (2) With regard to a request for an interim measure under Article 17(2) *(d)*, the requirements in paragraphs (1) *(a)* and *(b)* of this Article shall apply only to the extent the arbitral tribunal considers appropriate.

Additionally, Article 17(E)(1) stipulates that 'the arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.'

The UNCITRAL Model Law has come close to creating a kind of international understanding on conditions for granting the interim measures. This can be seen in several rules and laws,

[966] *Bank Mellat v. Helliniki Techniki S.A* [1984] Q.B. 291 at 304.

particularly those adopted after the promulgation of the new version of the UNCITRAL Model Law in 2006.[967] The conditions for granting the interim measures generally do not deviate far from what has been mentioned in the UNCITRAL Model Law. Of course, in arbitration practice conditions may be applied which differ from case to case because each case is dependent on its own facts, and the ultimate objective is to achieve so far as possible justice between the parties.[968] Thus, for example, the impact of the measure on the subject matter of the dispute [969] may persuade the tribunal to request the provision of security in advance to cover the potential damage that could happen due to the granting of such measures.[970] Furthermore, most arbitration rules that recognise the tribunal's power to grant these measures do not provide a lot of detail about these measures. Such rules give the tribunal wide discretion to invent its own conditions and to determine the sort of evidence, which will satisfy it that the requested measure is urgently needed.[971]

Accordingly, the conditions for granting interim measures whether under the UNCITRAL Model Law or arising from arbitration practice could be said to fall into three categories, each of which features a number of sub-categories:

1. Conditions relating to the circumstances of case

[967] Dana Renee Bucy, *'How to Best Protect Party Rights: The Future of Interim Measures in International Commercial Arbitration under the Amended UNCITRAL Model Law'* (2010) 25 Am. U. Int'l L. Rev. 582.

[968] *Revenue and Customs Commissioners v Ali* [2011] EWHC 880 (Ch) at Paragraph 58.

[969] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 605.

[970] *Sergei Paushok v Mongolia - temporary restraining order and interim measures issued by a UNCITRAL Tribunal*. Order on iterim measures, September 2. 2008.

[971] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 604.

a) The urgency of the case[972]

b) Irreparable harm

c) Non-effect of the requested measures on substantive matters

2. Conditions related to the arbitral tribunal

a) The jurisdiction of the tribunal to grant an interim measure[973]

b) Reasonable chance of success on the merits[974]

3. Conditions related to the applicant

a) Providing security[975]

b) Making a request

c) Good faith

7.1.1 Case Conditions

7.1.1.1 Urgency

Interim measures are closely linked to the notion of the urgency, necessitating the intervention of the tribunal or court to avoid irreparable harm,[976] e.g. if critical evidence was about to be lost forever or there was a risk that it would be destroyed or otherwise tampered with, such as to make it of no probative value.[977] These examples illustrate the need for

[972] This is a common condition in most arbitration laws and rules. See Egyptian Arbitration Article 24; French Code of Civil Procedure 2011 Article 1468; Arbitration (Scotland) Act 2010 Rule 31(1); Jordanian Arbitration Law 31 of 2001 Article 23; ICC Arbitration Rules 2012 Article 28(1).

[973] English Arbitration Act 1996 s.38(1).

[974] Egyptian Civil Procedure Law Article 45, UNCITRAL Model Law 2006 Article 17A(1)(b).

[975] UNCITRAL Model Law 2006 Article 17E(1).

[976] *Paushok v Mongolia* Unreported September 2, 2008 at [39]. Cited in Yulia Andreeva, *'Russia: Sergei Paushok v Mongolia - temporary restraining order and interim measures issued by a UNCITRAL Tribunal'* (2009) 12(1) Int. A.L.R. 14.

[977] *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC).

taking expeditious action to protect the parties' rights.[978] Thus, Cooke J in *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* noted that:

> The evidence shows that the risks written under the binding authority agreement by DM are approaching renewal on a daily basis and that in order to offer renewal to its insureds, whether directly or via placing brokers, access to the records maintained by DM relating to the insurances bound under the binding authority agreement is a matter of critical importance. It is also a matter of urgency. If Hiscox is not able to offer renewal to its insureds it stands to lose an annual book of business which is worth approximately £6.5 million at a rate of about £500,000 net premium income per month, or approximately £25,000 per day.[979]

Hence, necessity and urgency are the most essential conditions to grant most the interim measures.[980] The arbitral tribunal in *Perenco Ecuador Limited v. Republic of Ecuador* stated that '[The tribunal] will not judge that circumstances require the grant of provisional measures unless it judges such measures to be necessary and urgent.'[981]

Considerations of urgency drove a number of arbitration bodies create provisions regulating the appointment of an emergency arbitrator, who will consider applications for interim measures before the constitution of the arbitral tribunal. For example, Article 29 of the ICC Arbitration Rules 2012 stipulates 'A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make

[978] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618.

[979] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm) at para 19

[980] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 178.

[981] *Perenco Ecuador Limited v. Republic of Ecuador*. ICSID Case No. ARB/08/6 (May 08, 2009) para 43.

an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V.'[982]

It is obvious that whether the circumstances of the case are urgent or not must be a matter for the arbitral tribunal's judgment. Therefore most arbitration laws and rules use words such as 'if [the Tribunal] considers that the circumstances so require' to indicate such discretion.[983] The situation has parallels in litigation. In *Revenue and Customs Commissioners v Ali,*[984] Warren J granted a freezing order over real property in the United Kingdom, since he considered that there was a real risk of dissipation of the debtor's assets. He remarked at para 67 that;

> I have a concern about the disposal of property to the sister of Stoner Road. There was nondisclosure initially of the Payments and I am satisfied that there is a propensity to take financial duties with considerable latitude. This is not perhaps the strongest case one has ever seen for dissipation, but nonetheless there is a real risk, in my view, of dissipation.

7.1.1.2 Irreparable Harm

Coulson J in *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd*, gave some examples of what he considered to be irreparable harm 'critical evidence was about to be lost forever or there was a risk that it would be destroyed or otherwise tampered with, such as to make it of no probative value.'[985] Thus, the granting of the interim measures in such cases

[982] See also LCIA Arbitration Rules 1998; Article 9 and 25 of the Arbitration Rules of Singapore International Arbitration Centre (SIAC) 2010 Rules 5(1)(c) and 26(2); Stockholm Chamber of Commerce Arbitration Rules (SCC) Article 4(2); ICSID Arbitration Rules (2006) amendments Rule 39, ACICA Arbitration Rules 2011 Schedule 2.

[983] *Perenco Ecuador Limited v. Republic of Ecuador*. ICSID Case No. ARB/08/6 (May 08, 2009); Egyptian Arbitration Law Article 24; ICSID Convention Article 47; French Code of Civil Procedure 2011 Article 1468.

[984] *Revenue and Customs Commissioners v Ali* [2011] EWHC 880 (Ch).

[985] *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 at 633.

become essential to protect a party' rights, whether in terms of preserving evidence or assets.[986]

Article 17 of the UNCITRAL Model Law 2006 speaks of 'harm not adequately reparable by an award of damages.' This provision therefore envisages two kinds of harm, one which can be compensated by an award of damages, and one which cannot. Only in the latter case should the grant of an interim measure be contemplated.[987] In the analogous context of litigation, Cooke J observed in *Lauritzen Cool AB v Lady Navigation Inc*:

> In assessing the inadequacy of damages so as to justify an injunction, the Court can take into account not only the unquantifiability of damages to be suffered and, the difficulty of assessment, but the irrecoverability of damages at law because of a liquidated damages or exception clause or because loss is suffered not by the applicant himself but by others or in some intangible way. The purpose of an interlocutory injunction is protection not just against loss which would sound in damages but against violation of any right where damages would not be adequate compensation. Loss of goodwill, loss of reputation and, in the context of a reefer pool, loss of competitiveness or marketability are all matters which can be taken into account.[988]

Accordingly, an arbitral tribunal shall not grant an interim measure if any possible harm resulting would have an insignificant impact on a party's rights,[989] and if it could be simply compensated by the final award.[990] Sir Nicolas Browne, in *Porzelack KG v Porzelack (UK)*

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[986] *Behring International, Inc. v Islamic Republic Iranian Air Force*, Interim and Interlocutory Award, IUSCT Case No. 382 (ITM/ITL 52-382-3), 21 June 1985.

[987] *LauritzenCool AB v Lady Navigation Inc*, [2005] 1 All E.R. (Comm) 77.

[988] Ibid at 93.

[989] Thomas H. Webster, *Handbook of UNCITRAL Arbitration; Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (Sweet & Maxwell, 2010) para 26-90.

[990] *Tokios Tokelės v kraine* Case No. ARB/02/18 Order No.3, January 18, 2005. available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC641_En&caseId=C220> accessed 26 June 2013

Ltd, dismissed an application for security for costs because there was no evidence of potential harm.[991]

7.1.1.3 The Non-effect of the requested measures on the substantive matters

Some interim measures might affect the subject matter of the dispute, such as an interim payment.[992] Such a measure sees the applicant requesting the arbitral tribunal to grant him 'provisionally' some cash in order to secure his financial obligations and avoid loss or damage to his business. It is obvious that this measure touches on the subject of the dispute, and thus may impact not only on substantive matters but also on the final award. Therefore, many arbitral tribunals are reluctant to grant such measures.[993] For example, the Iran-US Claims Tribunal dismissed an application to order a transfer of the goods in dispute to the warehouse of the applicant, because such a measure could have affected the arbitration final award.[994] In the same context, an arbitral tribunal in an ICC case refused to grant an interim payment, since the question of whether payment was due was 'seriously contested', so that granting the measure was 'too closely linked with the solution of whole dispute.'[995]

On the other hand, an arbitral tribunal in deciding whether to grant such a measure may need to examine briefly documents and evidence relating to the dispute, without actually considering the merits of the dispute, which should only be done at a full hearing in the

[991] *Porzelack KG v Porzelack (UK) Ltd*, [1987] 1 All E.R. 1074.

[992] See Chapter 5.

[993] *Iran-US Claims Tribunal, Behring International, Inc v Iranian Air Force, 8 Iran-US CTR 44,* cited in Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 605.

[994] Ibid.

[995] ICC Partial Award 9984 of 1999 cited in Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 219 footnote 255.

presence of the parties. In the analogous context of litigation, Rix J said in *Renel v Gulf Petroleum*:

> Having looked briefly at the pleadings in the arbitration and at some essential documents..., I will say nothing further than that I put out of account for the purpose of this application any question of the merits in the arbitration and I say nothing whatsoever about them.[996]

Since measures such as interim payments may affect the subject of the dispute, some scholars consider that such measure should only be granted in relation to undisputed sums, to avoid prejudicing the subject matter of the dispute.[997] In this context, the DAC Report stated that 'enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice.'[998] Generally, an arbitral tribunal should balance between the harm, which might result from granting such measures on the one hand and from rejecting the application on the other.[999]

7.1.2 Conditions of the Arbitral Tribunal

7.1.2.1 The Jurisdiction of the Arbitral Tribunal to take Interim Measures

An arbitral tribunal's jurisdiction to grant interim measures will differ from one case to another, and depends on many different elements in the arbitration process. For example, the applicable procedural law may makes the tribunal's power to grant an interim measure a default power, so that a tribunal has jurisdiction to grant an interim measure without needing

[996] *Renel v Gulf Petroleum* [1996] 2 All E.R. 319 at 323.

[997] Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 2008.

[998] DAC Report 1996 para 201.

[999] *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532.

the parties' consent.[1000] On the other hand, some arbitration laws make the power to grant certain measures dependent on the agreement of the parties. Thus unless the parties have positively agreed to confer such power, the arbitral tribunal has no jurisdiction to take grant such measures.[1001] Accordingly, a party should first check whether the arbitral tribunal has jurisdiction to grant the interim measures sought before considering applying for such measures.[1002] If the tribunal lacks such jurisdiction, the parties may be able to resort to a court to obtain such measures, without this step being considered a waiver of the arbitration agreement.[1003]

7.1.2.2 Reasonable Chance of Success on the Merits

Some arbitration rules and laws require that the applicant should have a good chance of succeeding on the merits before the tribunal may grant him an interim measure.[1004] In other words, the arbitral tribunal should believe that the applicant's chance of winning the dispute is better than his opponent's. In order for the arbitral tribunal make an 'overall assessment'[1005] of this case, it needs to consider the merits of dispute to reach such

[1000] *Starlight Shipping Co and another v Ta Ping Insurance Co Ltd and another* [2007] EWHC 1893 (Comm); see English Arbitration Act 1996 s.38(2); French Code of Civil Procedure 2011 Article 1468; Arbitration (Scotland) Act 2010 Rule 35.

[1001] Egyptian Arbitration Act Article 24, English Arbitration Act 1996 s.39(4).

[1002] *Victor Pey Casado and President Allende Foundation v Chile* (ICSID Case No ARB/98/2) Decision on Provisional Measures (September 25, 2001).

[1003] UNCITRAL Model Law 2006 Article 9; UNCITRAL Arbitration Rules 2010 Article 26(9); LCIA Arbitration Rules 1998 Article 25(3); ACICA Arbitration Rules 2005 Rule 28(8).

[1004] UNCITRAL Model Law 2006 Article 17A(1)(b), Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 604.

[1005] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 177.

conclusion.[1006] This runs the risk of prejudicing the independence of the tribunal,[1007] because it must reach a preliminary opinion on the merits before conducting any hearing or examining any evidence.[1008] For this reason, many tribunals overlook this condition, so as to avoid any challenge to their independence, and instead rely on the urgency of the case as the primary criterion determining whether to grant such a measure.[1009]

7.1.3 Conditions of the Applicant

7.1.3.1 Providing Security

Article 17E(1) of the UNCITRAL Model Law stipulates 'The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.' [1010] The notion of security in Article 17 is different from the notion of security for costs.[1011] Security in Article 17 contemplates covering the expenses arising from the measure and any damage that results from the measure.[1012]

[1006] UNCITRAL Model Law 2006 Article 17A(1)(b).

[1007] Lew, D. M. Julian, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law international, 2003) 604.

[1008] Ibid.

[1009] *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618.

[1010] Many arbitration rules and law have adopted this provision. See Portuguese Arbitration Law, N° 63/2011 of 14 December 2011 Article 24(3), Spain's Consolidated Arbitration Law 2011 Article 23(1), German Arbitration Act 1998 Section 1041.

[1011] Security for Costs is a sum of money that should be furnished by the plaintiff when there is reason to believe that s\he will be unable to pay the defendant's cost if ordered to do so. See Chapter 4.

[1012] See UNCITRAL Arbitration Rules 2010 Article 26(8).

The arbitral tribunal may request the applicant to provide security if it believes that there is a serious risk that the granting of the measure will cause damage to the other party.[1013] The relevant laws and rules tend not to prescribe a specific form for such security, so a party can generally provide any form of security as long as the tribunal regards it as effective.[1014] The amount of any security obviously is dependent on the tribunal's estimation of the sum that could be required to compensate the party for the loss which may arise from the measure.[1015] The security should not exaggerate or exceed the value of the subject matter of the dispute; otherwise the measure will be a bar to an arbitration claim.

An arbitral tribunal which believes that security should be provided will usually refrain from granting the measures sought until security is provided.[1016] However, the arbitral tribunal should not obstruct the grant of appropriate interim measures by requesting an extreme security from the applicant. The fear that this might occur might explain the refusal of the UNCITRAL Working Group to include this condition in Article 17A. The relevant report states that a 'general view emerged that the granting of security should not be a condition precedent to the granting of an interim measure.'[1017]

[1013] Thomas H. Webster, *Handbook of UNCITRAL Arbitration; Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (Sweet & Maxwell, 2010) para 26-90.

[1014] *Sergei Paushok v Mongolia - temporary restraining order and interim measures issued by a UNCITRAL Tribunal*. Order on iterim measures, September 2. 2008.

[1015] Thomas H. Webster, *Handbook of UNCITRAL Arbitration; Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (Sweet & Maxwell, 2010) para 26-92.

[1016] *Mietz v Intership Yachting Sneek BV* (C99/96) [1999] E.C.R. I-2277; See Article 92 of the Civil Procedure Law of the People's Republic of China 2007.

[1017] *Report of the Working Group on Arbitration on the work of its fortieth session* (New York, 23-27 February 2004) U N Doc. A/CN.9/547 available at

< http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/521/51/PDF/V0452151.pdf?OpenElement> Accessed 20 June 2013

7.1.3.2 Party request

Article 17(1) of the UNCITRAL Model Law stipulates 'Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.' In order for the arbitral tribunal to grant an interim measure, it needs to know that there is a risk of damage unless the measure is granted. The only way for the tribunal to discover such facts is through a party's application, which will indicate the circumstances that could affect his rights and why an interim measure is necessary to avoid such harm. Therefore, the granting of a measure tends to be dependent on a party requesting it. A party's application should highlight the circumstances that justify the granting of the interim measure, and present the evidence that supports the application. Otherwise, the tribunal or court should dismiss his request.[1018]

7.1.3.3 Good faith (*bona fide*)[1019]

The interim measures system is a tool to protect the rights of the parties during the arbitration proceedings. The arbitral tribunal should be careful that the tool is not exploited by a party acting in bad faith as a tactic to hinder or delay the arbitration process. Herbert E. Meister sought thus to define the meaning of 'bad faith' in *Senso Di Donna's Trade Mark* case and held that;

> Bad faith is the opposite of good faith, generally implying or involving, but not limited to actual or constructive fraud, or a design to mislead or deceive another, or any other sinister motive. Conceptually, bad faith can be understood as a "dishonest intention"…The words "bad faith" are not

[1018] *Porzelack KG v Porzelack (UK) Ltd,* [1987] 1 All E.R. 1074.

[1019] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) 185.

> apt for definition. They have to be applied to the relevant facts of each case. The test is the combined test and the standard must be that of acceptable commercial behaviour observed by reasonable and experienced persons in the particular commercial area being examined.[1020]

Hence, any application for the interim measures should be made in good faith,[1021] and any application reliant on dishonest intention should be considered in bad faith and dismissed.[1022] For example, an application for security might be intended to frustrate a valid claim where the defendant knew that the claimant would not be able to comply with the tribunal order, and would thus have to abandon the claim. In such case, the arbitral tribunal should dismiss the application on the basis that it is made in bad faith. In one ICC case the arbitral tribunal did indeed dismiss an application for security for costs on the ground that the applicant should have been aware of his contracting partner's financial difficulties.[1023]

Some measures may be seen as designed to counter a party acting in bad faith. Thus an anti-suit injunction, restrains a party from commencing or pursuing proceedings before a foreign court in breach of the arbitration agreement.[1024]

The arbitral tribunal when conducting the arbitration process should avoid any unnecessary delay or expense,[1025] and thus reject any suspicious application from a party who is just using the application in bad faith as a tactic to delay the process.[1026]

[1020] *Senso Di Donna's Trade Mark* Case C000616979/1 [2001] E.T.M.R. 5 at para 17.

[1021] French Code of Civil Procedure 2011 Article 1464.

[1022] Fraser Davidson, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para 16.13.

[1023] ICC Case No. 7074 (1996) cited in Weixia Gu, *'Security for Costs in International Commercial Arbitration'* (2005) 22 J.Int'l Arb.185.

[1024] For more information about the Anti-suit Injunction, see Chapter 6.

[1025] This is one of the arbitral tribunal's duties in many arbitration laws; see English Arbitration Act 1996 s.33, Arbitration (Scotland) Act 2010 Rule 24.

7.1.4 Conclusion

The conditions applicable to interim measures differ from one case to another depending such elements as the seat of the arbitration, the type of the measure sought and or the law applicable to the merits of the dispute.

7.1.5 The Conditions for granting Interim Measures under Egyptian Arbitration Law

7.1.5.1 The Arbitral Tribunal's Conditions

There is no doubt that the arbitral tribunal can be given discretion to set whatever conditions it wishes regarding the grant of interim measures where the relevant arbitration law has adopted the principle of party autonomy as regards the conduct of the arbitral proceedings.[1027] Article 24 of the Egyptian Arbitration Act does not contain explicit conditions for the granting of interim measures.[1028] It provides:

> Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered.

Nevertheless, this Article indirectly indicates to what could be considered conditions for such measures. It requires that the arbitral tribunal has jurisdiction to grant such measures on a

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[1026] Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 651.

[1027] See Egyptian Arbitration Law Article 25.

[1028] Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 53; Ali AL-Hadidi, *Provisional and Protective Measures in the Voluntary Arbitration* (Dar El-Nahda El-Arabia, Cairo 1997) 25.

party's request, taking into account the urgency of the situation and the need to provide security.

7.1.5.1.1 The Arbitral Tribunal's Jurisdiction

Article 24 makes the arbitral tribunal's power to grant interim measures an *opt-in* power, which means that the tribunal has no jurisdiction to grant such measures unless the parties agree to do so.[1029] Article 12 further requires that any such agreement to be in writing. Article 24 does not determine an exact time for such agreement to be reached. Therefore, the parties can agree on such matter at any time before or during the proceedings. If they failed to reach such agreement a party who has exhausted all arbitral recourse may seek an interim measure from the Court of Appeal under Article 14.

7.1.5.1.2 Necessity for the Interim Measures

Article 24 requires that the interim measures should be necessary in respect of the subject matter of the dispute. That means that interim measures should only be granted to protect a part right from real dangers that threaten his rights that relate to the dispute.[1030] It is the job of the arbitral tribunal to determine whether such necessity exists, and what sort of measure is suitable, briefly examining relevant documents and evidence of the case in order to make that judgment. The estimation of the urgency of the case and the necessity for the interim measure should rely, in the first place, on the nature of the subject matter of the dispute, rather on the party's description of his case. For example, if a party requests a sale of goods order in a

[1029] Abdul Aalmnam Zamzam, *The Interim and Conservatory Measures before, during and after the end of the Arbitration Dispute* (Dar El-Nahda El-Arabia, Cairo 2007) 62-69.

[1030] Ahmed Sedki Mahmoud, *The Provisional Measures and Orders Necessity for in Arbitral Litigation* (Dar El-Nahda El-Arabia, Cairo 2005) 54.

dispute that relates to a construction project or a freezing order in a dispute that relates to the sale of goods, such an application must be rejected because the requested measures do not relate to the subject matter of the dispute as required by Article 24.

7.1.5.1.3 Party request

Article 24 makes a tribunal's power to grant an interim measure contingent on the request of a party. Thus, the arbitral tribunal cannot grant an interim measure of its own motion. Article 24 does not indicate a specific time or an exact form for such application. Nevertheless, any such application should show the grounds for the request, the evidence that supports it, proof that there is a risk to the applicant's rights, and must finally specify the interim measure required.[1031]

7.1.5.1.4 The linking between the required Measures and the Subject of the Dispute

Article 24 stipulates that;

> Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered'

The phrase "in respect of the subject matter of the dispute" has a particular significance, as it indicates that any required interim measures should be linked to the subject matter of the dispute. By virtue of this provision, any measure has no direct link to the subject of the dispute unlikely be granted. Hence, this provision excludes security for costs; as such a

[1031] Abdul Aalmnam Zamzam, *The Interim and Conservatory Measures before, during and after the end of the Arbitration Dispute* (Dar El-Nahda El-Arabia, Cairo 2007) 69.

measure is not related to the substance of the dispute.[1032] Although this provision has been excluded from the UNCITRAL Model Law, it still exists under the Egyptian Arbitration Law.

7.1.5.1.5 Providing Security

Article 24 gives the arbitral tribunal the right to request the applicant to provide security to cover any damage, which could happen due to the granting of the interim measure. Provision of security is an optional condition, so the arbitral tribunal can make the granting of the application conditional on the providing of such security, or it could ignore such condition entirely if it saw no need for security. There is no provision under the Egyptian Arbitration Law regulating the provision of security. Therefore, the arbitral tribunal is free to apply the applicable substantive law on this subject, or it can follow the Articles that regulate the provision of security under Egyptian Civil Law - Articles 772-801. These Articles regulate everything related to the security, such as the conditions applicable to security,[1033] the types security,[1034] and how to provide it.

7.1.5.2 Conclusion

There are no specific conditions under Egyptian Arbitration law that should be satisfied before granting interim measures. Therefore, the arbitral tribunal seems to have a wide discretion to set conditions. In this context, before any interim measures are granted it will often be required that a party has requested them and they are shown to be necessary. The

[1032] Christopher Kee, *'International Arbitration and Security for Costs- A Brief Report on Two Developments'* (2006) 17 (273) Am Rev Int'l Arb. 275.

[1033] Egyptian Civil Code Article 773.

[1034] ibid Article 774.

phrase “in respect of the subject matter of the dispute” in Article 24 detracts from the tribunal’s power to grant any measures deemed necessary in arbitration dispute, as it excludes some important measures such as security for costs. Therefore, reform of Article 24 seems necessary to give the tribunal full power to protect the parties’ rights from beginning to end. In this regard, Article 17 of the UNCITRAL Model Law 2006 would seem to offer a good blueprint for reform.

7.1.5.3 The Conditions under Egyptian Civil Procedure Law

7.1.5.3.1 Urgency

Article 45 of the Civil Procedure Law 13 of 1968 requires two conditions to be in place before the granting of interim measures - urgency and not prejudice the substantive claim. If these conditions are not met, the court has no inherent jurisdiction to grant interim measures, as the conditions are rooted in public policy.[1035] While the court may Rule on such matters of its own initiative, any party can raise the issue before the court at any time.[1036]

The definition of urgency under Egyptian Law has been considered the introduction of this chapter,[1037] ‘the existence of risk or damage threatens parties' rights and needs in urgent

[1035] Rateb, M. Kamel, .M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 13.

[1036] Egyptian Civil Procedure Law Article 109.

[1037] Rateb, .M. Kamel, M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 13; Hafiza Haddad, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Dar-El-Fikr Al-Jame'i, Alexandria 1996) 184-185; Ahmed Abd-Lkarim Slama, *Theory of Urgent Matters, and its Impact on the Jurisdiction and Conflict of Laws and Enforcement of Foreign Judgments* (Dar El-Nahda El-Arabia, Cairo 2008) 187-202

actions, which are not available in the normal proceedings.'[1038]According to this definition, there are no limits on the concept of urgency under this law, as long as urgent action is required to stop or avoid any harm not adequately reparable by the substantive judgement.[1039] If such conditions have been fulfilled, the court of urgent matters can grant whatever interim measures are necessary to protect a party's rights whether against a party or non-party.[1040]

7.1.5.3.2 **Non-prejudice of substantive matters**

Article 45 requires that the requested measures should not impact upon the substantive matters of the dispute.[1041] The court should not consider the merits of the dispute, as this is the exclusive right of the arbitral tribunal.[1042] Hence, the judge's role in this case is just to scan the case file quickly, without seriously examining the merits of the dispute. Therefore, the court may not cite in its decision any grounds relating to the subject matter of the dispute.[1043] The judge is prevented by Article 45 from considering any matter that has any connection or could affect the subject matter of the dispute. Therefore, if the Court feels unable to Rule on the matter without examining the subject matter of the dispute, it must reject the request for interim measures because it has no jurisdiction to decide this matter,

[1038] Court of Sessions, appeal No.772, Judicial Year 43, Hearing date 22/06/1977, Session Technical Office, Vol 28. 1470; Court of Sessions, appeal No. 1678, Judicial Year 52, Hearing date 27/03/1989, Session Technical Office, vol 40. 857; see Rateb, .M. Kamel, M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 50; Ahmed Abd-Lkarim Slama, *The Arbitration in the Internal and International Dealings* (Cairo: Dar El-Nahda El-Arabia, 2006) 542.

[1039] Court of Sessions, appeal No.772, Judicial Year 43, Hearing date 22/06/1977, Session Technical Office, Volume 28, 1470.

[1040] Egyptian Civil Procedure Law Article 45.

[1041] Hafiza Haddad, *The Extent of Jurisdiction of the National Judiciary to Issue Interim and Provisional Measures in International Disputes Agreed upon in Arbitration* (Dar-El-Fikr Al-Jame'i, Alexandria 1996) 213.

[1042] Ibid.

[1043] Rateb, M. Kamel, M., *Judicial of Urgent Matters* (Dar Alam Al-Kotob, Cairo 1985) 70.

which is the exclusive right of the tribunal.[1044] For example, the court may not consider an application for an attachment order if this application needs the court first to decide who owns the property, where this is the matter the tribunal has been asked to determine.[1045]

7.1.5.4 Conclusion

The arbitral tribunal under Egyptian Arbitration Law can grant any interim measure in arbitration dispute as long as it is empowered to do so by parties' agreement, and can attach any conditions to its order.[1046] On the other hand, in an emergency a party can resort to the court, whether before, after, or during the arbitration process, to request interim measures to protect his rights.[1047]

7.1.6 The Conditions for granting Interim Measures under Scottish and English Arbitration Acts

7.1.6.1 Arbitral tribunal conditions for granting the interim measures

There are no clear provisions under the Arbitration (Scotland) Act 2010 or the English Arbitration Act 1996 that indicate the conditions for granting of interim measures in arbitration disputes. Nevertheless, such conditions might be deduced from the case law on

[1044] Court of Sessions, appeal No.1 Judicial Year 22, Hearing date 20/01/1955, Session Technical Office, Volume 6. 515.

[1045] Heba Badr and Al-Sadiq, *'The Interim Protection in Arbitration; Comparative Study'* (Ph.D Ain Shams University (Egypt) 2009) 101.

[1046] Egyptian Arbitration Law Articles 24-25.

[1047] Ibid Article 14.

interim measures.[1048] For example, Clarke L.J. in *Cetelem SA v Roust Holdings Limited* [1049] emphasised that urgency is one of the conditions for granting interim measures. Moreover, a few conditions are mentioned under s.39 of the English Act and Rule 53 of the Scottish Act - party agreement, the provisional basis of such measures, urgency, irreparable harm,[1050] party request and arbitral tribunal consent.

7.1.6.1.1 Agreement of the parties

Section 39(4) of the English Arbitration Act 1996 stipulates 'Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.' Thus, the arbitral tribunal's power to grant interim measures relies on the parties' agreement to confer such power on it.[1051] By virtue of s.5(1) such agreement should be in writing to clarify the ambit of the arbitral tribunal's power to grant such measures,[1052] but there is no need to agree on every detail as s.39 gives some guidance as to the type of measures contemplated.[1053]

7.1.6.1.2 Provisional Basis

Albeit Rule 53 of the Arbitration (Scotland) Act 2010 addresses provisional awards, it is the equivalent of s.39 of the English Act,[1054] so it will be appropriate to examine the conditions

[1048] *Kastner v Jason* [2004], EWHC 592 (Ch), *Permasteelisa Japan UK v Bouygesstroi*, [2007] All E.R. (D) 97 (Nov), *LauritzenCool AB v Lady Navigation Inc,* [2004] EWHC 2607 (Comm).

[1049] *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618.

[1050] This will be discussed under the court conditions for granting interim measures.

[1051] *Kastner v Jason* [2004], EWHC 592 (Ch).

[1052] *Kastner v Jason* [2004], EWHC 592 (Ch),

[1053] David ST. John Sutton, Judith Gill, *Russell on Arbitration* (22nd edn, Sweet&Maxwell, 2003) para 5-106.

[1054] Fraser Davidson, Davidson Fraser, *Arbitration* (2nd edn W. Green, Edinburgh 2012) para 17.02.

under which such an award can be made. Rule 53 took the opposite view to s.39 in recognising the arbitral tribunal's power to make a provisional award, without making this power dependent on the parties' agreement.[1055] However, because a provisional award is just that, any relief awarded under the Rule must be provisional and thus subject to being superseded by the final award. If under the Arbitration (Scotland) Act 2010 any relief is not awarded on a provisional basis, it is not truly provisional relief, but rather a partial award under Rule 54 of the Act.

7.1.6.2 Court conditions for granting interim measures

Rule 46 of the Arbitration (Scotland) Act 2010 and s.44 of the English Arbitration Act 1996 regulate the court's power in relation to the arbitration proceedings and require three conditions to enable a court to grant an interim measure:

1. Agreement of the parties
2. Commencement of the arbitration process
3. Urgency

7.1.6.2.1 Agreement of the parties [1056]

The court's power under s.44 of the English Arbitration Act 1996 is a default power, which means that the parties may agree to remove or reduce the court's power to take interim

[1055] Fraser Davidson, Hew R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W.Green Thomson Reuters 2010) 258.

[1056] See earlier the condition for granting interim measures under s.39.

measures.[1057] In the absence of such agreement, the court is fully empowered to grant interim measures.

7.1.6.2.2 Commencement of the arbitration process and arbitral tribunal consent

Rule 46 of the Arbitration (Scotland) Act 2010 distinguishes between two cases - where the application has been submitted before the arbitration has begun, and where the application has been submitted after this stage. In the latter case, the applicant must have the consent of the tribunal or the other party; otherwise, the application will be dismissed.[1058] That being said, if the case is urgent the consent of the arbitral tribunal becomes unnecessary, as urgency is considered to be a sufficient ground for court intervention.[1059] In the former case, the court can take any measures deemed necessary to preserve the party's rights[1060] whether *ex parte* or inter parties,[1061] as its power in this case becomes unfettered

7.1.6.2.3 Urgency

Under both Acts, the existence of urgency gives the court jurisdiction to grant interim measures to protect a party's rights.[1062] It is for the court to determine whether the case is urgent or not, based on the circumstances of the case and any evidence submitted on the matter. [1063] If the court is satisfied that the case is urgent it will have jurisdiction to grant

[1057] *Kastner v Jason* [2004], EWHC 592 (Ch).

[1058] Explanatory Notes para 182.

[1059] *Phaethon International Co Sa v Ispat Industries Limited* [2010] EWHC 3446 (Comm), Rule 46(2)(b)(ii).

[1060] *Cetelem SA v Roust Holdings Limited,* [2005] EWCA Civ 618, *United Technologies International, Inc. v. Islamic Republic of Iran,* Case No. 114, Dec. No. 53-114-3 (10 December, 1986) 13 Iran-U.S.C.T.R. 254.

[1061] Lord Mustill, Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London and Edinburgh, 2001) 324.

[1062] *Cetelem SA v Roust Holdings Limited,* [2005] EWCA Civ 618.

[1063] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm).

interim measures,[1064] otherwise it must dismiss the application.[1065] If the court decides that the case is not urgent, it will have no jurisdiction to grant interim measures, unless the applicant has the consent of the tribunal or his opponent to the application. [1066]

7.1.6.3 Conclusion

The granting of interim measures, whether under Egyptian, Scottish, and English Arbitration are subject to almost the same conditions for granting the interim measures in arbitration.

The arbitral tribunal, if these conditions have been satisfied, can grant any type of interim measure to protect the parties' rights during the arbitration. If the party has obtained such a measure, s/he will be obliged to go to court should it become necessary that measure. The enforcement of interim measures under Egyptian, Scottish, and English law will be the author's next research project.

[1064] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618.

[1065] *Porzelack KG v Porzelack (UK) Ltd*, [1987] 1 All ER 1074.

[1066] *Cetelem SA v Roust Holdings Limited*, [2005] EWCA Civ 618, Arbitration (Scotland) Act 2010 Rule 46(2)(b)(ii), English Arbitration Act 1996 s.44(3).

Chapter 8

In this chapter, I will summarise the key findings and the contribution that this research makes to knowledge. I will outline the limitations of the research, and make suggestions for further research and recommendations to improve the law.

8.1 Summary of the research

1. The first part of the study was the introduction, which highlighted the important of the study of the interim measures in international commercial arbitration, particularly in Egypt. Moreover, it highlighted the reasons for choosing the subject - the major gaps under the Egyptian Arbitration Law 27 of 1994, and the Egyptian Civil Procedures Law 13 of 1968 relating to the subject of study. In this part, the researcher gave examples of the main studies of interim measures, whether on the international level or in Egypt. The review of these studies indicated a lack of knowledge of and research addressing the topic of interim measures. Most existing studies addressed the subject of the interim measures from the perspective of the authority of the arbitral tribunal to grant such measures. This research examines the theories that explain the tribunal's authority and the relationship with the authority of the court. Other studies do not explain the types of interim measures in depth, as this study does. Moreover, the reasons for choosing a comparative approach were highlighted.
2. In Chapter 1 the researcher defined interim measures through studying many arbitration laws, rules, and case laws. The chosen definition was that mentioned in the UNCITRAL Model Law Article 17. Additionally, Chapter 1 illustrated the

characteristics of the interim measures as a necessary introduction for understanding the legal nature of the various types of interim measure.

3. In Chapter 2, the researcher examined the first type of interim measure - that which regulates the taking and preserving of evidence. This area was examined under Egyptian, Scots and English law. This comparative approach allowed the researcher to make a number of recommendations regarding improving the system of interim measures in Egyptian Law.[1067]
4. In Chapter 3, the researcher examined interim measures directed towards maintaining the *status quo*. Again, he was able to offer recommendations for improvement, this time to both Egyptian and Scottish legislators.
5. In Chapter 4 the researcher examined the issue of security for costs by studying this measure at international level, and then in the three main systems under review.
6. In Chapter 5 the researcher studied issue of interim payments and how this measure is addressed in the legislative regimes under examination.
7. In Chapter 6 the researcher examined anti-Suit injunctions and whether they should be considered as an interim measure or not. The researcher concluded that they should not.
8. In Chapter 7 the researcher scrutinised the conditions for granting interim measures, both in a general way and in the legislative regimes under examination.

8.2 Implications for Practice

On the basis of the study findings, this part offers some recommendations which could help improve the arbitration process in the Middle East in general and under Egyptian law in particular. These recommendations are divided into three sections; the first is directed to

[1067] The recommendation will be made separately later in this chapter

Egyptian lawmakers and arbitration practitioners; the second to Scottish Lawmakers, and the last to English legislators.

8.2.1 Recommendations for Egyptian Lawmakers

This study showed that every law system has strengths and weaknesses. The Egyptian legal system has adopted approaches that may lead to many contradictory situations. The Egyptian Arbitration Law adopted the principle of party autonomy, but when the Court of Appeal recognized this principle, the Court of Session annulled its decision.[1068] This inconsistent situation under Egyptian Arbitration law system affects the efficiency of the interim measures system and may hinder the whole arbitration process.

Therefore, the study recommends that;

1. Adopting Article 17 sections 1, 3, and 5 of the UNCITRAL Model Law 2006.[1069]

Article 17 would fill gaps in the current Egyptian Arbitration Law as follows:

1) Unlike Egyptian Arbitration Law, Article 17(2) defines interim measures. Thus by adopting this provision the ambit of interim measures will be clearer, and such definition will help arbitral tribunals and arbitration practitioners understand their legal nature.
2) This study showed that Article 24 of the Arbitration Law regulating interim measures is vague, equivocal, and has led to many conflicting judgements. Moreover, it still

[1068] Court of Cassation appeal No. 1975 for the year 66 BC on December 12 of 1996.

[1069] Article 17 covers two remedies; interim measures and preliminary orders, since the later falls outside the scope of this research, the recommendations will just target the provisions that address the interim measures under Article 17.

contains the expression "in respect of the subject matter of the dispute", which deprives the arbitral tribunal of the power to grant measures like ordering the provision of security for costs. On the other hand, Article 17(2) contains and lists variety of interim measures that could be used in arbitration disputes. This a list covers all kinds of interim measures, whether related to the arbitration process itself e.g., the anti-suit injunction, the parties' relationship, e.g. maintaining the *status quo*, or the subject matter of the dispute, e.g. preserving assets or evidence. Hence, the adoption of Article 17 would fix all these loopholes, and at the same time gives the arbitral tribunal the power to conduct arbitration proceedings effectively.

3) Article 17A lays down the conditions for granting the interim measures, while Article 24 of the Egyptian arbitration Law does not.[1070] Hence, the adoption of Article 17A will improve the performance of the tribunal, as by indicating the conditions for granting the interim measures, the tribunal should be aiding in assessing the needs for interim measures more accurately. Moreover, this provision indicates to parties the conditions that should be fulfilled for them to make an application, which in turn will help them to base their requests on acceptable grounds.
4) Article 24 of the Egyptian Arbitration Law has not addressed, in detail, tribunal's power over the interim measure after it has been granted, and whether it can modify, suspend, or terminate a measure, while Articles 17D and F address this issue appropriately. Article 17 D and F recognize the tribunal's power to modify, suspend, or even terminate the interim measure it has granted upon party's request or even of its own motion.[1071] Moreover, Article 17F requires a party in whose favour the order

[1070] Article 17 A of the UNCITRAL Model Law 2006

[1071] Ibid, Article 17 D.

is issued to disclose any change in the circumstances on the basis of which the measure was requested or granted.[1072]

Hence, the adoption of Article 17 D and F will fill the gaps in current Egyptian Law, and determine in a very clear way the tribunal's power in this regard, which would otherwise be unclear.

5) Article 24 of the Egyptian Law has addresses the issue of security for loss in a very brief way, while this subject has carefully addressed by Articles 17 E and 17 G of the UNCITRAL Model Law. Therefore, the adoption of these provisions will make this subject is consistent with the rest of the regime.

2. The researcher recommends that the Egyptian legislator should allow courts and arbitral tribunals to issue anti-suit injunctions and to enforce such measures. Nonetheless, the researcher suggests that there should be treaties between Egypt and other countries to regulate the mutual enforcement of such injunctions in order to protect the arbitration agreement from violation from by a party, as the New York Convention did with arbitral awards.
3. There should be a clear provision under the Arbitration Law allowing the arbitral tribunal to seek court help in obtaining evidence, as this question is currently unclear under Article 37.
4. The Egyptian Arbitration Law preferably should contain provisions to regulate the court's power in arbitration dispute like section 44 of the English Arbitration Act 1996 and Rule 46 of the Scottish Act 2010. By adopting this suggestion, court assistance would be more effective since it will avoid the procedural difficulties of the Civil Procedure Law.

[1072] Ibid, Article 17 F.

5. The current Civil Procedure Law 13 of 1968 is not suitable to deal with international commercial arbitration in general and with the interim measures in particular. Therefore, two steps should be taken. The first is to create a new provision under the Civil Procedure Law to regulate and facilitate the arbitration process, particularly the taking and enforcement of interim measures. The second step is following the same process with regard to other relevant laws such as the Civil Law and the Evidence Law.

The researcher believes that the UNCITRAL Model Law 2006 could form a useful blueprint for amending Egyptian Arbitration Law, particularly as regards the subject of interim measures.

8.2.2 Recommendation for Scottish Lawmaker

This study found that Rule 39(2)(d) of the Arbitration (Scotland) Act 2010 could impact negatively on the efficiency of the interim measures system, since a decision under that provision cannot be challenged as a result of Rule 71(3), and this is inconsistent with the aims of the system. Therefore, this study recommends that the Scottish lawmaker intervenes to rephrase Rule 39(2)(d) to prevent any misuse or misapplication.

8.2.3 Recommendation for English Lawmaker

This study highlighted the subject of *Mareva* Injunctions under the English Arbitration Act 1996, discussed many arguments, and finally concluded that the arbitral tribunal should be empowered to issue a freezing injunction to preserve the evidence in arbitration. Therefore,

the study recommends that the English Lawmaker rephrase s.38 to remove any ambiguity about this question.

8.3 Contributions to knowledge

This study aimed to fill a gap in Egyptian legal literature, which lacked a study of the types of the interim measures.

8.3.1 For Egyptian and Middle East Arbitration Laws

The contributions related to Egypt may be applicable to the rest of the Arabic states in the Middle East, especially as have the same legal background since their arbitration laws derive from the UNCITRAL Model Law 1985 and their civil procedure laws from French law.

1. This study is first research, which addresses the types of the interim measures under Egyptian Arbitration Law and Civil Procedures Law.
2. This is the first study comparing the Egyptian Arbitration Law conducts common law jurisdictions such as England. This gives the study some exceptional features particularly in relation to the discussion of case law.
3. This study for the first time examines security for costs measures under Egyptian arbitration law compared with many other jurisdictions. Therefore, this study will offer arbitration parties in Egypt or across the Middle East, an effective way to protect their rights from frivolous or nuisance claims.
4. This is the first study to examine the anti-suit injunction in Egypt and the Middle East. Therefore, the study will offer arbitration practitioners and customers an in-depth study of anti-suit injunctions, which helps them to resist any improper use of such injunctions.

5. This study offers examples of interim measures at an international level, which could help lawmakers in Egypt make comparisons and take advantage of the ideas and experiences of other legal systems.

8.3.2 For Arbitration in Scotland

1. To the best of the author's knowledge, this is the first study of the Arbitration (Scotland) Act 2010 which addresses the subject of interim measures. It is hoped that later researchers will be inspired by its results to dig even deeper into the subject.

8.3.3 For Arbitration in England

1. This study highlighted the use of the *Mareva* Injunction in arbitration in England. After considering a wealth of arguments, it finally concluded that the arbitral tribunal should be empowered to issue freezing injunctions to preserve evidence.
2. This study discussed the justifications which have been advanced to support the granting of anti-suit injunctions by the English courts, and concluding that most of the reasons used to reject the use of such injunctions within EU Member States apply with equal force to the use of such injunctions generally.

8.4 Limitations of the research

Naturally, any research has its limitations and this study is no different.

1. One limitation is that the Egyptian case is relatively old because there is no system for properly reporting and classifying court judgements, particularly those related to arbitration. Therefore, the researcher found it difficult to access the most recent Egyptian cases.
2. Secondly, there are no formal translations of many of the Egyptian laws examined in this study. Therefore, the researcher translated these provisions himself, thereafter

having the English translations confirmed by a number of peers who have a very good knowledge of both Arabic and English. Yet the fact remains that the translations are not official.

8.5 Further research

Further study should perhaps concentrate on obtaining the most recent Egyptian courts decisions and tribunals awards, because this could help examine the types of interim measures and their effectiveness in arbitration. This might assist Egyptian lawmakers in reaching a clear vision of the types of the interim measures that should be adopted, and those should be left.

Research could also be done into the enforcement of interim measures, perhaps on a comparative basis. Such research could enhance this current study because it would provide a complete vision of interim measures under the systems in question from beginning to end.

8.6 Conclusion

The research has had a significant contribution to the researcher's personal development. It is hoped that this will allow him to contribute effectively to the future improvement of Egyptian Law

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