

# **The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union**

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# **Abstract**

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## **The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union**

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International arbitration, as an essential part of any modern legal system, needs provisional measures to protect the rights and interests of the arbitration parties while they are awaiting the final decision of the tribunal. The existence of a legal framework enabling cross-border enforcement of such measures is of great importance in the EU, which allows free movement of citizens, assets and trade within its single European market. However, the enforcement of such measures within the EU lacks a legal framework. This is due, primarily, to two interrelated reasons. The first is the failure of international conventions to address the issue of the cross-border enforcement of provisional measures and to resolve jurisdictional uncertainties between arbitral tribunals and national courts. The second reason is that the EU's attempts to remedy the shortcomings created by international conventions -via the Judgment Regulation ("The Recast") and decisions of the CJEU- have ultimately subverted the very system it sought to enhance. The aggregate effect of this failure has been overall increased complexity.

This thesis will try to answer three questions: 1) Is it possible to find a solution to deal with the uncertain positions of arbitration agreements and proceedings within the EU, and can the suggested solution be utilised to help the regulation and use of provisional measures?; 2) Is it possible to harmonise the different approaches taken by Member States' arbitration rules on the jurisdictions of national courts and arbitral tribunals in respect of granting provisional measures?; 3) Is it possible to

achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?

In order to answer these questions, the thesis proposes the following: (1) Recognising an exclusive jurisdiction for the seat court to decide on the existence of the arbitration agreement; (2) Providing an exclusive jurisdiction for the arbitral tribunal to rule on the existence of the arbitration agreement after its formation; (3) Recognition of a supervisory role for the seat court in granting provisional measures and (4) Enforcement of tribunal-ordered measures in the form of awards. It is hoped that these suggestions will help determine the jurisdictions of arbitration tribunals and national courts in respect of provisional measures and arbitration agreements. It will also create a viable framework for cross-border enforcement of tribunal-ordered and court-ordered provisional measures. It is hoped that these suggestions will consequently help improve the efficiency of arbitration as a valuable form of alternative dispute resolution.

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## **Dedication**

I would like to dedicate this thesis to my family, particularly my parents who have always supported me throughout my life and my time as a Ph.D. student. I would also like to dedicate this thesis to a special person in my life who has always believed in me and tried to give her support in any way possible.

## **Acknowledgement**

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# Introductory Chapter

The fundamental objective of contemporary international commercial arbitration is a simple one: to refer a business dispute to independent, non-governmental decision-makers who possess the relevant expertise and knowledge to decide on the disagreement between the parties of the dispute.<sup>1</sup> International commercial arbitration has become one of the key methods of resolving disputes in international trade and commerce, and reports of renowned centres of arbitration have indicated increasing activity, year on year.<sup>2</sup> This is because of the benefits offered by this method of dispute resolution, which include confidentiality, expertise of the arbitrators and neutrality of the forum selected by the parties.<sup>3</sup>

Still, in recent years, reaching a final decision by arbitrators has become a lengthy process due to the growing complexities of arbitration procedures. This has raised the need for a mechanism to protect the interest of the arbitration parties pending a final award. Having realized such a need in international arbitration, national laws and international arbitration rules have empowered arbitration tribunals and national courts to grant interim measures in support of the arbitration process.<sup>4</sup> In today's international arbitration framework, the availability of provisional measures, also referred to as interim measures of protection, is now well-recognised and they

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<sup>1</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) p63, 64.

<sup>2</sup> Alan Redfern, Martin Hunter, *Law and Practice of Commercial Arbitration* (5<sup>th</sup> edition, Oxford University Press, 2009), 10.1.

<sup>3</sup> *Ibid.*

<sup>4</sup> Article 26 of UNCITRAL Arbitration Rules. Article 28 International Chamber of Commerce Rules of Arbitration. Section 44 of Arbitration Act 1996 of UK. Article 1468 of Book IV of the Code of Civil Procedure of France.

are commonly requested by the parties.<sup>56</sup> Such measures include orders for the seizure of assets, injunctions, orders to preserve the status quo, which generally can be sought through arbitral tribunals or national courts.<sup>7</sup>

There are some major advantages for arbitration parties when they apply for interim measures from arbitral tribunals. These include confidentiality of the process and issuance of the measure by arbitrators who have more expertise than court judges.<sup>8</sup> However, arbitration tribunals do not enjoy the coercive power of state courts to enforce the interim relief and, therefore, compliance of the parties with these measures is mostly voluntary. Such an enforceability factor has great significance in international arbitration as there is still a significant percentage of non-compliance with interim remedies.<sup>9</sup> Additionally, the formation process of the arbitral tribunal and issuing such measures by arbitrators can be very lengthy whereas national judges are always available in courts to issue such measures.

Given such advantages of court-ordered measures, arbitration parties sometimes prefer to apply to national courts directly. Seeking these measures from national courts has its own drawbacks such as sacrificing the confidentiality of the disputes in the public procedure of these forums. Additionally, a court-ordered interim

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<sup>5</sup> Some scholars prefer to use provisional measures instead of interim measures as they want to avoid the confusion between the interim award and interim measures. But in this thesis, provisional measures and interim measures have been used interchangeably.

<sup>6</sup> This growing option in International Arbitration has even led to the change of Article 17 of UNCITRAL Model Law in International commercial arbitration on 2006.

<sup>7</sup> William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) *Brook J. Int'l L*, Volume 28, p1080, 1081.

<sup>8</sup> Richard Allan Horning, 'Report: Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules' (1998) *Am. Rev. Int'l Arb*. Volume 155, p2.

<sup>9</sup> Peter Sherwin and Douglas Rennie, 'Interim relief under International Arbitration rules and guidelines: A comparative analysis' (2010) *Am. Rev. Int'l Arb*, Volume 20, No.3, p324.

measure can be appealed by the other party, in which case this might considerably slow down the arbitration process.<sup>10</sup> Another option can be obtaining provisional measures from arbitral tribunals and seeking help from national courts to enforce them.<sup>11</sup>

There are various sets of provisions in national laws and international arbitration rules enabling the granting and enforcement of these measures. Nevertheless, despite the existence of these provisions in major arbitration institutions and conventions, there is no coherent and uniform structure for the use of these remedies in international commercial arbitration. There are three aspects to the lack of coherent structure:

- 1) Lack of clarity on the jurisdictions of national courts and arbitral tribunals in granting and enforcing provisional measures.
- 2) Disagreement between arbitral tribunals and courts on the recognition of arbitration agreements.
- 3) The lack of a cross-border enforcement framework for provisional measures within the EU.

These issues will be examined more closely in following sections respectively.

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<sup>10</sup> *Ibid* p324.

<sup>11</sup> Obtaining and enforcing the tribunal-ordered interim measures might not be available at all times as in some jurisdictions national courts such as Austria and Italy do not allow such measures at all. William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J. Int'L, Volume 28, p1085.

***1. Lack of clarity on the jurisdictions of national courts and arbitral tribunals in granting and enforcing provisional measures:***

Currently, most national arbitration laws and international arbitration rules recognise the concurrent jurisdictions of arbitral tribunals and national courts to grant provisional measures in support of arbitration proceedings. Yet, different jurisdictions apply divergent approaches in respect of how and when such measures should be granted. For instance, English courts apply the subsidiary model<sup>12</sup> while Germany applies the free choice of law model.<sup>13</sup> Other jurisdictions such as Italy completely preclude arbitrators from granting provisional measures and only their national courts are allowed to do so.<sup>14</sup> Therefore, the different attitudes of national laws towards granting and enforcing provisional measures have caused major difficulties for the users of international arbitration.<sup>15</sup> The need for harmonisation in this respect has been addressed and endorsed by numerous scholars and practitioners.<sup>16</sup>

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<sup>12</sup> The underlying philosophy of court subsidiary model considers the court as the last resort. The arbitrators can have the priority to grant interim measures but the parties have to opt in for it. The courts step in under certain precondition. Jan Schaefer, 'New solution for interim measures of protection', (1998) EJCL, Vol 2.2, p16.

<sup>13</sup> Free choice model law creates a free choice of a party to decide where to apply for interim measures. German Law attempts to make arbitrator-granted interim measure equally effective to court-ordered interim relief. Ragnar Harbst, 'Arbitrating in Germany' (2004) Arbitration, volume 70(2) p 89.

<sup>14</sup> William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J.Int'l, Volume 28, p1085.

<sup>15</sup> Raymond J.Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' (2010), AAA Handbook on international arbitration & ADR. p102. Helene Adlard, 'A funny thing happened on the way to the forum' (2009) Arbitration, 75(4), p 1. Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration' (2006) Am. Rev. Int'l Arb, Volume 17, p15.

<sup>16</sup> See Gregoire Marchac, 'Interim measures in international commercial arbitration under ICC, AAA, LCIA and Uncitral' (1999) AM. Rev.Int'l Arb Volume 123. Sundaresh Menon, Elain Chao 'Reforming The Model Law Provision on Interim Measures of Protection' (2006) Asian Int'l Arb.J. Issue 1. John Lurie, 'Court intervention in arbitration: support or interference?' (2010) Arbitration, Volume 76(3). Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration' (2006) Am. Rev. Int'l Arb. Volume 17. Raymond J.Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' (2010), AAA Handbook on international arbitration & ADR. p102. Veronica Ruiz Abou-Nigm.

## ***2. Disagreement between tribunals and courts on the recognition of arbitration agreements and its effect on the legitimacy and use of provisional measures:***

A valid and applicable arbitration agreement is one of the most fundamental pillars of international arbitration. Provisional measures, both in issuance and enforcement stages, are closely connected to the recognition of arbitration agreements by tribunals and courts. This is because national courts and tribunals need to reach a decision on whether an arbitration agreement exists before they can grant or enforce interim measures in support of it. A recognised, valid arbitration agreement in the European Union (EU) would allow parties to have a better chance to apply for provisional measures from different jurisdictions.

Nonetheless, Article II(3) of the New York Convention<sup>17</sup> allows national courts to examine the arbitration agreement before referring the parties to arbitration. Such examination of an arbitration agreement should also take place when the courts are asked to grant provisional measures in support of arbitration proceedings. This requires the court to ensure that the arbitration agreement is not null and void, inoperative or incapable of being performed.<sup>18</sup> On the other hand, based on the

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'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2009) 26 J. Int. Arb. 5, p 763, 764.

<sup>17</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) accessed on 05/12/2015.

<sup>18</sup> United States courts, followed by English courts, have described the expression "null and void" to mean "devoid of legal effect". In *Albon v. Naza Motor* ([2007] EWHC 665 (Ch)) Mr Justice Lightman provided 'In this context "null and void" means "devoid of legal effect". This is made clear by the decision in 1983 of the US 3rd Circuit Court of Appeals in *Rhone Mediterranee v Achille Lauro* 712 F.2d50. the court held: "...an agreement to arbitrate is 'null and void' only (a) where it is subject to an internationally recognised defence such as duress, mistake, fraud or waiver or (b) when it

Competence-Competence principle<sup>19</sup>, which is globally recognised in international arbitration, the arbitral tribunal has the priority to rule on its own jurisdiction, including matters with respect to the existence or validity of the arbitration agreement.<sup>20</sup> Neither the New York Convention nor the European Convention on International Commercial Arbitration (Geneva Convention)<sup>21</sup> has dealt adequately with concurrent jurisdictions of courts and tribunals in this respect.<sup>22</sup> The competing authorities of these forums in international arbitration have caused major disagreements on the existence of a valid arbitration agreement and added a layer of complexity to arbitration proceedings. Moreover, as a result of such a gap in international arbitration, different legal systems have taken considerably

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contravenes fundamental policies of the forum State. The 'null and void' language must be read narrowly for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate." (Pages 3-4). Likewise in this context for an arbitration agreement to be "inoperative" it must have been concluded but for some legal reason have ceased to have legal effect; e.g. by reason of acceptance of a repudiation as in *Downing v. Al Tameer Establishment* [2002] EWCA Civ 721 ("Downing") at paragraphs 26-35'. Please also see *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

<sup>19</sup> The Competence-Competence principle essentially allows an arbitral tribunal to rule on its own jurisdiction. There are two effects of the principle of competence-competence, positive and negative. The positive effect is to permit arbitral tribunals to decide on their own jurisdiction to hear the dispute. By emphasising the jurisdiction of the tribunal, the positive effect recognises a framework of concurrent jurisdiction between courts and arbitral tribunals. On the other hand, the negative effect rests on the view that the arbitral tribunal should have a chronological priority to decide on its jurisdiction before the courts. Thus, the negative effect restricts courts from examining the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal. Ozlem Susler, 'The English Approach to Competence-Competence' (2013) *Pepperdine Dispute Resolution Law Journal*, Volume 13, p427,428.

<sup>20</sup> Doug Jones, 'Competence-Competence' (2009) *Arbitration*, Volume 75, p1. This can be seen in AAA/ICDR International Arbitration Rules, Article 15 (1) 'The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'

<sup>21</sup> The objective of this Convention is to promote 'the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries'. <<http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/pre.html>> accessed on 05/12/2015.

<sup>22</sup> Patrizio Santomauro, 'Sense and sensibility : Reviewing West Tankers and dealing with its implications in the wake of the reform of the EC Regulation 44/2001' (2010) *Journal of Private International Law*, Volume 6, no.2, p295.

divergent views on when and to what extent such examination should be conducted by courts. For instance, the French approach restricts courts from full examination in respect of existence and validity of the arbitration agreement (at least at the outset of the arbitration process) and instead courts must apply a *prima facie* review of the arbitration agreement. This is in contrast to the English approach that allows the court to exercise a full examination of the arbitration agreement.<sup>23</sup>

One of the obvious signs of such disagreements is the considerable number of anti-suit injunctions granted by the common law jurisdictions, particularly by English courts. This type of injunction orders the party who has breached an arbitration clause and commenced court proceedings to discontinue the litigation.<sup>24</sup> Such an injunction is used to protect the arbitration agreement and to put pressure on the breaching party to respect the arbitration clause.<sup>25</sup> When the injunction is granted, the respondent who breaches the anti-suit order will potentially be in contempt of the court.

This might have a limited impact on the respondent who lives out of the jurisdiction of the court. Nonetheless, any decisions given by foreign courts that are contrary to the injunction will not be enforceable in the jurisdiction of the granting court and should not be able to have *res judicata* effect that is binding on the arbitral

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<sup>23</sup> Doug Jones, 'Competence-Competence' (2009) *Arbitration*, Volume 75, p1. Emmanuel Gaillard, 'Prim facie review of existence, validity of arbitration agreement' (2005) *New York Law Journal*. p7

<sup>24</sup> For further information please see Anti-suit injunction chapter.

<sup>25</sup> Micheal black, Rupert Reece, 'Anti-suit Injunctions and arbitration proceedings' (2006) *Arbitration*, Volume 79(3), p1.



tribunal.<sup>26</sup> The Court of Justice of the European Union (henceforth the CJEU) in *West Tankers*<sup>27</sup> concluded that it is incompatible with the Judgement Regulation<sup>28</sup> 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”.<sup>29</sup>

The negative effects of this judgment on international arbitration in the EU have been addressed by several scholars and practitioners. Such effects include a) Causing parallel proceedings in arbitral tribunals and national courts in different Member States and creating uncertainty in relation to whether a judgment of a Member State’s court, which invalidates an arbitration agreement, can prevent commencement or continuance of the arbitration process, b) Creating competition for parties to commence court proceedings and allowing parties to use litigation tactics such as forum-shopping or torpedoing (Torpedo actions are often started by arbitration parties in Member states where the judicial process is particularly slow, complex, or more likely to favour a local litigant which creates the risk of frustrating

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<sup>26</sup> David Altaras, ‘The anti-suit injunction: historical overview’ (2009) *Arbitration*, Volume 75, p1.

<sup>27</sup> [2009] 1 A.C. 1138.

<sup>28</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The regulation provides provisions governing the jurisdiction of courts in civil and commercial matters. A decision given in an European Union (EU) Member State is to be recognised without special proceedings, unless the recognition is contested.

<sup>29</sup> [2009] 1 A.C. 1138 [34].

the arbitration process) and c) Undermining basic principles of international arbitration such as Competence-Competence and party autonomy.<sup>30</sup>

In December 2012, the European Council adopted the Recast of Judgment Regulation (The Recast henceforth), which was passed by the European Parliament in November of the same year.<sup>31</sup> The Recast adopts a contrasting view to what was previously ruled in *West Tankers*<sup>32</sup> and to what was suggested by the European Commission in the Green Paper<sup>33</sup> regarding the scope of the arbitration exclusion in the Judgment Regulation and its effect on interim measures in support of arbitration proceedings.<sup>34</sup>

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<sup>30</sup> Andrew Pullen, 'The future of International Arbitration in Europe: West Tankers and the EU green paper' (2009), Int. A.L.R. Volume 56. Stuart Dutson, Mark Howarth, 'After West Tankers - Rise of the "Foreign torpedo"?' (2009) Arbitration, Volume 75 p1,3. Jacob Grierson, 'Comment on West Tankers' (2009) Journal of International Arbitration, Volume, 26(6). Patrizio Santomauro, 'Sense and sensibility: Reviewing West Tankers and dealing with its implications in the wake of the reform of the EC Regulation 44/2001' (2010) Journal of Private International Law, Volume 6. no.2. Hakeem Seriki, 'Declaratory relief and arbitration : the aftermath of the Front Comor' (2010) Journal of Business Law. Alexis Mourre, Alexandre Vagenheim, 'The arbitration exclusion in regulation 44/2001 after West Tankers' (2009), Volume 12(5). Philip Clifford, Oliver Browne, 'Lost at sea or a storm in a teacup?' (2009) International Arbitration Law Review, Volume 12. Mauro Rubino-Sammartano, 'Turning the tanker: anti-suit and anti-arbitration injunctions' (2013) Arbitration, Volume 79(1). Yvoon Baatz, Alexander Sandiforth, 'A setback for arbitration' (2009) Shipping & Trade Law. Volume 9. Number 4. *Grace Gunah Kim*, 'After the ECJ's *West Tankers*: The clash of civilizations on the issue of an anti-suit injunction' (2010) Cardozo Journal of Conflict Resolution, Volume 12. Simon Camilleri 'The Front Comor - the end of arbitration as we know it?' (2010) Cambridge Student Law Review, Volume 21.

<sup>31</sup> Recast of the Brussels I regulation, PRES/12/483. This Regulation entered into force on 9 January 2013 and it has started applying from January 2015.

<sup>32</sup> EU Case C-185/07.

<sup>33</sup> In 2009, the European Commission issued its report on the application of the Judgments Regulation accompanied by a Green Paper addressing a consultation on, amongst other matters, the interconnection between the Judgment Regulation and arbitration proceedings within the EU. For further information see 1.5. Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters < <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433318086120&uri=CELEX:52009DC0175> > accessed on 10/11/2015.

<sup>34</sup> Andreas Estrup Ippolito, Morten Adler-Nissen, 'West Tankers revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?' (2013) Arbitration Volume 79, p8.

Considering the rather contrasting positions of the European Parliament, European Commission and the CJEU in respect of arbitration agreements and anti-suit injunctions, it is clear that the EU has been unsuccessful in finding a balance between the jurisdiction of Member States' courts and arbitration tribunals. Again this uncertainty has been left to national courts to resolve based on their national laws.<sup>35</sup> In addition, divergent approaches of national laws in different Member States in respect of arbitration agreements do not solve the current problems of their recognition and validation. As noted previously, in order to grant any interim measures, the issue of the validation of arbitration agreements needs to be dealt with first. Consequently, the need for harmonisation in this regard remains essential for international commercial arbitration within the EU.

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<sup>35</sup>Recast of the Brussels I regulation, PRES/12/483. Paragraph 1 of Section 12 provides: "Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law".

### ***3. The lack of a cross-border enforcement framework for provisional measures within the EU:***

One of the innovations of the Recast is that it expressly enables the provisional measures granted by the court deciding on the merits to use the enforcement mechanism of the Recast.<sup>36</sup> Nevertheless, the Recast only recognises the enforcement mechanism for the provisional measures granted by a state court which has jurisdiction under the Recast and decides on the merits of the case. By virtue of Article 35 of the Recast, arbitration parties can only obtain measures from Member State courts separately and they are only enforceable within the jurisdiction of the granting court. This means that the provisional measures granted by the court in support of arbitration cannot use the cross-border mechanism provided by the Recast because the court granting the measures is not the forum which decides on the merits (as the tribunal is the forum deciding on the merits).

Similarly, there is no structure for the cross-border enforcement of interim measures granted by arbitral tribunals. As discussed earlier, arbitral tribunals do not have the authority to enforce the awarded interim measures and the compliance with this order is only voluntary. When arbitration parties do not comply with granted measures, then it becomes necessary to seek assistance of courts to enforce interim measures. While there have been considerable improvements in international and national arbitration rules recognising interim measures granted by arbitral tribunals, these rules are usually silent as to the issue of enforcement, particularly on the cross-border enforcement.

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<sup>36</sup> 33) Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation.

The key reason for such difficulty within the EU (and in the world generally) in this respect is the presence of different systems for enforcing tribunal-ordered measures through state courts. Such discrepancies can be because of the form of the measure, the seat of the arbitration, denial of the tribunals' power to order provisional measures or their finality. For example, in Sweden, interim orders granted by arbitrators are not enforceable because they are not final.<sup>37</sup>

England permits courts to enforce provisional measures by arbitral tribunal, but such an enforcement procedure is reserved only for provisional measures granted within its jurisdiction.<sup>38</sup> In France, provisional measures can only be enforced through state courts when they are granted in the form of awards.<sup>39</sup> If tribunal-ordered or court-ordered interim measures could be enforced cross-border, one order would suffice and there would be no need to apply to different state courts for an order under different legal regimes of provisional measure and only enforcement proceedings in different Member States would be needed.<sup>40</sup>

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<sup>37</sup> Neil Kaplan, 'Interim Measures- A Practical Experience' (2007) ICCA Congress Series, Volume 13, p731.

<sup>38</sup> S.42 of the 1996 Arbitration Act of England.

<sup>39</sup> Alexis Moure, in Laurence Newman(ed), Denis Ong(ed), *Interim measures in International Arbitration* (2014 Juris) p 10.

<sup>40</sup> J. Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998) Volume 2.2 Electronic Journal Of Comparative Law, < <http://www.ejcl.org/22/art22-2.html>> p10, accessed on 05/12/2015 .

- **Research questions and their significance:**

In light of the issues raised in the overview, the previous sections, and the lack of a framework to regulate the use of provisional measures in international commercial arbitration within the EU, this thesis will attempt to answer three main questions:

- *In respect of the judgment of the CJEU in West Tankers<sup>41</sup> and the Recast, is it possible to find a solution to deal with the uncertain positions of arbitration agreements and proceedings within the EU and can the suggested solution be utilised to help the regulation and use of provisional measures?*
- *Is it possible to harmonise the different approaches taken by Member States' arbitration rules on the jurisdictions of national courts and arbitral tribunals in respect of granting provisional measures?*
- *Is it possible to achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?*

- **Structure and contribution of the research:**

This thesis will contribute to the current research by proposing a combination of interdependent proposals that, collectively, seek to address the lack of coherent structure identified above. These main proposals are:

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<sup>41</sup> [2009] 1 A.C. 1138

- a) Recognising an exclusive jurisdiction for the seat court to make a *prima facie* examination of the arbitration agreement before the constitution of the tribunal.
- b) Recognising an exclusive jurisdiction of the arbitration tribunal to rule on the validation of the arbitration agreement after its formation.
- c) The granting of anti-suit injunctions by arbitrators.
- d) Recognising the supervisory role of the seat court for grant of provisional measures which uses the enforcement mechanism of the Judgment Regulation.
- e) Recognising the cross-border enforcement of tribunal-ordered provisional measures in the form of awards.

To the knowledge of the author, a comprehensive analysis of such proposal has not been considered before in the literature in this field.

This thesis dedicates a chapter to the issue of anti-suit injunctions. This is due to the fact that anti-suit orders as one the most granted provisional measures in England, have played an essential role in protecting arbitration agreements and arbitration proceedings. In the absence of court-ordered anti-suit injunctions, providing a similar means to protect arbitration process seems necessary. However, even if a similar means would be provided, this would not solve the more pressing problem that the EU is facing regarding arbitration proceedings. Even before *West Tankers*<sup>42</sup>, anti-suit injunctions could only protect arbitration proceedings within the jurisdiction of the granting court and was not able to stop parallel proceedings between arbitral tribunals and national courts.

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<sup>42</sup> [2009] 1 A.C. 1138

As explained in section 2 of this chapter, disagreements of national courts and arbitral tribunals on the recognition of arbitration agreements have caused parallel proceedings affecting the use of the provisional measures (granted in the support of arbitration proceedings). A recognised validated arbitration agreement within the EU would allow parties to have a better chance to apply for provisional measures from different Member States' courts or to enforce the provisional measures granted by the seat court in other Member States. Additionally, recognising the arbitration agreement would result in the recognition of the arbitral tribunal (which decides on the merits) and possible recognition of the provisional measures (and awards) by Member States' courts.

Thus, providing a clear solution for the recognition of arbitration agreements will lay the foundation of other propositions that this thesis will make in the next chapters and is essential for their application within the EU. The proposals made in chapter one providing the solution for the recognition of arbitration agreements are as follows: i) Recognising the exclusive jurisdiction of the seat court to make a *prima facie* examination of the arbitration agreement before the constitution of the arbitral tribunal, ii) Recognising the exclusive jurisdiction of the arbitral tribunal for ruling on its own jurisdiction after its constitution, iii) The granting of anti-suit injunction by the arbitrators. These primary proposals will be built upon in the next chapters.



Chapter one starts with a short history of anti-suit injunctions and their position prior to *West Tankers*.<sup>43</sup> Following that, the effects of anti-suit orders' prohibition on the arbitration in the EU will be illustrated. The chapter looks into the Green Paper, European Parliament resolution on the Judgement Regulation and the Recast. In the last section, the chapter will examine the grant of anti-suit injunctions by arbitrators. Here, this thesis submits that the best approach to the current situation of arbitration in the EU would be the exclusive jurisdiction of the seat court for examining the validation and application of arbitration agreement (before the constitution of the arbitral tribunal). However, the seat courts should limit their scrutiny to a *prima facie* determination that whether the arbitration agreement is null and void, inoperative or incapable of being performed and they should refuse to study the merits of the dispute. This will remove the chance of other Member States' courts to examine the arbitration agreement before the constitution of the tribunal and to start parallel proceedings with the arbitration.

It will be argued that arbitrators should have the exclusive jurisdiction for thorough examination of the arbitration agreement (after its constitution). Additionally, it will be submitted that arbitrators should grant anti-suit injunctions (in the form of awards) at the outset of the arbitration proceedings after the tribunal confirms its jurisdiction and such an award should be enforceable under the New York Convention. This exclusive jurisdiction of arbitration tribunals and the granting of anti-suit injunctions together will prevent national courts to examine arbitration agreements after the formation of the tribunal.

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<sup>43</sup> [2009] 1 A.C. 1138

Chapter two will discuss court-ordered interim measures in support of arbitration proceedings in the EU. The first section of this chapter will focus on interim measures granted in English courts in support of arbitration proceedings. The second section will study such measures in the French jurisdiction and show the similarities and differences between French and English approaches in this regard. The third section of chapter two will examine the current status of cross-border enforcement of court-ordered interim measures in the EU and the new problems it will be facing as a result of the Recast.

This thesis submits that a supervisory role for the seat court should be recognised by the Recast. This recognition should be in the way that interim measures granted by the seat court (in support of arbitration proceedings) should use the enforcement mechanism in the Recast. This means that such measures should be enforced by other Member states' courts without any extra procedure. This is because the seat court is often chosen intentionally by parties because of its judicial advantages and the trust that parties place in such a judicial system. Additionally, the law applicable to the tribunal's authority to award interim measures is the procedural law of the arbitration which normally is the arbitration law of the seat.

Chapter three will shed some light on the provisional measures granted by arbitral tribunals. After a general overview of this type of measures in international commercial arbitration, English and French arbitration laws will be analysed respectively. As well as presenting the strengths and weaknesses of their arbitration systems, it will be argued how the power of arbitrators can be improved in respect

of awarding provisional measures. Moreover, the grant of “without notice” measures will be discussed and the chapter will try to explain why awarding such measures should be recognised under certain circumstances.<sup>44</sup>

In the last section of the chapter, the issue of the emergency arbitrators will be discussed. In the conclusion, it will be submitted why providing an inherent power for tribunals to grant provisional measures can increase the use of such measures from arbitral tribunal. Further, the chapter will suggest that arbitrators should be able to grant pecuniary fines in the case of non-compliance by the arbitration parties so this would increase the chance of compliance by the parties. Finally, it will be submitted that emergency arbitrators should be recognised as ordinary arbitrators and accordingly incorporated into the arbitration laws of the EU Member States. This would allow the provisional measures and awards granted by them to enjoy the same recognition as the ones granted by ordinary arbitrators.

Chapter four will analyse the enforcement of tribunal-ordered interim measures. After studying the approaches taken by England and France to enforcement, the author will try to explain the need for the EU Member States’ arbitration laws to introduce a provision into their law recognising and enforcing the provisional measures granted by arbitral tribunals out of their jurisdiction. Further, it will be argued that granting provisional measures in the form of an award is the most

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<sup>44</sup> Without notice measures are provisional measures ordered without granting a prior hearing to the party against whom the measure is directed. Marianne Roth, ‘Interim measures’ (2012) *Journal of Dispute Resolution*, Volume 2012, p430.

feasible option to enhance the cross-enforcement of the tribunal-ordered interim measures.

There are various reasons for this proposition. First, there are many differences within the EU Member States laws in respect of interim measures granted by arbitral tribunals. For instance, there are still some Member States in which the arbitral tribunal's power to grant provisional measures is not recognised and this fact makes the cross-border enforcement of tribunal-ordered measures very hard.<sup>45</sup> Second, some other states have extended the regime for enforcement of award to the provisional measures (France, Scotland) which means they only enforce provisional measures when they are in the form of award. This latter fact makes any suggestion (in relation to granting measures in the form of award) more practical.

Third and the most important reason for issuing provisional measures in the form of awards is that all the EU Member States are the signatories to New York Convention and they cannot refuse the enforcement of the arbitral awards.<sup>46</sup> Accordingly, any suggestion through the New York Convention would have a higher prospect of acceptance and enforcement by the signatories in the current situation.

In the conclusion, the contributions of this thesis will be presented as framed within the three questions asked in the beginning of this thesis. Recognising the exclusive jurisdiction of seat court to do a *prima facie* examination of the arbitration

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<sup>45</sup> Such as Italy and Spain. William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J.Int'L, Volume 28, p1085.

<sup>46</sup> Unless they have reasons to do so under Article V of the New York Convention.

agreement (before the formation of tribunal), recognising the exclusive jurisdiction for the arbitral tribunal to examine the arbitration agreement (after the formation of the tribunal) and the granting of an anti-suit injunction in the form of an award, All together will remove the uncertainty surrounded the arbitration agreement within the EU. These propositions will answer the first question of the research, namely, *is it possible to find a solution to deal with the uncertain positions of arbitration agreements and proceedings within the EU and can the suggested solution be utilised to help the regulation and use of provisional measures?*

Recognising the emergency arbitrator in the national laws, recognising the inherent power of arbitral tribunals to grant provisional measures, limiting the power of the court to grant interim measures and providing monetary penalties will help to harmonise the different approaches taken by national courts and arbitral tribunals in respect of their jurisdiction to grant provisional measures. These propositions will answer the second question of this thesis, namely, *is it possible to harmonise the different approaches taken by Member States' arbitration rules on the jurisdictions of national courts and arbitral tribunals in respect of granting provisional measures?*

Recognising the supervisory role of the seat courts, incorporating a provision in international Convention or national laws to enforce tribunal-granted measures and particularly enforcing the provisional measures in the form of award would enhance the cross-border enforcement of the provisional measures within the EU and answer the third question of the research, namely, *Is it possible to achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?*

- **Methodology**

Comparative legal method is the logical reaction to worldwide development, the transnational structure of laws and intensified economic relationship.<sup>47</sup> A key motivation for conducting such a method is to find good, if not the best possible law. The idea is that knowledge about rules in foreign systems says something about the quality of these rules and about the possibility and desirability of adopting these rules in one's own legal system.<sup>48</sup> In light of that, this research involves an analytical comparison which examines the approaches of English and French legal systems, EU laws, the CJEU's decisions and international treaties in respect of provisional measures. This thesis will critically examine the national laws of England and France as well as the practice of their courts regarding these measures. Thereafter, this thesis examines the relevant EU regulations, resolutions, reports and proposals, as well as the CJEU's decisions.

England and France have been chosen for two reasons. First, they enjoy two of the most advanced arbitration systems in the world and they host two of the most popular centres for arbitration seekers, namely LCIA (The London Court of International Arbitration) in London and ICC (International Chamber of Commerce) in Paris. This thesis will make limited references to the arbitration rules of LCIA and ICC and arbitrations conducted under these rules.

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<sup>47</sup> Giinter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) Harvard International Law Journal, volume 26, No.2, p418

<sup>48</sup> Jaap Hage, 'Comparative Law as method and the method of Comparative Law' (2014) Maastricht European Private Law Institute, Working Paper No. 2014/11, p10.

Secondly, England and France have taken considerably different approaches regarding jurisdictions of arbitration tribunals and courts, validation of arbitration agreements and enforcement of interim measures.<sup>49</sup> French law enables the arbitral tribunal with the inherent power to grant interim measures, whereas in English law this is only possible when parties stipulate such power for arbitrators in their arbitration agreements.<sup>50</sup> The English system only enforces interim measures granted by the arbitral tribunals seated in England (and Wales), whereas the French system enforces interim measures in the form of award even if they are granted by tribunals outside the jurisdiction of France.<sup>51</sup> While French law prohibits courts from making a thorough examination of arbitration agreements, particularly before the constitution of the arbitral tribunal, English courts have made thorough examinations of arbitration agreements in various cases.

Using a comparative method entails focusing careful attention on the similarities and differences between the legal systems being compared.<sup>52</sup> This research will thoroughly examine the similarities and differences of English and French systems in relation to provisional measures. Accordingly, it will use such findings as examples to show the types of problems facing the use of provisional measures within the EU's arbitration system and it will make practical propositions to improve such a system.

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<sup>49</sup> Please see 1.9.

<sup>50</sup> Please see 2.2.1 and 2.3.1.

<sup>51</sup> Please see 4.3 and 4.4.

<sup>52</sup> John C. Reitz, 'How to Do Comparative Law' (1998) *The American Journal of Comparative Law*, Vol. 46, No. 4, p620.

While the scope of comparison of this research involves examining English and French laws, a limited part of American case law concerning the enforcement of tribunal-granted provisional measures will be analysed too. This is because, in international commercial arbitration, the United States is the only jurisdiction which permits the enforcement of tribunal-ordered measures (such as orders for preservation of assets or escrow orders) in the form of awards.<sup>53</sup> Studying such cases and arguments made by American judges will help this thesis to better frame the propositions suggested in the concluding chapter for enforcement of these measures within the EU.<sup>54</sup>

One of the advantages of comparative analysis is that it pushes the analysis to examine broader levels of abstraction through its investigation.<sup>55</sup> Accordingly, this thesis examines broader and more fundamental issues such as the divergent approaches of the EU, England and France in respect of the validation and application of arbitration agreements and the extent of recognition of Competence-Competence and party autonomy principles.

This thesis will go beyond the comparison and will try to formulate a number of suggestions to improve the use of provisional measures in international commercial arbitration within the EU. However, this research is not trying to make the actual harmonization of provisional measures in the EU. The goal of this thesis is to frame

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<sup>53</sup> Please 4.6.1.

<sup>54</sup> Please see 4.6.

<sup>55</sup> John C. Reitz, 'How to Do Comparative Law' (1998) *The American Journal of Comparative Law*, Vol. 46, No. 4, p625.



propositions in the form of provisions or amendments that could be used by legislators or drafters of the EU's regulations and international conventions.

If this thesis had not conducted such an analytical comparison, it could not have shown the differences between English and French arbitration systems and therefore made practical propositions such as a) Providing arbitral tribunals an inherent power to grant interim measures or b) Enforcing tribunal-ordered interim measures in the form of awards. Equally, if the comparison had not been conducted on the broader matters in the EU's Regulations, reports, resolutions, proposals and the CJEU's decisions, the research could not have shown the contrasting and unfavourable views taken by the EU towards arbitration and consequently, could not have proposed a) Exclusive jurisdictions for the seat court and arbitral tribunals to rule on the existence of arbitration agreements or b) Empowering arbitral tribunals to grant anti-suit injunctions.

This thesis includes only secondary research methods conducted through i) desk research; ii) previous academic evaluation and research; iii) institutional information through reports, decisions. In addition to the study of the various perspectives of scholars in their commentaries, reviews, articles and books, this comparative study entails a case study in which the practice of courts (French and English courts and The CJEU) and tribunals in various cases will be scrutinized. This case law approach has been helpful for European academic writers to benefit from other European legal systems, particularly when the actual choice of cases

represent picture of the concerned legal field.<sup>56</sup> This is the way that this thesis has approached the case study which is vital to understand the approaches taken in England, France and the CJEU regarding provisional measures and arbitration agreements.<sup>57</sup>

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<sup>56</sup> Karl-Heinz Ladeur, 'Methodology and European law—Can methodology change so as to cope with the multiplicity of the law?(2004) in *Epistemology and Methodology of Comparative Law*, Edited by Mark Van Hoecke Katholieke, Hart Publishing. Mark Van Hoecke, 'Deep level Comparative Law' (2004) ) in *Epistemology and Methodology of Comparative Law*, Edited by Mark Van Hoecke Katholieke, Hart Publishing.

<sup>57</sup> While this thesis has made every effort to find and use French case law, Civil law states (France being one) do not publish the judgments of courts with the thoroughness and persistence of common law states (England and US). John C. Reitz, 'How to Do Comparative Law'(1998) *The American Journal of Comparative Law*, Vol. 46, No. 4, p631

# Chapter One: *Anti-suit injunctions*

## 1.1. *Introduction*

This chapter will begin with a brief history of anti-suit injunctions. Then, it will critically discuss the two key cases decided on anti-suit injunctions by the CJEU and their effects on the arbitration system in the EU. Subsequently, it will examine the evolution of anti-suit injunctions in England as the main state in which such injunctions have been granted.<sup>58</sup> The French section will be relatively small as French courts have rarely granted similar orders. The reason for that is awarding such injunctions has been viewed by civil law commentators as constituting an unjustified interference with the working of foreign courts or tribunals.<sup>59</sup> In the following sections, the chapter will respectively scrutinize the Green Paper, European Parliament resolution on the Judgement Regulation<sup>60</sup> and the Recast.

This chapter then will answer the first question of this thesis, namely, *is it possible to find a solution to deal with the uncertain positions of arbitration agreement and arbitration proceedings within the EU? and how can we utilise this solution to help the practice of provisional measures?*

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<sup>58</sup> The history of anti-suit injunctions goes back to the 15<sup>th</sup> century in England, however, the scope of application of these injunctions was later extended to Scotland, Ireland, the British colonies, and finally to proceedings before American courts. Olga Vishnevskaya, 'Anti-suit injunctions from arbitral tribunals in international commercial arbitration: A necessary evil?' (2015) *Journal of International Arbitration*, Volume 32, Issue 2, p175.

<sup>59</sup> Micheal black, Rupert Reece, 'Anti-suit Injunctions and arbitration proceedings' (2006) *Arbitration*, Volume 79(3), p3,4.

<sup>60</sup> European Parliament resolution on the implementation and review of Council Regulation (EC) No 44/2001 (2009/2140(INI)) available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0304+0+DOC+XML+V0//EN>> accessed on 10/11/2015.

This chapter will explain why the granting of an exclusive jurisdiction to the seat court (before the constitution of the tribunal) to make a *prima facie* examination of arbitration agreement can reduce the risk of parallel proceedings in another Member States' court. Further, it will be argued that giving the exclusive authority to arbitrators (after the formation of the tribunal) for a thorough examination of the arbitration agreement can clarify the jurisdictional problems and uncertainties between tribunals and Member States' courts. Finally, it will be proposed that arbitrators should grant anti-suit injunctions and explained how granting these injunctions could help arbitrators to protect the arbitration process.

## ***1.2 History and Evolution***

In its simple form, an anti-suit injunction is a provisional measure granted where a court decides to restrain a party before it from the commencement or continuation of proceedings before another court. When the injunction is granted, the respondent who breaches the anti-suit order will be liable for contempt of the court. This might have limited impact on the respondent who lives out of the jurisdiction of the court. Nonetheless, any judgment obtained by the respondent from a foreign court in contrary to the injunction will not be enforceable in the jurisdiction of the granting court and in the context of arbitration should not be able to have *Res Judicata* effect binding on the arbitral tribunal.<sup>61</sup> The anti-suit

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<sup>61</sup> Patrizio Santomauro, 'Sense and sensibility: Reviewing West Tankers and dealing with its implications in the wake of the reform of the EC Judgement Regulation' (2010) *Journal of Private*

injunction might also concern the third parties and they might as well be liable for contempt of the court, if they assist any breach by the principal defendant.<sup>62</sup>

Such injunctions have been granted mainly for two reasons: existence of an exclusive clause or an arbitration clause. The parties can stipulate an exclusive clause which shows a clear consent that one specified court should decide on the disputes between the parties regardless of the fact that another jurisdiction might be eligible for deciding on a given case. Accordingly, commencing judicial proceedings in another jurisdiction is a breach of the exclusive clause. The other reason for grant of anti-suit injunctions is the breach of an arbitration clause by which parties agree to settle the dispute in an arbitration tribunal rather than a domestic court. These injunctions are common law phenomenon and within the EU, they have been granted mostly by English courts.<sup>63</sup>

The history of anti-suit injunctions goes back to the 15<sup>th</sup> century and over the years the significance of these orders, as an equitable remedy, has gradually evolved.<sup>64</sup> In the beginning of the eighteenth century, an agreement to refer a dispute to arbitration as a general rule would not preclude a party starting proceedings concerning the same dispute in a court of law or equity. This was because, in that

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International Law, vol.6. no.2 p283. David Altaras, 'The anti-suit injunction: historical overview' (2009) Arbitration, Volume 75,p1.

<sup>62</sup> Thomas Raphael, *The Anti-Suit Injunction Updating Supplement* (2010 Oxford Press) 1.01.

<sup>63</sup> Such injunctions have been criticized, particularly by authors and judges from civil law systems, where anti-suit injunctions are largely unknown. It has been claimed that they are irreconcilable with international comity and public international law, and amount to an unjustified interference with the sovereignty of the foreign state and the jurisdiction of the foreign court. Thomas Raphael, *The Anti-Suit Injunction Updating Supplement* (2010 Oxford Press), 1.02. Trevor C. Hartley 'Legislative Comment The Brussels I Regulation and arbitration' (2014) International & Comparative Law Quarterly, Volume 63(4), p7.

<sup>64</sup> *Turner V. Grovit* [2005] 1 A.C. 101. p7.

period of time, it was against the public policy to oust the jurisdiction of English courts; therefore parties could not opt out of the right to have their disputes settled in the court of justice.<sup>65</sup> This situation remained extant till Common Law Procedure Act 1854 s.11 which authorized indirect enforcement of an arbitration agreement. That provision allowed an English court to stay proceedings on the application of one party to an arbitration agreement if the other party, in breach of the arbitration agreement, brought an action against the first.<sup>66</sup>

Up until the decision of the CJEU in *Turner v Grovit*<sup>67</sup>, the EU Member States' courts could grant such injunctions in support of either the exclusive or arbitration clause. In this case, the first major change in the granting of these injunctions occurred. Although this case did not concern anti-suit injunctions granted in support of arbitration proceedings, it paved the path for the next decision of the CJEU namely, *West Tankers Inc v Allianz SpA* (*West Tankers* henceforth).<sup>68</sup>

### **1.2.1 *Turner v Grovit***

In *Turner v Grovit*, the claimant, Turner, requested an anti-suit injunction from the Court of Appeal in England against the continuation of court proceedings by the defendants in Spain. The injunction was granted on the basis that the Spanish proceedings merely had been brought in bad faith for the purpose of obstruction of

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<sup>65</sup> David Altaras, 'The anti-suit injunction: historical overview' (2009) *Arbitration*, Volume 75, p4. In *Waters v Taylor* [1807] 15 Ves Jr. [10], Lord Eldon stated: "[A]s a general proposition, an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration, before they come into Court".

<sup>66</sup> *Ibid*, p4.

<sup>67</sup> EU Case C-159/02, <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-159/02>> accessed on 11/11/2015.

<sup>68</sup> [2009] 1 A.C. 1138.

the English proceedings. Following an appeal from the defendants, the House of Lords (as it was called then)<sup>69</sup> asked for a preliminary order from the CJEU on whether a national court of a Member State, which is a party to the Brussels Convention<sup>70</sup> (as it was called then)<sup>71</sup>, could restrain proceedings in another state party to the Convention in the circumstance such as those of the case.

The House of Lords argued that the grant of such injunctions is justified as it “does not purport to determine the jurisdiction of a foreign court” because the addressee of the injunction is not the court but is the defendants themselves and the fact that restraining orders are usually granted when the “foreign authority has or [is] willing to assume, to hear the case” indicates that these orders do not entail an assessment of jurisdiction of another Member State.<sup>72</sup> The House of Lords, subsequently, argued that not only no provision in the Brussels Convention prevents the adaptation of these types of injunctions but also such orders are useful to attain one of the Brussels Convention’s objectives which is to reduce the number of courts with jurisdiction to deal with the same dispute.<sup>73</sup>

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<sup>69</sup> In October 2009, The Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

<sup>70</sup> The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by various Accession Conventions) (Brussels Convention).

<sup>71</sup> Until the Recast section, we will refer to the Recast as the Brussel Convention and sometimes as Judgment Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. Both of them were predecessors of the Recast. The reason is for this is to avoid creating confusion for the reader as there are many quotes from different cases and judges in which references have been made to the previous legislation and convention.

<sup>72</sup> [2005] 1 A.C. 101 [28] The House of Lords believed that anti-suit injunction is not the right term for these injunctions and the term of ‘restraining orders’ should be used instead.

<sup>73</sup> *Turner v Grovit*. [2005] 1 A.C. 101 [23].

Advocate General Ruiz-Jarabo Colomer, nonetheless, had different point of view on this issue. In his argument, he stated that the concept of mutual trust between Member States' courts is decisive in this case because it justifies the automatic recognition of the decisions which are made. Furthermore, he stated that based on a comparative review, only Common Law systems permit such orders and this imbalance is against the scheme of the Brussels Convention. He accepted the argument of the UK, stating that anti-suit injunctions address the respondent not national courts. Nevertheless, he argued that when a litigant is prohibited, under threat of a penalty, to pursue a judicial proceeding in a foreign court, the litigant is being deprived of proceeding with the case and this is a direct intervention with the authority of Member States' courts.<sup>74</sup>

The CJEU, In order to reach its decision, followed the argument of the Advocate General. The CJEU stated that the application of the national procedural rules cannot prejudice the effectiveness of Brussels Convention. Accordingly, CJEU provided "Even if it were assumed...that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings and therefore as being a matter of national law alone, it needs merely [to] be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention".<sup>75</sup> The CJEU concluded that grant of

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<sup>74</sup> In order to support of his argument he referred to the decision of the US Senior Courts in *Peck v. Jennes* (48 U.S. 612 (1849)) which provided that that there is no difference between addressing an injunction to the parties and addressing it to the foreign court deciding on dispute. Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 20 November 2003. *Turner v. Grovit* [2005] 1 A.C. 101 [31][32][33][34].

<sup>75</sup> This is against what UK argued that restraining orders are of procedural nature which are indented to safeguard the integrity of the judicial proceeding of the court and granting it and for that reason is a matter of national law for the English courts.



anti-suit injunctions in support of an exclusive clause of that kind has the effect of limiting the application of the rules on jurisdiction laid down by the Convention and therefore should not be granted.<sup>76</sup>

The important point in the CJEU's argument is the reconfirmation of its perspective on supremacy of Brussels Convention's rules over national ones. The CJEU stated such a point of view in earlier cases such as *Hagen*<sup>77</sup>, but perhaps the most explicit one was provided in *Duijnste v Goderbauer*<sup>78</sup> which stated; "It must be concluded that the [Brussels] Convention, which seeks to determine the jurisdiction of courts of the contracting states in civil matters, must override national provisions which are incompatible with it".

Despite the ruling of CJEU in *Turner v. Grovit* that the grant of anti-suit injunctions in support of litigations is not allowed by the EU courts, award of anti-suit injunctions granting continued (particularly) by English courts in support of arbitration agreement because they believed such orders were not incompatible with *Turner v. Grovit* arguing that arbitration was excluded from the Judgment Regulation.<sup>79</sup>

This latter situation was sustained till 2009 when the House of Lords referred another similar case to the CJEU, but this time the anti-suit injunction was granted in support of an arbitration agreement.

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<sup>76</sup> *Turner v. Grovit* [2005] 1 A.C. 101 [29].

<sup>77</sup> *Hagen* [1990] ECR I-1845, paragraph 20. "It should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention. As the Court [CJEU] has held ... a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention".

<sup>78</sup> (1983) ECR 3663 [14].

<sup>79</sup> See *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67 [44]. *The Ivan Zagoubanski* (2000) WL 33281266 [71].

### 1.2.2 *West Tankers*

In *West Tankers*<sup>80</sup>, a charter party between the claimant (owner of a vessel) and the charterer contained a clause which provided that any disputes were to be resolved by arbitration in London. After the vessel had damaged a jetty in Italy, owned by the charterer, the defendant's insurers, having been subrogated to the charterer's claim for damages, began proceedings in Italy against the claimant, which disputed the jurisdiction of the Italian court on the grounds of the arbitration agreement. In a parallel action brought in London, the claimant sought a declaration that the dispute was to be settled by arbitration pursuant to the arbitration agreement and an order for defendants to discontinue the Italian action.

The High Court granted the orders sought and defendants appealed to the House of Lords on the basis that the grant of such an injunction was contrary to the Judgment Regulation. As in the House of Lords' view, the answer to the question that whether anti-suit proceedings would fall within the exception of Article 1(2)(d) of the Judgment Regulation was not obvious and had a substantial practical importance, the House of Lords decided to refer this to the CJEU for a preliminary ruling.

In this case, the CJEU addressed two main questions. The first one was whether the principle in *Turner v Grovit* preventing the grant of anti-suit injunction concerning exclusive clauses should be applied to the anti-suit injunction in support of arbitration. The second was whether the decision regarding the validity of the

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<sup>80</sup> [2009] 1 A.C. 1138.

arbitration clause is excluded from the scope of the Judgment Regulation based on Article I(2)(d).

Lord Hoffmann (on behalf of the House of Lords) argued that in *Gasser*<sup>81</sup> and *Turner v Grovit* the CJEU has held that “the Regulation has provided a set of uniform rules for the allocation of the jurisdiction between Member States and the courts of each Member State have to trust the courts of other Member States to apply those rules correctly”.<sup>82</sup> He continued that unlike those cases, there is no set of uniform rules exists with respect to arbitration and the principle by which the Judgment Regulation allocates jurisdiction, giving priority to the defendant’s domicile, are not suitable for the arbitration in which the place and the governing law are generally chosen by the parties on the basis of neutrality, availability of legal service and the extent of interference of the supervisory jurisdiction.<sup>83</sup>

Lord Hoffmann argued that an application for an anti-suit order is included in arbitration exclusion as its aim is “to protect the contractual right to have the dispute determined by arbitration”.<sup>84</sup> In doing so he firstly referred to *Marc Rich v Società Italiana*<sup>85</sup> in which the CJEU held that the exclusion not only covers arbitration proceedings themselves, but also court proceedings where the subject matter of those proceedings is arbitration. Secondly, the case of *Van Uden*<sup>86</sup> was referred by him in which the CJEU concluded that the subject matter of court

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<sup>81</sup> *Erich Gasser v Misat Sri EU* Case C-116/02 <<http://curia.europa.eu/juris/liste.jsf?Language=en&num=C-116/02>> accessed on 08/12/2015.

<sup>82</sup> *West Tankers* [2007] UKHL 4

<sup>83</sup> *Ibid* [12].

<sup>84</sup> *Ibid* [15][16][17].

<sup>85</sup> *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] I.L.Pr. 524.

<sup>86</sup> *Van Uden Maritime BV, trading as Van Uden Africa Line, v. Kommanditgesellschaft in Firma Deco-Line and Another* [1999] 2 W.L.R. 1181.

proceedings is arbitration where those proceedings serve to defend the right to settle the dispute by the arbitration.<sup>87</sup>

The CJEU accepted the House of Lords' argument that the proceedings in English courts which resulted in granting anti-suit injunction do not fall into the judgment Regulation scope. Nonetheless, the CJEU believed that though these proceeding do not come within the scope of the Judgment Regulation, they preclude a court of another Member State from exercising the jurisdiction conferred on it by the Judgment Regulation, and such injunctions may have consequences which undermine the efficiency of the Regulation by preventing the unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decision in those matters which are the objectives of the Judgement Regulation.<sup>88</sup> Consequently, the CJEU ruled that the grant of anti-suit injunctions in support of arbitration agreement is not compatible with the Judgment Regulation.

The CJEU has not addressed the effect of *West Tankers* on arbitration proceedings and this has left many uncertainties about the future of international arbitration in the EU. In the following section, the main effects of this decision on the international arbitration proceedings will be explored.

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<sup>87</sup> *West Tankers* [2009] 1 A.C. 1138 [15].

<sup>88</sup> *Ibid* [31].

### **1.2.2.1 The main effects of West Tankers:**

#### ***a) Creating parallel proceedings and jurisdictional problems:***

Including preliminary rulings of Member States' courts on the validation of arbitration agreements in the scope of the Judgment Regulation has left the jurisdiction of arbitral tribunals in an ambiguous and unreliable position. It is not clear whether the arbitration proceedings can be commenced and continued parallel to the court proceedings in a Member State when there is a possibility of conflicting decision with a judgment of a Member State's courts regarding the validation of the arbitration clause.

Moreover, since anti-suit injunctions are banned in the EU, national courts can support neither the arbitration agreement nor the arbitration process in case that the other party obtain a conflicting judgment from another Member State. Imagine the scenario that parties, based on an arbitration agreement, start the arbitration proceeding in France and the tribunal holds that there is a valid arbitration clause. Party A, then commences court proceedings in England in which the court holds that there is no binding arbitration agreement and makes its judgment on the dispute. Now, according to *West Tankers* the judgment of English court will be binding on French courts.

The question is whether Party B should continue with the proceeding and request the award from the tribunal or simply stop the arbitration proceedings. Even if the arbitration proceedings could disregard the decision of the English court on the validation of the arbitration clause, this situation may cause considerable

complications for the parties as they have to fight parallel proceedings in two jurisdictions; in a Member State court and in the arbitration tribunal located in another Member State.<sup>89</sup> (It should be born in mind that this scenario could be different if the states in which the party wants to start court proceedings were signatories of the Geneva Convention).<sup>90</sup>

Moreover, if a party who wants to carry on with the arbitration proceedings and contests the jurisdiction of the deciding court in another Member State, it should be careful not to submit to the jurisdiction of that court within Article 24<sup>91</sup> of the Judgment Regulation. Contesting jurisdiction of a national court can be lengthy and expensive, involving costs for the parties which certainly was the purpose of the arbitration agreement to avoid.<sup>92</sup>

These complications can be clearly seen in *DHL v Fallimento*<sup>93</sup>. In this case, an Italian company (Fallimento) went into receivership and the receiver brought a claim in Italy for non-payment of some invoices under a software supply contract with DHL.

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<sup>89</sup> Yvoon Baatz, Alexander Sandiforth, 'A setback for arbitration' (2009) Shipping & Trade Law. Volume 9. Number 4. O Clifford and O brown, 'lost at sea or a storm in a tea cup? Anti-suit injunctions after West Tankers' (2009) International Arbitration Law Review, Volume 12, p21.

<sup>90</sup> According to Geneva Convention Article VI(3): "Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary." Thus, if the arbitration proceedings were started in England and then the other party wanted to start court proceedings in France on the same subject then, the French court had to stay its proceedings. This is important because only 17 members (from 28 members) of the EU are signatories to Geneva Convention.

<sup>91</sup> Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

<sup>92</sup> Y Baatz and A Sandiforth, "A Setback for Arbitration" [2009] *Shipping and Trade Law* Volume 9. Number 4. p3

<sup>93</sup> *DHL GBS (THE UK) Limited v Fallimento Finmatica S.P.A.* 2009 WL 364334.

The contract included an English choice of law clause and a London arbitration clause. DHL did not take part in the Italian proceedings and in its absence the Italian court held that it had jurisdiction to decide on the case and that the arbitration clause was not binding on the receiver as a matter of Italian law.

Falimento successfully applied to the English High Court in order to register the Italian decision under the Judgment Regulation. DHL appealed on the grounds that the judgment fell outside the scope of the Regulation because it is included in the arbitration exclusion in Article 1(2)(d) and that registration of the judgment was against the public policy of the UK as it breaches a binding arbitration clause. DHL, subsequently, applied for a stay of its own appeal in respect of the registration proceedings awaiting its appeal of the original Italian judgment. The High Court rejected the application for the stay.

Tomlinson J held that considering the CJEU's decision in *West Tankers*, it would be difficult for DHL to argue that the Italian judgment fell within the arbitration exclusion in the Judgment Regulation or that the English court could review the Italian court's judgment on the basis of its own jurisdiction and the applicability of the arbitration agreement on the grounds of public policy.<sup>94</sup> Tomlinson J's narrow reading of the arbitration exclusion in the Judgement Regulation shows that an English court could not decline to enforce a decision of an EU Member State's court, notwithstanding the existence of a *prima facie* binding arbitration clause and it

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<sup>94</sup> *Ibid* [20]. In *National Navigation Co v Endesa Generacion SA* ([2009] EWHC 196 (Comm)) Gloster J argued that such Judgments are against public policy of the UK, but it was later on rejected in the Court of Appeal. *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 please see 1.3.2.1.

indicates the limited room for national court to re-examine the case in these circumstances which matches the CJEU's reasoning in *West Tankers*.<sup>95</sup>

**b) Inclusion of the preliminary ruling in the Judgment Regulation and scope of the arbitration agreement:**

As well as banning anti-suit injunctions, one of the most important outcomes of *West Tankers* was in relation to decisions of Member States' courts concerning the validation of arbitration agreements. According to *West Tankers*, if the subject matter of the proceedings is arbitration, the decision in respect of such proceedings falls outside the scope of the Judgment Regulation. Thus, a decision of a Member State's court which merely validates an arbitration agreement falls outside of the Judgment Regulation as the subject matter of such proceedings is an arbitration agreement.

Nevertheless, when an EU court, by ruling that there is no arbitration agreement, believes that it has jurisdiction to hear a dispute regarding a contract and wants to make a judgment on the case, the question of whether there is a valid arbitration agreement is a preliminary issue to the actual decision. As the preliminary ruling of the court on the existence of the arbitration agreement is part of its final judgment, therefore is also binding on the EU Member States.<sup>96</sup>

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<sup>95</sup> Stuart Dutson, Mark Howarth, 'After *West Tankers* - Rise of the "Foreign torpedo"?' (2009), Sweet & Maxwell, Arbitration, Volume 75, p5. Such approach later on followed in *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397.

<sup>96</sup> *West Tankers* [2009] 1 A.C. 1138 [26], Advocate General opinion. [53] [54].



The CJEU in *West Tankers* has failed to explain this issue that why a decision of a national court which only addresses the validity of an arbitration agreement is not recognised as a decision inside the scope of the Judgment Regulation, but the same decision in the role of a preliminary matter (addressing the same arbitration agreement) as part of a final judgment of the same court would be inside the scope of the Judgment Regulation.<sup>97</sup> This significant issue causes several faults in the arbitration proceedings which will be examined later in this chapter.

Before *West Tanker*, there were opposing views on whether the preliminary ruling on the validation of the arbitration agreement should be included in the Judgement Regulation and eventually it was agreed that the exclusion should not be amended in the Judgment Regulation (in 2001) and should be left to members to deal with the issue of interpretation in their implementing legislation.

The reports on Brussels Convention (Provided for the amendment of Brussels Convention and enactment of the Judgment Regulation) all stated that the reason for excluding the arbitration from the scope of the Brussels Convention is existence of other conventions namely, the New York and the Geneva Conventions which deal with the issue of the arbitration.<sup>98</sup> Nonetheless, as Lord Hoffman provided,

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<sup>97</sup> Jacob Grierson, 'Comment on West Tankers ' (2009) *Journal of International Arbitration* 26(6): p895. Stuart Dutson, Mark Howarth, 'After West Tankers - Rise of the "Foreign torpedo"?' (2009), *Arbitration*, Volume 75, p5. For a different opinion in respect of this inclusion see Vesna Lazić, 'The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado about Nothing' Can End Up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels style' (2012) *Journal of International Arbitration*, Volume 29, p4.

<sup>98</sup> Looking at three main reports on the regulation, points out the main ground for excluding the arbitration and the different view of Member States on this issue. Professor Schlosser's report shows that from very early stages there were two main interpretations of the Article 1(2)(d). One interpretation was from the UK's position regarding the Article 1 (2) (d) which argued that this exclusion covers all disputes which the parties had effectively agreed should be decided by the

there is no set of uniform rules exists [in international arbitration Conventions] in respect of arbitration and the principle by which the [Judgment] Regulation allocates jurisdictions are not suitable for arbitration.<sup>99</sup>

Due to this failure of international rules to address this allocation of jurisdictions between national courts and arbitral tribunals, it was not surprising that the CJEU would wrongly attempt to use the Judgment Regulation's mechanism such as *Lis Pendens*<sup>100</sup> to address the allocation of such jurisdictions in international arbitration.

**c) Undermining the Jurisdiction of arbitral tribunals (the Competence-Competence principle):**

The post-*West Tankers* situation in the EU brings the important question that how and to what extent the jurisdiction of the arbitral tribunal is practically applied in

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arbitration as well as any secondary disputes related to the agreed arbitration. The other approach which was referred to as European continental provided that article 1(2)(4) provision only addresses proceedings brought in national courts as part of 'arbitration' if they refer to arbitration proceeding, whether concluded, in progress or to be started". Report on Brussels Convention by Peter Schlosser, <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1979:059:0071:0151:EN>> [61] accessed on 02/09/2013. Jenard's Report states: "The Brussels Convention ...does not apply for the purposes of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration – for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings". P. Jenard, "(1979) *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968*" <<http://aei.pitt.edu/1465/>> accessed on 02/09/2013. Nevertheless, in *Evrigenis* Report which is the one that the CJEU used in its argument) was mentioned that "the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued ... must be considered as falling within its scope". *Evrigenis*, Demetrios I. and Kerameus, K.D. "(1986) *Report on the accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.*" 1986 <<http://aei.pitt.edu/5623/>> accessed on 02/09/2013.

<sup>99</sup> *West Tankers* [2009] 1 A.C. 1138 [10].

<sup>100</sup> In *Erich Gasser v Misat Sri* EU C-116/02 <<http://curia.europa.eu/juris/liste.jsf?Language=ennum=C-116/02>> accessed on 08/12/2015. There were two national courts dealing with the validation of the arbitration agreement and CJEU resolved this issue by applying *Lis Pendens* principle in article 27 and 28 of the Regulation which provides that the first national court which seized the case had to deal with the validation of the arbitration agreement.

the EU. The positive effect of the Competence-Competence principle, which is a widely recognised principle in international arbitration<sup>101</sup>, provides that the arbitral tribunal has the power to rule on its own jurisdiction, including matters with respect to the existence or validity of the arbitration agreement.<sup>102</sup> On the other hand, the negative effect of the Competence-Competence principle prevents the early interference by any other forum than the tribunal because of the existence of a valid arbitration agreement.<sup>103</sup> The New York Convention, has hardly addressed any similar jurisdictional rules or procedural framework in this regard.<sup>104</sup>

The New York Convention in its Article II(3) simply allows the national courts to examine the arbitration agreement before referring the parties to arbitration. This examination requires the court to ensure that the arbitration agreement is not null and void, inoperative or incapable of being performed. However, in relation to the parallel jurisdictions of courts and tribunals on validity of arbitration agreement, the New York Convention does not provide any rule to determine which of these forums has the priority to decide on the existence of an arbitration agreement. Moreover, it does not define when and to what extent, the examination that should be applied by national courts.<sup>105</sup>

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<sup>101</sup> Thomas Raphael, *The Anti-Suit Injunction Updating Supplement* (2010 Oxford Press), 1.10. Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) p 397. This can be seen in Article 16(1) UNCITRAL Model Law on International Commercial Arbitration.

<sup>102</sup> Doug Jones, 'Competence-Competence' (2009) *Arbitration*, Volume 75, p1.

<sup>103</sup> Christa Roodt, 'Conflict of procedure between courts and arbitral tribunal with particular reference to the right of access to court' (2011). *African journal of International and Comparative Law*, Volume 19, Issue 2, p5.

<sup>104</sup> Patrizio Santomauro, 'Sense and sensibility: Reviewing West Tankers and dealing with its implications in the wake of the reform of the EC Judgement Regulation' (2010) *Journal of Private International Law*, Volume 6, no.2, p295.

<sup>105</sup> Vesna Lazić, 'The Commission's Proposal to ...', p11.

Article VI(3) of the Geneva Convention provides: “Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary”. While this provision prevents courts from ruling on the existence of the arbitration when the tribunal is formed, it does not provide the adequate protection for certainty of arbitration agreement. This is because it does not prevent the courts from examining the arbitration agreement before the formation of the arbitral tribunal.<sup>106</sup> Further, England (as well as nine other Member states<sup>107</sup>) as a non-signatory of the Geneva Convention can examine the arbitration agreement and decides on its validity even if an arbitration tribunal has been already formed.

In relation to the extent of the examination, national courts apply different standards in determining whether an arbitration agreement is not “void, inoperative or incapable of being performed.”<sup>108</sup> For example, according to the French view, courts are restricted from inquiring into the merits of the existence and validity of the arbitration agreement and instead they must apply a *prima facie*

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<sup>106</sup>Further, there have been many disagreements between parties in different cases in relation to who the arbitration parties were in *West Tankers* [2009] 1 A.C. 1138 [10] between the UK and Italy, In *National Navigation* National Navigation Co v Endesa Generacion SA [2009] EWHC 196 (Comm), between England and Spain, In *Dallah v Metal Distributors* 2004 WL 3154142 between England and France, in *Comet v Unika*<sup>106</sup>[2004] I.L.Pr. 1 between England and France and *CMA v Hyundai* [2008] EWHC 2791 (Comm) again between England and France.

<sup>107</sup> Sweden, Greece, Netherlands, Republic of Cyprus, Estonia, Ireland, Lithuania, Malta and Portugal.

<sup>108</sup> Ozlem Susler, ‘The English Approach to Competence-Competence’ (2013) *Pepperdine Dispute Resolution Law Journal*, Volume 13, p429.

review of the arbitration agreement.<sup>109</sup> This is because based on their interpretation of the Competence-Competence principle, domestic courts are not allowed (at least at the outset of the arbitration procedure), in parallel and with the same level of scrutiny, to decide on the existence of the arbitration agreement unless the arbitration agreement is manifestly void.<sup>110</sup>

While it is accurate that under the New York Convention and the Geneva Convention, national courts have the authority to rule on the validation of the arbitration agreement, this does not mean that application of jurisdictional rules of the Judgment Regulation should undermine jurisdiction of arbitral tribunals. According to *West Tankers*, the decision of national courts on the validity of an arbitration agreement as a preliminary issue is binding on other Member States' courts. This practically makes the jurisdiction of the arbitral tribunal insignificant because even if the arbitral tribunal believes that the arbitration agreement is valid, it would be highly unlikely to get any support from national courts, particularly the seat court throughout the arbitration or at the enforcement stage of the award.

As explained earlier (in *Turner v. Grovit's* section), the policy of the CJEU in respect of the jurisdictional rules of the Judgment Regulation is overriding those rules on national procedural law.<sup>111</sup> Therefore, where there is a binding judgment which invalidates an arbitration agreement, it is not even clear whether arbitration parties can apply for any interim measures from any domestic court in the EU. This

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<sup>109</sup> Hong-lin Yu, Masood Ahmed, 'legislative comment, The new French Arbitration Law Review: an analysis' (2012) *International arbitration Law Review*. Volume 15(1), p2.

<sup>110</sup> Article 1448 of the Code of Civil Procedure of France.

<sup>111</sup> Please see 1.2.1.

situation, which undermines the arbitral tribunal and arbitration proceedings, cannot certainly be the intention of major international rules such as the New York Convention, UNCITRAL Model law or the Geneva Convention.<sup>112</sup> Looking at the Explanatory notes on UNCITRAL Model Law, it is clear one of the objectives of the UNCITRAL is delimitation of courts' intervention in the arbitration process which is contrary to the effect of *West Tankers* on jurisdiction of arbitral tribunals.<sup>113</sup>

This thesis submits that recognising the negative effect of the Competence–Competence principle which prohibits the intervention of national courts (particularly in the early stages of the arbitration procedure) would be the correct approach to the jurisdiction and if there is need for such examination (For instance, when there is a need to grant interim measures before the formation of the arbitral tribunal), courts should only do a *prima facie* review of the arbitration clause. Such an approach is currently applied in France, whereby most challenges to the parties' underlying contract, including challenges based upon illegality, fraud and initial invalidity, do not impeach the arbitration clause and are therefore for arbitral tribunals (not French courts) to decide, subject to eventual judicial review of the award.<sup>114</sup>

In contrary, English case law after Arbitration Act 1996, has “demonstrated an oscillation between a narrow and wide interpretation” of the Competence–

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<sup>112</sup> Spain, Germany, etc have adopted the Model of UNCITRAL in their Arbitration Acts.

<sup>113</sup> Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, section B(b).

<sup>114</sup> Emmanuel Gaillard, '*Prima facie* review of existence, validity of arbitration agreement'. (2005) New York Law Journal. p3, 4.

Competence principle.<sup>115</sup> In some cases, courts have clearly recognise the negative effect of this principle and ruled that the arbitral tribunals are the primary forums to rule on the validation of arbitration agreements.<sup>116</sup> In *Vale do Rio Doce Navegacao SA v Shangai Bao Steel Ocean Shipping Co Ltd*, Thomas J held that “In my view therefore the present application for the determination of whether there is an arbitral agreement is a matter regulated by Part I of the Act and in accordance with s.1(c), the court must approach the application on the basis it should not intervene except in the circumstances specified in that part of the Act.”<sup>117</sup>

Conversely, In *Law Debenture*<sup>118</sup>, Mann J. stated “There is no support for any suggestion that court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile”.<sup>119</sup> Such divergent approaches by English courts have prevented the development of a consistent body of law. Further, there are numerous opportunities in the 1996 Act

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<sup>115</sup> Ozlem Susler, 'The English Approach to Competence-Competence' (2013) Volume 13, p427.

<sup>116</sup> *Vale do Rio Doce Navegacao SA v Shangai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1 QBD. This was followed by *XL Insurance Ltd. v. Owens Corning* [2000] 2 Lloyd's Rep in which the court stated “[U]nder the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Coming challenges its jurisdiction on that ground, unless the matter is referred to the Court for determination under section 32. I am satisfied that in the meantime, justice requires that an injunction should be granted restraining Owens Coming from continuing its litigation against XL in Delaware.” [509] This approach recognises the least intervention of the courts in arbitral process particularly in the early stages of the arbitration. Also followed by *JT Amckley And Co Ltd v Gostport Marina Ltd* [2002] EWHC 1315.

<sup>117</sup> [2000] C.L.C. 1200 51.

<sup>118</sup> *Law Debenture Trust Crop Plc v Elektrim Finance BV* [2005] EWHC 1412(ch) [34].

<sup>119</sup> Similar approach taken by *Ahmad Al-Naimi v Islamic Press Agency Inc* [2--] 1 Lloyd's Rep.552. Please also see *Dallh Estate And tourism Holding Company v. The Ministry of Religion Affairs, Government of Pakistan* EWCA Civ 46[2010] , *Habas Sinai ve Tibbi Gazler Isthisal Industri AS v. Cometal SAL* [2010] EWCH (Comm), *Azov Shipping Co. v. Baltoc Shipping Co.* [199]. In this decision the court ruled that when the seat of arbitration is in the UK, the court is allowed to make a full examination rather than *prima facie* one. Please also see *Fiona Trust & Holding Corp v Privilov* [2007] UKHL 40.

that a party to challenge the jurisdiction of the arbitral tribunal, such as s.67 and s.32.<sup>120</sup>

Although a commentator suggests the most recent cases indicate that Competence-competence principle has become more established in the English arbitration<sup>121</sup>, there seems to be no precedent in this respect and courts have done a full review of arbitration agreements in numerous cases. This thesis proposes that English law needs to clarify its position in respect of the extent of the review on arbitration agreements. Of course the correct approach would be preventing courts from any thorough examination of arbitration agreement.

***d) Undermining party autonomy:***

Unlike national courts which are restricted to their conflict of law rules, arbitral tribunals because of their neutrality and freedom to choose governing law of arbitration agreements are the best forums to find the most appropriate applicable law to the arbitration agreement.<sup>122</sup> Thus, most logically, the arbitral tribunal should be the forum which decides on the validation of the parties based on the law that chosen by the parties and in absence of that the applicable law chosen by the arbitral tribunal.<sup>123</sup>

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<sup>120</sup> John Lurie, 'Court Intervention in arbitration: support or interference?' (2010) *Arbitration*, 76(3) p448, 449.

<sup>121</sup> Ozlem Susler, 'The English Approach to Competence-Competence' (2013) Volume 13 p452.

<sup>122</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) p15.

<sup>123</sup> *Ibid* p15.



Nonetheless, *West Tankers* by banning anti-suit injunctions has restricted national courts to support parties' choice of forum and applicable law in arbitration agreements. Further, according to *West tankers*, examining validation and applicability of the arbitration agreement as a preliminary issue to the actual decision are binding on national courts and most probably on arbitration tribunals and this will create more chance for parties to recourse to biased national courts and accordingly more decisions from national courts.

The CJEU's ruling also undermines the confidence of parties that expect their commercial disputes within the EU to be dealt with only by the tribunal and according to the procedural rules agreed between themselves. This is an obvious dent to the principle of party autonomy. Businesses undoubtedly prefer the certainty of knowing that litigation will take place in a pre-agreed forum and this is a common reason for selecting arbitration as the method for dispute resolution, for instance, to avoid one party having "home advantage".<sup>124</sup>

***e) Litigation tactics:***

Because the CJEU has included the preliminary ruling of the national court on validation of arbitration in the scope of the Judgment Regulation, application of first-seized rule (*Lis pendens*) on decision regarding the validation of arbitration agreement is available now.<sup>125</sup> This means if a court of Member States starts with

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<sup>124</sup> Stuart Dutson, Mark Howarth, 'After West Tankers - Rise of the "Foreign torpedo"?' (2009), Sweet & Maxwell, Volume 75, p3.

<sup>125</sup> Article 27: '1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established'.

examining the validity of arbitration agreement (as part of establishing its jurisdiction), other Member States should stay their proceedings on the same subject. Furthermore, if the court seized of the dispute makes the preliminary ruling that there is no valid arbitration agreement and make a judgment on the dispute, both ruling and the judgment are binding on other courts.

This situation will encourage use of litigation tactics for arbitration parties.<sup>126</sup> Now there is a greater risk of a party being able to circumvent the agreed arbitration process by commencing vexatious overseas proceedings.<sup>127</sup> Considering the unclear position of arbitral proceeding when there is parallel proceeding in a national court, starting a vexatious proceeding particularly in a jurisdiction famous for having slow proceedings can seriously damage the arbitration process,<sup>128</sup> Also, the current situation creates the opportunity for the parties to choose a non-arbitration friendly or biased national court in order to make the arbitration process ineffective.

**f) *Removing the effect of declaratory award:***

The declaratory award, requested by the arbitration parties from a national court, provides that there is a valid arbitration clause and parties are bound by it. According to *West Tankers*, such declaratory awards do not fall within the scope the

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2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

<sup>126</sup> Dicey, Morris & Collins, *The Conflict of Laws* 15th Ed. 16.097. Guido Carlucci, 'Arbitration, Anti-suit injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention' (2001), *Arbitration International*, Volume 27, Issue 2, p6.

<sup>127</sup> Stuart Dutson, Mark Howarth, '*After West Tankers* - Rise of the "Foreign torpedo"?' (2009), Sweet & Maxwell, *Arbitration*, Volume 75, p3.

<sup>128</sup> Patrizio Santomauro, 'Sense and sensibility: Reviewing *West Tankers* and dealing with its implications in the wake of the reform of the EC Judgement Regulation' (2010) *Journal of Private International Law*, vol.6. no.2, p296.

Judgment Regulation as their subject matter is arbitration and a decision of a court concerning the validity of an arbitration clause is only within the Judgment Regulation when it comes as a preliminary ruling to another proceeding which the subject matter comes within the Judgement Regulation. Consequently, declarations are of little significance now.<sup>129</sup>

In the above section, the problems and difficulties caused by *West Tankers* were discussed. In the following section the reflection of this decision on the English law will be discussed. It will also be explained how English courts have applied inconsistent interpretations of principles of public policy and *Res Judicata* between EU and non-EU cases.

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<sup>129</sup>Hakeem Seriki, 'Declaratory relief and arbitration: the aftermath of the *Front Comor*' (2010) *Journal of Business Law*. Issue 7, p9.

### ***1.3 Anti-suit injunctions in England***

Since *Pena Copper Mines Ltd v. Rio Tinto Co Ltd*<sup>130</sup> English courts have granted anti-suit injunctions in support of arbitration agreements. As illustrated previously, after *Turner v. Grovit* by which the CJEU banned anti-suit injunctions in support of exclusive clauses, English courts continued awarding such injunctions in support of arbitration agreements on the grounds that these injunctions do not fall in the scope of the judgment Regulation.<sup>131</sup> The statutory authority of English courts for to grant anti-suit injunctions is derived from two acts in England, namely; the Senior Courts Act 1981<sup>132</sup> and Arbitration Acts 1996 s.44.<sup>133</sup>

While the look of the act indicates that the Senior Courts Act could grant these injunctions in all the cases which they consider to be convenient, English courts limited the cases in which these orders can be granted. For such orders to be awarded under s.37, it is essential to verify that the respondent of the injunction

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<sup>130</sup> (1911) 105 LT 846. In this case, the first anti-suit injunction granted in Support of an arbitration agreement.

<sup>131</sup> Based on this approach, Court of Appeal in *The Hari Bhum(Through Transport)* [2004] EWCA Civ 1598 held that the English court which seized the action secondly, should not stay its proceeding based on the *Lis Pendens* principle and can grant anti-suit injunction against the proceeding in Finland which was started in breach of arbitration agreement. Moreover, Court of Appeal stated that grant of this injunction does not breach the principle of mutual trust in the Regulation as this matter is excluded under article 1(2)(d) . Please also see following cases for similar approach. *Toepfer International GMBH v Molino Boschi SRL* [1996] 1 Lloyd's Rep. 510. *Navigation Maritime v Rustal Trading Ltd* [2002] 1 Lloyd's Rep. 106.

<sup>132</sup> Section 37 Senior Courts Act 1981:

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

<sup>133</sup> Section 44: Court powers exercisable in support of arbitral proceedings:

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

...

(e) The granting of an interim injunction or the appointment of a receiver.

has been involved in wrongful conduct and the claimant has a legitimate interest such as a contractual right not to be sued in a particular jurisdiction. This can be stipulated in the contract as an exclusive clause or an arbitration clause. Additionally, these protective injunctions are obtainable for the victims of abuse of process such as vexatious or oppressive proceedings, regardless of the fact that they are brought in England and Wales or abroad.<sup>134</sup>

### **1.3.1 Establishing Jurisdiction by the English courts:**

Courts of England, Wales or Northern Ireland (Henceforth English courts) can grant restraining orders based on s.44 (which granting interim injunction is one of them) when:

- 1) The seat of arbitration is in England, Wales and Northern Ireland.
- 2) The seat is not within the jurisdiction of England or no seat has been designated or determined unless the court would believe it would not be appropriate to do so.

Under s.37 of Senior Courts Act, English courts normally can grant this form of injunctions in two situations. First, it is when the court can claim jurisdiction over the applicant in the foreign proceedings and secondly, when the court can be convinced to exercise its discretion to order such a remedy to the defendant in those proceedings.<sup>135</sup>

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<sup>134</sup> *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace) [1995] 1 Lloyd's Rep. 87, *American International Specialty Lines Insurance Co v Abbott Laboratories* [2002] EWHC 2714 (Comm).

<sup>135</sup> According to the Civil Procedure Rule 1998, the courts has jurisdiction when: 1)The respondent is domiciled in England or has submitted to the jurisdiction of the English court by his actions. 2)The respondent is represented in any arbitration

### 1.3.2 Problems with the application of *West Tankers* in England:

As previously set out, the CJEU in *West Tankers* left many uncertainties on the effect of the Judgment Regulation on arbitration proceedings.<sup>136</sup> Such ambiguities also include the unclear role of other Member States' courts (other than the deciding court) in relation to granting interim measures. England as the main Common Law jurisdiction, which has granted anti-suit injunctions, was affected the most by *West Tankers*. Accordingly, English courts had to clarify their approach in relation to arbitration proceedings and probably the most important case in England in this respect is *National Navigation Co v Endesa*.<sup>137</sup>

In this case, the appellant electricity company, Endesa, appealed against a judgment in the Commercial Court of the UK that proceedings in the Almeria court of Spain were not binding in arbitration proceedings brought by the respondent.<sup>138</sup> Endesa, a Spanish company, had bought coal which was shipped aboard a vessel owned by National Navigation (NNC). Endesa started proceedings in the Almeria court for damages in relation to the late delivery of the coal according to a bill of lading. NNC applied for a stay of proceedings in the Spanish court on the basis that there was an arbitration clause incorporated into the bill of lading, or alternatively that the English court was first seized of the dispute.

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proceedings by the Solicitors in England.(CPR 62.3) When the seat of the arbitration in England and the commencement of foreign proceedings is in breach of arbitration clause in contract which is governed by English Law.

<sup>136</sup> Please see 1.2.2.1

<sup>137</sup> *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397.

<sup>138</sup> *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) [97] .

The Spanish court held that no arbitration clause was incorporated into the bill of lading and rejected to decline jurisdiction but stayed proceedings pending the English court's determination regarding the jurisdiction. NNC began arbitration proceedings and sought to establish that English law was the proper jurisdiction for the bill of lading. Endesa claimed that according to the Judgment Regulation Article 33(Article 39 in the Recast), the judgment of the Spanish court was binding on the English court which prevented the court from deciding the issue differently.

These proceedings occurred before the CJEU delivered its judgment in *West Tankers*. Gloster J, in the Commercial Court held that while the Spanish decision was a judgment within the Judgment Regulation, it was not binding on the arbitration proceedings as the proceedings are within the arbitration exclusion of the Judgment Regulation. The court granted a declaration that the bill of lading contained a valid arbitration clause. Endesa successfully appealed against the decision of the Commercial Court. The issue on the appeal was whether the judgment of the Spanish court was a judgment within the Judgment Regulation and enforceable as such in the arbitration proceedings. The difficulty for NNC was the judgment of the CJEU in *West Tankers* which included the preliminary ruling of Member States' courts in the Judgment Regulation.<sup>139</sup>

In the Commercial Court Gloster J held "... given that arbitration actions within Article 1(2)(d) are not part of "the system of jurisdiction under the [Judgment] Regulation", as described by the CJEU in *The West Tankers*, there can, in my judgment, be no assumption, in circumstances where different Member States have

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<sup>139</sup> Please see 1.2.2.1 of this chapter.

their separate and respective obligations under the New York Convention , that one Member State will be in a position to accept, or should, on grounds of comity, accept, the decision of the court of another Member State, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to the question.”<sup>140</sup>

She concluded that the judgments of the Spanish court are not required to be recognised by the arbitral tribunal. Further on, she stated that even if she was wrong in her conclusion that Spanish decision should not be recognised, the decisions of the Spanish court yet could be recognised as it is against the public policy of the UK.<sup>141</sup> In order to reach her conclusion in respect of the public policy, Gloster J referred to *Philip Alexander Securities v Bamberger (Bamberger)*.<sup>142</sup>

This case was decided By Waller J (as he then was) and in his obiter he opined that a decision of foreign court in a Member State regarding the invalidity of the of an arbitration agreement, should not have to be recognised by the English court, regardless of whether the judgment was obtained from the foreign court at a preliminary stage or at the stage of the substantive determination and irrespective of the fact that foreign court's judgment was a Judgment Regulation decision.

He concluded that it would be contrary to the English public policy to recognise a decision obtained in breach of an arbitration clause that was valid pursuant to its

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<sup>140</sup> *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) [97].

<sup>141</sup> Public policy is used most often as a defence against the enforcement of foreign laws or acts believed to be inconsistent with fundamental principles of the court's legal system. In the context of arbitration law of UK, it can be court judgment granted in breach of an arbitration agreement. Javier Garcia, 'The role of public policy in International commercial arbitration' (1989-1990) *Law & Pol'y Int'l Bus*, Volume 21, p392.

<sup>142</sup> [1997] *I.L.Pr.* 73.



proper law. Furthermore, he added that as the English court was making its disapproval of the breach of the contract rather than reviewing the jurisdiction of the foreign court, the Article 27(3) of the Brussels Convention does not apply.<sup>143</sup>

In the Court of Appeal, Waller LJ confirmed the position of the *West Tankers* by stating that English courts are bound by the judgments of the Member State's courts on preliminary matters such as existence, validity or the scope of the arbitration clause. In contrary to what he argued in *Bamberger*<sup>144</sup> which was decided prior to *West Tankers* in the CJEU, he stated "It seems to me that if, following *The Front Comor* [*West Tankers*], Endesa were entitled to challenge the incorporation of the arbitration clause into the bill of lading in the Almeria Mercantile Court and, if the English court is bound to recognise the decision of the Almeria court, that precludes any re-examination of that question and precludes any argument on the grounds of public policy.... The English court in such circumstances is not entitled to examine for itself whether the clause is incorporated and that is the end of the matter."<sup>145</sup>

Waller LJ also referred to a part of the CJEU's judgment in *Krombach v Bamberski*<sup>146</sup> "...Recourse to the public policy clause in [Article 34(1)] ... can be envisaged only where recognition or enforcement of the judgment delivered in

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<sup>143</sup> In *National Navigation Co v Endesa* [2009] EWHC 196 (Comm)[99] Gloster J agreed with the argument of the Waller LJ that it would be contrary to the public policy of English law to recognise a decision which has been given in breach of an arbitration agreement. Additionally, she stated that English court pursuant to section 9(4) of Arbitration Act 1996 and Article II of the New York Convention is under a statutory and conventional obligation to give effect to an arbitration agreement which is valid according to its proper law. *National Navigation Co v Endesa* [2009] EWHC 196 (Comm) [100][ 101].

<sup>144</sup> [1997] I.L.Pr. 73.

<sup>145</sup> *National Navigation Co v Endesa* [2009] EWCA Civ 1397 [65][66].

<sup>146</sup> [2001] Q.B. 709.

another Contracting State would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle...”.<sup>147</sup> Subsequently, Waller LJ concluded that such an unacceptable degree had not occurred in the case.<sup>148</sup> He also opined that even if in circumstances where an English court has granted a deceleration, the fact that a litigant is seeking to obtain an opposing result in another court of Member State would not likely allow the English court to consider that as an infringement of some fundamental principle of the UK.

Moore-Bick LJ (Another judge in the court of Appeal) stated that the argument that the Judgment Regulation does not apply to arbitration tribunals and arbitrators is correct, however, it does not mean these judgements can be disregarded. He argued that a decision of the foreign court which is considered under English conflict of laws as having jurisdiction which is conclusive and final on the merits (Res Judicata effect) is entitled to be recognised and accepted at Common Law and hence, arbitrators applying English law are obliged to give effect to that rule. It was also added by him that even if the arbitrators could disregard the judgement, the

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<sup>147</sup> *Ibid* [20].

<sup>148</sup> Moore-Bick LJ, the other judge of the Court of Appeal, in confirming the view of Waller LJ opined that in his view it would not be against the public policy of the UK to recognise a decision of a foreign court of competent jurisdiction merely on the grounds that an English court would have come to a different decision. He also stated that “In my view the question whether the courts of this country should recognise a foreign judgment given in proceedings taken in breach of an arbitration agreement is also essentially one of jurisdiction. ... if the court in question is regarded as being of competent jurisdiction, I do not think that it would be contrary to public policy to recognise the judgment, even if an English court would have held that the parties had agreed to refer the dispute to arbitration”. Similar view was applied in *DHL GBS (THE UK) Limited v Fallimento Finmatica S.P.A.* 2009 WL 364.

English court cannot do so because they are under obligation to enforce the foreign judgement and this eventually can affect the arbitration proceedings.<sup>149</sup>

This line of argument is in contrary to what was held by Burton J in *CMA v Hyundai*, in which he held that if the arbitrators are applying the English law they are not bound by the procedural law of England. This approach does not differentiate between substantive and procedural law. Accordingly, the arbitrators will apply English law, but they would not then be bound by the procedural requirements.<sup>150</sup>

The main outcomes of the decision of the Court of Appeal in *National Navigation*<sup>151</sup> in the light of *West Tankers* can be outlined in four different sections. They are as follows:

**a) Public Policy:** English courts cannot refuse to recognise a decision of a Member State's court, invalidating an arbitration agreement, on the grounds that it is against public policy, "even if an English court would have held that the parties had agreed to refer the dispute to arbitration."<sup>152</sup> What is evident from comparison of case law before and after of *West Tankers* is the fact that public policy of England on breach of arbitration agreement by an EU Member State has changed. An

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<sup>149</sup> *National Navigation Co v Endesa* [2009] EWCA Civ 1397[118][119].

<sup>150</sup> This opinion of the Moore-Bick LJ is rejecting the argument of Burton J in *CMA v Hyundai* [2008] EWHC 2791 (Comm) in which he held that if the arbitrators are applying the English law they are not bound by the procedural law of England. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, estopping it from considering the facts underlying that judgment.

<sup>151</sup> *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397[125] by Moore-Bick LJ

<sup>152</sup> *Ibid* [125] by Moore-Bick LJ.

English court can still grant such measures in support of arbitration when the deciding court is non-European.<sup>153</sup>

When a judgment has been obtained in breach of an arbitration agreement in non-EU states, the English court can still reject that judgment based on s.32 of the Civil Jurisdiction and Judgement Act of 1982 (CJA Act 1982)<sup>154</sup> (and accordingly grant anti-suit injunctions). Nonetheless, when English courts deal with a judgement of a Member State's court in breach of an arbitration agreement, as stated above in *National Navigation*, it is not possible to refuse to enforce that judgment. This brings up the question that if a judgment in breach of an arbitration agreement (awarded in any court out of England) is so significant that under CJA Act 1982 the judgment must not be recognised in England, why should there be a discrimination between the EU Member State courts and non-EU courts merely because of jurisdictional rules in the Judgment Regulation?

English courts are applying different standard of public policy on the EU based arbitration and non-EU based arbitration proceedings. This unclear and vague approach of English courts which is mainly due to the CJEU's decision in *West Tankers* can cause uncertainties for arbitration proceedings in England. Moore-Bick LJ in *National Navigation* suggested that it would be desirable to make a specific

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<sup>153</sup> See *BNP Paribas SA V QJc Russaiain Machine s* [2012] ARb LR 51. *Shashoua v Sharma* [2009] EWHC 957 (Comm).

<sup>154</sup> Based on Section 32 of the Civil Jurisdiction and Judgement Act of 1982, English courts can refuse a judgment made in breach an arbitration agreement. It seems that including the preliminary ruling of the Member State's court in the Judgment Regulation has also disabled the English courts from using section 32 of the Civil Jurisdiction and Judgement Act of 1982( CJA 1982 from now) to refuse a judgment made in breach an arbitration agreement in the EU and English courts have no grounds for refusing a decision of a Member States which invalidated an arbitration agreement even if the arbitral tribunal or English courts (as a declaratory award) have ruled that the arbitration agreement is a valid one.

provision in s.32 of CJA Act 1982 in relation to recognition of the judgments brought contrary to arbitration agreements.<sup>155</sup> He also added that provisions of that type would not be needed at all if there were a clear established rule of public policy that foreign judgments brought contrary to arbitration agreements were not to be recognised in England.

Nonetheless, he explained that according to subs. 4(1) it is hard to see how a simple failure from another Member State's court to enforce an arbitration agreement could justify a refusal to recognise and enforce its decision on the grounds of public policy.<sup>156</sup> However, this thesis submits that the amendment to s.32 of CJA Act 1982 can be useful for the current system of the arbitration in England because English courts are currently unable to support a binding arbitration agreement against a judgment from another Member State's court particularly when its validated by the arbitral tribunal.

**b) *Declaratory Awards:*** As explained earlier, obtaining a declaratory award prior to a judgement from a Member State's court would not remove the obligation from English courts to recognise the judgment and it can only give the chance to the arbitral tribunal to continue make the final award. Thus, it seems that obtaining a declaratory award would not change the obligation of English courts to enforce an opposing judgment and accordingly would not make the arbitration process any better. Furthermore, even if obtaining a declaration would make any difference on decision of English courts in recognising a conflicting judgment, it would still incur

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<sup>155</sup> National Navigation Co v Endesa [2009] EWCA Civ 1397[127].

<sup>156</sup> *Ibid.*

more cost for the parties as they have to go to courts and obtain a declaration on validation of arbitration agreement.<sup>157</sup>

**c) *The unclear position of English courts in relation to provisional measures:***

It is not clear whether English courts can grant provisional measures in support of an arbitration agreement when they are bound by a decision of another Member State's court invalidating the same arbitration agreement. In light of this, how can the court grant any interim measures in support of an arbitration agreement when they are bound by a decision invalidating the same arbitration agreement? If English courts believe that they can carry out the supervisory role in relation to an arbitration agreement while they are bound by a judgment which invalidated the same arbitration agreement, they need to clarify their position in this regard.

**d) *Application of Res Judicata and Estoppel principles:*** It was provided by both Waller LJ and Moore-Bick LJ in *National Navigation* that when a foreign court which has jurisdiction under English conflict of laws rules (for example, because one of the parties is a resident in that state), makes a judgement, that decision is final and conclusive on the merits and it is entitled to recognition in Common Law.<sup>158</sup> This

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<sup>157</sup> *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397[63] per Waller LJ: "Might it make any difference if the English court had already granted a declaration that an arbitration clause was incorporated before the court of a Member State considers whether to grant a stay? If in such circumstances a stay were refused by the court of a Member State then the question might arise as to whether the English court should recognise the judgment but I doubt whether public policy would need to be invoked or indeed could be invoked. In such a case the claimant in England could proceed with the arbitration in England so as to obtain a judgment in England; if that were inconsistent with the judgment obtained in the Member State then that would provide an answer on its own".

<sup>158</sup> "In my view the question whether the courts of this country should recognise a foreign judgment given in proceedings taken in breach of an arbitration agreement is also essentially one of jurisdiction. There is apparently no common law authority on the point (see *Dicey, Morris & Collins* ,

conclusiveness and finality of this judgment, known as *Res Judicata*, can give rise to the *estoppel* principle which stops the parties from re-litigating any claim or defence already litigated. The effect of *Res Judicata* and *Estoppel* will prevent English courts from re-examining the same dispute between the same parties and these principles also apply to a judgment which has ruled that the arbitration agreement is not applicable or valid.

Nonetheless, according to the New York Convention, national courts are under obligation to recognise and enforce an arbitration agreement and in order to do so they are permitted to examine such an agreement to see whether they are valid and applicable. Moore-Bick LJ argued that while this obligation to examine exists, the New York Convention does not prevent application of established rules of *Estoppel*.<sup>159</sup>

Even if we accept the reasoning of Moore-Bick LJ in respect of the New York Convention, there is still a conflict in English law regarding the application of *Res Judicata* and *Estoppel* in relation to the arbitration agreement. If a judgment made in breach of an arbitration agreement by a foreign court, which has jurisdiction under English conflict of laws rules, stops the English court from re-examining the applicability and validation of an arbitration agreement, *Estoppel* principle should apply to non-EU cases as well as the EU cases. This means that if a non-EU court,

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paragraph 14-091), but if the court in question is regarded as being of competent jurisdiction (for example, because both parties were resident within the territorial area of its jurisdiction) I do not think that it would be contrary to public policy to recognise the judgment, even if an English court would have held that the parties had agreed to refer the dispute to arbitration. *National Navigation* [125]. by Waller LJ, followed by Moore-Bick LJ in the same case [118].

<sup>159</sup> *National Navigation* [127].

which has jurisdiction under English conflict of laws rules, decides that there is no arbitration agreement and renders its judgment, it should prevent English courts from re-examining whether there is an arbitration agreement.

Nevertheless, in practice, after *West Tankers*, English courts have re-examined the arbitration agreements and granted anti-suit injunctions against judgements made in breach of those arbitration agreements.<sup>160</sup> This shows that English courts has discriminated between the jurisdiction of the EU Member States' courts (because of the jurisdictional rules of the Judgment Regulation) and the jurisdiction of non-EU states in rendering judgments in breach of an arbitration agreement. The only reason for such discrimination is the supremacy of EU Regulation and the CJEU's decision over principles of international arbitration such as Competence-Competence and party autonomy.

## ***1.4 Anti-suit injunctions in France***

The broad wording of Article 808<sup>161</sup> and 809<sup>162</sup> of the new French Code of Civil Procedure (NCPC) are probably sufficient to enable French courts to grant anti-suit injunctions.<sup>163</sup> However, in practice, French courts have rarely been asked to grant

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<sup>160</sup> *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*, [2013] 1 W.L.R. 1889. *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm).

<sup>161</sup> In cases of urgency, the President of the *Tribunal de Grande Instance* may order any measures which are not subject to any serious objection or which are justified by any given proceedings.

<sup>162</sup> The President may, at any time, even when a serious objection exists, grant protective or conservatory measures which may be necessary, either to protect an imminent danger or to put an end to a manifestly wrongful nuisance.

<sup>163</sup> Julian D. M. Lew, 'Control of Jurisdiction by Injunctions Issued by National Courts' (2007) ICCA Congress Series, Volume 13 Kluwer Law International, p195.



similar injunctions.<sup>164</sup> The reason for that is awarding such injunctions has been viewed by civil law commentators as constituting an unjustified interference with the working of foreign courts or tribunals.<sup>165</sup> Additionally, *Cour de Cassation*<sup>166</sup> in *Stolzenberg v Dainler*<sup>167</sup> indirectly stated that grant of such measures is an infringement of foreign sovereignty.

Given that, the decision of *Chambre Compagnie Tunisienne de Navigation*<sup>168</sup> indicates that French courts can grant *in personam* injunctions with mandatory or prohibitory effect against a person whom the court wants to behave in a certain way in respect of its assets in a foreign jurisdiction. It appears that the only French decision which followed *Compagnie Tunisienne de Navigation's* view and applied it in the context of an anti-suit injunction is *Epoux Brachot*<sup>169</sup> by *Cour de Cassation*.<sup>170</sup> In this case, the court declared the *Brachot* spouses bankrupt, but ruled that the trustee in bankruptcy must not seek to enforce the bankruptcy order in Spain where the spouses possessed real estate. Knowing the order was granted, a French bank sought an order before the Spanish courts for the sale of the spouses' real estate in Spain. In these circumstances, the French court believed justified in

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<sup>164</sup> Micheal black, Rupert Reece, 'Anti-suit Injunctions and arbitration proceedings' (2006) *Arbitration*, Volume 79(3), p3, 4.

<sup>165</sup> *Ibid* p4.

<sup>166</sup> The Court of Cassation is the highest court in the French judiciary.

<sup>167</sup> *Stolzenberg v Dainler Chrysler Canada Inc* [2005] ILPr 24.

<sup>168</sup> 1977 Rev. ARB 151 <[http:// www. legifrance.gouv.fr/ affichJuriJudi.do?idTexte= JURITEXT000006974015](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006974015)> accessed on 11/12/2015

<sup>169</sup> Cass. Civ. 1<sup>ère</sup>, November 19, 2002, D., 2003.797. as it was referred to in Thomas Raphael, *The Anti-Suit Injunction Updating Supplement*, (2010 Oxford Press), p2

<sup>170</sup> Thomas Raphael, *The Anti-Suit Injunction Updating Supplement*, (2010 Oxford Press), p2

ordering the bank to withdraw the Spanish proceedings upon threat of a fine in case of non-compliance.<sup>171</sup>

Nonetheless, it seems that the Court of Cassation later withdrew from its approach from what was held in *Stolzenberg v Dainler*.<sup>172</sup> In the case of *In Zone Brands International Inc v In Beverage International*<sup>173</sup> the Court of Cassation held that anti-suit injunctions are not contrary to international public policy of France.<sup>174</sup> In this case, A French company, In Zone Brands Europe, had entered into an exclusive distribution contract of beverages with In Zone Brand International (an American Company). The agreement gave jurisdiction to the court of Georgia (USA). After the termination of the contract by the American company, the French distributor sought for damages in the commercial court of Nanterre (France), whose jurisdiction was challenged by the American party. In parallel, In Zone Brand International commenced proceedings in the Superior Court of Cobb County, Georgia (USA) and successfully obtained an anti-suit injunction ordering the French party to stop the proceedings before French courts.

The American company then sought the recognition and enforcement (“exequatur”) of the decision of the Georgia’s court (i.e. the anti-suit injunction) in France. On 17

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<sup>171</sup> Horatia Muir Watt ‘Injunctive relief in the French courts: a case of legal borrowing’ (2003) The Cambridge Law Journal, Volume 62, Issue 03 p574. Micheal black, Rupert Reece, ‘Anti-suit Injunctions and arbitration proceedings’ (2006) Arbitration, p4.

<sup>172</sup> *Stolzenberg v Dainler Chrysler Canada Inc* [2005] ILPr 24.

<sup>173</sup> Cass 1re civ14 October 2009 no08-16.549 as it was referred in Laurence Franc-Mengeton, ‘France: A New Haven For Anti-suit Injunctions?’ (2010) <<http://kluwerarbitrationblog.com/2010/05/17/France-a-new-haven-for-anti-suit-injunctions/>> accessed on 15/12/2015.

<sup>174</sup> Public policy is used most often as a defence against the enforcement of foreign laws or acts believed to be inconsistent with fundamental principles of the court’s legal system. Javier Garcia, ‘The role of public policy in International commercial arbitration’ (1989-1990) Law & Pol’y Int’l Bus, Volume 21. p392.

April 2007, the Court of Appeal of Versailles approved the judgment of the first instance judges and recognised the anti-suit injunction awarded by the Superior Court of Cobb County and later on the Court of Cassation upheld this ruling. But, the approval of the of the Court of Cassation was limited to the situation where an anti-suit injunctions was requested to enforce a jurisdiction clause outside the scope of the EU law in order not to be seen to oppose the *West Tankers*.<sup>175</sup>

While there is an indication (particularly in case of *In Zone brands International Inc v In Beverage International*<sup>176</sup>) that French courts recognise anti-suit injunctions, it seems that we should wait to see whether French courts want to grant such injunctions in non-EU related disputes.<sup>177</sup> It should be noted that while French courts have not granted anti-suit injunction in support of arbitration proceedings, they have provided a principle which restricts the interference of French courts in the examination of the arbitration agreement.

The Court of Cassation made an important judgment in the case of *American Bureau of Shipping (ABS) v. Copropriété Jules Verne*<sup>178</sup> stating that the courts are prohibited from making any thorough examination of the validity of an arbitration

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<sup>175</sup> Thomas Raphael, *The Anti-Suit Injunction Updating Supplement* (2010 Oxford Press), 12.6.

<sup>176</sup> Cass 1re civ14 October 2009 no08-16.549

<sup>177</sup> *In Vivendi v Gerard* (d'appel de Paris , 28 April 2010, No 10/01643), the Paris Court of Appeal dismissed an appeal against the refusal by the *Tribunal de Grande Instance* (TGI) to grant anti-suit injunctions stopping the continuance of proceedings in the USA. Nevertheless, though it had been contended that French courts did not have authority or jurisdiction to grant such injunctions, the court of Appeal (like TGI before it) did not approve that reasoning, instead refused to grant the injunctions on the grounds that the American court was a natural forum for the substantive litigation, that there was no unlawful 'forum shopping'. The Court of Appeal abstained from commenting on the question of power or jurisdiction. Thomas Raphael, *The Anti-Suit Injunction Updating Supplement* (2010 Oxford Press), p104.

<sup>178</sup> *American Bureau of Shipping v. Copropriété Jules Verne*, Cass. 1e civ., June 7, 2006, 2006 Rev. Arb. 945. [http://www.newyorkconvention1958.org/index.php?lvl=notice\\_display&id=171&seule=1](http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=171&seule=1) accessed on 10/12/2015

agreement prior to any decision of the arbitral tribunal on the matter.<sup>179</sup> Article 1448 of the Decree 2011 of France has confirmed this principle.<sup>180</sup> This approach is different from what seems to be the view of the New York Convention provided in its Article II(3) by which state courts are permitted to examine(thoroughly) the validity of the of the arbitration agreement, before referring parties to arbitration.

The Court of Cassation in *American Bureau v. Copropriété*<sup>181</sup> explained that priority is with the arbitral tribunal to decide on the validity or existence of the arbitration agreement and such a priority rule is based on the principle of Competence-Competence. Unlike the previous Decree, the 2011 Decree expressly applies the Competence-Competence principle to international arbitration as well. It seems this principle cannot be overridden by the parties' agreement excluding the arbitral tribunal from such an examination.<sup>182</sup> This appears to be the correct approach to this fundamental notion in international arbitration.

Since the decision of the CJEU in *West Tankers* in 2009, there has been a report (2009), a resolution (2010) and a regulation (2012) all addressing same matters, namely, anti-suit injunctions, arbitration agreements and parallel proceedings between arbitral tribunals and courts. The next three sections will explore these

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<sup>179</sup> Beatrice Castellane, 'The New French Law on International Arbitration' (2011) Journal of International Arbitration, Volume 28, issue 4. p372.

<sup>180</sup> Article 1448 which says that a court shall refuse to hear a dispute which is covered by an arbitration agreement unless the arbitral tribunal has not been seized of the dispute and the arbitration agreement is manifestly void or inapplicable.

<sup>181</sup> Cass. 1e civ., June 7, 2006, 2006 Rev. Arb. 945.

<sup>182</sup> Beatrice Castellane, 'The New French Law on International Arbitration' (2011) Journal of International Arbitration, Volume 28, issue 4, p373.

documents respectively and demonstrate the inconsistent approaches taken within the EU on above mentioned matters.

## ***1.5 The Green paper***

As discussed previously, the approach of the CJEU towards the issue of anti-suit injunctions in *West Tankers* and the arbitration scope in the Judgment Regulation has an undeniable effect on the practice of arbitration and the courts' decisions in relation to arbitration process. In April 2009, the European Commission issued its report on the application of the Judgments Regulation accompanied by a Green Paper addressing a consultation on, amongst other matters, the interconnection between the Judgment Regulation and arbitration proceedings within the EU.

The report indicates that while the New York Convention functions satisfactorily, the problem of the parallel proceedings still exists where the arbitration tribunal holds that the arbitration clause is valid and the court believes otherwise. Additionally, it states "... procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the [Judgment] Regulation if they unduly interfere with the determination by the courts of the other Member States of their jurisdiction under the Regulation ... " and it adds that "... there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of

judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain;...”<sup>183</sup>

The commission has rightly addressed the current problems in the EU on the allocation of the jurisdiction and judgment in respect of the validity of an arbitration agreement. The Green Paper, in order to solve this situation in the EU, suggested two major changes in this respect which are removal of the arbitration exclusion in the Judgment Regulation and exclusive jurisdiction for the seat court.<sup>184</sup>

The practical outcome of this deleting is the automatic recognition of all the decisions made by the court of another Member State in relation to the arbitration agreement.<sup>185</sup> This proposed regulation was heavily criticized as it would cause more parallel proceedings and result in discouraging the users of international arbitration in the EU.<sup>186</sup> The exclusive jurisdiction for the seat court is also defective as it is not clear if it applies to all the decisions that can be granted in relation to arbitration agreements. For instance, it is not clear whether interim measures are included in this exclusivity of the seat court.

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<sup>183</sup> See para.3.7 of the Report on the application of Judgement Regulation COM(2009) 174 final.

<sup>184</sup> Philippe Pinsolle, ‘The proposed reform of Judgement Regulation: a poison pill for arbitration in the EU?’, (2009) *International Arbitration Law Review*, Volume 12(4). Patrizio Santomauro, ‘Sense and sensibility : Reviewing *West Tankers* and dealing with its implications in the wake of the reform of the EC Judgement Regulation’ (2010) *Journal of Private International Law*, Volume 6. no.2. Ugo Draetta, Andrea Santini, ‘Arbitration exception and Brussels I Regulation: no need for change’ 2009 *International Business Law Journal*, Volume 6.

<sup>185</sup> Alexis Mourre, Alexandre Vagenheim, ‘The arbitration exclusion in Judgement Regulation after *West Tankers*’ (2009), Volume 12(5), p9.

<sup>186</sup> Pullen describes his concerns as “...a Member State may be put in the position of being required to recognise a judgment denying the applicability of an arbitration agreement, when its own court would have decided to the contrary.” Andrew Pullen, ‘The future of international arbitration in Europe: *West Tankers* and the EU green paper.’(2009), *Int. A.L.R* volume 56,p2. Please also see Andreas Estrup Ippolito, Morten Adler-Nissen, ‘*West Tankers* revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?’(2013) *Arbitration*. Volume 79, p6.

However, one advantage of deleting the arbitration exclusion in the Judgment Regulation would be that the declaration of the seat court on the validity of the arbitration clause would be equally recognised in Member States and it could benefit from the recognition of such a judgment in the EU. Nevertheless, the fact that arbitration needs the declaration of the court in order to form or continue and the extra cost that would create for the parties of arbitration is already a huge step backward in international arbitration.<sup>187</sup> Furthermore, the proposal entirely focused on the jurisdiction of national courts and neglected the Competence-Competence principle. The Green Paper was not accepted in the European Parliament as will be explained in the next section.

### ***1.6 European Parliament resolution on the implementation and review of Council Regulation (EC) No 44/2001 (2009/2140(INI))***

On 7 September 2010, European parliament passed a resolution in contrast to what European Commission had suggested in the Green paper. Section M of the resolution suggests that the position of the EU in respect of arbitration agreements and anti-suit injunctions should go back to pre-*West Tankers* period.<sup>188</sup> The CJEU in *West Tankers* stated that such injunctions are against the objective of the EU such

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<sup>187</sup> Philippe Pinsolle, 'The proposed reform of Regulation 44/2001: a poison pill for arbitration in the EU?', (2009) *International Arbitration Law Review*, 12(4) p2.

<sup>188</sup> M. Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the '*Kompetenz-Kompetenz* principle', etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in *Allianz and Generali Assicurazioni Generali*(*West Tankers*).

as free movement of the judgment and particularly the jurisdiction of national courts; it appears that this no longer is the case and European Parliament believed that these injunctions should be awarded.

Nevertheless, according to section M, anti-suit injunctions permitted if they are in conformity with the free movement of persons and fundamental rights, declaration of an arbitration clause, etc. While this is neither an exhaustive nor a restrictive list, it might bring some uncertainties as to the circumstances on which these measures can be granted. Nonetheless, the most outstanding fact in the provision is recognising the Competence-Competence principle and emphasising on the negative effect of that which is the essence of arbitration proceedings in international commercial arbitration.

Section I, K and L expressly reject the implications of the Green paper on the deletion of the arbitration exclusion and the exclusive jurisdiction for the seat court.<sup>189</sup> While the approach of the European Parliament has basically brought back the pre-*West Tankers* situation, it is far more pro-arbitration compared to the CJEU's approach. This resolution was approved by European parliament, but it was not accepted by the European Council. However, this invited another round of

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<sup>189</sup> I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention, to which all Member States are parties and the exclusion of arbitration from the scope of the Regulation must remain in place,  
K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,  
L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.



consultations, which resulted in further draft amendments to the Brussels Regulation.

### ***1.7 The European Council regulation on the Recast of the Judgement Regulation***

On December 2010, the Commission introduced its proposal for the Recast of the Judgment Regulation (The Proposal). The Proposal decided to maintain the arbitration exclusion in the Judgment Regulation but it did not address any national procedural devices such as anti-suit injunctions.<sup>190</sup> Nevertheless, Article 29(4) suggested a provision which would achieve better result than grant of anti-suit injunctions.

Article 29(4) of the Proposal provides that “[W]here the agreed or designated seat of an arbitration is in a Member State, the court of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the court of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seized of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. Where the existence, validity or effects of the arbitration agreement are established, the court seized shall decline jurisdiction”.

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<sup>190</sup> Proposal for a Regulation of The European Parliament and of The Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast). <<https://www.justice.gov.uk/downloads/consultations/european-commissions-legislative-proposal-brussels-regulation.pdf>> accessed on 09/12/2015.

During the first rounds of discussion in the Council, the provision suggested in Article 29(4) was scrapped. Instead, it was proposed that a more elaborate recital be introduced explaining the scope of the arbitration exemption and the relationship between the Regulation and the New York Convention. However, later discussions led only to minor adjustments in the wording of the recital which did not provide any provision similar to Article 29(4).<sup>191</sup>

Approval of Article 29(4) could have solved the concurrent jurisdictions of national courts and arbitral tribunals in relation to validity of arbitration agreements, as it would give priority to the seat court to rule on such matter. This deletion is in line with the guidelines already set out in the resolution of 7 September 2010, in which the Parliament had strongly opposed judicial procedures ruling on the validity or extent of arbitral competence (arbitration agreement in particular) must be excluded from the scope of the new Regulation.<sup>192</sup>

In December 2012, the European Council adopted the Recast of Judgement Regulation (the Recast henceforth) which was passed by the European Parliament in November of the same year.<sup>193</sup> Section 12 of this regulation provides “This Regulation should not apply to arbitration.... a ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or

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<sup>191</sup> Andreas Estrup, Ippolito, Morten Adler-Nissen, ‘*West Tankers* revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?’, 2013 *Arbitration*. Volume 79(2), p 166.

<sup>192</sup> Alessandro Villani and Manuela Caccialanza, ‘The proposal for reviewing the Brussels Regulation and the new Regulation No. 1215/2012 after the *West Tankers* decision: a new step back for arbitration?’ < <http://kluwerarbitrationblog.com/blog/2013/05/30/the-proposal-for-reviewing-the-brussels-regulation-and-the-new-regulationno-12152012-after-the-west-tankers-decision-a-new-step-back-for-arbitration>> accessed on 05/12/2015.

<sup>193</sup> Recast of the Brussels I Regulation, PRES/12/483. This Regulation entered into force on 9 January 2013 and it will start applying in two years from that date.

incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.”

The effect of this clarification is that where a party commences parallel proceedings in foreign courts, such proceedings will not preclude arbitral proceedings from commencing or continuing.<sup>194</sup> The Recast also provides that “if a court of Member State decides that an arbitration agreement is not valid, this should not prevent that court’s decision on the substance of the matter from being recognised or enforced according to this Regulation”.<sup>195</sup> This shows that the EU legislators (unlike what they decided in Article 29(4) of the previous proposal) have accepted that parallel arbitral and judicial proceedings concerning the same subject can occur within the EU. Moreover, they have failed again to address crucial problems such as the effect of parallel proceedings in arbitration and complexity of the enforcement of a court judgment when there are on-going arbitration proceedings.

The new regulation, similar to its predecessors, fails to find a way to harmonise the allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings and more importantly in respect of recognition and validation of arbitration agreement. Besides what Recast has provided in relation to recognition of the arbitration agreement, most of the problems that were discussed in the *West Tankers* still exist. These problems included a) creating the opportunity for the parties to use litigation tactics, b) not recognising the negative effect of

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<sup>194</sup> Andreas Estrup Ippolito, Morten Adler-Nissen, ‘*West Tankers* revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?’, 2013 Arbitration. Volume 79, p8.

<sup>195</sup> Section 12 of Recast of the Brussels I regulation, PRES/12/483.

Competence-Competence principle and c) inability to use public policy to refuse enforcement of judgments awarded in the presence of an arbitration agreement.

A recognised validated arbitration agreement within the EU would allow parties to have a better chance to apply for provisional measures from different Member States' courts or to enforce the provisional measures granted by the seat court in other Member States. Additionally, recognising the arbitration agreement would result in the recognition of the arbitral tribunal (which decides on the merits) and possible recognition of the provisional orders (and awards) by the Member State courts. Thus, providing a clear solution for the recognition of arbitration agreements would lay the foundation of other propositions that this thesis will make in the next chapters and would be essential for their application within the EU.

This thesis submits that the best approach to the current situation of arbitration in the EU would be the exclusive jurisdiction of the seat court for examining the validation and application of arbitration agreements. When commercial parties agree to the fact that the seat of the arbitration should be in a particular state, they have certainly thought about the benefits and advantages that they could obtain by the court of that state under its national laws. Accordingly, exclusive jurisdiction of the seat court is closer to the intention of the parties, particularly if they have expressly agreed to that.

This exclusive jurisdiction of the seat court was initially suggested in a crude form in the Green Paper and Article 29(4) of the Proposal of the European Commission (2010). However, an important point which was missing from both of

these document was the extent of the examination by the court. This thesis proposes that seat courts should limit their scrutiny to a *prima facie* determination that whether the arbitration agreement is null and void, inoperative or incapable of being performed and they should refuse to study the merits of the dispute. This thesis submits that such exclusivity and its effect should be expressly provided in the Recast as a provision.

Nevertheless, such an exclusive authority should only be exercised for the seat court before the formation of the tribunal. The moment that the tribunal is constituted, the exclusive power should only be available for arbitrators and they should make a full examination of the arbitration agreement. Acknowledging the principle of Competence-Competence entails the corollary that state courts should not, in parallel and with the same level of examination, decide on the same issue.<sup>196</sup> This is the view taken by French and is contrary to the current approach of some English cases and Article 2 of the New York Convention which do not prevent the courts to do a thorough examination of the arbitration agreement.<sup>197</sup>

Suggesting a mechanism which gives the authority to one forum would be compatible with jurisdictional rules of the Recast and mutual trust between Member states' courts. This will prevent parallel proceedings of between national courts and arbitral tribunals. Giving priority to one forum when two courts are dealing with the same subject is not incompatible with the Recast as the Regulation

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<sup>196</sup> Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' 2007 Congress Series, Volume 13, p242.

<sup>197</sup> Doug Jones, 'Competence-Competence' (2009) Arbitration, Volume 75, p1.

itself has provided *Lis Pendens* mechanism for preventions of parallel proceedings between national courts (When both of the seizing national courts have jurisdiction to rule on the same matter). One might argue that this would preclude Member States from their jurisdiction under the Recast and the New York Convention. Nonetheless, this exclusive jurisdiction is recognised for every Member State which is chosen as the seat of arbitration, not just for certain Member States.

Further, giving the primary jurisdiction to arbitrators does not mean that courts relinquish their power permanently. Having examined the arbitration agreement on a *prima facie* basis and confirmed its validity, then state courts leave it to arbitrators to decide on the question and regain the authority of full examination at the end of the arbitral process. More importantly, any courts would be able to the full scrutiny at the time of the enforcement of the award.

Secondly, such an authority would also respect one of the key principles of international arbitration, namely, party autonomy. This principle provides that international arbitration is non-national and therefore, parties in a private dispute should be able to freely choose every element of their contract, including the choice of law.<sup>198</sup> According to the principle of separability, the arbitration agreement is separate from the underlying contract. In light of this, the laws adjudicating the merits of the dispute can be different from the laws deciding on the validation of the arbitration agreement. The law applicable to the arbitration clause defines the

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<sup>198</sup> Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) *Transnational Law*, Volume 15, p323, 329.

scope of the arbitration agreement, its validity, its enforceability, and its interpretation.<sup>199</sup>

It is logical that arbitrators should not be restricted by national conflict of laws rules. However, arbitration will inevitably always be held within some states' jurisdiction and if a national court wants to find the applicable law on the arbitration agreement, it has no choice but to use its own conflict of laws rules. Applying national conflict of laws rules to international arbitration can be problematical because national conflict of laws rules are not designed for international transactions.<sup>200</sup> Therefore, national conflict of laws rules create uncertainty in international commercial arbitration due to the potential for different outcomes based upon the conflict of laws rules apply to the dispute.<sup>201</sup>

On the other hand, the arbitral tribunal because of its neutrality and freedom to choose governing law of arbitration agreement unlike national courts which are restricted to their conflict of law rules, is the most appropriate forum to find the suitable applicable law of the arbitration agreement which defines its validity.<sup>202</sup> Considering all these matters, this thesis submits that assigning the arbitral tribunal as the primary forum to make a full examination of the arbitration agreement is the closest option to the principle of party autonomy.

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<sup>199</sup> The substantive law applicable to the arbitration proceeding, known as the *Lex Arbitri*, is also separate from the substantive law applicable to the arbitration agreement itself.

<sup>200</sup> Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 *Transnational Law*. 323 p,333,339,340 "However, while, in theory, international treaties may be applicable to an international arbitration, most fail to specifically address conflict of laws rules that may be applicable."

<sup>201</sup> *Ibid.*

<sup>202</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) p15-26.

This thesis submits that such exclusivity and its effect should be expressly provided in the Recast as a provision. This provision should include the exclusive jurisdiction of the arbitral tribunal for ruling on its jurisdiction (particularly in respect of thorough examination of arbitration agreement) and exclusive jurisdiction of the seat court to do a *prima facie* validation of the arbitration agreement before the formation of the tribunal. Such a provision should expressly require Member States' courts to stay the proceedings so the seat court could make the *prima facie* examination. Equally, it should oblige Member States' courts to stay proceedings when the arbitration tribunal has been formed, so arbitrators could rule on their jurisdiction. Further, the provision needs to clarify that the examination by the seat court before the constitution of the tribunal must be a *prima facie* one.

Taking both propositions together, this would create certainty for arbitration agreements within the EU and increase the prospect of enforcement for measures granted by the seat court and tribunals in other Member States. This is because national courts need to accept the ruling of the seat court and tribunals on the validation of the arbitration agreement and accordingly the measures granted by the seat court in support of that arbitration agreement. Accepting such exclusive jurisdictions for the seat court and the arbitral tribunal would considerably reduce the likelihood of parallel proceedings as well.



## **1.8    *Anti-suit injunctions by arbitrators***

The prohibition of the EU Member States' courts from ordering anti-suit injunctions has created the opportunity for arbitral tribunals to grant similar injunctions in support of arbitration proceedings. In other words, arbitration parties, when the seat of the arbitration is located within the EU, could only obtain such injunctions from arbitral tribunals.<sup>203</sup> However, there is a question in international commercial law on whether arbitrators have the authority to grant anti-suit injunctions, precluding parties from initiating or continuing legal proceedings in state courts.<sup>204</sup>

The need for such an injunction can occur in three situations: where a party initiates proceedings in a state court in respect of a dispute, covered by an arbitration agreement; when the court seised determines that it has jurisdiction to decide on the merits of the case and starts proceedings and finally, when the latter court prohibits the other party from starting arbitral proceedings. This means that the arbitral tribunal can face the introduction of a parallel court action or if there are existing court proceedings, it could face a possible anti-arbitration injunction granted by the court. The effect of such circumstances is disrupting or terminating the arbitral proceedings by recalcitrant in a dispute which should be decided by an arbitral tribunal in the first place.<sup>205</sup>

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<sup>203</sup> Rahim Moloo, 'Arbitrators Granting Antisuit Orders: When Should They and on What Authority?' 2009 Journal of International, Issue 5, p676.

<sup>204</sup> *Ibid* p677, 678. Rahim Moloo believes that the measures that can be granted by the arbitral are anti-suit orders not anti-suit injunctions. But, it seems that the terminology would not change anything about the nature of the order.

<sup>205</sup> Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' 2007 Congress Series, Volume 13, p236.

### **1.8.1 Jurisdiction of the arbitral tribunal to grant anti-suit injunctions:**

The authority of arbitrators to grant anti-suit injunctions can be derived from three matters:

**a) *Authority to sanction breach of the arbitration agreement and to protect the arbitration process:***

The authority conferred on the tribunal by the arbitration agreement is not limited to the resolution of the merits of the dispute. An arbitration agreement obliges the parties to submit all the disputes included by the arbitration agreement and gives the jurisdiction to the arbitral tribunal to hear all the disputes included by the arbitration agreement. Accordingly, a fundamental principle of arbitration law is that arbitrators enjoy the authority to rule on their own jurisdiction.<sup>206</sup>

This is what was previously discussed as the Competence-Competence principle. To that end, the arbitrators' jurisdiction to rule on disputes relating to the arbitration agreement naturally entails the jurisdiction to decide breaches of the obligation to arbitrate and the power to sanction any breaches occurred on that basis. Nevertheless, some scholars have questioned whether an arbitration agreement imposes a strict obligation on its parties, which allows the tribunal to order performance of this agreement in kind. Such a view is supported by the claim that jurisdiction is something that is declared, not something that can be ordered.<sup>207</sup>

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<sup>206</sup> Nael G. Bunni, 'Interim Measures in International Commercial Arbitration: A Commentary on the Report by Luis Enrique Graham' (2009) ICCA Congress Series, Volume 14, p591.

<sup>207</sup> Olga Vishnevskaya, 'Anti-suit injunctions from arbitral tribunals in international commercial arbitration: A necessary evil?' (2015) Journal of International Arbitration, Volume 32, Issue 2, p182. Laurent Lévy, 'Anti-Suit Injunctions Issued by Arbitrators' (2005) IAI Series No. 2 p199,120.

The latter argument cannot be accepted for all cases as there are certain circumstances under which jurisdiction is ordered, such as stay of proceedings by the second court seises the case when another court has seised the case earlier (*Lis Pendens* rule). It has also been suggested that arbitrators need to protect the arbitration process and that can also be used as a basis to use anti-suit injunctions.<sup>208</sup> Although this thesis submits that arbitrators should protect the integrity of the arbitration process by granting such measures, it seems this is not in line with the approach of the EU in respect of granting anti-suit injunctions.

In *Turner v. Grovit*<sup>209</sup> the CJEU stated that “Even if it were assumed...that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings and therefore as being a matter of national law alone, it needs merely [to] be borne in mind that the application of national procedural rules may not impair the effectiveness of the [Brussels] Convention”.<sup>210</sup> While anti-suit injunctions granted by arbitrators are not national procedural orders, the fact that the CJEU expressly opposes any order that impair the effectiveness of the convention makes it harder to justify the grant of anti-suit injunction on this basis.

**b) The authority to make enforceable awards:**

Arbitrators also need to protect the arbitration process and that can also be used as a basis to use anti-suit injunctions. Further, there is an ingrained notion in

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<sup>208</sup> Olga Vishnevskaya, ‘Anti-suit injunctions from arbitral tribunals ...’ (2015) *Journal of International Arbitration*, Volume 32, Issue 2, p173.

<sup>209</sup> [2005] 1 A.C. 101 .

<sup>210</sup> *Ibid* [29].

international arbitration according to which arbitrators must render an enforceable award. Where there is an arbitral award enforceable under New York Convention and there is a judgment by a state court from another Member State on the same subject, the judge must enforce the legitimate arbitral award under the New York Convention. Equally, he is required to enforce a valid judgment made in another Member State's court within the EU. Gaillard believes such an unpleasant result can justify grant of anti-suit injunctions perfectly.<sup>211</sup>

**c) *Authority to grant provisional measures:***

It seems the better legal basis for the power of arbitrators to grant anti-suit injunctions would be the authority to issue provisional measures.<sup>212</sup> One type of provisional measures is an order forbidding acts which would aggravate or exacerbate the dispute between the parties.<sup>213</sup> For granting such orders, arbitrators base their judgment more on the commercial desirability of preventing or stopping unilateral actions by the parties in order to improve their respective place in the dispute.<sup>214</sup> When parties submit the issues agreed to be settled in an arbitration

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<sup>211</sup> Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' 2007 Congress Series, Volume 13, p239.

<sup>212</sup> Nadja Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, (2014) International Arbitration Law Library, Volume 30) p216. Several arbitration rules have included the issuance of anti-suit injunctions in the scope of conservatory or interim measures that can be ordered by the tribunal widely. Art. 28(1) ICC Rules, Art. 25.1(c) LCIA Rules.

<sup>213</sup> Nael G. Bunni, 'Interim Measures in International Commercial Arbitration: A Commentary on the Report by Luis Enrique Graham' (2009) ICCA Congress Series, Volume 14, p591. This view can also be seen in article 17(2)(b) of UNCITRAL Model Law Under the new draft of UNCITRAL Model Law, in which Working Group on Arbitration has decided to acknowledge the arbitrators' power to grant ant-suit injunction in order to protect the integrity of the arbitral process against the parties' obstructive and abusive tactics. As the goal of the Working Group is to promote consensus and harmonisation in response to the needs of international commercial law, its work on Art 17 indicates general acceptance that anti-suit injunctions may be issued by arbitrators.

<sup>214</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2488, 2489.

tribunal, they can aggravate the dispute and that can justify the grant of an order addressed to the parties forbidding such an action.

### **1.8.2 Arguments against the issuance of such injunctions:**

The first type of argument is very similar to what was used in *West Tankers* against anti-suit injunctions granted by courts providing that such measures interfere with state courts' jurisdiction. In response to that, it should be noted that parties, by entering into an arbitration agreement, accept to waive their right to recourse to state courts for resolving their dispute. Of course such a waiver does not include recourse to courts for interim measures (unless parties expressly stipulate that too). When parties agree to settle their dispute in arbitration, they undertake to resolve any dispute stipulated in the arbitration agreement, therefore, courts are prohibited from dealing with such disputes and accordingly, they should refer parties to arbitration.<sup>215</sup>

Before *West Tankers*, many courts had accepted that view that granting an injunction in aid of an arbitration generally would not offend the affected court.<sup>216</sup> Although such views were prior to the decision of the CJEU in *West Tankers*, it should be noted that an anti-suit order granted by arbitral tribunals has a major difference with the court-ordered injunction. Such injunctions granted by tribunals do not take away the jurisdiction of courts permanently and instead it enables

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<sup>215</sup> *Ibid*, p240.

<sup>216</sup> Rahim Moloo, 'Arbitrators Granting Antisuit Orders: When Should They and on What Authority?' 2009 Journal of International Issue 5 p696. In *The Angelic Grace*[1995] 1 Lloyd's Rep. 87, the Court of Appeal provided that it was not incorrect in principle to issue an anti-suit injunction, before the foreign court had decided whether to assume jurisdiction or reject it in favour of arbitration (West Law case summary paragraph 2). Please also see 1.8.3.

arbitral tribunals to rule on the jurisdiction from its start till the issuance of the final award. After the final award is made the enforcing court can retake the jurisdiction.

### **1.8.3 Requirements for granting anti-suit injunctions:**

It has been stated that arbitrators should consider certain points in order to issue anti-suit injunctions. First, arbitrators should establish their jurisdiction over the dispute at least on a *prima facie* basis. Secondly, arbitrators should examine whether the parallel court proceedings are initiated in breach of arbitration agreement. This means that arbitrators should verify whether such proceedings have same subject matter, same cause of action and between the same parties as the arbitration proceedings.<sup>217</sup> Thirdly, the applicant for the injunction must demonstrate that it cannot wait until the rendering of the final award and he/she would face imminent or irreparable harm, for instance in the form of severe financial difficulties. This can be the case when the applicant is involved in the second set of proceedings, or for the sake of the protection of business secrets.<sup>218</sup>

Almost all commentators believe that, arbitrators should only issue anti-suit injunctions when they realize that one of the parties has engaged in parallel proceedings, particularly in an abusive behaviour in order to revoke the arbitration agreement.<sup>219</sup> This thesis submits that although granting anti-suit injunctions after

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<sup>217</sup> Olga Vishnevskaya, 'Anti-suit injunctions from arbitral tribunals ...' (2015) *Journal of International Arbitration*, Volume 32, Issue 2, p184.

<sup>218</sup> Nadja Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, (2014) *International Arbitration Law Library*, Volume 30) p219, 220.

<sup>219</sup> Matthias Scherer, 'Court proceedings in violation of an arbitration agreement: arbitral jurisdiction to issue anti-suit injunction and award damages for breach of the arbitration agreement' (2011)

the start of the proceedings is the correct approach, it should not preclude the arbitrators to grant such injunction before the start of any parallel proceedings. This means that the tribunal should be able to grant anti-suit injunctions right after it establishes its jurisdiction and before any of the parties start parallel proceedings.

Granting such an injunction with the threat of financial punishment from the tribunal will have a preventing effect on the party who intends to start parallel proceedings. Such punishment can be imposed on the recalcitrant party in different ways such as paying the cost of arbitration, damages and astreinte.<sup>220</sup> Rahim Moloo believes that an award of damages covering the costs of parallel judicial proceedings can be a reasonable supplementary relief for the breach of an arbitration agreement, or an appropriate relief for the breach of the anti-suit injunction already granted.<sup>221</sup>

Such anti-suit injunctions should only prevent the parties from initiating substantive proceedings, not applying for interim measures. Therefore, if parties want to apply for an interim measure, they should be able to do so and if the tribunal deems that such an application is intended to impede the arbitration agreement then it should make another order to demand the parties from such an application specifically.

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International Arbitration Law Review, Volume 14(2), p46. Olga Vishnevskaya, 'Anti-suit injunctions from arbitral tribunals ...'(2015) Journal of International Arbitration, Volume 32, Issue 2, p184. Nadjia Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, (2014) International Arbitration Law Library, Volume 30) p218,219. Toby Landau, "Arbitral Lifelines": The Protection of Jurisdiction by Arbitrators' (2007) ICCA Congress Series, Volume 13, p292.

<sup>220</sup> Olga Vishnevskaya, 'Anti-suit injunctions from arbitral ...'(2015) Journal of International Arbitration, Volume 32, Issue 2, p211, 212. Astreinte constitutes a measure which intends to assure compliance with the decision under threat of a civil remedy. It originated in the French law and arbitral tribunals with their seat in France have used such remedy.

<sup>221</sup> Rahim Moloo, 'Arbitrators Granting Antisuit Orders: When Should They and on What Authority?' 2009 Journal of International Issue 5, p675.

This thesis proposes that the anti-suit injunction should be ordered in the form an award which is enforceable under New York Convention. The reason for that is such an injunction should primarily prevent the initiation of parallel substantive proceedings and because of that, it needs enforceability (otherwise, it would not be ineffective). Given that, this thesis does not oppose the idea that arbitrators grant anti-suit injunctions in the form of an interim measure during the arbitration proceedings.

Nevertheless, grant of anti-suit injunctions in the form of awards can be significant in the states that provisional can only be granted in the state courts or can only be enforced in the form of awards. In such states, it would advisable to grant such an injunction in the form of an award so it would not rejected by the state courts solely because of the its form.<sup>222</sup>

#### **1.8.4 Cases in which anti-suit injunctions were granted by arbitrators:**

Anti-suit injunctions have not only been granted by state courts, in fact, such injunctions have been awarded in a number of arbitrations in ICSID<sup>223</sup>, Iran-US arbitration and international commercial arbitration tribunals.<sup>224</sup> A number such cases are mentioned below.

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<sup>222</sup> Please see 4.5

<sup>223</sup> International Centre for Settlement of Investment Disputes.

<sup>224</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2502



In *E-Systems v. Bank Melli Iran*<sup>225</sup>, E-System brought a claim against Iran and Bank Melli Iran in respect of a contract by which the company was supposed to modify two Iranian military aircraft and their equipment for Iranian Government. E-Systems had to install on the airplanes' equipment to be supplied to it by the Iranian Government through suppliers in the USA. The claimant contended that Iran had breached the contract by not compensating E-Systems for the work it had carried out and by not disbursing the suppliers who had to deliver the necessary equipment and therefore forcing E-Systems to stop its deliveries. Subsequently, E-Systems terminated the contract and initiated proceedings in the Iran-US Tribunal requesting compensation for the damages incurred because of such a termination of the contract.

In the meantime, Iran obtained an order from the Public Court of Tehran demanding E-System to return the aircraft and to pay for the damages Iran had suffered because of both the breach and termination of the contract by E-Systems. The company sought an order from the tribunal to dismissal or stay of the Iranian proceedings. The tribunal ruled that it had an inherent power of issuing such orders which are necessary to protect the respective rights of the parties and to ensure that this power of the tribunal is made fully effective.

The tribunal then ordered the Government of Iran to move or stay of the proceedings before the court.<sup>226</sup> One of the arbitrators opined that grant of such an injunction was a means of protecting the tribunal's jurisdiction and the integrity

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<sup>225</sup> *E-Systems, Inc. v. The Islamic Republic of Iran, Bank Melli Iran*, 4 February 1983, 2 Iran-United States Claims Tribunal Rep. (1983) p. 51.

<sup>226</sup> *Ibid*, p57.

of its awards, as the claims before the tribunal and Iranian lawsuit involved the same matters related to the same contract.<sup>227</sup> Similarly, In *Quiborax SA v. Plurinational State of Bolivia*,<sup>228</sup> the tribunal ordered the respondent to suspend the proceedings in the court and refrain from any future proceedings courts.

In ICC Case No. 6798, the claimants, made an application to the District Court in Pakistan for the removal of the arbitral tribunal. They also challenged the tribunal's first partial award and argued that the curial law of this arbitration was Pakistani Law. In support of their argument, they intended to demonstrate that the parties had agreed that the curial law of any arbitration between them was that of Pakistan.

None of these matters were previously raised by either of the parties before the tribunal. The respondent had requested a limited stay of the proceedings whilst the claimant, on the other hand, wished the proceedings to go forward as scheduled. However, the tribunal held that, in the absence of an agreement between the parties, it would only be prepared to proceed if the claimants were either to: (1) Withdraw the Pakistani proceedings, or (2) Undertake to bring the subject matter of these proceedings before the English court as the court applying the curial law and exercising the supervisory power over this Arbitration.<sup>229</sup>

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<sup>227</sup> *Ibid*, p59.

<sup>228</sup> ICSID Case No. ARB/06/2 of 26 February 2010 <<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Born-2014-Ch17#a0467>> accessed on 08/12/2015 p46. A similar order was made in unreported case of ICC demanding the parties to withdraw all the judicial proceedings in all jurisdictions. Eric Schwartz, 'The Practices and Experience of the ICC Court' in *ICC, Conservatory and Provisional Measures in International Arbitration* (1993) p61. <[http://app.sni.gob.ec/snlink/sni/%23recycle/CAITISA/Quinta%20Entrega%20CAITISA/CAJA\\_03/03\\_09/024153.pdf](http://app.sni.gob.ec/snlink/sni/%23recycle/CAITISA/Quinta%20Entrega%20CAITISA/CAJA_03/03_09/024153.pdf)> accessed on 08/12/2015.

<sup>229</sup> Reported in Nael G. Bunni, 'Interim Measures in International Commercial Arbitration: A Commentary on the Report by Luis Enrique Graham' (2009) ICCA Congress Series, Volume 14, p591. In another ICC arbitration seated in Geneva, the tribunal ruled that under the ICC Rules and Swiss

The principle of confidentiality, covering most arbitral awards and procedural orders in international commercial arbitration, makes it very challenging to determine how often tribunals have actually granted anti-suit orders in purely commercial issues. Yet, analysing the reported cases shows granting of such injunctions by the arbitrators has been relatively common in international commercial arbitration.<sup>230</sup>

This is particularly evident from ICC's cases in which such an injunction were granted by arbitrators so as to ensure that arbitral proceedings were able to follow their normal course. In 1982 ICC case No. 3890, the arbitral tribunal, located in Switzerland, had to decide on a dispute initiated by a French construction company (claimant) against an Iranian Government agency (respondent). While the arbitration was ongoing, the respondent demanded an Iranian bank to make a call under a performance guarantee given by a banking syndicate to secure the contractual obligation of the claimant. The French Company asked the tribunal to grant a declaration, providing the bank guarantee was void and the attempt of the respondent to call the security was fraudulent.

The company requested from the tribunal to include in the declaration that respondent should suspend the call till a judgement is made on the merits by the arbitrators. In the meantime, a national court granted an order prohibiting the

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law, it had both jurisdiction and the authority to decide on a party's application for interim remedy seeking an order against the other party to withdraw and refrain from pursuing parallel proceedings. Reported in Matthias Scherer, Werner Jahnel, 'Anti-suit and anti-arbitration injunctions In international arbitration: a Swiss perspective' (2009) International Arbitration Law Review, Issue4, p70.

<sup>230</sup> Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' 2007 Congress Series, Volume 13 p240 ,253.

guarantor from disbursing any sum till the final decision by the arbitral tribunal. The respondent requested from the tribunal to declare that the action in the state court was abusive as it was intended to obstruct the performance of the guarantee and to aggravate or extend the dispute.

The tribunal granted a partial award, stating that it has the duty to recommend or suggest the measures which, in its view, are appropriate to preclude an aggravation of the dispute. In its award the arbitrators stated “...the tribunal must recall the well-established principle of international arbitration law ... according to which: The parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision and, in general, to refrain from committing any act, whatever its nature, likely to aggravate or to prolong the dispute.”<sup>231</sup>

In the recent case of *Gazprom OAO*<sup>232</sup>, the CJEU was requested to consider an application for a preliminary ruling submitted by a Lithuanian court in respect of the status of arbitration and anti-suit injunctions in light of the Recast. The Lithuanian court asked: 1) where an arbitral tribunal grants an anti-suit injunction and thereby prohibits party from taking certain claims to a Member State’s court (which under the Recast has jurisdiction to hear the civil case as to the substance), does the Member State’s court have the authority to refuse to recognise such injunction because it restricts the court’s right to determine its own jurisdiction to hear the

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<sup>231</sup> ICC Award No. 3896. Further, tribunal believed that there was an undeniable risk of the dispute before it becoming aggravated and parties should refrain from any action likely to widen or aggravate the dispute or to complicate the task of the tribunal or even to make more difficult the observance of the final award reported in Emmanuel Gaillard, ‘Anti-suit Injunctions Issued by Arbitrators’ 2007 Congress Series, Volume 13, p164.

<sup>232</sup> [2015] All E.R. (EC) 711.

case?; 2) If the answer to the first question is affirmative, does the same also apply where the anti-suit injunction granted by the tribunals orders a party to the proceedings to limit his claims in a case which is being heard in another Member State court (which has jurisdiction under the Recast)?; 3) Can a national court, seeking to safeguard the supremacy of the EU law and the full effectiveness of the Recast, refuse to recognise an award made by an arbitral tribunal if such an award restricts the right of the state court to decide on its own jurisdiction and powers in a dispute which falls within the jurisdiction of the Recast?

The CJEU held that the Recast must not be interpreted as preventing a Member State's court from recognising and enforcing, or refusing to recognise and enforce an arbitral award prohibiting a party from bringing certain claims before a court of that Member State. This is because the Recast does not govern the recognition and enforcement, in a Member State, of an arbitral award made by an arbitral tribunal in another Member State.

Proceedings for the recognition and enforcement of an arbitral award such as that at issue were covered by the national and international law applicable in the Member State in which recognition and enforcement were sought.<sup>233</sup> In other words, the Recast does not prohibit the grant of the anti-suit injunction granted by the arbitral tribunal and arbitrators can issue such injunctions to safeguard their jurisdiction or sanction any violation of the arbitration agreement.

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<sup>233</sup> Case digest of *Gasprom* [2015] I.L.Pr. 31 from West Law.

Moreover, this case indicates that such injunctions can be issued in the form of awards which can be enforceable under the New York Convention. This is in line with what this thesis is suggesting in respect of such injunctions. This thesis submits that such award should also include the confirmation of the tribunal's jurisdiction. Nonetheless, recognition and enforcement of such awards will depend on the national and international law applicable to the Member State's court where recognition and enforcement are pursued and not by the Recast.<sup>234</sup>

Although leaving the recognition of such injunctions (in the form of award) to the national court is not the most desirable situation, the fact that CJEU has clarified that anti-suit injunctions in the form of an award are not against the Recast is a major step forward for the practice of such injunctions.

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<sup>234</sup> Chukwudi Paschal Ojiegbe, 'Arbitral tribunals are not bound by the principle of mutual trust: the CJEU (Grand Chamber) decides in the Gazprom case' (2015) *International Arbitration Law Review*, Volume 18(4), p77,78.

## ***1.9 Conclusion***

This chapter examined the problematic issues regarding anti-suit injunctions and parallel proceedings within the EU. Since 2009, there have been numerous attempts by the EU to address these issues including the CJEU's decision in *West Tankers*, the Green Paper (2009), Resolution no.2140 (2010) and the Recast (2012). The EU has adopted different and sometimes contrasting approaches to the above issues.

The Recast, as the latest attempt of the EU to resolve these conflicts, has failed again to harmonise the allocation of jurisdiction in proceedings ancillary to, or supportive of, arbitration proceedings and more importantly in respect of recognition and validation of arbitration agreements. These conflicts included the existence of parallel proceedings, the creation of opportunities for parties to use litigation tactics, the failure to recognise the negative effect of the Competence-Competence principle and the inability to use public policy to deny the enforcement of judgments awarded in breach of an arbitration agreement.

A recognised validated arbitration agreement within the EU would allow parties to have a greater prospect to apply for provisional measures from different Member States' courts or to enforce the provisional measures granted by the seat court in other Member States. Moreover, recognising the arbitration agreement would result in the recognition of the arbitral tribunal (which decides on the merits) and possible recognition of provisional orders (and awards) by the tribunal and Member States' courts. Thus, providing a clear solution for the recognition of arbitration

agreements is a necessary step in order to lay the foundation for other propositions that this thesis will make in subsequent chapters.

This thesis submits that the best approach to the current situation of arbitration in the EU would be the exclusive jurisdiction of the seat court for examining the validation and application of arbitration agreements. When commercial parties agree to the fact that the seat of the arbitration should be in a particular state, they have certainly thought about the benefits and advantages that they would obtain by the court of that state under its national laws. Accordingly, the exclusive jurisdiction of the seat court is more closely aligned with the intention of the parties, particularly where there is an express agreement to that effect.

Such a proposition would be compatible with the jurisdictional rules of the Recast and the mutual trust between Member States' courts. This is because giving priority to one forum when two courts are dealing with the same subject is not incompatible with the Recast as the Regulation itself has provided a *Lis Pendens* mechanism for the prevention of parallel proceedings between national courts. Moreover, this exclusive jurisdiction is recognised for every Member State which is chosen as the seat of the arbitration, not just for certain Member States. The jurisdiction of seat courts should only be before the formation of the tribunal and they should limit their scrutiny to a *prima facie* determination of whether the arbitration agreement is null and void, inoperative or incapable of being performed.

The moment that the tribunal is formed, the exclusive power should only be available for arbitrators and they should make a full examination of the arbitration



agreement. Acknowledging the Competence-Competence principle entails the corollary that state courts should not, in parallel and with the same level of examination, decide on the same issue.

The arbitral tribunal because of its neutrality and freedom to choose the governing law of the arbitration agreement – unlike national courts which are restricted to their conflict of law rules – is the most appropriate forum to find the suitable applicable law of the arbitration agreement which defines its validity.<sup>235</sup> With regard to all of these matters, this thesis submits that assigning the arbitral tribunal as the primary forum to make a full examination of the arbitration agreement is the closest option to party autonomy.

Giving the primary jurisdiction to arbitrators does not mean that courts relinquish their power permanently. Having examined the arbitration agreement on a *prima facie* basis and confirmed its validity, state courts leave it to the arbitrators to decide on the question and regain the authority of full examination at the end of the arbitral process. More importantly, any courts would be able to undertake a full scrutiny at the time of the enforcement of the award.

This thesis submits that such exclusive jurisdictions and their effects should be expressly incorporated into the Recast as a standalone provision. This provision should include the exclusive jurisdiction of the arbitral tribunal for ruling on its jurisdiction (particularly in respect of the thorough examination of arbitration agreements) and exclusive jurisdiction of the seat court to perform a *prima facie*

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<sup>235</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999). p15-26.

validation of the arbitration agreement before the formation of the tribunal. Such a provision should expressly require Member States' courts to stay the proceedings so that the seat court can make the *prima facie* examination of the arbitration agreement. Equally, it should oblige other Member State courts to stay proceedings when the arbitration tribunal is formed, so that arbitrators could rule on their jurisdiction.

Taking both propositions together, this would create certainty for arbitration agreements within the EU and increase the prospect of enforcement for measures granted by the seat court and tribunals in other Member States. This is because national courts need to accept the ruling of the seat court and tribunals on the validation of the arbitration agreement and accordingly they principally should enforce the measures granted by the seat court in support of that arbitration agreement as well. Accepting such exclusive jurisdictions for the seat court and the arbitral tribunal would also reduce the prospect of parallel proceedings.

In respect of tribunal-ordered anti-suit injections, there should be little doubt that arbitrators have the authority to issue these injunctions. The issuance of such injunctions by arbitrators can avoid the aggravation of the dispute and protect the effectiveness of the award. It is submitted that such injunctions should be granted in the form of awards at the outset of arbitration proceedings after the tribunal confirms its jurisdiction. Such an award should be enforceable under the New York Convention. In *Gazprom*<sup>236</sup> the CJEU stated that grant of such injunctions are not against the provisions or objectives of the Recast (as they are when granted by a

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<sup>236</sup> [2015] All E.R. (EC) 711.

court of Member States). Taking such a view by the CJEU should encourage arbitrators to grant these injunctions. In light of this view, this thesis submits that including a provision in the New York Convention or the Geneva Convention requiring national courts to recognise such awards would assist the enforcement of such injunctions.

# **Chapter Two: *Court-ordered interim measures in support of arbitration proceedings in the EU***

## **2.1 Introduction**

Chapter one proposed changes to law to the effect that: i) the Recast recognises the exclusive jurisdiction of the seat court to make a *prima facie* examination of the arbitration agreement before the constitution of the arbitral tribunal, ii) the Recast recognises the exclusive jurisdiction of the arbitral tribunal for ruling on its own jurisdiction after its constitution, iii) arbitrators are empowered to grant anti-suit injunctions.

As discussed in the introductory chapter<sup>237</sup>, the above mentioned proposals provide the necessary foundation for the remaining proposals of this thesis. A recognised validated arbitration agreement within the EU would allow parties to have a greater chance to apply for provisional measures from different Member States' courts or to enforce the provisional measures granted by the seat court in other Member States. When the seat court or the arbitral tribunal validates the arbitration agreement, other Member States' courts should grant or enforce provisional measures granted in support of the arbitration agreement.

The changes identified in chapter one are not in themselves sufficient without complimentary changes being made to the role of the seat court. This chapter

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<sup>237</sup> Please see section 4 of the introductory chapter.

proposes that the Recast should recognise a supervisory role for the seat court in order to ensure that parties have timely access to the grant and enforcement of provisional measures.

This chapter submits that a supervisory role for the seat court should be recognised by the Recast. This recognition should be in the way that provisional measures granted by the seat court (in support of arbitration proceedings) should use the enforcement mechanism in the Recast. This would create a chance for parties to obtain provisional measures from a forum which is most likely chosen by the parties for its judicial advantages. Further, it would create an opportunity for parties to swiftly enforce the granted measures in other Member State without any extra procedure which would save cost and time for the parties. It should be noted that propositions of this chapter concern provisional measures granted during arbitration proceedings, not measures granted within the final judgment of courts.<sup>238</sup>

The first and the second sections of this chapter will study court-ordered interim remedies and their similarities and differences between England and France. The chapter will focus on jurisdiction of courts in these states and the standards that they consider in granting them. It should be noted that almost all the interim measures available for the parties in litigation in English and French law, are also obtainable in support of arbitration agreements. Accordingly, this research will

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<sup>238</sup> This is because, provisional measures granted within final judgments are enforceable as part of the judgment and therefore use the enforcement mechanism provided for final judgments. Article 40 of the Recast.

consider the significant litigation cases (which were not granted in support of arbitration proceedings) in order to explain the standards and principles of such measures that have been set out in case law. Examining these two jurisdictions together will show the difficulties facing the required harmonisation and the methods which can be used to achieve it.

The third section will focus on the cross-border enforcement of provisional measures. It will answer the third question of the research, namely, *is it possible to achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?*

## ***2.2 Court-ordered interim measures in international commercial arbitration***

In international commercial arbitration, due to the lengthy process of formation of the arbitral tribunal, availability of provisional measures from courts is of great significance for parties to protect their rights and interests.<sup>239</sup> Court-ordered measures can maintain the integrity of arbitration proceedings and help the parties to obtain an effective final award from the tribunal. For instance, this can be conducted by restraining parties from dissipating their assets or destroying evidence.

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<sup>239</sup> Peter Sherwin and Douglas Rennie, 'Interim relief under International Arbitration rules and guidelines: A comparative analysis' (2010) Am. Rev. Int'l Arb, Volume 20, No.3, p317. In fact, limited numbers of international arbitration cases are now decided in less than a year. Kaj Hobér, 'Interim Measures by Arbitrators' (2006) International Arbitration, Volume 13, p721.

National courts commonly grant provisional measures in support of arbitration proceedings and their assistance becomes inevitable when the parties seek interim measures that arbitral tribunals are unable to grant, such as conservatory attachments.<sup>240</sup> Jurisdictional relationships between state courts and arbitral tribunals in respect of provisional measures have always been a controversial issue in international commercial arbitration. As Lord Mustill provided:

“There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators a power of decision...”.<sup>241</sup>

This correlation between courts and arbitral tribunals on grant of such measures is even more complex in the EU. This is because different jurisdictions apply divergent approaches in respect of how and when such measures should be granted. For instance, English courts apply the subsidiary model<sup>242</sup> and Germany applies the free choice of law model.<sup>243</sup> Such different attitudes of national laws to granting and

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<sup>240</sup> Martin Davies ‘Court-ordered interim measures in aid of international commercial arbitration’ (2006) Am. Rev. Int'l Arb. Volume 17, p299.

<sup>241</sup> [1993] 2 W.L.R. 262 by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.

<sup>242</sup> The underlying philosophy of court subsidiary model considers the court as the last resort. The arbitrators can have the priority to grant interim measures but the parties have to opt in for it. The courts step in under certain precondition. Jan Schaefer, ‘New solution for interim measures of protection’, (1998) EJCL, Vol 2.2, p16.

<sup>243</sup> Free choice model law creates a free choice of a party to decide where to apply for interim measures. German Law attempts to make arbitrator-granted interim measure equally effective to court –ordered interim relief. Ragnar Harbst, ‘Arbitrating in Germany’ (2004) Arbitration, volume

enforcing provisional measures have caused major difficulties for the users of international arbitration and the need for harmonisation in this respect has been addressed by numerous scholars and practitioners.<sup>244</sup>

The next two sections will study court-ordered interim measures in English and French jurisdictions. This examination includes the authority of courts to grant interim measures before and after the formation of the tribunal. Accordingly, the best approach on the concurrent jurisdictions of courts and tribunals will be proposed. These sections will also study the different types of court-ordered measures available under English and French laws and it will argue which types of measures are suitable for the cross-border enforcement mechanism that this chapter will subsequently propose.

### ***2.3 Court-ordered interim measures in England***

S.44 enables the court with powers in support of arbitration agreements such they have for the purpose of courts proceedings.<sup>245</sup> These powers, to some extent, run parallel to corresponding powers of arbitral tribunals. Generally, the court's

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70(2) p89. Other jurisdictions such as Italy completely preclude the arbitrator from granting provisional measures and only their national courts are allowed to do so. William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J. Int'l, Volume 28, p1085.

<sup>244</sup>See Raymond J. Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' (2010), AAA Handbook on international arbitration & ADR. P102. Helene Adlard, 'A funny thing happened on the way to the forum' (2009) Arbitration, 75(4), 578-581, p 1. Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration' (2006), Am. Rev. Int'l Arb. Volume 17, p15. Gregoire Marchac, 'Interim measures in international commercial arbitration under ICC, AAA, LCIA and Uncitral' (1999) ! AM. Rev. Int'l Arb. 123. Sundaresh Menon, Elain Chao 'Reforming The Model Law Provision on Interim Measures of Protection' (2006) Asian Int'l Arb. J. 1. Veronica Ruiz Abou-Nigm. 'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2009) 26 J. Int. Arb. 5, p 763, 764.

<sup>245</sup> Subsection 1 of s.44.



authority is wider, particularly where it would not be appropriate or possible for arbitrators to act. Under English law, s.44 of the Arbitration Act 1996 (the 1996 Act henceforth) provides the subsidiary character of the English judge in the presence of an arbitration agreement; more specifically, s.44 defines and limits the extent of his powers.<sup>246</sup> According to the court-subsidiarity principle<sup>247</sup>, the arbitral tribunal is considered to be the primary forum to grant provisional measures.<sup>248</sup>

National courts are regarded as last resorts and they can only step in when arbitrators have no power or are unable to act effectively for the time being.<sup>249</sup> In the light of such an approach, s.44 enables courts with broad powers to grant provisional measures in support of arbitration proceedings.<sup>250</sup> These measures can include taking evidence from witnesses; preservation of evidence; granting orders

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<sup>246</sup> 44.— Court powers exercisable in support of arbitral proceedings.

(1) Unless otherwise agreed by the parties, -

(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....

<sup>247</sup> The general approach taken in English law regarding the role of the court in arbitration proceedings, as Jan Schafer refers to it, is subsidiarity-court model J. Schaefer, “New Solutions for Interim Measures ...”, p 9.

<sup>248</sup> Georgios I. Zekos ‘The role of the courts in Commercial and Maritime Arbitration under English Law’ *Journal of International Arbitration*, 1998 volume 15 issue p72.

<sup>249</sup> William Wang, ‘International Arbitration: The Need for Uniform Interim Measures of Relief’ (2003) *Brook J.Int’l*, Volume 28, p 1086. J. Schaefer, ‘New Solutions for Interim Measures...’ p10.

<sup>250</sup> Georgios I. Zekos ‘The role of the courts in Commercial....’ p68.

for the inspection, photographing, and preservation of property; and for ordering interim injunctions.<sup>251</sup>

### 2.3.1 Jurisdiction of English courts

As discussed earlier, s.44 is the central provision which outlines the authority of national courts to grant interim orders in support of arbitration agreements. Under s.2(1) of the 1996 Act, s.44 applies where the seat of the arbitration is in England and Wales or in Northern Ireland. S.2(3)(b) expands the jurisdiction of English courts by giving authority to grant interim orders even if the seat of the arbitration is outside England or no seat has been designated or determined. Nonetheless, if the court believes that granting provisional remedies in such a case is inappropriate, it has the right not to do so.<sup>252</sup> Taking these provisions together, they indicate the competence of an English court to exercise its powers under s.44 to assist foreign arbitrators who have no power to act effectively or to enforce their provisional relief within England.<sup>253</sup>

S.44 is not a mandatory provision of the 1996 Act and therefore parties can opt out of the court's support by stipulating in their arbitration agreement with clear wording. Arbitration parties have the option to choose in which matter they want

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<sup>251</sup> Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration'(2006) , Am. Rev. Int'l Arb. Volume 17, p9.

<sup>252</sup> This provision is reiterating the principle which was developed in the *Channel Tunnel Group v Balfour Beatty Construction*. [1993] A.C. 334. J. Schaefer, 'New Solutions for Interim Measures...' p10.

<sup>253</sup> Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration'(2006) , Am. Rev. Int'l Arb. Volume 17, p9.

to retain the court support and in which they do not.<sup>254</sup> Given that, it should be noticed that refusing the court protection under s.44 will stop the parties to access to without notice (ex parte) freezing and search and seizure orders (Henceforth search orders) completely.<sup>255</sup>

Given the scope of the courts' authority in this regard, grant of interim remedies is a matter of the courts' discretion. Therefore, if a party seeks the court's intervention as a delaying tactic or to put pressure on the other party, this often would be rejected by courts.<sup>256</sup> Applications under s.44 are arbitration claims which can be served out of the court's jurisdiction.<sup>257</sup> This power is available under rule 62.5(1)(b) of the Civil Procedure Rules. The question is whether the court can grant measures affecting third parties (not a party to the arbitration agreement).

It can be interpreted from s.44 that courts have the power to make orders affecting third parties.<sup>258</sup> For instance, under s.44(2)(e), freezing injunctions can be granted against an intended respondent to the arbitration proceedings where there is a reason to think that a third party holds assets for the respondent and accordingly, it would be reasonable to join the third party as a co-defendant and grant an injunction against the third party.<sup>259</sup> In such situations, s.44(2)(e) enables courts with the same power to order interim measures in relation to the arbitration

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<sup>254</sup> Kieron O'Callaghan and Jerome Finnis, *Chapter 20: Support and Supervision by the Courts* in Julian D. M. Lew, Harris Bor, et al. (eds), *Arbitration in England*. Volume (Kluwer Law International 2013) p428.

<sup>255</sup> William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) *Brook J.Int'l*, Volume 28, p1087.

<sup>256</sup> Haydn A. Main, "Court Ordered Interim ...", *Journal of International Arbitration* 22(6): 2005 p 509

<sup>257</sup> Civil procedure rule 62.2(1).

<sup>258</sup> Steven Gee, *Commercial Injunction*. (Fifth Edition Sweet &Maxwell 2004) p163.

<sup>259</sup> *Ibid*.

proceedings that they have for the purpose of the judicial proceedings. Therefore, courts can order an injunction against a third party when this is ancillary to an interim order awarded against the respondent.<sup>260</sup>

**i. Measures available under section 44(3) of the Arbitration Act 1996:**

There has been a discussion in English case law on the types of interim measures available under s.44(3). Initially, it was argued in *Hiscox*<sup>261</sup> that because of the language that the legislator has used in the s.44(3), this section is permissive rather than restricted to orders only for the purpose of preserving evidence or assets.<sup>262</sup> However, later on in *Cetelem S.A. v Roust Holdings Limited*<sup>263</sup>, the Court of Appeal ruled that the court's power under s.44(3) should be restricted to the orders necessary for the preservation of assets or evidence and held that the approach taken in *Hiscox*<sup>264</sup> was wrong and should not be followed.<sup>265</sup>

Prior to *Cetelem*, it was deemed that s.44(3) of the 1996 Act, in respect of preservation of assets, was merely providing authority for English courts to grant

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<sup>260</sup> *Ibid.*

<sup>261</sup> *Hiscox Dedicated Corporate v Michael Spiridonis* [2004] EWHC 3344 (Comm).

<sup>262</sup> *Ibid.*

<sup>263</sup> [2005] EWHC 300 (QB) .

<sup>264</sup> Clark J stated that section 44(3) is not limited to the orders for the preservation of assets or evidence, "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".

<sup>265</sup> [2005] EWHC 300 (QB) *Cetelem S.A. v Roust Holdings Limited* [49]. Main believes that use of the word 'may' in section 44(3) is not designed to indicate that the court has the option to order any form of interim measures, but merely to show that fact that it has the power to award the form of relief provided with as being available to it. Haydn A. Main, "Court Ordered Interim Relief Developments in English Arbitration Law", *Journal of International Arbitration* 22(6): 2005 p 507.

traditional freezing orders against the defendant's assets. Nevertheless, in *Cetelam*, the Court of Appeal made a very broad interpretation of the s.44(3) allowing the award of mandatory interim injunctions for the purpose of safeguarding a claimant's contractual rights.<sup>266</sup> Additionally, the court refused to accept the argument that 'assets', referred to in s.44(3), only entails the defendants' assets and not the assets of the claimant and argued that there could be circumstances, such as where a claimant's assets were stolen by the defendant, where the order for conserving the assets of claimant would be reasonable.<sup>267</sup>

The *Cetelam* judgment limits the circumstances in which provisional measures can be awarded and puts greater restrictions on the courts' involvement in arbitration proceedings. Accordingly, it would give parties who seek urgent court-ordered measures limited options.<sup>268</sup> Whether the approach taken in *Cetelem* case is right or not, there is no strong argument to restrict the court's authority to award different types of interim remedies, particularly before the formation of the tribunal, when the court's assistance is mostly needed. S.44(6) has already restricted the power of courts by providing that courts are only allowed to award provisional measures where the tribunal has no power or is unable to act effectively for the time being (we will discuss this in the next section).

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<sup>266</sup> *Cetelem SA v. Roust Holdings* [2005] 2 Lloyd's Rep 494, at {57}. In particular, the court believed that the High Court has the authority under s.44(3) to order the defendant to carry out certain actions (such as the delivery of documents) to fulfil its contractual duty. Further, the Court did not find any problem ordering a mandatory interim measure, as a traditional freezing order normally requires some type of positive action by the corresponding party. Kieron O'Callaghan, *Arbitration in England* (Kluwer Law International 2013) p428.

<sup>267</sup> Haydn A. Main, 'Court Ordered Interim Relief Developments in English Arbitration Law' (2005) *Journal of Intentional Arbitration*, Volume 22(6), p508.

<sup>268</sup> *Ibid* p507.

Given this precondition, courts by ordering any type of measure which they believe is appropriate for the case, cannot jeopardise the tribunal's jurisdiction.<sup>269</sup> This thesis submits that, although restricting courts' power to intervene in arbitration proceedings is in line with the spirit of the arbitration, it seems that the *Cetelem* judgment has unnecessarily limited the circumstances that courts can assist the parties to protect their rights.<sup>270</sup>

Given that, according to s.44(1), this provision of the 1996 Act is not mandatory and can be opted out or agreed against by the parties. Kelda Groves claims that parties can agree to incorporate a set of arbitral rules and can arguably allocate more extensive power to courts in relation to the grant of interim measures.<sup>271</sup> It would be improbable that courts acquire more powers beyond what they have been given in s.44. More importantly, even if they are enabled with more power, it would not be likely that they would be willing to exercise it as it can be deemed to be too much intervention in the arbitration proceedings.

The next two sections will illustrate requirements for granting interim measures by courts and restrictions provided by the 1996 Act for parties to seek interim measures from English courts.

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<sup>269</sup> *Ibid* p508.

<sup>270</sup> The limitation conferred in s.44 has made it harder for the parties to obtain injunctive relief from courts compared to what was available for them in s.12(6) of the 1950 Arbitration Act which did not have any restriction on the court's power to award interim measures. This matter becomes more significant when considering the fact that, since 1950, English law has developed wide-range of injunctive remedies. Kelda Groves 'Virtual reality: effective injunctive relief in relation to international arbitrations' (1998) *International Arbitration Law Review* p191,192.

<sup>271</sup> *Ibid*.

## **ii. Effectiveness test as a criteria to award provisional measures**

### ***Section 44(4) and 44(6)***

Regardless of whether the case is urgent or not, courts can award a provisional measure, where the tribunal is not able to act effectively for the time being (after the formation of the tribunal). S.44(5) indicates the underlying policy of the 1996 Act which favours the grant of interim remedies by an arbitral tribunal rather than by courts.<sup>272</sup> When arbitration parties need to seek interim orders from the court, as well as convincing the court that they are entitled to the order, they need to prove the tribunal has no power to make an interim order or is unable to act effectively for the time being.<sup>273</sup> Only when arbitrators have no authority to award the respective measure, the court is competent to do so without passing the “effectiveness test”.<sup>274</sup> The principle of effectiveness is the main point in the court’s jurisdiction to assist the arbitration procedure.<sup>275</sup> In practice, verifying the matter of urgency and whether the tribunal would be capable to act effectively are often very much connected.<sup>276</sup>

## **iii. Urgency**

The notion of urgency is important for the correct application of the procedure under s.44. According to 44(3), in the case of urgency, a party can ask the court for an interim measure without the permission of the arbitral tribunal or without a

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<sup>272</sup> Kieron O’Callaghan, *Arbitration in England* (Kluwer Law International 2013) p428, 429.

<sup>273</sup> William Wang, “International Arbitration: The Need for...” (2003) 28 *Brook J.Int’L*, p1087.

<sup>274</sup> J. Schaefer, ‘New Solutions for Interim Measures...’ p11.

<sup>275</sup> *Ibid* p12.

<sup>276</sup> Kieron O’Callaghan, *Arbitration in England* (Kluwer Law International 2013) p429.

special written party agreement.<sup>277</sup> In non-urgent cases, either the tribunals' permission or written agreement is required. According to Cooke J in *Starlight Shipping*,<sup>278</sup> in order to establish the 'urgency', the reference must be made to the question whether the arbitrators could reach any decision on the matter in any relevant timescale.<sup>279</sup> A more common case to verify the urgency is where it is not possible to constitute an arbitral tribunal and because of that it is necessary for the court to interfere with the intention of preserving assets or evidence.<sup>280</sup>

In the above section, it was explained where English courts have the jurisdiction to grant interim measures in support of arbitration proceedings. Providing this section and comparing it to the French approach will demonstrate the different approaches that exist in the EU national laws regarding the availability of court-ordered interim measures in support of arbitration agreements. In the next section, the types of measures available under English law will be explained and it will be illustrated which one can be used in the cross-border enforcement mechanism that this chapter proposes later.

## **2.3.2 Different kind of measures granted by English courts**

### **1) Interim freezing injunctions:**

One of the most important interlocutory protective measures in English law is the freezing injunction. Up until 1975, interim protective measures had a very limited place in the English legal system. Because the English system did not permit the

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<sup>277</sup> *Ibid.*

<sup>278</sup> *Starlight Shipping Co V. Tai Ping Insurance Co Limited* [2007] 2 C.L.C. 440.

<sup>279</sup> *Ibid.*

<sup>280</sup> Kieron O'Callaghan, *Arbitration in England* (Kluwer Law International 2013) p429.



seizure or freezing of the defendant's assets prior to the trial, this created opportunities for extensive abuse by defendants, particularly for foreign companies, by simply removing all their assets from the English jurisdiction.<sup>281</sup> Experiencing these problems, the House of Lords in 1975, in *American Cyanamid v. Ethicon*<sup>282</sup> changed the practice of granting interim injunctions and in *Rena K*<sup>283</sup>, the Admiralty Court held that a freezing injunction could be granted to safeguard assets awaiting the final award of arbitration.<sup>284</sup>

A freezing order precludes the respondent from unduly disposing of his assets so as to render the final judgment or the arbitral award ineffective.<sup>285</sup> A freezing injunction is an *in personam* order which addresses the respondent and cannot be requested merely for the purpose of providing the applicant with security for its claim.<sup>286</sup> Such an injunction is often granted together with a disclosure order demanding the respondent to provide information and documents concerning his assets. In practice, applications for freezing are frequent, but not invariably made without notice to the other party due to the risk that if there were notice in advance; the respondents would take action which would render any subsequent order ineffective.<sup>287</sup>

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<sup>281</sup> Campbell McLachlan 'Transnational applications of Mareva injunctions and Anton Piller orders' (1987) International & Comparative Law Quarterly, Volume 36, p670.

<sup>282</sup> [1975] A.C. 396.

<sup>283</sup> [1979] Q.B. 377

<sup>284</sup> "[i]t appears to me that both section 12 (6) (f) and (h) [of the Arbitration Act 1950] cover the granting of a *Mareva* injunction, and so give the court the same power to grant such an injunction for the purpose of and in relation to an arbitration as it has for the purpose of and in relation to an action or matter in the court." by Brandon J.

<sup>285</sup> Kieron O'Callaghan, *Arbitration in England* (Kluwer Law International 2013) p430.

<sup>286</sup> *Ibid*, p430.

<sup>287</sup> William Wang, "International Arbitration: The Need for..." (2003) 28Brook J.Int'L p1088. In English law, a freezing order can also be granted with an extra-territorial effect, known as a 'worldwide freezing order'. This order can be sought to stop the correspondent from disposing of their assets in

A freezing order can address the respondent's tangible assets such as property or intangible assets such as a bank account. It is submitted that freezing orders addressing bank accounts have a better chance to be enforced outside the jurisdiction of the granting court. Despite bank accounts, properties such as buildings or lands are closely connected to the sovereignty of the enforcing court. Accordingly, this would make the enforcement of a foreign decision on such properties very difficult and they do not seem to be suitable for cross-border enforcement.

## **2) Search orders:**

Initially, in *Anton Piller v. Manufacturing Processes*<sup>288</sup> the Court of Appeal granted an order requiring the defendant to permit the plaintiff and his solicitor to enter his premises in order to preserve evidence which otherwise would have been destroyed. S.44(2)(c) of the 1996 Act affirms the case law and permits the court to allow any person to enter any premises in the possession or control of an arbitration party so as to inspect, photograph, preserve, take custody of or detain property which concern the arbitral proceedings. Search orders allow the applicant or its representative to access the defendant's premises to search for and retain documents or other materials such as CDs, hard drives, relevant to the case which might otherwise be abolished by the respondents. Any obstruction of the order

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any place in the world. This type of freezing order is only awarded in very exceptional cases that are based on strong evidence. Kieron O'Callaghan, *Arbitration in England* (Kluwer Law International 2013) p433.

<sup>288</sup> [1976] Ch. 55

would be equal to contempt of court.<sup>289</sup>

This can entail the court demanding the debtor to present under oath information or documents regarding the place and worth of his assets. Search orders can assist the enforcement of a final award by disclosing the hidden assets of debtors all around the world and even enhance the efficiency and impact of freezing injunctions.<sup>290</sup> Applications for search orders are almost invariably made without notice for this reason and if this cannot be justified in the facts of the case, then it should not be granted.<sup>291</sup> Such measures can be very helpful for the protection of parties' right throughout the arbitration process; however, it does not seem that such an order could be enforced out of the jurisdiction of the enforcing court. This is because such measures are mainly granted without notice and it requires access to properties such as lands and buildings which are closely connected to the sovereignty of the enforcing court.

### **3) Orders in respect of evidence — Subs.(2)(a), (2)(b)**

Under Subs(2)(a) courts can grant orders taking of evidence of witnesses. S.43 enables a party to an arbitration to use the witness summons (Civil Procedure Rules (CPR) part 34) process to obtain testimony or documents from a witness as long as the witness is in the UK and the proceedings are being conducted in England, Wales or Northern Ireland.<sup>292</sup> According to subs(2)(b), the court can also order the preservation of evidence by arbitration parties. While the court may not order

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<sup>289</sup> William Wang, 'International Arbitration: The Need for...' (2003) 28 Brook J. Int'l L, p1088.

<sup>290</sup> Guy Robin, 'Conservatory and provisional measures in international arbitration: the role of state courts' (2008) International Business Law Journal, Volume 3, p338.

<sup>291</sup> Steven Gee, *Commercial Injunction* (Fifth Edition Sweet & Maxwell 2004) p161.

<sup>292</sup> This also applies to the witnesses in any Member States( CPR 34.13).

disclosure of documents by a non-party, it can order preservation of the contents of certain documents in possession of third parties when appropriate.<sup>293</sup>

The orders taking of evidence from witnesses are only available when the witness is in the UK, therefore it cannot be enforced in other jurisdiction. However, orders requiring arbitration parties to produce evidence are one of the most common measures granted in arbitration proceedings and this thesis submits that parties should be able to obtain one measure to that effect and enforce it in other Member States.<sup>294</sup>

#### **4) Orders in respect of Property subs.2(C):**

According to this subsection, English courts can make orders in relation to the property which is the subject of the proceedings or as to which arises in the proceedings. Such powers also include the properties in the hands of third parties.<sup>295</sup> Courts can also authorise entry by 'any person' into 'premises' in the possession or control of a party to the arbitration. According to s.82(1) of 1996 Act 'premises' include 'vehicle, vessels, aircraft and hovercraft'. Arbitral tribunals can only demand the arbitration parties over a property which is in their hands. Accordingly, this power can have a major significance in the arbitration process as in many cases properties of the parties can be in possession or under control of non-parties. As explained in the freezing order's section, orders concerning

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<sup>293</sup> *Assimina Maritime Ltd v Pakistan National Shipping; The Tasmin Spirit* [2004] EWHC 3005 (Comm), White Book 2013 Section 2 - Specialist Proceedings 2E - Arbitration Proceedings Arbitration Act 1996 2E-196.

<sup>294</sup> Matthews believes that such measures should not be enforceable in other Member States. Paul Matthews, 'Provisional and protective measures in England and Ireland at common law and under the conventions: a comparative survey' (1995) Civil Justice Quarterly, Volume 14, p198,199.

<sup>295</sup> CPR r.25.1 and s.34(3) of the Senior Court Act 1981.

immovable properties can be only and enforced within the jurisdiction of the granting court and it would be highly unlikely that this would be enforced by any other Member State's courts.

### **5) Sale of goods — Subs.(2)(d)**

Courts can also order the sale of good which are subjects of the proceedings. A prime example of such cases would be an order to sell perishable goods.<sup>296</sup> This thesis submits that such types of measure should be enforceable in other Member States. This is because currently, there are many types of goods that can be freely traded and moved throughout the EU. Accordingly, obtaining a single provisional measure and trying to enforce it in different Member States would be more efficient.

### **6) Interim injunction/appoint a receiver — Subs.(2)(e)**

By virtue of this subsection, courts can order an interim injunction or appoint a receiver.<sup>297</sup> An interim freezing injunction, which is the most important injunction, was separately discussed above. There are other various situations that courts grant injunctions. In *Engineered Medical Systems v. Bregas AB*<sup>298</sup> an order was granted that required the respondent to carry on supplying the claimant with goods for a period of time. It is proposed that such orders ordering parties to continue or

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<sup>296</sup> The power can be found in the CPR r.25.1.

<sup>297</sup> The power of courts in this regard can be found CPR Part 69.

<sup>298</sup> *Engineered Medical Systems v. Bregas AB* [2003] EWHC 3287 (Comm).

complete their obligations under the contract (specific performance orders) should be available for cross- border enforcement.

### **2.3.3 Granting interim measures in support of foreign proceedings**

As was explained previously, granting provisional measures in support of foreign arbitration proceedings is permitted by the 1996 Act. This ability to grant interim measures has been recognised in respect of judicial proceedings under s.25 of Civil Procedure Rule(CPR) and s.37 of Senior Courts Act. Although English courts are given broad discretion in this respect, the emerging jurisprudence indicates that such powers should be used sparingly when the case concerns international arbitration.<sup>299</sup> In other words, courts should not exercise their power in respect of foreign proceedings if exercise of such power would be “inappropriate” (or “inexpedient” in the wording of s.25 of CPR). Such inexpediency occurs when the court considering the grant of the measure has no link (or a weak link) with foreign proceedings. There are a number of principles which should be considered by

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<sup>299</sup> See obiter of Lord Mustill in *Channel Tunnel Group v Balfour Beatty Construction* [1993] 2 W.L.R. 262. Even when the seat of arbitration is in England, the court might not be willing to grant injunction when they think they are not the appropriate forum for the grant of the measure. In *U&M Mining Zambia Ltd v Konkola Copper Mines*[2013] EWHC 260 (Comm), the claimant Zambian company U&M Mining sought an interim anti-suit injunction to stop the defendant Zambian company Konkola Copper from pursuing court proceedings in Zambia. Blair, J held “... It was not clear that the English court could or would have made any order in a dispute between two Zambian companies concerning the operation of a copper mine in Zambia. So far as judicial assistance by way of interim measures pending the appointment of the arbitrators was required, the natural forum for such proceedings was in Zambia, not in England [though the seat of arbitration was England]”. [63]-[73].

courts when provisional measures are granted in support of foreign arbitration proceedings.<sup>300</sup>

For example, in *Econet Wireless Ltd v. Vee Networks Ltd*<sup>301</sup>, the claimant sought a without notice injunction restraining the other shareholders from selling their shares to a take-over bidder. Langley J granted the order, believing that he had power to do so according to s.44, though arbitration of the dispute was going to take place in Nigeria. Morison J later lifted the injunction believing that it should never have been awarded, because there was no basis to invoke the jurisdiction of the English courts when the aim was to obtain injunctive relief maintaining the status quo against shareholders in Nigeria.

Nevertheless, it seems that English courts might decide differently when the defendant owns assets that are in England.<sup>302</sup> In *Cetelam v. Roust Holding*<sup>303</sup>, the Court of Appeal confirmed the award of a freezing order made under s.44 awaiting the final decision of arbitration in England between a French bank and a company registered in the British Virgin Islands. When the interim measure sought in support of the foreign proceedings only concerns the jurisdiction of England, presence of defendants or their assets have been held as sufficient connection for the English court to grant such measures.<sup>304</sup> There are other matters which courts take into

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<sup>300</sup> Adam Johnson 'Interim injunctions and international jurisdiction' Civil Justice Quarterly, Volume 27, p435.

<sup>301</sup> EWHC 1568 (Comm).

<sup>302</sup> Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration' (2006), Am. Rev. Int'l Arb. Volume 17, p9.

<sup>303</sup> [2005] EWCA Civ 618. Same approach was taken By Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

<sup>304</sup> In 1979, in *Owners of Cargo Lately Laden on Board v Distos Compania Naviera SA (Siskina)* ([1979] A.C. 210) cargo owners of a sunken ship sought a freezing injunction against the insurance money of ship owners, located in England, until cargo owners would receive the final judgment in the Italian

consideration when they are granting measures in support of foreign proceedings.

The desire of the parties and extent of their wish for arbitration are also factors to be taken into consideration when the court is exercising its discretion.<sup>305</sup>

However, sometimes even if there is sufficient link between English courts and the foreign proceedings, grant of the sought measures can be inappropriate. The Commercial Court in *Viking Insurance Co. V. Rossdale*<sup>306</sup> found it inappropriate to grant an interim remedy that would not normally be obtainable under the law of the forum, though it was available under the curial law.<sup>307</sup> This seems to be a reasonable approach as it would prevent parties from forum-shopping.

English courts have sometimes granted injunctions with extraterritorial effects, such as worldwide freezing injunctions. Such measures are a peculiarity of the English jurisdiction. Standards for verifying sufficient links for word-wide orders are different and more complex. When there is no presence of assets or respondent, English have refused to grant such word-wide measures.<sup>308</sup>

Given that, the question is whether English courts have jurisdiction to grant a worldwide measure when only of these factors exists. When there is only the presence of assets of English jurisdiction, it seems that the answer is negative. In

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proceeding. Lord Diplock refused to grant the injunction based on the grounds that there was nothing in the case on which to find an action within the jurisdiction of the High Court to which a freezing order can be attached.

<sup>305</sup> Martin Davies 'Court-ordered interim measures in aid of international commercial arbitration'(2006) , Am. Rev. Int'l Arb. Volume 17, p10.

<sup>306</sup> [2002] 1 W.L.R. 1323.

<sup>307</sup> *Ibid* 'The procedure adopted under the curial law differs in this respect from that which applies under our law in a way which, on this ground alone, makes it inappropriate in my view to make the order now being sought' by Moore-Bick J.

<sup>308</sup> *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*[2008] EWHC 532.



*Van Uden*[1999]<sup>309</sup> the CJEU ruled that where provisional remedies, under Article 31(as it was at the time, Article 35 under the Recast), are requested in support of foreign proceedings, there must be a “real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought”.<sup>310</sup>

The application of *Van Uden* can be seen in *Banco Nacional de Comercio v. Empresa*<sup>311</sup> in England. This case concerned an application for an asset freezing order in support of an attempted enforcement. The Court of Appeal held that a worldwide freezing injunction would not be awarded because the case had no link with England, other than the presence of assets.<sup>312</sup> It appears that *Banco Nacional de Comercio v. Empresa* should be taken as the right approach in English law and the mere presence of the assets should not be held as the reason for grant of interim measures with the extra territorial effect.

Nonetheless, the mere presence of assets in England’s jurisdiction may be a basis for the grant of an injunction when there is an intention to dissipate assets by the respondent. The intention for dissipation of assets is also referred to as ‘presence of fraud’. It seems that when the *mala fide* party intends to dissipate assets in England and English courts are the only forums with jurisdiction that can help the claimant

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<sup>309</sup> 2 W.L.R. 1181.

<sup>310</sup> Ibid [40].

<sup>311</sup> [2007] EWCA Civ 662.

<sup>312</sup> Please see *Motorola v. Uzen*(No 6) [2003] EWCA Civ 752 for a contrasting judgement.

to stop the other party from dissipating its assets, English courts can grant a world-wide order.<sup>313</sup>

In relation to presence of the respondent, Hartley believes that English courts should not award a worldwide order unless it has personal jurisdiction over the respondent and this should be based on his domicile or residence in England.<sup>314</sup> In the context of international law, the presence of a respondent does not create any complication or difficulty. The difficulty here is the application of *Van Uden* judgment in the context of freezing orders in England. *Van Uden* requires a real connecting link between the subject matter of the measures and the territorial jurisdiction of the granting court. This clearly cannot be meaningful in the context of an order which addresses the respondent (*In personam*), not his assets. This brings up the question of whether the real connecting link requirement limits the award of freezing orders to assets within the English jurisdiction.<sup>315</sup>

It is clear that English courts have granted measures with the extra-territorial effect knowing that such order might not be enforceable anywhere in the world.<sup>316</sup> In other words, such orders are granted mainly because of their weight rather than their enforceability. Nonetheless, this chapter later will propose a framework for the cross-border enforcement of court-ordered measures. Under this mechanism

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<sup>313</sup> Please see *Mediterranean Shipping Co v OMG International Ltd* [2008] EWHC 2150 (Comm). Adam Johnson 'Interim injunctions and international jurisdiction' Civil Justice Quarterly, Volume 27 , p442. Campbell McLachlan 'The jurisdictional limits of disclosure orders in transnational fraud litigation' (1998) International & Comparative Law Quarterly Volume 47, Issue 01,p 10,11.

<sup>314</sup> Trevor C. Hartley 'Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders' Law Quarterly Review 2010, p220.

<sup>315</sup> Louis Merret , 'Word wide freezing order in Europe' The Cambridge Law Journal , Volume 66, Issue 03, p497.

<sup>316</sup> Maher, G & Rodger, BJ 1999, 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' International and Comparative Law Quarterly, Volume 48, p 309.

(which will be discussed extensively in section 2.5) provisional measures granted by the court of seat of the arbitration should enjoy the enforcement mechanism in the Recast.

In light of such mechanism, studying the requirements based on which English courts grant measures with extra-territorial effect become significant. This chapter submits that if England would be the seat court in the arbitration proceedings, this factor should suffice for English courts to grant provisional measures which can be enforceable in other jurisdictions without the need for any territorial connection with the sought provisional measures or presence of assets.

Based on this approach, *in personam* orders such as freezing orders should be granted. This is because granting one *in personam* order addressing the entire respondent's assets (such as bank account, shares and goods) would be more practical as the claimant can enforce the granted order in any Member States against any of respondent's assets. This removes the need for obtaining separate freezing orders for different assets of the respondent. Given that, when England is not the seat court of the arbitration, the territorial connection or the respondent's place of residence should be considered for grant of measures within the EU.

The next section will explain the approach of the French arbitration law in respect of jurisdiction of courts in respect of granting provisional measures. France, as one of the main centres for arbitration in the EU, has been active in promoting the use of arbitration as a means of dispute resolution. Hosting a large number of

arbitration institutions, France is considered as a pro-arbitration jurisdiction.<sup>317</sup>

Examining French jurisdiction has a particular significance for the research as it has one of the most clear and advanced system regarding the jurisdiction of national courts before and after the formation of arbitral tribunals. This thesis will submit why such approach should be followed by other Member States' courts.

## ***2.4 Court-ordered interim measures in France***

French law has kept the dual approach which separates domestic from international arbitration, though there are many articles which apply to both aspects of arbitration. Nonetheless, the part which concerns international arbitration allows for a more flexible system.<sup>318</sup> Throughout the course of the arbitration, it may be needed to preserve an item of evidence which may otherwise be destroyed. For instance, this can be a document or the current state of construction site. In some cases, such as shares in a company which its ownership is contested, it might be necessary to put disputed assets under the third party's custody.<sup>319</sup> Moreover, there might be a request from courts to stop manifestly

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<sup>317</sup> The Association Française d'Arbitrage; The International Court of Arbitration of the International Chamber of Commerce; The Chambre Arbitrale de Paris; The Chambre Arbitrale Maritime de Paris (Chamber of Maritime Arbitration of Paris).

<sup>318</sup> Emmanuel Gaillard 'France Adopts New Law on Arbitration' (2011) New York Law journal, Volume 245, N015.

<sup>319</sup> This can be seen in *Terex v. Banexi* CA Paris, Dec. 12, 1990, , 1991 BULL. JOLY 595 as reported in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999), p734 footnote 61.

unlawful acts.<sup>320</sup> These are the common applications for provisional and conservatory measures made by the parties in French courts.<sup>321</sup>

French law, in the Decree of 2011 (the 2011 Decree),<sup>322</sup> has given more powers to arbitral tribunals in respect of provisional measures. But, it has kept the authority of state courts to grant such measures in support of arbitration proceedings.<sup>323</sup> Court-ordered provisional measures are instantly enforceable, despite the availability of appeal by the respondent in the Court of Appeal.<sup>324</sup> The enforcement cannot be stopped; however, it can be conditioned on a pledge in the form of security or deposit.

Court-ordered provisional measures which can be in form of orders or injunctions do not have a *res judicata* effect.<sup>325</sup> Another judge in chambers cannot modify an

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<sup>320</sup> Jean-Louis Delvolvé , Gerald H. Pointon , et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, Second Edition (Kluwer Law International 2009)p120.

<sup>321</sup> *Ibid.*

<sup>322</sup> For general understanding of the 2011 decree please see Emmanuel Gaillard 'France Adopts New Law on Arbitration' (2011) New York Law journal, Volume 245 no. 15, Pierre Heitzmann, Johanna Schwartz Miralles 'The 2011 French Arbitration Reforms In Comparative Perspective' MEALEY's International Arbitration Report. Hong-Lin Yu, Masood Ahmed, 'The new French Arbitration Law: an analysis' (2012) International Arbitration Law Review. Gudino Carducci, 'The Arbitration Reform in France: Domestic and International Arbitration Law, Arbitration International (2012) Volume 28 Issue 10. Beatrice Castellane, 'The New French Law on International Arbitration' (2011) Journal of International Arbitration Volume 28, issue 4. Ali Bencheneb 'Arbitration and the role of the juge d'appui in Algerian and French law' (2012) International Business Law Journal. Loïc Cadiet 'Introduction to French Civil Justice System and Civil Procedural Law' Ritsumeikan Law Review 2010, < <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr28/CADIET3.pdf>> accessed on 09/11/2015. Elie Kleiman 'Legislative Comment: France's new arbitration law about to enter into force' (2011) International Arbitration Law Review, Volume14(3).

<sup>323</sup> Article 1449 and Article 1468.

<sup>324</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) p723.

<sup>325</sup> *Res judicata* is the principle that a matter cannot, generally, be redecided (relitigated) once it has been judged on the merits.

awarded measure unless the circumstances have changed and this can give the party who obtains the measure an instant strategic advantage over its rival.<sup>326</sup>

### **2.4.1 Jurisdiction of French Courts**

Article 1449 of the 2011 Decree provides “the existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory.” Nonetheless, the grant of such measures should not prejudice the merits of a dispute.<sup>327</sup>

French courts have jurisdiction to grant provisional measures when the case concerns a French citizen, or a person domiciled in France.<sup>328</sup> French courts do not generally have jurisdiction over a case concerning non-citizens. However, if the assets are located in France, the French judge has the authority to grant provisional remedies even if both parties are non-citizens, the governing law of the contract is not French law or the arbitration seat is outside of France. Under French law, the judge is also competent to grant an interim remedy when the two parties are not French nationals, but the provisional measure involves real estate placed in France or an airplane which has landed in French territory.<sup>329</sup>

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<sup>326</sup> Wallace R. Baker, Patrick De Fontbressin ‘The French Réfère procedure – a legal miracle?’ 2 U. Miami Y.B. Int’l L. 1 1992-1993 Volume 2, p17.

<sup>327</sup> Article 1458 of NCPC.

<sup>328</sup> Jean de Hauteclouque, ‘French Judicial Expertise Procedure and International Arbitration’, (1987) Journal of International Arbitration, Volume 4 Issue 2, p78.

<sup>329</sup> Maitre Jacques Buhart: ‘Attachments and other interim court remedies in support of arbitration’ (1984) International Business Law Review, Volume 12, p108.

#### **2.4.1.1 Involvement of the French courts before and after the formation of the tribunal:**

The stage of the formation of the arbitral tribunal has been broadly interpreted by the French courts. Accordingly, an arbitration tribunal is not formed until the last arbitrator formally agrees to his appointment. An informal agreement of an arbitrator to participate in the first oral hearing of the case does not meet this condition.<sup>330</sup>

When the tests of urgency, absence of challenge and existence of a dispute are met (Article 808 of New Code of Civil Procedure (NCPC)), the judge in chambers has jurisdiction to award interim relief in arbitration proceedings similar to what he may order in non-arbitration cases.<sup>331</sup> According to Article 1469 of 2011 Decree, courts are permitted to grant interim measures before the constitution of the arbitral tribunal. The question here is whether provisional measures can be awarded after the formation of the tribunal.

French courts are permitted to interfere even after the formation of the tribunal, where a conservatory attachment or a judicial security is needed which can include bank guarantees, attachments, freezing orders and charging orders over property.<sup>332</sup> French courts can grant such measures before or after the constitution of the tribunal.

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<sup>330</sup> Kate Brown, 'The Availability of Court-Ordered' (2003) Int'l. Trade & Bus. L. Ann. Volume 8, p148.

<sup>331</sup> Coleen C. Higgins, Interim Measures In Transnational Maritime Arbitration' (1990-1991) Tulane Law Review, Volume 65, p1543.

<sup>332</sup> Article 1449. *Court de Cassation* also has ruled that conservatory attachments can be requested from after the formation of the tribunal. *SNTM Hyproc v. SNACH*, Cour de Cassation (2Ch. civile), 8 June 1995 *Revue de l'Arbitrage*, Comité Français de l'Arbitrage 1996, Volume 1996 Issue 1) pp. 125 – 124.

In respect of other types of interim remedies, prior to 2011 Decree, the parties were able to apply for provisional measures in courts even after the formation of the arbitral tribunal. The "*référé*" procedure (the summary interlocutory proceedings) involves urgent measures that do not encounter any serious objections and measures meant to preclude imminent damage or to restrain a manifestly illegal act.<sup>333</sup> Further, the judges in chambers could only award them when the matter is urgent or the arbitral tribunal cannot grant them due to the limits of its power.<sup>334</sup>

Nevertheless, Article 1449 of the 2011 Decree provides: "The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures." It is not clear whether wording of Article 1449, when it states "insofar as the arbitral tribunal has not been constituted" provides that parties could still recourse in French courts for urgent measures after the constitution of the tribunal or not.

The majority of the scholars and practitioners believe that after the formation of the tribunal, French courts cannot grant urgent interim measures anymore.<sup>335</sup>

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<sup>333</sup> Laurent Gouiffès, Lara Kozyreff 'Commentary on the new French ...'p 49.

<sup>334</sup> Yves Derains, Laurence Kiffer, National Report for France (2013) in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, (Kluwer Law International 1984 Last updated: May 2013 Supplement No. 74 ) p51. This can be seen in *Terex v Banexi*(CA Paris, Dec. 12, 1990, *Terex v. Banexi*, 1991 BULL. JOLY 595.) In this case, the Court of Appeal held that due to the urgency of the case it was competent to order the escrow of the disputed share awaiting the final award by the arbitrators on the merits of the case and to preclude a company from issuing new shares.

<sup>335</sup> Nicolas Bouchardie and Celine Tran believe that the 2011 Decree has reserved this jurisdiction to grant interim measures after the arbitral tribunal and it can no longer be requested from the court. Arbitration in France Nicolas Bouchardie and Celine Tran 'Arbitration in France' 2013 Practical Law,



This principle was applied by case law even before the new Decree.<sup>336</sup> In Moure's idea such case law remains applicable after 2011 Decree as well.<sup>337</sup> There are some commentators who argue that some measures still can be granted by national courts even after the formation of the tribunal.<sup>338</sup>

On the one hand, arbitral tribunals cannot always make prompt and effective provisional measures throughout the arbitration process or to provide for their enforcement. On the other hand, wording of Article 1459 and the fact that 2011 decree expressly empowers the tribunal to grant provisional measures (and attach pecuniary fines to them) indicate that the new decree has leaned towards giving more power to arbitral tribunals and limiting the courts' role in the arbitration process.

This thesis submits that providing such a restriction on the ability of national courts to grant interim measures after the constitution of the tribunal is a major step towards recognising and improving the power of arbitral tribunals to grant provisional measures. Moreover, this approach would prevent parties from applying the same provisional measure in courts after they are rejected by tribunals

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p13. Thomas Bevilacqua and Ivan Urzhumov (both practitioners) also believe that after the formation of the tribunal, courts cannot grant urgent measures unless by invitation of arbitration tribunal regarding obtaining evidence. Thomas Bevilacqua and Ivan Urzhumov, 'Arbitration procedures and practice in France: overview' (2014) Practical Law question 20 <<http://uk.practicallaw.com/7-501-9500#a950822>>. Please also see Denis Bensaude, 'French Code of Civil Procedure (Book IV), Article 145' in Loukas A. Mistelis (ed), *Concise International Arbitration*, 2nd edition (Kluwer Law International 2015), p1411.

<sup>336</sup> *Ste Schwind et Mme Marquest c/ Ste Leon Grosse*, Cass. Civ. Le, 6 Dec. 2005, RTD Com. 2006 <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007051462>, accessed on 14/12/2015.

<sup>337</sup> Lawrence Newman and Colin Ong(eds), *Interim measures in International arbitration* (Juris 2014) p302.

<sup>338</sup> Laurent Gouiffès, Lara Kozyreff 'Commentary on the new French ...' page49. please also see Lawrence Newman and Colin Ong(eds), *Interim measures in International arbitration* (Juris 2014) p302.

or vice versa.<sup>339</sup> This approach is similar to what English system applies. Nonetheless, it seems that French approach is more clear in respect of preventing courts from granting provisional measures.

#### **2.4.2 Summary interlocutory proceedings**

Most of the provisional and conservatory measures in French law are granted under the summary interlocutory proceedings.<sup>340</sup> French courts started granting measures under the interlocutory proceedings in late 1986.<sup>341</sup> In 1980, in the Paris and neighbouring commercial courts, there were 3,000 interlocutory proceedings. By 1992, there were about 20,000. Nonetheless, more than two thirds of these proceedings were interim payment (*Référé provision*) procedures.<sup>342</sup> The purpose of interlocutory proceedings is to allow the rapid grant of interim remedies such as temporary injunctions, provisional suspensions (such as preventing the opening of a business), or sequestration.<sup>343</sup> In order to justify the grant of a measure, the French court (alike the English court) is not allowed to examine the merits of the case.

This explains why the court for summary applications under Article 808 has been called the court “of the obvious”.<sup>344</sup> Accordingly, if the court, after a superficial consideration of the facts, is convinced to order the measures sought, it must avoid

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<sup>339</sup> Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007) p532

<sup>340</sup> A summary interlocutory order is described as “an interim order... in cases where the law confers upon a judge to whom the main issue is not referred, the power to give immediately the necessary orders.” Article 484 NCPC.

<sup>341</sup> Wallace R. Baker, Patrick De Fontbressin ‘The French Réfère procedure...’, p 11.

<sup>342</sup> *Ibid.*

<sup>343</sup> Loic Cadiet ‘Introduction to French Civil Justice System...’ p353.

<sup>344</sup> Maitre Jacques Buhart ‘Attachments and other interim court remedies in support of arbitration’ (1984) *International Business Law Review*, Volume 12, p108.

making any decision on the merit.<sup>345</sup> Under article 1449 of the 2011 Decree, applications for interim measures shall be made to the President of *Tribunal de Grand Instance* (under Articles 808) or *Tribunal de Commerce* (under Articles 809 and 873) and in all cases of urgency, they may order all measures that do not encounter any serious challenge or which the existence of the dispute justifies. The procedures for grant of interim measures by these judges are almost identical.<sup>346</sup>

#### **2.4.1.2 General standards for grant of summary interlocutory proceedings**

Article 808 of NCPC provides: “In all cases of urgency, the president of the High Court may order in a summary procedure all measures that do not encounter any serious challenge or which the existence of the dispute justifies”.

If there is to be summary proceedings based on urgency, the judge should find that there is urgency or that urgency is clearly demonstrated by the facts noted by the judge. If by not granting the measures, the damage which is occurred on one party becomes irreparable, then there is an urgent situation.<sup>347</sup>

Under Article 808, the President must conclude that the loss is imminent enough to indicate urgency. The test of urgency is deemed to be satisfied whenever a delay in delivering a judgement is likely to prejudice the interests and rights of the claimant. The test of serious contestation and existence of a dispute is not completely defined and is generally used with discretion and with wide-ranging

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<sup>345</sup> Catherine Kessedjian ‘Note on provisional and protective measures ...’ p28.

<sup>346</sup> Wallace R. Baker, Patrick De Fontbressin ‘The French Réfère procedure ...’ p14.

<sup>347</sup> Donald Francis Donovan, ‘The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward’ (2003) ICCA Congress Series, Volume 11, p93.

discrepancies.<sup>348</sup> Under Article 809 of NCPC, “the President may always, even if there is a serious challenge, prescribe any necessary protective or restorative measures when sitting in summary applications, either in order to prevent imminent damage, or to bring to an end a nuisance which is evidently unlawful.”

The concept of “imminent damage” can apply to a variety of examples. This can include; stock exchange cases, unfair competition, the prohibition on broadcast of a film or television programme or the right to strike. The term of “manifestly unlawful disturbance” occurs in a wide range of cases including privacy, labour law, economic law cases (advertising, the management of commercial activities, opening and closure of stores, medical and in defamation cases, particularly via media).<sup>349</sup>

If the existence of a serious challenge is verified, the claimant, in order to obtain any interim measure, must establish the two-tier test contained in Article 809 and 873 of the NCPC. The claimant must first show that the damage is imminent, or a manifestly illegal conduct or action is taking place. Secondly, the measure must be necessary for prevention of the damage or behaviour or action. Having fulfilled those requirements, the claimant may obtain provisional measures from the court. Nevertheless, in order to apply the first paragraph of Article 809, the President is not required to establish the urgency of the requested measures.<sup>350</sup>

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<sup>348</sup> For instance, the challenge is held to be serious where the stipulations of a contract need interpretation. Accordingly, it is not held to be serious where the stipulations have no ambiguity. Catherine Kessedjian ‘Note on provisional and protective measures ...’ p27.

<sup>349</sup> Kate Brown, ‘The Availability of Court-Ordered ...’ (2003) Int’l. Trade & Bus. L. Ann, Volume 8, p146.

<sup>350</sup> *Ibid* p147.

According to Article 809, the seeking party can obtain interim measures before the formation of the arbitral tribunal even if the matter is not urgent and there is a requirement for having the agreement of the other party in order to do so. On the contrary, under English law, when the arbitral tribunal has not been formed and the matter is not urgent, the seeking party can only request interim measures with the agreement of the other party.<sup>351</sup>

In the above sections, the jurisdiction of French courts before and after the formation of the tribunal was discussed. Subsequently, the general standards for granting such measures were set out. The next section will explore the different types of court-ordered interim measures under French law and their similarities and differences to the measures available under English law. This section will examine the interim payment order as the most popular measures under French law and will argue why such measure should be granted by arbitrators rather than national courts.

### **2.4.3 Various types of interim measures in French law**

#### **2.3.3.1 Conservatory measures**

There are two main purposes for granting conservatory measures. They are used either to preserve a situation or to create guarantees and prepare for enforcement of an award. There are certain situations which necessitate the grant of immediate and prompt measures in order to prevent factors that might cause damage or

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<sup>351</sup> Section 44(4) of English 1996 Arbitration Act.

interruption throughout the arbitration proceedings. These elements can have irreparable or irreversible consequences before the final ruling by the judge. This can be the case when the goal of measures is to impede a manifestly illegal competition or to prevent the practice of the fraudulent usage of a brand or to discontinue a construction project.<sup>352</sup>

***a) Conservatory seizure or attachment***

Due to the trans-border nature of international business, debtors can circulate assets and funds in order to hide them and this enables the debtors to announce themselves bankrupt or insolvent so they could avoid any payment to the creditors. Thus, it is necessary to prevent such disappearance of assets so the enforcement of the final award would be effective and meaningful.<sup>353</sup> French courts can order a pre-arbitration attachment, known as a conservatory attachment. Such a measure involves without notice proceedings which can be based on a monetary claim against a debtor.<sup>354</sup>

An attachment order blocks any transfer of assets that are the subject of the order. Such assets can be chattels, intangible property of the debtors by the third parties or any funds held by banks. Third parties, retaining the debtor's assets, become personally liable if any attached chattels or funds are sent or transferred to the debtor. This is very similar to what English courts grant as a freezing order addressing specific assets of the parties, regardless of who is in control or

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<sup>352</sup> Loic Cadet 'Introduction to French Civil Justice System...' p333.

<sup>353</sup> Guy Robin, 'Conservatory and provisional measures in international arbitration: the role of state courts' (2008) International Business Law Journal, Volume 3, p335.

<sup>354</sup> Maitre Jacques Buhart: 'Attachments and other interim court remedies in support of arbitration' 1984) International Business Law Review, Volume 12, p110.

possession of them.<sup>355</sup> Such measures may only be requested from national courts in relation to foreign arbitration proceedings regardless of the fact that the final award has been made or not.<sup>356</sup>

Similar to the approach taken regarding English freezing orders, conservatory attachments which address bank account of the respondent should be able to be cross-border enforceable and the ones concern immovable assets (such as houses or lands) should be left to French court to grant. However, Article 1468 of the 2011 Decree provides that “..only courts may order conservatory attachments and judicial security”. It seems this provision indicates that such measures can exclusively be granted by French courts and similar measures granted by foreign courts would not be enforced by French courts.

#### ***b) Judicially-granted guarantee***

This remedy can be requested in any claim against debtors that could establish the basis of an attachment. This measure, while allows the assets which are subject of order to be transferable by the debtor, enables the claimant to levy the related assets against any transferee. A judicially granted guarantee would effectively stop any transfer of the mortgage asset without the sum of the registered mortgage or pledged asset to be carved out of the proceeds of the transfer and positioned in escrow. A provisional judicial mortgage or a judicial pledge may be requested in respect of international arbitral proceedings. Although it is not compulsory for the claimant to show the existence of an emergency situation, a real and substantial

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<sup>355</sup> Coleen C. Higgins, *Interim Measures In Transnational Maritime Arbitration* (1990-1991) Tulane Law Review, Volume 65, p1523.

<sup>356</sup> Article 1449 of Decree 2011.

threat over future collection of the debt must be established. Such measures can only be granted by courts.<sup>357</sup> As such measures concern immovable assets such as buildings and lands, they would not be suitable for the cross-border enforcement mechanism.<sup>358</sup>

### **2.3.3.2 Injunctions and temporary restraining orders**

Under the second paragraph of Article 809 of the NCPC, the judges in chambers can order the execution of an obligation, even though it involves specific performance (*obligation de faire*). Failure to comply with the court's decision requiring the execution of an obligation can result in a monetary penalty.<sup>359</sup>

An injunction or interim restraining order can be applied on the basis of any civil or commercial claim. These remedies largely function as safeguards in order to maintain the status quo until the final award is rendered by arbitrators. The President in the chambers may grant a measure putting sums of money or shares of companies in escrow. The Court of Cassation has held that the existence of an arbitration agreement will not preclude a judge from awarding the legally permitted measures of instruction subject to the presence of a legitimate incentive for safeguarding or establishing of evidence on which the result of the case might depend.<sup>360</sup>

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<sup>357</sup> Kate Brown, 'The Availability of Court-Ordered ...' (2003) Int'l. Trade & Bus. L. Ann. Volume 8, p151.

<sup>358</sup> Please see 2.2.

<sup>359</sup> Article 491 of NCPC.

<sup>360</sup> *Atlantic Triton Company v. Republic of Guinea, Soguipeche*, Cour de Cassation [Supreme Court], First Civil Chamber, Not Indicated, 18 November 1986 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (1987 Volume 12) pp. 183 – 185.



Such remedies can entail expert reports or inspection orders for a property. This thesis submits that escrow orders (which sums of money or share in an escrow account) are suitable for the cross-border enforcement mechanism. This approach should also apply to orders for preserving status quo including injunctions (with exception of conservatory attachments and judicial guarantees).

### **2.3.3.3 Protective measures**

The Law of 1991<sup>361</sup> in its Article 1 states that: “[a]ny creditor may carry out a protective measure in order to safeguard his rights”. For this purpose, the Law 1991, has assigned an execution judge. Execution judges, who receive the assistance of the bailiff in enforcement of orders and in protective attachments, are the only ones who can implement these measures.<sup>362</sup> The execution judge is competent to order the removal of any measures which is abusive or irrelevant and to award damages against the creditor if the attachments are abused.<sup>363</sup>

A protective measure can be obtained from the court by any person who can establish the presence of circumstances which may threaten the recovery of the debt. The execution judge does not decide on the merits and he merely makes his decision (normally without notice) based on the evidence brought by the creditor.<sup>364</sup> In respect of intellectual property, there is a special measure known as a “counterfeit attachment”. Obtaining this order can put a provisional ban on

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<sup>361</sup> The Law of 1991 was added to the French civil procedure rule as an amendment.

<sup>362</sup> Catherine Kessedjian ‘Note on provisional and protective measures ...’ p31.

<sup>363</sup> Article 22 of the law of 1991.

<sup>364</sup> Article 68 of the Law of 1991.

copyright infringement or stop the all of the ongoing production.<sup>365</sup> The Code of Intellectual Property of France also enables attachment of the profits of the illegal copying.<sup>366</sup>

Similarly, videograms and phonograms can be subject to the attachment.<sup>367</sup> Other similar measure may be the temporary closure of the companies in which the unlawful actions have occurred. In order to enforce this without notice measure, the bailiff may visit the premises of the infringer with the assistance of police officers (if necessary). This measure is similar to what is granted under English law as a search and seizure order.<sup>368</sup> As discussed in respect of English search and seizure order, as such measures are usually without notice and against tangible properties and therefore could not enjoy the enforcement mechanism which this thesis proposes.

Another type of protective measure in French law is the probational measure (or the investigatory measure). Such a measure granted when there is a legitimate incentive to preserve or establish the evidence which has significance for the outcome of the dispute. This remedy can be ordered in chambers in the presence of the other party or as without notice proceedings. Article 145 has been particularly used in cases concerning construction contracts which do not need either urgency or a serious dispute.<sup>369</sup>

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<sup>365</sup> Articles L333-1 to L333-4.

<sup>366</sup> Articles L333-1 to L333-4.

<sup>367</sup> Article L335-5.

<sup>368</sup> Catherine Kessedjian 'Note on provisional and protective measures ...', p30.

<sup>369</sup> Maitre Jacques Buhart, 'Attachments and other interim court remedies in support of arbitration' (1984) Int'l Bus. Law, Volume 12, p108.

Because of the principle of privity, an arbitral tribunal cannot compel a third party to submit any evidence. Given that, state courts are allowed to order the submission or production of document held by the third party. The order under Article 1449 of the 2011 decree should be made by the president of the *Tribunal de Grande Instance* or of the *Tribunal de Commerce*. They can summon a third party so as to attain a copy of an official or private deed.<sup>370</sup> This thesis submits that such measures should also be able to use the cross-border enforcement mechanism.

#### **2.3.3.4 Interim payment (Référé-provision):**

Interim payment order is the most popular interlocutory procedure in French civil procedure. This swift procedure results in an executory decision of the court for the claimant who may immediately proceed to attach the assets of the defendant. Obtaining this order by the claimant increases his chance to negotiate a settlement with the defendant.<sup>371</sup> The aim of the interim payment is to grant a swift action to a creditor of good faith. This measure provides instant protection for the creditor against the tactics of debtors who, despite the existence of their indisputable debt, attempt to postpone the payment of their debt by starting legal proceedings and delays that such proceedings can create.<sup>372</sup> Nevertheless, because the judge makes

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<sup>370</sup> Hong-Lin Yu, Masood Ahmed 'The new French Arbitration Law: an analysis International Arbitration Law Review'(2012) Volume 15(1), p7.

<sup>371</sup> Wallace R. Baker, Patrick De Fontbressin 'The French Réfère procedure ...', p26.

<sup>372</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) p728.

a quick decision, there is higher risk of error by him, particularly in complex cases.<sup>373</sup>

There has been a debate in French Law on whether an interim provision, which provides both a conservatory and an executory purpose, is compatible with arbitration procedure.<sup>374</sup> Where there is an arbitration agreement, recourse to the interim payment raises two major difficulties. As the court responsible for interlocutory proceedings needs to establish the presence of the obligation that cannot be seriously challenged, it has the authority to order for this purpose any investigatory measures. Given that, sometimes, in order to grant interim payment order, the judge in chambers will inevitably examine the merits of the case beyond his competence, despite the fact that parties have already agreed that the case should be decided by arbitral tribunals.<sup>375</sup>

The second problem is that the court, by ordering interim payment, swaps the parties' roles in the arbitration, as the claimant whose credit has been satisfied, though temporarily, no longer has the liability of keeping the pace of the arbitral proceedings. In fact, the French judge may allow payment of the entire sum of a

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<sup>373</sup> Wallace R. Baker, Patrick De Fontbressin 'The French Réfère procedure...', p26. Additionally, ordering an interim payment does not require a guarantee to the defendant, accordingly, the plaintiff who obtains the interim payment may not have enough assets to reimburse the payment in the case that the defendant proves later to be not liable.

<sup>374</sup> *Ibid.*

<sup>375</sup> Yves Derains, Laurence Kiffer, *National Report for France* (2013) p51. It is argued that the granted interlocutory payment is provisional by nature and it does not bind the arbitrators or competent court which hears the merits. Accordingly, the possible infringement of the arbitrator's competence on the merits by the state judge is temporary. However, because of the other effect that has on the arbitration proceedings, this argument does not seem to be acceptable. Please also see Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) p723, 729.

debt which could essentially void the merits of the proceedings.<sup>376</sup> The creditor, by obtaining such an order, avoids the risk of insolvency of the opposite party in future, whereas, the judge in chambers by ordering the interim payment would anticipate the result of the case which will perhaps be confirmed in the final ruling by the arbitrators.<sup>377</sup> Accordingly, in many cases this could result in litigants giving up their pursuit of the case. As Veeder explains, “in reality ... the provisional order is final despite its legally provisional nature”.<sup>378</sup>

Due to such adverse effects, the Court of Cassation laid out two conditions for the grant of interim payments, where they are granted in support of an arbitration agreement. First, an application for the interim payment can only be made before the constitution of the arbitral tribunal.<sup>379</sup> Second, when the urgency of the case is established, the claimant must prove that recovery of his debt is at risk or he can wait no longer for a settlement.<sup>380</sup> Interim payment orders have clearly been very successful in the French litigation, grant of such measures. It is proposed here that the grant of such orders, even before the formation of the tribunal can have considerable effect on the arbitration process, particularly if such measures would be enforced in other Member States.

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<sup>376</sup> Guy Robin, ‘Conservatory and provisional measures in international arbitration: the role of state courts’ (2008) *International Business Law Journal*, Volume 3, p347.

<sup>377</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) p729.

<sup>378</sup> V. V. Veeder, ‘The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court In Support of the International Arbitral Process’ (2004) *ICCA Congress Series*, Volume 12, p247.

<sup>379</sup> Claude Goldman ‘Provisional measures in international arbitration’ (1993) *International Business Law Journal*, Volume 3, p24.

<sup>380</sup> Jean-Louis Delvolvé, Gerald H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, Second Edition (Kluwer Law International 2009) p121. The outcome of such requirements is that such interference by the judges must be an exception and subject to an urgency which is fully verified. Further, the debt must not be seriously challengeable and the amount of the liability must be clear.

This is why CJEU in *Van Uden*<sup>381</sup> has restricted the effect of such orders to the territorial jurisdiction of the granting court. In this case, parties (*Van Uden Maritime(VUM)* and *Deco Line (DL)*) had agreed that disputes were to be referred to arbitration in the Netherlands. VUM, claiming that DL had not paid certain invoices, started arbitration proceedings in the Netherlands and also applied to the court there for an interim payment on the basis that the non payment of invoices was affecting its cash flow. The Dutch court referred the case to the CJEU for a preliminary ruling as to whether a court had jurisdiction to hear an application for interim measure under the Brussels Convention 1968 Art.5(1) or Art.24.

The CJEU held that interim payment of a contractual obligation does not constitute an interim measure within the meaning of Article 24 ‘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’.<sup>382</sup> The CJEU clearly prevents the chance of cross-border enforcement of such measures because it believed that ‘an order for interim payment of a sum of money is, by its very nature, such that it may pre-empt the decision on the substance of the case’.<sup>383</sup>

Given above considerations, the thesis submits that interim payment orders should only be available for arbitral tribunals to grant. This is because tribunals are the forums which decide on the merits of the disputes and if they grant such a payment

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<sup>381</sup> [1999] 2 W.L.R. 1181.

<sup>382</sup> Ibid [47].

<sup>383</sup> Ibid [46].

order, it would be after the careful consideration of the merits and the possible outcome on the case.

## **2.5 Overview of the findings in French and English systems**

Even before the new decree of 2011, French courts had always attempted to have a non-interfering but supportive approach to international arbitration.<sup>384</sup> Having followed this tradition, the new decree of 2011 has made more clarifications in the allocation of power between courts and arbitral tribunals to grant provisional measures. In French law, the judge in chambers is competent to award various types of interim and protective measures in support of international arbitration. His competence is very extensive before the constitution of the tribunal. As discussed earlier, it seems to be clear that under the 2011 Decree, French courts cannot grant any interim measures after the constitution of the tribunal, except when they are asked to consider the grant of conservatory attachments and judicial securities which include bank guarantees, attachments and charging orders over property.<sup>385</sup>

Taking a similar approach, English arbitration law attempts to limit courts' intervention as far as possible. Before the formation of the tribunal, English courts can only grant provisional measures involving preservation of assets and evidence. Unlike French law, arbitration parties can still apply for provisional measures after the formation of the tribunal. Nevertheless, the applicant has to prove that the arbitrators have no power or cannot act effectively (effectiveness test).

French case law does not allow the grant of measures with an extra territorial effect such as worldwide freezing orders or measures addressing the person of the debtor

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<sup>384</sup> Kate Brown, 'The Availability of Court-Ordered ...' 2003 Int'l. Trade & Bus. L. Ann. Volume 8, p135

<sup>385</sup> Article 1449. Court de Cassation also has ruled that conservatory attachments can be requested from the courts after the formation of the tribunal. See Civ. 2ème, 08.06.1995, *SNTM Hyproc v. SNACH*, Rev. arb. 1996.125, n. Pellerin.



(*in personam* orders), as it holds that such measures are against its sovereignty.<sup>386</sup>

Nonetheless, it was argued that grant of such *in personam* measures would be compatible with the enforcement mechanism which this thesis is suggesting. This is because, for instance in respect of freezing order, one order be enough for all the respondent's assets within the EU. With the exception of the interim payment order, both jurisdictions grant similar provisional measures in support of arbitration proceedings. Accordingly, it was explained which types of measures should be included in the mechanism that this chapter suggests for the cross-border enforcement of provisional measures.

The next section will explain the enforcement mechanism provided by the Recast for court-ordered interim measures granted in support of judicial proceedings. It will also illustrate that the types of measures which are enforceable under the Recast. These illustrations would be necessary for the proposition of this chapter, which allows provisional measures granted by the seat court to use the same enforcement mechanism provided under article 2 of the Recast.

## ***2.6 Cross-border enforcement of interim measures***

It is believed that in transnational trade, presence of enforceable interim measures is a necessity for the accurate operation of any legal system and international arbitration is not an exception to this principle.<sup>387</sup> Nevertheless, as Veeder points out, it is rather surprising that the world wide system of international arbitration

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<sup>386</sup> Guy Robin, 'Conservatory and provisional measures in international arbitration: the role of state courts' (2008) International Business Law Journal, Volume 3, p342, 334.

<sup>387</sup> Veronica Ruiz Abou-Nigm 'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2005)Unif. L. Rev. n.s. Volume 10, p759.

law has been operating successfully without any universal system for the cross-border enforcement of provisional measures.<sup>388</sup>

Recognition and enforcement of interim measures in the EU is correlated with the jurisdictional issues provided by the Recast and national laws. The cross-border enforcement of court-ordered measures in support of arbitration process faces the same problems of interim measures granted in support of litigation.<sup>389</sup> There are substantial dissimilarities in relation to interim measures between the legal systems within the EU, such as France, Germany and Netherland.<sup>390</sup> While similarities can be found in different legal systems, there is no international arbitration framework for the cross-border enforcement of interim measures.

Due to the slow and lengthy process of commencing arbitral tribunals, they cannot act effectively at the time they are urgently needed. This is the time before the formation of the arbitral tribunal which is even longer in institutional forms of arbitration. Given that, all trading states within the EU would benefit from a harmonised international arbitration framework which has a good balance between jurisdictions of both arbitral tribunals and state courts.<sup>391</sup>

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<sup>388</sup> V. Veeder, 'The Need for Cross-border Enforcement of ...' (2004) ICCA Congress Series, Volume 12, p242.

<sup>389</sup> G. A. Bermann 'Provisional Relief in Transnational Litigation' (1997) Colum. J. Transnat'l L. Volume 35, p553.

<sup>390</sup> Campbell McLachlan 'The Continuing Controversy over Provisional Measures in International Disputes' (2005) Int'l L.F. D. Int'l Volume 5, p8. For example, the order of interim payment can be only found in the Dutch and French systems and this order has no equivalent in other systems.

<sup>391</sup> V. Veeder, 'The Need for Cross-border Enforcement of ...' (2004) ICCA Congress Series, Volume 12, p242.

The Recast provides new important changes into the cross-border enforcement of provisional measures. This clarification is in the second paragraph of Article 2 which provides:

“For the purposes of Chapter III, ‘judgment’ includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;”

This provision is illustrated in s.33 of the introduction:

“Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State”.

In Article 2, the Recast expressly includes the provisional measures granted by the court deciding on the merits inside the enforcement mechanism of the Recast. Nevertheless, the Recast only recognises the enforcement mechanism for the provisional measures granted by a court or tribunal which has jurisdiction under the Recast. It is clear that the term of “tribunal” does not apply to arbitration

tribunals.<sup>392</sup> Therefore, this section clearly removes any possibility for the cross-border enforcement of interim measures in support of arbitration proceedings which could use the enforcement mechanism available in the Recast.

Thus, arbitration parties can only obtain measures from Member States' courts separately and they are only enforceable within the jurisdiction of the granting court which would impose extra cost and time on arbitration parties. Nevertheless, under section 33 of the introduction, the Recast does not preclude any Member States' courts to enforce a provisional measure voluntarily. The Recast has rightly provided the exclusive jurisdiction for the court deciding on the merits to enjoy the cross-border enforcement of its interim measures within the EU. Nonetheless, it has failed to address the jurisdiction of arbitral tribunals and its effect on court-ordered interim measures in support of arbitration agreements.

It is also not clear whether the court deciding on the merits of the case should also comply with the condition provided in the decision *Van Uden*<sup>393</sup> prior to the Recast. In this case, the CJEU stated that '[t]he granting of provisional or protective measures on the basis of Article 35 is conditional on, amongst other things, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought'.<sup>394</sup>

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<sup>392</sup> Please see Annex II of the Judgment Regulation.

<sup>393</sup> [1999] 2 W.L.R. 1181.

<sup>394</sup> *Van Uden Maritime v. Kommanditgesellschaft* [1999] 2 W.L.R. 1181 [40]. The CJEU did not define the "real connecting link". It seems that correct approach would be that when there is an actual possibility of intervention in the jurisdiction where the order was granted and the granting court has the power to enforce sanctions against the defendant in the case of contempt of court, then the

This thesis submits that it is clear that the Recast has empowered the court deciding on the merits to have an inherent authority to grant provisional measures and there is no need for connecting link between the subject matter of the measures sought and territorial jurisdiction of the court deciding on the merits. Nonetheless, it seems this condition would still be applicable under Article 35 for the measures granted by any courts of Member States which are not deciding on the merits of the case.

The Recast in section 25 of introduction states that only provisional measures with a protective nature can be included in the scope of the Recast and therefore enjoy the enforcement mechanism when granted by the court deciding on the merits. The terms of “protective measures” or also called “interim measures of protection” have been used interchangeably with provisional measures. It seems that here this includes protective interim measures, such as orders to preserve assets or evidence. Such approach was mentioned by the CJEU in *Reichert v. Dresdner Bank*.<sup>395</sup> The court held that measures which fall within the scope of the convention “are intended to preserve a factual or legal situation so as to safeguard rights which are the subject of a substantive legal action.”

This clearly includes wide-ranging types of protective interim measures, such as orders to preserve assets or evidence. Some commentators believe such orders

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granting court may grant the provisional measure (Veeder, *The Need for Cross-border Enforcement of ...* 2004 Beijing Volume 12 (Kluwer Law International 2005) p 246 252 253) Therefore, freezing orders could be granted under Article 35 the Recast when they are actually enforceable against the defaulting defendant in England. Such a view can be seen in *the Virgin Atlantic* (2002) Rev crit 371).

<sup>395</sup> Case 261/90 [1992] E.C.R I-2149.

include freezing orders or search orders too.<sup>396</sup> But, it seems that enforcement of such measures have certain restriction. First, these measures often granted without notice to the other party and would make the cross-border enforcement of such orders very difficult. This is because the Recast has expressly provides in s.33 of the introduction that without notice measures cannot be enforced under this Regulation (Although the recast allows national courts to enforce such measures voluntarily).

Second, as discussed before, because search order concerns the properties such as buildings, enforcement of such measures is very much as such properties related to the sovereignty of the national court. It seems the only enforceable option in under enforcement mechanism of the Recast would be with-notice freezing orders addressing bank accounts, shares or goods. Further, as proposed previously (at 2.2.2), *in personam* freezing orders should be available under such mechanism as it saves time and cost for the claimant.

In the current situation of international arbitration in the EU, the cross border enforcement of measures granted by the court deciding on the merits can cause some unpleasant outcomes for the arbitration process. Imagine that a dispute arises between Spanish and English parties and there is an arbitration agreement in the underlying contract which provides England as the seat of the arbitration. The Spanish party starts proceedings in Spain and the court decides that the arbitration agreement is not valid and subsequently starts proceedings on the merits of the

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<sup>396</sup> G Maher, B Rodger, 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' (1999) *International and Comparative Law Quarterly*, Volume 48, p 305. V. Veeder, *The Need for Cross-border Enforcement of ...*' (2004) *ICCA Congress Series*, Volume 12, p246.

case. Later, the English party starts arbitration proceedings in England and arbitrators decide that there is an arbitration agreement and begin the arbitration proceedings. The Spanish court grants an escrow order against the English party to put the money inside a joint account with the Spanish party. Now, under the Recast, the Spanish party can enforce such an order in England and this can considerably affect the on-going arbitration in England.

It was explained above how the enforcement mechanism of the Recast works for provisional measures and what types of measures are included in the enforcement mechanism of the Recast. While such illustrations only apply to provisional measures granted in support of judicial proceedings, they are necessary to what this thesis wants to offer now.

The structure provided in the 2012 Recast, would remove the chance of cross-border enforcement of court-ordered provisional measures in support of arbitration proceedings. This thesis submits that a supervisory role for the seat court should be recognised by the Recast. This recognition should exclusively enable the seat court to grant provisional measures in support of arbitration proceedings which could use the enforcement mechanism in the Recast.

As mentioned in the first chapter, the judicial support that the seat court could have in arbitration proceedings was recognised by the European Commission in Article 29(4) of its proposal for 2012 Recast.<sup>397</sup> While the main point of the suggested provision was in relation to the jurisdiction of the seat court on

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<sup>397</sup> Please see Anti-suit injunctions chapter 1.9.1.

validation of the arbitration agreement, this indicates the important supporting role that the seat court can play in international arbitration within the EU.

Although the seat court is not the forum deciding on the merits of the case, it is usually chosen intentionally by the parties because of its judicial advantages. This is mainly because of the judicial support from the seat court and the trust that parties place in such a judicial system. Additionally, the law applicable to the tribunal's authority to award interim measures is the procedural law of the arbitration which normally is the arbitration law of the seat.<sup>398</sup>

As Morison J provided in *Econet Wireless* "...Mr. Brindle submitted on behalf of the respondents, *"The natural court for the granting of interim injunctive relief must be the court of the country of the seat of the arbitration, especially where the curial law of the arbitration is that of the same country."*<sup>399</sup>

Accordingly, since the seat court is the most knowledgeable forum on its own national law, the seat court is in the best position to grant urgent interim measures in support of arbitration agreement and therefore, such measures should enjoy the enforcement mechanism in the Recast. Further, this would save cost and time for arbitration parties as they only need to obtain one measure (at least for many of provisional measures) from the seat court and try to enforce in other Member

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<sup>398</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2045.

<sup>399</sup> *Econet Wireless Ltd v Vee Networks Ltd* [2006] 2 Lloyd's Rep. 428 at 433.



States. Admitting such a role for the seat court also prevents parties from forum-shopping which can be applying for the same injunction from different states.<sup>400</sup>

The importance of creating such a role for the seat court should not be underestimated as application for interim measures is mostly made to the state courts before the formation of the arbitral tribunal and the seat court can help to protect the parties' rights promptly. Nonetheless, the role of the seat court after the formation of the tribunal should be limited unless the arbitral tribunal cannot act effectively. When the tribunal is formed, the focus should be on the enforcement of tribunal-granted measures in other Member States. This matter will be discussed thoroughly in the fourth chapter.

Recognising such a power for the seat court by the Recast and exclusive jurisdiction of the seat on the validation of the arbitration agreements can create certainty in the use of provisional and encourage arbitration parties to select their seat of their arbitration carefully.

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<sup>400</sup> *Swift Fortune Ltd v Magnifica Marine S.A.* [2008] Lloyd's Rep. 54. In this case, the judge believed claiming the same relief by the buyer in English court when it had already been sought in Singapore' court is forum shopping. He provided "In one sense that is obvious. Having failed in Singapore, the claimant now embarks on a further attempt to get the same relief in England." [19].

## 2.7 Conclusion

Interim measures are an essential means for any system of dispute resolution. International commercial arbitration as one of the most used dispute resolution techniques in the world requires court-ordered interim measures in order to protect parties' rights and interests. This is because of two main reasons: a) from the moment that any dispute arises between parties till the formation of the arbitral tribunal, national courts are the only forum that can protect parties' rights effectively; and b) some interim measures cannot be obtained from tribunals such as search and seizure orders or conservatory attachments.

In this chapter, court-ordered interim measures were examined and compared in England and France. Overall, the approaches of both English and French systems towards court-ordered interim measures are similar. It seems clear that under the 2011 Decree, French courts cannot grant any interim measures after the constitution of the tribunal, except when they are asked to consider the grant of conservatory attachments and judicial security.<sup>401</sup> Taking a similar approach to French law, English arbitration law attempts to limit courts' intervention as far as possible. However, unlike French law, arbitration parties under English law can still apply for provisional measures after the formation of the tribunal (subject to satisfying the effectiveness test).

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<sup>401</sup> Article 1449. Court of Cassation also has ruled that conservatory attachments can be requested from the courts after the formation of the tribunal. See *SNTM Hyproc v. SNACH*, Cour de Cassation (2Ch. civile), 8 June 1995, *Revue de l'Arbitrage*, (1996) Comité Français de l'Arbitrage, Volume 1996, Issue 1 pp. 125 – 124.

This thesis submits that all Member States should take similar approaches in restricting the grant of court ordered-interim measures after the formation of the tribunal. This would encourage parties to seek interim measures from the tribunal and reduce intervention by national courts in arbitration proceedings.<sup>402</sup>

Granting court-ordered interim measures without an international regime for the cross-border enforcement of such measures create extra costs and more complication for arbitration parties. This is because parties, due to the international nature of the case, must sometimes apply for different states with different legal systems so as to obtain the required provisional measures. The existence of a legal framework enabling the cross-border enforcement of such measures is of great importance in the EU in the context of the single European market, which encourages and promotes free movement of its citizens, assets and trade within the EU.

In light of this, the EU has tried to design the necessary judicial framework for the free movement of judgment. Part of this framework is obtaining and enforcing provisional measures in litigation within the EU which now expressly enjoys the benefit of the free movement within the EU. While the Recast has provided the required structure for the circulation of the provisional measures (in support of judicial proceedings) within the EU, there is no attempt from international arbitration conventions, to address a structure for the cross-border enforcement of

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<sup>402</sup> For instance, in Germany, arbitration parties can choose to apply for provisional measures from the tribunal or the court, even after the formation of the tribunal. Ragnar Harbst, 'Arbitrating in Germany' (2004) *Arbitration*, volume 70(2), p94.

provisional measures (in support of arbitration proceedings). The result of such a failure is that the jurisdiction of the Member States' courts to grant such measures in support of arbitration is tangled and twisted with their jurisdiction under the Recast.

The 2012 Recast has allowed the court deciding on the merits to be the only forum to grant interim measures which could use the Recast enforcement mechanism. This removes any hope that cross-border enforcement could be used in support of arbitration proceedings. Based on this framework, when parties want to obtain any interim measures in support of arbitration proceedings, they need to apply to the relevant Member States' court separately, which would impose extra cost and time for arbitration parties. This thesis submits that a supervisory role for the seat court should be recognised by the Recast. This recognition should be in the way that interim measures granted by the seat court (in support of arbitration proceedings) should use the enforcement mechanism provided by the Recast for the interim measures granted by the court deciding on the merits.

Although the seat court is not the forum which decides on the merits of the case, it is usually chosen intentionally by the parties because of its judicial advantages. This is mainly because of the judicial support from the seat court and the trust that parties place in such a judicial system. Further, the law applicable to the tribunal's authority to award interim measures is the procedural law of the arbitration which normally is the arbitration law of the seat. Accordingly, due to the knowledge of the seat court of its own national legislation, the seat court is in the best position to

grant an urgent interim measure in support of the arbitration agreement and these measures should enjoy the enforcement mechanism in the Recast. Moreover, this would save cost and time for arbitration parties as they only need to obtain one measure from the seat court and try to enforce it in other Member States.

The importance of creating such a role for the seat court should not be underestimated as application for interim measures is mostly made to the state court before the formation of the arbitral tribunal and the seat court can help to protect the parties' rights promptly. The role of the seat court after the formation of the tribunal should be limited unless the arbitral tribunal cannot act effectively or where there is a need for measures such as without notice conservatory attachments. When the arbitration proceedings begin, the focus should be on enforcement of the arbitral granted measures in other Member States.

This chapter illustrated the different provisional measures available for parties in English and French jurisdictions. It was also demonstrated which types of measures are suitable for cross-border enforcement. Because the Recast in s.33 expressly does not allow the cross-border enforcement of without notice measures, suggesting the enforcement of similar measures in support of arbitration proceedings would not be reasonable. This thesis submits that with-notice freezing orders targeting bank accounts or shares have a better chance to be enforced outside the jurisdiction of the granting court. Similar to the approach that was taken with respect to English freezing orders, only with-notice conservatory attachments which address bank accounts of the respondent should be able to be

cross-border enforceable and the ones concerning assets such as houses or lands should be left to French courts to grant.<sup>403</sup>

It is also proposed that *in personam* orders such as freezing orders should be granted and enforced under the suggested enforcement mechanism. This is because granting one *in personam* order addressing the entire respondent's assets (such as bank accounts, shares and goods) would be more practical as the claimant can enforce the granted order in any Member States against any of respondent's assets. This removes the need for obtaining different freezing orders for different assets of the respondent.

This thesis submits that escrow orders (which put sums of money or shares in an escrow account), orders for preserving status quo including interim injunctions, orders requiring the sale or preserving goods, orders to produce evidence and probational measures should enjoy cross-border enforcement. Given that search (and seizure) orders in England and counterfeit attachments in French law should not be enforced out of the jurisdiction of granting courts. As discussed, such orders are usually granted without notice and require accessing the premises of the respondent, which is closely connected to the sovereignty of the enforcing states. Finally, this thesis submits that interim payment should be left to the tribunal to grant, as it has major adverse effects on the arbitration process and even if such a

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<sup>403</sup> As discussed in 2.4, It is not clear whether French court would enforce such orders as Article 1468 of the 2011 Decree provides that “..only courts may order conservatory attachments and judicial security”. It seems this provision indicates that such measures can exclusively be granted by French courts and similar measures granted by foreign courts would not be enforced by French courts.

measure is granted by national courts, it should not enjoy cross-border enforcement.

# Chapter Three: *Provisional measures granted by arbitral tribunals*

## 3.1 *Introduction*

Chapter one proposed changes to international commercial arbitration to the effect that: i) the Recast recognises the exclusive jurisdiction of the seat court to make a *prima facie* examination of the arbitration agreement before the constitution of the arbitral tribunal, ii) the Recast recognises the exclusive jurisdiction of the arbitral tribunal for ruling on the validity of arbitration agreement after its constitution, iii) arbitrators should grant anti-suit injunctions. It was explained that the above mentioned proposals are a necessary foundation for the EU to grant and enforce provisional measures. A recognised validated arbitration agreement within the EU would allow parties to have a greater chance to apply for provisional measures from different Member States' courts or to enforce the provisional measures granted by the seat court in other Member States. When the seat court or the arbitral tribunal validates the arbitration agreement, other Member States' courts should grant or enforce provisional measures granted in the support of the arbitration agreement.

Chapter two proposed that the Recast should recognise a supervisory role for the seat court so the provisional measures granted in support of arbitration could also enjoy the enforcement mechanism within Member States. This would ensure that arbitration parties have timely access to the grant and enforcement of provisional measures so their rights and interests would be protected before the formation of



the tribunal. Applying the proposals of chapter one and two regarding the seat court would create certainty and efficiency for the use of court-ordered provisional measures, particularly before the formation of arbitral tribunals.

Nonetheless, when the tribunal is formed and it has confirmed the validity of the arbitration agreement, it becomes the main forum to grant provisional measures. This is because, as proposed in chapter two, courts of all Member States should restrict the grant of court ordered-provisional measures after the formation of the tribunal. Thus, the role of the arbitral tribunal as the main forum for granting provisional measures becomes very significant. Based on this approach, this chapter will advance proposals which would increase the granting of and compliance with tribunal-ordered provisional measures.

This chapter proposes that arbitration laws of all Member States should recognise an inherent power for arbitrators to grant provisional measures. This removes the need for any stipulation by parties in the arbitration agreement and increases the chance for parties to seek provisional measures from the forum which has the best knowledge on the merits of the case. Second, such an inherent power for arbitrators is necessary to what was suggested in chapter one which is granting anti-suit injunctions by arbitrators.

This is because the power of arbitral tribunals to grant such injunctions is predominantly derived from their authority to grant provisional measures. Accordingly, having such an inherent authority is necessary for arbitral tribunals to grant anti-suit injunctions. Further, this chapter proposes that arbitrators should be

able to grant pecuniary fines in case of non-compliance by the parties. Finally, an argument will be advanced as to why emergency arbitrators should be recognised as normal arbitrators and accordingly incorporated into the arbitration laws of Member States.

The above mentioned prepositions have two major effects. First, it creates certainty regarding the power of arbitrators to grant provisional measures and accordingly, encourages the parties to seek provisional measures from arbitral tribunals. Second, recognising the same power for granting different types of measure by all Member States' laws would be essential for the propositions of chapter four. If some Member States do not recognise the authority of arbitral tribunals to grant these measures or the type of measures granted by tribunals, it probably will not enforce such measures either and accordingly, any suggestion in respect of enforcement of such measures would be meaningless.

In this chapter, after a general overview of interim measures in international commercial arbitration, English and French arbitration laws will be analysed respectively. As well as presenting their advantages and disadvantages, it will be argued how the power of arbitrators can be improved in respect of awarding provisional measures. In the following section, the granting of without notice measures will be discussed and this thesis will argue why awarding such measures should be recognised. In the final section, the emergency arbitrator procedure will be discussed. In the conclusion, this chapter will answer the second question of the this thesis, namely, *Is it possible to harmonise the different approaches taken by*

*Member States' arbitration rules on the jurisdictions of national courts and arbitral tribunals in respect of granting provisional measures?*

### ***3.2 Jurisdiction of arbitral tribunals for granting provisional measures:***

Throughout the last 25 years, international arbitration has developed considerably. One of the main reasons for this development is the globalization of the world economy which created the opportunity for companies and people to transfer their assets from one jurisdiction to another with ease and speed.<sup>404</sup> One of the outcomes of these developments is the increasing need for provisional measures, so the parties' rights could be protected promptly during the arbitration process. Currently, most national arbitration laws and International arbitration rules authorise arbitral tribunals to grant provisional measures and arbitrators are gradually given more powers in this respect.<sup>405</sup>

Such improvements in respect of tribunal-ordered provisional measures can be seen in three main aspects: a) Recognising the power of arbitrators to grant provisional measures. In some states such recognition provides an inherent right for arbitrator which does not need the stipulation of the parties (The approach taken by 2011 Decree of France), b) Empowering the arbitral tribunal with the same authorities that state courts enjoy and sometimes take some authority from courts

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<sup>404</sup> Kaj Hobér, 'Interim Measures by Arbitrators' (2006) *International Arbitration*, Volume 13, p721.

<sup>405</sup> Chester Brown, 'The Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration' (2013) *ICCA Congress Series*, Volume 17, p280. Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International; Kluwer Law International 1999) p717.

and confer it exclusively on tribunals, such as granting security for costs,<sup>406</sup>c) Proving the emergency arbitrator procedure which enables arbitration parties to obtain interim measures before the constitution of the arbitral tribunal.<sup>407</sup>

However, there are still major dissimilarities between the EU Member States on authority of arbitrators to grant provisional measures. For instance, England empowers arbitrators to grant provisional measures if parties stipulate such authority in the contract, whereas in French law, arbitrators enjoy this power without the stipulation of the parties.<sup>408</sup> More importantly, some national laws in the EU do not even recognise such a power for arbitral tribunals at all.<sup>409</sup> Further, although major international arbitration rules have recognised emergency arbitrator procedure, none of the EU Member States has incorporated it in their national laws.<sup>410</sup> While without notice measures are very much needed in international commercial arbitration, there is still a major controversy over the granting of such measures by arbitrators.<sup>411</sup>

Such inconsistencies are due to various reasons; it is argued that because arbitral tribunals do not have the coercive power of courts, they should not be able to grant provisional measures and based on such an argument, arbitration law of certain

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<sup>406</sup> Article 38, 39 of UK Arbitration Act 1996. Before this act primarily courts could grant security for costs unless parties agree otherwise.

<sup>407</sup> Article 9B of LCIA Arbitration Rules, Article 29 of ICC Arbitration Rules.

<sup>408</sup> Donald Francis Donovan, 'The allocation of authority between courts and arbitral tribunals to order interim measures: a survey of jurisdictions', (2005) ICCA Congress Series, Volume 12, p214. Germany has also recognised the inherent ability of arbitrators to grant provisional measures.

<sup>409</sup> Such as Italy and Greece. Pierre A. Karrer, 'Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please', ICCA Congress Series, (2000) ICCA Congress Series, Volume 10, p98.

<sup>410</sup> Article 9B of LCIA Arbitration Rules, Article 29 of ICC Arbitration Rules.

<sup>411</sup> Without notice measures are provisional measures ordered without granting a prior hearing to the party against whom the measure is directed. Marianne Roth, 'Interim measures' (2012) Journal of Dispute Resolution, Volume 2012, p430.

states only allowed courts to grant interim measures in support of arbitration proceedings.<sup>412</sup>

The other criticism is regarding the time that would inevitably take to constitute the arbitral tribunal to grant such measures, whereas national courts are established and available almost at any time. However, it is now widely acknowledged that the arbitral tribunal is often the most appropriate forum to grant specific provisional measures for each case.<sup>413</sup> Particularly, when the arbitral tribunal has already been formed and the arbitration proceedings have initiated, arbitrators, who are normally expert in the area of the dispute, would be more aware of the legal and factual details of the case than a state judge.

Moreover, the tribunal, as the forum which eventually makes the final decision, is in a better position to evaluate the chances of final success in the substantive dispute and to decide the effect of the possible interim measure on the case and accordingly whether it should be granted or not. Arbitrators could distinguish better if the provisional measure's application intended for dilatory, tactical or offensive purposes rather than in pursuit of a legitimate interest.<sup>414</sup>

Furthermore, obtaining interim measures from arbitral tribunals would create less cost and complications for the parties. This is because in domestic arbitration,

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<sup>412</sup> Italy, Greece, the Swiss inter-cantonal Concordat, Finland, Pierre A. Karrer, 'Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please', (2000) ICCA Congress Series, Volume 10, p98.

<sup>413</sup> Jeff Waincymer, *Procedure and Evidence in international Arbitration*, (Kluwer Law International 2012) p619.

<sup>414</sup> Julian Lew and Loukas Mistelis, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) p589.

parties need to deal with only one national court (if its intervention is needed), but in international arbitration parties have to deal with different courts in the different jurisdiction. This explains why applications for interim measures from the arbitral tribunal in international commercial arbitration is approximately twice the number such an application in domestic arbitration.<sup>415</sup>

The following section will examine the main requirements used by arbitrators to grant provisional measures. It will then submit that national or international arbitration rules should avoid creating mandatory provisions regarding such requirements. They instead should consider factors including the location of the arbitration seat, the circumstances of the case and the law applicable to the arbitration agreement.

### ***3.3 Requirements for granting provisional measures***

The majority of national legislation and institutional rules provide little detail regarding the standards of awarding interim orders. Usually, arbitral tribunals are given a broad discretion to exercise such a power. Traditionally, arbitrators have considered principles which are common to most legal systems in granting of such measures.<sup>416</sup> This creates the maximum flexibility and adaptability for arbitral process. Clearly, each arbitration case is different and must be decided based on its own fact and circumstances. Nonetheless, such an approach does not help the

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<sup>415</sup> A study carried out by the AAA indicated that the number of requests for interim measures in international commercial arbitrations was nearly double the number of such requests in domestic arbitration; see Naimark-Keer, 'Analysis of UNCITRAL, Questionnaires on Interim Relief' (2001) Mealey's International Arbitration Report, p23.

<sup>416</sup> Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, (6th edition Oxford University Press 2015) 5.31.

consistency and predictability of interim measures. This issue becomes increasingly important because, as stated in the introduction of this chapter, the need for interim measures is growing in international arbitration. Two main requirements usually taken into consideration by arbitrators are:

**a) *A likelihood of success in the merits***

Most arbitrators require the seeking party to demonstrate that there is a possibility to succeed on the merits of the claim. This is an essential precondition for award of interim measures for most arbitrators.<sup>417</sup> While arbitrators can take dissimilar approaches on how “possibility to succeed” should be considered, surprisingly, most of them do not require the level of “possibility to succeed” to be more than likely.<sup>418</sup> This view seems to be rational as it is hard to speculate the final decision on the dispute when the interim measure is sought. This is because such measures are normally requested in the early stages of the arbitration. Further, the responsible tribunal, in order to award the interim measure, can only make a *prima facie* examination of the case and cannot prejudice the merits of the case.<sup>419</sup>

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<sup>417</sup> By contrast, Donovan believes that this should not be the requirement in the international commercial arbitration and he states “The criterion of success on the merits is in direct contrast to the practice of international courts and tribunals, which only consider the merits of the case to the extent necessary to determine if *prima facie* jurisdiction exists”. Donald Francis Donovan, ‘The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward’ (2003) ICCA Congress Series, Volume 11, p93.

<sup>418</sup> Jose Maria Abascal Zamora, ‘The Art of interim measures’ (2006) ICCA Congress series, Volume 13, p751.

<sup>419</sup> Nigel Blackaby , Constantine Partasides , et al., *Redfern and Hunter on International Arbitration*, (6th edition Oxford University Press 2015) 5.31.

**b) Urgency and presence of irreparable harm**

Most arbitrators deem the “urgency” to be a key requirement for awarding interim orders, though it does not appear in any of the modern arbitration rules. Some commentators believe that determining what is “urgent” is complicated and difficult.<sup>420</sup> It appears that the concept of “urgency” is closely connected to demonstrating “irreparable harm”.<sup>421</sup> Requesting party must show that if the measure is not awarded, the harm will not be reparable later. He/she must demonstrate that damage will not be adequately reparable, if the relief is not order. When the requesting party proves the presence of the irreparable harm, this would create the urgent situation itself.<sup>422</sup> It seems that such an approach is reasonable, because the main goal of provisional measures is to protect the parties rights and interests. Accordingly, when a party shows that his interest should be protected immediately or it cannot be adequately reparable later, this would create the urgency for arbitrators to grant provisional measures.

Such requirements mentioned in some applicable institutional rules, or otherwise stipulated in the parties’ agreement, are theoretically binding, just like other term in the parties’ contract. Nevertheless, no national arbitration legislation has addressed the issue of the requirements applicable for awarding interim orders by

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<sup>420</sup> Hilary Heilbron, *Interim Measures in International Commercial Arbitration – Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?* (2015) ICCA Congress Series, Volume 18, p241. Jose Maria Abascal Zamora, *‘The Art of interim measures’* (2006) ICCA Congress series Volume 13, p 763.

<sup>421</sup> Irreparable harm is understood as harm not adequately addressed through monetary compensation. Francisco González De Cossío, *‘Interim Measures in Arbitration: Towards a Better Injury Standard’* (2015) ICCA Congress Series, Volume 18, p274.

<sup>422</sup> *Ibid.*



an arbitral tribunal, much less providing mandatory ones.<sup>423</sup> It seems rational that national laws do not consider providing mandatory provisions for the standards of granting interim measures believing that such considerations should be left to arbitrators.

Because arbitration proceedings are confidential, what arbitrators are generally considering in granting such measures can be very difficult to access.<sup>424</sup> While national rules, arbitration rules of international institutes such as LCIA or ICC are silent on standards of awarding provisional measures,<sup>425</sup> the only set of international arbitration rules which expressly discusses such standards is UNCITRAL Model Law Article 17A which basically restating what were mentioned above as the main requirements used in international arbitration.<sup>426</sup>

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<sup>423</sup> The exception to this tendency in the national legislation can be what English law has provided in respect of security for costs in s.38 which prohibits the tribunals to grant security for the cost for the arbitration on the ground that the claimant is an individual ordinarily resident outside the UK.

<sup>424</sup> Hilary Heilbron, *Interim Measures in International Commercial Arbitration – Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?* (2015) ICCA Congress Series, Volume 18, p241.

<sup>425</sup> Although ICC arbitration rules have been silent on this issue, looking at ICC awards indicate that the most required precondition for acquiring provisional measures from an arbitral tribunal. These are very similar to what were discussed: 1) Apparent jurisdiction by the of the arbitral tribunal to rule on the case( arbitration clause) ICC Award 8766, ICC Bul, 2000, vol.1111/1. p83. 2) Reasonable chance of success on the merits. ICC Interim Award, 10973, YCA 2005, p833. 3) Urgency or imminent injury to the rights of the applicant. ICC Interim Award, 10973, YCA 2005, p83. 4) Risk of substantial harm in the absence of the protection by the provisional measures. ICC Interim Award, 10973, YCA 2005, p83. 5) The future final judgment on the merits must not be prejudiced. ICC Interim Award, 10973, YCA 2005, p.83 6) Providing security for the requested measures from Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007) p530.

<sup>426</sup> Article 17 A. Conditions for granting interim measures:

(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.

This thesis submits that though the general standards mentioned by the Article 17A are very useful for arbitrators or councils, such standards can very much depend on factors like the circumstances of the case, where the seat of the arbitration is located and more importantly the law applicable to the arbitration agreement (particularly where it is chosen by the parties). For instance, arbitrators should consider procedural law of the applicable law or law of the seat while granting interim measures. Thus, while the general principles mentioned in Article 17A should be followed by the arbitrators, it appears to be reasonable to leave the extent of application of such standards to arbitrators.

It should be noted that such criterion can also depend on the measure requested by the parties. The more extensive the measure, the more convincing the requesting party should be. If a party applies for measures such as preservation of property or interim payment, because of the effect that such measures can have on the respondent, the requesting party has a harder task to persuade the arbitrators to grant those measures compare to when he applies for a measure like production of evidence.<sup>427</sup> Better to say, the greater the possible effect of the measure on the respondent, the higher the bar for satisfying the tribunal to grant it.<sup>428</sup> Accordingly, because of such an effect, the standards previously mentioned should be considered in the context of each of these specific remedies and as Born puts it '...

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<sup>427</sup> Hilary Heilbron, *Interim Measures in International Commercial Arbitration – Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?* (2015) ICCA Congress Series, Volume 18, p257.

<sup>428</sup> Donald Francis Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' (2003) ICCA Congress Series, Volume 11, p120.

it is important to avoid mechanically transposing standards adopted for one form of provisional measures to other types of relief.<sup>429</sup>

In the following two sections, arbitration laws of England and France will be examined respectively. These sections will demonstrate the different approaches taken by England and France regarding the jurisdiction of arbitral tribunals to grant provisional measures. Subsequently, it will be proposed that the arbitration laws of all Member States should provide an inherent power for arbitrators to grant provisional measures. These sections will also demonstrate the types of provisional measures available for arbitral tribunals in both English and French arbitration laws throughout the arbitration proceedings. Accordingly, it will be proposed that all types of measures, particularly injunctions should be obtainable from tribunals throughout the arbitration proceedings.<sup>430</sup>

These propositions will enable parties to obtain all kinds of provisional measures from the tribunal at any time of the proceeding and will accordingly reduce the need to seek provisional measures from national courts. Further, illustrating different tribunal-ordered measures would be important for proposals of chapter four. This is because in the following sections, it will be explained that which types of tribunal-ordered provisional measures are suitable for the cross-border enforcement mechanism that are suggested in chapter four.

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<sup>429</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2489

<sup>430</sup> Exceptions to this point would be provisional measures which are provided exclusively for state courts such as conservatory attachments and judicial guarantee in the French system. Please see 2.6.

### 3.4 England

#### 3.4.1 Jurisdiction of arbitral tribunals:

As explained in the first chapter, under English law, the task to award provisional measures is primarily allocated to arbitral tribunals and courts can only act where the tribunal has no power or is unable to act effectively (effectiveness test).<sup>431</sup> Nevertheless, arbitral tribunals in England do not enjoy the authority to order interim measures by default and parties need to opt in such a power for tribunals in their arbitration agreements by stipulating it or by incorporating a set of arbitration rules which recognises such a power (such as Art.25.1(c) of LCIA rules).<sup>432</sup> As s.38, s.39 are not included in mandatory provisions 1996 Act (annexed to the Act in Schedule One), parties are free to agree against them. This can also be the situation where the parties agree on a set of arbitration or a procedural law which their provisions can be contrary to s.38 and s.39.

As mentioned above, the tribunal needs the parties to opt-in its power to grant provisional measures. Nonetheless, this stipulation does not happen often unless parties agree to a set of arbitration rules which provide an inherent power for the tribunal to do so.<sup>433</sup> Currently, most of international arbitration rules and advanced arbitration laws (such as France and Germany) have recognised such an inherent

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<sup>431</sup> Please 2.2.1(I).

<sup>432</sup> Although it was the initial draft of 1996 Act suggested that arbitrators should have such a power by default, this restriction was later added during the consultation process because of the strong concerns that had been stated by practitioners as they deemed that such powers could be abused by the arbitrators. David Brynmor Thomas' Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996' (1997) *Arbitration International*, Volume 13 Issue 4) p405.

<sup>433</sup> Mark Cato. *Arbitration and practice and procedure. Interlocutory and Hearing problems* (second edition LLP 1997) p319, 320.

power for the arbitrators.<sup>434</sup> The interesting fact is that in the first draft of the 1996 Act, the inherent power of arbitral tribunals was included, but it was later removed.<sup>435</sup> Some have praised such an approach by English law as a well-designed application of the fundamental principle of party autonomy. However, as stated before, parties do not use such a freedom provided by the 1996 Act, as arbitration clauses are often drafted without much attention to details of the *lex arbitri* (the arbitration law of the seat).<sup>436</sup>

There were some concerns in DAC report on giving such a power to the tribunal as an inherent right. It should be noted that it has been almost 20 years since the 1996 Act and the international arbitration has progressed towards giving more inherent powers to tribunals including the authority to order interim measures. Having regards to the approaches taken by the main arbitral institutes (ICC and LCIA) and the EU states such as France, it indicates that the inherent ability of tribunals to order interim measures has become a norm in international arbitration. Accordingly, this thesis proposes that all Member States' arbitration laws, as well as English law, should provide an inherent power for tribunals to grant provisional measures.

When parties agree that the arbitral tribunal should have such a power, they opt in s.39 which automatically triggers the effectiveness test. This means that courts can only grant provisional measures when the tribunal has not been constituted or it is unable to act effectively. Such a system restricts the access to courts after the

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<sup>434</sup> J. Schaefer, 'New Solutions for Interim Measures...' p28.

<sup>435</sup> Dac Report: Clause 39. NO200 provides In the July 1995 draft Clauses, this power did not require the agreement of the parties. As a result of responses, we have concluded on further consideration that this is necessary.

<sup>436</sup> J. Schaefer, 'New Solutions for Interim Measures...' p28,29.

constitution of the tribunals. This is the right approach taken in English law as it prevents the unnecessary recourse to courts, similar to what French system has taken in its 2011 Decree.

Parties' choice on a different procedural law can affect the scope of powers granted by law to the arbitrators and the way in which this is conducted. For example, if German law has been agreed as the governing law, the tribunal would enjoy unlimited power to award interim measures unless parties decide otherwise. This would include the German freezing order. When parties agree to give the arbitrators such powers, they cannot later avoid that and recourse to the court for provisional orders that can be granted by arbitrators. The only exception to this principle is the request for without notice freezing injunction and search orders which are not available for the tribunal to grant.<sup>437</sup>

Unlike the tribunal's authority, powers of English courts in respect of interim measures cannot be extended by parties' agreement or by the law that parties have chosen. This means that arbitration rules or the chosen law which might provide the parties the access to the national court at any time of arbitration (such as Germany) do not have any effect as they are inconsistent with s.44. This is because English courts are bound by the restrictions provided in the s.44(3). Although the parties can depart from what s.44 provides, this deviation can only be towards restricting court's power, not expanding it. This is particularly the case in respect of

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<sup>437</sup> *Ibid.*

s.44(5).<sup>438</sup> Accordingly, agreeing to a procedural law which excludes courts' assistance in respect of interim measures would be considered as opting out of s.44 and is permissible in English law.

### **3.4.2 Powers of arbitrators to grant provisional measures under 1996 Act**

#### ***a) Section 38 of the 1996 Arbitration Act***

S.38<sup>439</sup> deals with general powers of the tribunal to order provisional measures, particularly subsections 3, 4 and 6 which refer to interim remedies such as security for cost of the arbitration or preservation of evidence. These powers conferred by s.38 resemble the powers given to courts in this regard (in s.44). As discussed in the previous chapter<sup>440</sup>, court's powers are available for the parties subject to the restriction in s.44 (effectiveness test) which prevents the parties from applying directly to the court before they try to obtain the same measures from the tribunal.

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<sup>438</sup> Subsection (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.

<sup>439</sup> 38.— General powers exercisable by the tribunal.

(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 powers.

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

(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.

<sup>440</sup> Please see 2.2.1.

Accordingly, this would help the tribunal to be in control of the arbitration procedure as far as possible.<sup>441</sup>

### **1. Security for costs:**

Security for costs allows the defendants to request the deposit of a guarantee enough to pay costs in cases where the claimant might not be successful in the substantive proceedings.<sup>442</sup> Prior to the 1996 Act only courts could order security for cost, unless the parties agreed otherwise. The theory behind the latter was that it was the duty of an arbitral tribunal to decide on the merits of the case and that it would not be able to perform this duty if it is stayed or struck out the proceedings awaiting the delivery of the security.<sup>443</sup> Nevertheless, the proposition that courts should be involved in deciding whether a claimant in arbitration should provide security for cost has been rejected universally.<sup>444</sup> Now, security for cost is only obtainable from tribunals and if the parties do not give such a power to the tribunal, it cannot be obtainable from national courts.<sup>445</sup>

The question is whether by opting in rules which do not particularly provide such a power to order such a security, parties would remove the chance of it being

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<sup>441</sup> The underlying logic of the 1996 Act is to empower the arbitral tribunal so the parties would not have to submit to the inconvenience and cost of an application to the court. Harris, Planterose and Tecks, *The Arbitration Act 1996 A COMMENTARY* (Forth Edition Blackwell 2007) p188.

<sup>442</sup> Guy Robin, 'Conservatory and provisional measures in international arbitration: the role of state courts' (2008) *International Business Law Journal*, Volume 3, p339.

<sup>443</sup> DAC Report 191.

<sup>444</sup> DAC Report 193. Because of such approach in international arbitration that decision of the House of Lords in *SA Coppee Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd (in liquidation)* [1995] 1 AC 38, was heavily criticized by commentators.

<sup>445</sup> Although the new provision itself was a necessary change to the previous approach in English law, it created many controversies which even led to a proposition by DAC to change the provision. Chapter 6 of DAC reports in clause 367 provides '.. we recommend that Clause 38(3) be deleted, and replaced with a new provision along the following lines:“(3) The tribunal may order a claimant to provide security for the costs of the arbitration...’. Please see DAC Report in chapter two clause 38(189-198).



granted by the tribunal, having regard to s.4(3).<sup>446</sup> it seems that unless there is an express provision disabling arbitrators from granting security for costs, arbitrators should be able to use such a power. Such a measure as discussed above does not require enforcement because the outcome of non-compliance would be that the arbitrators would not continue the arbitration proceedings (s.41(6)).

## **2. *Direction in respect to property: subs(4):***

Under s38(4), arbitrators enjoy substantial powers in relation to the property 'which is the subject of the proceedings or as to which a question arises, where the property (whether within or without England) is owned by or is in the possession of a party'. Arbitrators can grant direction in this respect which can include inspection, photographing and preservation and detention of any property by the tribunal, an expert or a party. This can be for example perishable goods or a vessel in a foreign port. The arbitrators can act on their own initiative as well parties' request.

The tribunal has no power in relation to property of a non-party, nonetheless, the court does enjoy such a power over the parties under s.44(2)(c).<sup>447</sup> Similar to what was suggested in chapter two regarding court-ordered interim measures, orders regarding intangible property such as bank accounts and shares should be cross-border enforceable. Measures addressing movable assets such as goods or vessels should also be cross-border enforceable including photographing and preservation or detention of goods.

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<sup>446</sup> Section 4: (3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

<sup>447</sup> V. Veeder, *National Report for England* (Kluwer law 1997) p42.

**b) Section 39 of 1996 Act:**

S.39<sup>448</sup> is the main provision empowering arbitrators to grant provisional measures in support of arbitration. Subs.4 separates provisional orders from awards on different matters made pursuant to s.47. The latter can be made by the tribunal during the proceedings but are still final as to the matters which they determine.<sup>449</sup> The section also indicates that while the section is named 'provisional award', it concerns provisional orders. This terminology has significance as this section particularly concerns orders which are subject to later change, while awards are final and binding(unless otherwise agreed(s.58)).<sup>450</sup>

Robert Merkin believes that this section is not designed to enable arbitrators to grant provisional orders which are the equivalent of search orders or freezing orders. Its purpose is narrower and is designed typically to grant interim financial

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<sup>448</sup> 39.— Power to make provisional awards.

(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.).

<sup>449</sup> Ian Mendiz as one of the leading construction arbitrators provides: 'The concept of an award which is not finally dispositive of any part of the dispute is one I find difficult to rationalise. What will be the position if, on a final determination, a sum paid under a provisional award is found to be high? Is the payer entitled to interest on the difference? What happens if the sum is reduced but the recipient has become insolvent in the meantime? On what basis is the provisional amount to be determined? If this power is conferred, can it be exercised tribunal's own motion or must there be an application from one of the parties? Is it right that the same tribunal could, in effect, be dealing with an appeal on its own earlier decision? I am afraid that I view this section with a great deal of suspicion....' Mark Cato. *Arbitration and practice and procedure. Interlocutory and Hearing problems* (second edition LLP 1997) p319, 320.

<sup>450</sup> Although the section concerns provisional orders, the term of 'provisional award' seems to have been used in *BMBF (No.12) Ltd v. Harland & Wolff Shipbuilding & Heavy Industries Ltd* [2001] 2 Lloyd's Rep. 227.

remedies in order to preserve the claimant's cash flow in a case which is ultimately bound to win. He also believes that a provisional award, by its nature, is substantive rather than procedural.<sup>451</sup> The outcome of such an approach concerning the provisional awards under s.39 is to empower arbitrators to grant interim payment orders which can be enforced under the New York Convention.

This thesis completely endorses the approach of Merkin in respect of interim payments, however, it suggests that arbitrators should still be able to grant freezing order under s.39. The reason for approval of Merkin's approach is that because granting interim relief which is enforceable under the New York Convention is in line with what this thesis will propose in the next chapter regarding the enforcement of provisional measures.

S.39, subject to the parties' written agreement, allows the arbitration parties to confer on the tribunal greater powers to order on an interim basis any measure which the tribunal would have power to grant in a final award. Subs.2 sets out some examples of ways in which the arbitrators can exercise their powers. The list is clearly non-exhaustive and the parties have very broad powers in this respect.

Similar to s.38, there is no positive indication on how the tribunal should exercise its discretion (except the general duties of tribunals set out in s.33). Accordingly, the tribunal should be able to use its power very flexibly. Nonetheless, It is suggested that the tribunal should use such powers sparingly in order to prevent causing injustice in long term. For instance, the tribunal can order a provisional

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<sup>451</sup> Robert Merkin, *Arbitration Law* (Informa Law 2004) p693.

order for the payment of money and later on may find that a smaller sum must have been granted, but the respondent cannot obtain repayment as the claimant has since become bankrupt.<sup>452</sup>

In order to interpret s.39(1), s.48 needs to be considered.<sup>453</sup> S.48 sets out the remedies that tribunals can grant in the final award. S.39(1) provides that tribunals shall have the power to order, on a provisional basis, any remedies which can grant in the final award. Considering this section in conjunction with s.48 shows what types of measures can be obtained from arbitrators. Similar to s.38, parties should agree to give the tribunal such an authority in the first place by stipulation in the contract.

As discussed earlier<sup>454</sup>, this stipulation does not happen often unless the parties agree to set of arbitration rules which provide an inherent power for the tribunal to do so. Considering the fact that most of international arbitration rules and EU states (such as France and Germany) have recognised such an inherent power for the arbitrators, English arbitration law needs to provide such inherent power for arbitrators. The interesting fact is that in the first draft of 1996 Act, the inherent

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<sup>452</sup> Harris, Planterose and Tecks, *The Arbitration Act 1996 : A COMMENTARY* (Fourth Edition Blackwell 2007) p195.

<sup>453</sup> 48.— Remedies.

(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.

<sup>454</sup> Please see 3.4.1.

power of the arbitral tribunal was included, but it was later removed.<sup>455</sup> Some have praised such an approach by English law as a well-designed application of the fundamental notion of party autonomy, however, as stated before, parties do not use such a freedom provided by the 1996 Act, as arbitration clauses are often drafted without much attention to details of the *lex arbitri* (arbitration law of the arbitration seat).<sup>456</sup>

**c) Powers of tribunals under section 48 of 1996 Act :**

It was explained above that s.48 in order to identify the measures that tribunals can grant, the remedies under should be examined. S.39(1) provides that tribunals shall have the power to order, on a provisional basis, any remedies which it would have power to grant in final award(s.48). The main remedies available under s.48 are:

**1. Payment of money (S. 48((4))**

An order by the tribunal for the payment of money is the most common relief used by tribunals. As discussed above, this payment should be granted in the form of an award. It is proposed that such a measure should be enforceable throughout the EU. The cross-border enforcement of interim payment orders is more important than other provisional measures. This because in chapter two it was proposed that interim payment orders should only be granted by arbitrator or even if it is granted

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<sup>455</sup> DAC Report: Clause 39. NO 200 provides this power did not require the agreement of the parties. As a result of responses, we have concluded on further consideration that this is necessary.

<sup>456</sup> J. Schaefer, 'New Solutions for Interim Measures...' p28.

by national courts, it should not be included in the suggested enforcement mechanism.<sup>457</sup>

## **2. Injunctions (Section 48(5(a))**

Before the 1996 Act, it was not clear whether the arbitrator has the authority to grant an injunction in the form of an interim award and the safest option would have been for the claimant to have made an application to courts.<sup>458</sup> S.48(5)(a) has clarified this situation in this respect which provides “[the] tribunal has the same power as the court to order a party to do or refrain from doing anything”. This clearly enables arbitrators with the power to grant mandatory and prohibitory injunctions, which resembles the court’s power to make such orders. In order to grant an injunction, certain issues must be taken into consideration.

Before awarding an obligatory injunction, arbitrators must find that the seeking party is very likely to suffer serious damage for which monetary compensation would not be a sufficient remedy if such damage did occur.<sup>459</sup> If the tribunal decides to grant such an order, it must be careful to specify explicitly what the respondent must perform.<sup>460</sup> There can be a case in which parties have agreed that the tribunal may not have the power conferred by this section to order injunctive relief or specific performance and also stipulated that the parties should not be prevented from applying to courts in relation to a genuine dispute which was not

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<sup>457</sup> Please see 2.3.3.6.

<sup>458</sup> Mark Cato. *Arbitration and practice and procedure. Interlocutory and Hearing problems* (second edition LLP 1997) p973.

<sup>459</sup> ‘New Solutions for Interim Measures...’ (1998) EJCL, Vol 2.2 (1998) EJCL, Vol 2.2, p14.

<sup>460</sup> *Redland Bricks v. Morris* [1970] AC 652.

capable of being referred to arbitration. In this case it was held that party has the right to apply to courts for the injunctive relief.<sup>461</sup>

As mentioned above, s.39 and s.48 make it clear that arbitrators can grant injunctions in the final awards. The question is whether the tribunal, during the arbitration process, is able award temporary orders equivalent to interim injunctions and to demand undertaking in damages. Some commentators believe that the wording of 48(5)(a) and the fact that this matter is provided in the part of the 1996 Act dealing with awards, indicate that the answer to this question would be negative. In fact, in respect of temporary orders, it has been held in *Kastner v. Jason*<sup>462</sup> that s.48(5) only applies to conservatory and injunctive awards that are granted when the arbitrators make the final award not as interim remedy during the arbitration process. Further, it was held that ‘the same power as the court’ refers to the generality of this power given on both the High Court and the County Court.<sup>463</sup>

It seems that in English arbitration law, parties cannot obtain the injunctive relief from the tribunal during the arbitration proceedings. This would leave parties with no option rather than requesting them from national courts. If parties have already agreed to the power of the tribunal to grant interim measures, then this triggers the effectiveness test and as a result of that recourse to courts will become more

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<sup>461</sup> *Vertex Data Science Ltd v. Powergen Retail Ltd* [2006] 2 Lloyd’s Rep. 591.

<sup>462</sup> [2004] 2 Lloyd’s Rep 223.

<sup>463</sup> Kelda Groves ‘Virtual reality: effective injunctive relief in relation to international arbitrations’ (1998) *International Arbitration Law Review*, Volume 1(6), p189.

difficult.<sup>464</sup> This would discourage arbitration parties to enable the arbitral tribunal to grant interim measures, because not only parties cannot obtain interim injunctions during the arbitration proceedings, but also it would be difficult to obtain such measures from courts, when the arbitral tribunal is formed.

This thesis submits that English law should clarify (if it exists) or provide (if it does not) the ability of arbitrators to award such remedies during the arbitration process. Recognising this authority for arbitral tribunals is also important for grant of anti-suit injunctions. It was submitted in chapter one that arbitral tribunals should be able to grant anti-suit injunctions at the outset and throughout the arbitration proceedings.<sup>465</sup> Accordingly, English law needs to clarify its position in this respect so the arbitral tribunal could grant the anti-suit injunction throughout the arbitration proceedings. This thesis proposes that injunctions should also be available for cross-bordered enforcement throughout the EU.

### ***3. Specific performance orders (Section 48(5)(b))***

Specific performance order is a discretionary remedy which orders the party in breach of a contract to perform or finish the performance according to the contract. This relief is awarded where the subject matter of the contract is in some way unique or not readily obtainable elsewhere. This can be a rare commodity or a goods that is in short supply. In this scenario, monetary compensation would not be enough for the claimant and therefore may be granted.<sup>466</sup> Courts are hesitant to award such a remedy where the issue requires a high level of specification of what

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<sup>464</sup> This was explained in 3.6.1.

<sup>465</sup> Please see 1.9.1.

<sup>466</sup> *Ibid.*



the respondent must perform and high degree of supervision over a long period of time by the court to insure that the measures is complied with. Such cases can be in the context of construction contracts.

### **3.4.3 Powers of arbitral tribunals in case of party's failure to comply with interim order**

Under s.41, if there has an inordinate and inexcusable delay on the part of the claimant, the tribunal may make an award dismissing the claim. If a party, without presenting sufficient reasons, fails to comply with any order or directions of the tribunal, arbitrators can also then make peremptory order to the same effect. The peremptory orders cannot be granted unless an ordinary order has been granted first.<sup>467</sup> Such an order provides a time limit for compliance with the order (subs.5). Such non-compliance by claimant in respect of peremptory order to provide security for costs can result in arbitrators making an award dismissing his claim (subs.6).

If the addressing party does not comply with the order, there are two options available for the other party. First one is the application to the court for enforcing the peremptory order under s.42. If the tribunal decides not to ask for the enforcement by courts, it can penalize the recalcitrant party by a) preventing the

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<sup>467</sup> *Wicketts and Anor v. Brine Builders and Anor* [2001] CILL 1805 [54]. It is suggested that arbitrators should use 'peremptory' term in order to be clear that the order they are awarding is peremptory. In addition to that they should specify the intended sanction in the order rather than being set out and imposed later. Harris, Planterose and Tecks, *The Arbitration Act 1996 : A COMMENTARY* (Fourth Edition Blackwell 2007) p204.

party in default from the relying upon any allegation or material which was the subject matter of the order, b) drawing adverse inferences from the action of the defiance as the circumstances justify, c) proceeding to an award on the basis on the materials that have been provided, d) ordering the party to pay the costs of the arbitration incurred in consequences of the non-compliance(Subs.7).

### **3.5 France**

The provisions which form arbitration law in France, are primarily found in the New Code of Civil Procedure (NCPC) and the 2011 Decree. They are supplemented by the general rules contained in the Civil Code and Code of Judicial Organisation which have often been interpreted by French courts. The Paris Court of Appeal and the Court of Cassation have played a major role in developing French arbitration case law including features not codified in the NCPC. For instance, this covers the extension of the arbitration agreement to non-signatories, provisional and conservatory measures, etc.<sup>468</sup> While there is no doctrine of precedent<sup>469</sup> as such under French law, lower courts normally rely on decisions of higher courts, which therefore have a significant role in understanding and interpreting laws. France is a signatory to the New York Convention and the Geneva Convention. In

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<sup>468</sup> Heitzmann, Miralles 'The 2011 French Arbitration Reforms In Comparative Perspective' [2011] Volume 26 MEALEY's International Arbitration Report. p2, 3.

<sup>469</sup> The doctrine of judicial precedent is based on *stare decisis*. That is the standing by of previous decisions. Once a point of law has been decided in a particular case, that law must be applied in all future cases containing the same material facts < <http://e-lawresources.co.uk/Judicial-precedent.php>> accessed on 27/11/2015.

practice, French arbitration rules regarding recognition and enforcement are generally more favourable than the New York Convention.<sup>470</sup>

### **3.5.1 Arbitrators' power to order provisional measures**

The previous arbitration decree of France (1981) did not have any express provision on power of the tribunal to order interim measures or to impose penalties in case of non-compliance by a party. Nonetheless, it was recognized by case law that the arbitral tribunal can order interim measures, as long as the arbitration clause or arbitration rules incorporated include words to that effect. The 2011 Decree has codified such an authority and in Article 1468 which provides "The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such an order."<sup>471</sup>

This article expressly enables the tribunal to order interim relief without any need for stipulation into that effect by the parties. This article is a non-mandatory provision in the 2011 Decree against which arbitration parties can disagree. This would respect the party autonomy principle as the parties can opt out of such powers for arbitrators.<sup>472</sup> The codification of such a power considerably strengthens the authority of the tribunal in this respect and therefore, helps the further development of provisional measures.

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<sup>470</sup> Heitzmann, Miralles 'The 2011 French Arbitration Reforms In Comparative Perspective' [2011] Volume 26 MEALEY's International Arbitration Report. p2, 3.

<sup>471</sup> Yves Derains and Laurence Kiffer, *National Report for France* (in Jan Paulsson (ed), International Handbook on Commercial Arbitration, (Kluwer Law International 1984 Last updated: May 2013) p98

<sup>472</sup> Beatrice Castellane, 'The New French Law on International Arbitration' (2011) Journal of International Arbitration, Volume 28, Issue 4, p374.

As arbitrators have no coercive power to order the conservatory attachment and the judicial security, only courts can award such orders.<sup>473</sup> Moreover, according to Article 1468, the arbitral tribunal has the authority to amend or add to any provisional measures it has awarded. This provision was introduced by the 2011 Decree and it means that in arbitration; the tribunal is not required, as would normally be the case under the French civil procedure, to verify the existence of new circumstances in order to make an amendment to an interim measure or an additional interim order.<sup>474</sup>

The 2011 Decree does not provide any conditions that must be fulfilled for awarding interim measures by the tribunal, except for the necessity for the arbitral tribunal to be constituted (Article 1449) and for the measures not to consist a conservatory attachment or a judicial security (Article 1468). The arbitral tribunal is almost free to grant any measures that it believes appropriate and set any condition for awarding them.

The next section will illustrate why the time of formation of the tribunal is important in the French arbitration law. It will be explained how this formation would affect the jurisdiction of the tribunal to grant provisional measures. Subsequently, it will be proposed that the French approach which highly restricts

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<sup>473</sup> Attachments (saisies conservatoires), judicially granted guarantees (sûretés judiciaires) such as provisional judicial mortgages (hypothèques judiciaires provisoires) or judicial pledges (nantissements judiciaires). Attachments include freezing orders and charging orders over the property. V. Veeder, 'The Need for Cross-border Enforcement ...' [2004] ICCA Congress Series, p267.

<sup>474</sup> Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, 'ARBITRATION IN FRANCE' 2013 CMS Guide to Arbitration vol1 <[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_FRANCE.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf)> p346, 349.

the court-ordered provisional measures should be followed by all Member States within the EU.

***3.5.1.1 The time of the constitution of the tribunal and its effect on the jurisdiction of the tribunal to grant interim measures:***

The 2011 Decree has placed a considerable emphasis on the date of the arbitral tribunal's constitution.<sup>475</sup> Under Article 1456 of the Decree the formation of the tribunal "shall be complete upon the arbitrators' acceptance of their mandate. As of that date the tribunal is seized of the dispute." Since this Article is a mandatory provision in the Decree, parties cannot agree against it, therefore, the correct interpretation of this Article has a great significance on jurisdiction of the tribunal.

The importance of this date is that it determines when the arbitrators can begin to grant interim measures or to rule on the validity of an arbitration agreement and when the jurisdiction of French courts become limited.<sup>476</sup> Before the formation of the tribunal, French courts will only refuse to award provisional measures if the parties expressly excluded recourse to these measures or if they are otherwise prohibited in the applicable arbitral rules.<sup>477</sup> As discussed in chapter 2, the majority of scholars and practitioners believe Article 1449 of the 2011 Decree<sup>478</sup> prevents

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<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.*

<sup>477</sup> Nicolas Bouchardie and Celine Tran 'Arbitration in France' 2013 Practical Law, p13 <<http://www.whitecase.com/files/Uploads/Documents/Arbitration-in-France.pdf>> accessed on 21/12/2014.

<sup>478</sup> "The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures".

French courts from granting urgent interim measures after the formation of the tribunals.<sup>479</sup>

Wording of Article 1459 and the fact that 2011 decree expressly empowers the tribunal to grant provisional measures and attach pecuniary fines to them, indicate that the new decree has leaned towards giving more power to arbitral tribunals and limiting the court's role in the arbitration process. Nevertheless, arbitral tribunals are not always able to make provisional orders effectively or to provide for their enforcement. One might argue that limiting court's authority to grant conservatory attachments and judicial guarantees (after the formation of the tribunal) might encourage parties to agree against the power of the tribunal to order provisional measures so as to have the court's assistance during the arbitration proceedings.

This chapter submits that setting such restrictions on the ability of national courts to grant interim measures after the constitution of the tribunal is a major step in recognising and improving the jurisdiction of arbitral tribunals to grant provisional measures in international commercial arbitration. Creating such limitation would encourage the grant of interim measures from the arbitral tribunal which decides on the final merits and has more knowledge and expertise in this respect. This approach would prevent the parties from applying the same provisional measure in courts after they are rejected by the tribunal or vice versa. While, the arbitrators can later waive the measure granted by the court, this could create the situation in

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<sup>479</sup> Please see 2.3.1.1.

which arbitrators need to grant an order for reimbursement of the costs caused by the court proceedings.<sup>480</sup>

### **3.5.2 Different types of tribunal-ordered provisional measures**

In practice, the most common measures granted by arbitrators are the ones designed to guarantee the execution of the award, such as an order prohibiting a party to dispose of certain assets or ordering it to post a security. They also make orders to preserve the status quo, for instance, this can be an order demanding a supplier to continue making its deliveries.<sup>481</sup> The other main interim orders can be:

#### ***a) Security for costs:***

As provided previously, tribunals with less common law orientation have been historically doubtful in grant of security for costs. There is nothing in French law addressing the security for costs, however, nothing in French law prevents an arbitral tribunal to demand a respondent of a claim or counterclaim to provide security for all or part of the amount in dispute— by way of deposit or bank guarantee or in any other way and upon such terms as the tribunal may deem appropriate.<sup>482</sup> Parties to international arbitration in France are entirely free to decide on whatever procedural rules they desire, be the ad hoc, institutional, or drawn from some other state's national legal system.

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<sup>480</sup> Jean Francois Poudret , Sebastien Besson *Comparative Law of International Arbitration* (Thomson 2007) p 532.

<sup>481</sup> Thomas Bevilacqua and Ivan Urzhumov, 'Arbitration procedures and practice in France: overview ' question 23.

<sup>482</sup> Lawrence Newman and Colin Ong(eds), *Interim measures in International arbitration* (Juris 2014)p317.

Noah Rubins believes that French court should be able to such measures in summary proceedings where arbitral rules or explicit party agreement allow parallel recourse to national courts.<sup>483</sup> In contrary, as was mentioned in the English section, in modern international commercial arbitration, courts should not be able to grant security for costs at all, even if parties agree to such a power. This seems to be the prevailing approach among legal commentators in France as they believe such measures should only be requested from tribunals only in exceptional cases.<sup>484</sup> This is the approach that this thesis follows.

For instance, this can be a claim commenced by a party that seems to have planned its own insolvency, with the goal of applying pressure on or causing adverse consequences to the other party. This thesis could not find any decision in French case law regarding the security for costs, so we cannot make any comparison on standards of granting such an order between France and England. Nonetheless, security for costs has been granted by arbitration conducted under ICC rules and it seems that they apply the standards used by other tribunals outside France.<sup>485</sup>

***b) Orders addressing properties or goods:***

Under Article 1468 the arbitral tribunal can order any conservatory or provisional measures that believes appropriate. Accordingly, in theory, there is no prohibition for arbitrators to demand from parties, in a procedural order, not to dispose of

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<sup>483</sup> Noah Rubins, 'In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration' (2000) *The American Review of International Arbitration*, Volume 11, p333.

<sup>484</sup> Thomas Bevilacqua and Ivan Urzhumov, 'Arbitration procedures and practice in France: overview' question 23.

<sup>485</sup> *Ibid.*



goods or an asset.<sup>486</sup> Article 1468 merely precludes arbitrators from ordering measures that are intended to be enforced as conservatory attachments or judicial securities. Given that, in practice, the arbitral tribunal will normally place the property under the control of a neutral escrow, such as the Paris Bar Association.<sup>487</sup> It is submitted here that provisional measures which putting money, shares and property under control of an escrow should also be cross-border enforceable.

**c) *Provisional measures in respect of evidence:***

Under Article 1467, arbitrators have the power to take all the necessary steps concerning evidentiary and procedural matters.<sup>488</sup> As this article is non-mandatory, it can be agreed against by the parties.<sup>489</sup> The tribunal may order the party who is in possession of an item evidence to produce it and it can also order the way for such production. Non-compliance with an order of the tribunal will create penalties for the breaching party.<sup>490</sup> In respect of witness evidence, according to Article 1467(2), the arbitrators are enabled to call upon any person to provide testimony; however, they are not supposed to give oath.<sup>491</sup> In relation to a claim on the genuineness of handwriting or document, unless otherwise agreed, the arbitral tribunal may rule

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<sup>486</sup> Lawrence Newman and Colin Ong(eds), *Interim measures in International arbitration* (Juris 2014)p317.

<sup>487</sup> *Ibid.*

<sup>488</sup> Article 1467 of 2011 Decree provides: "The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorise it to delegate such tasks to one of its members. The arbitral tribunal may call upon any person to provide testimony. Witnesses shall not be sworn in. 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".

<sup>489</sup> CCP Decree Article1467(1).

<sup>490</sup> CCP Decree Article 1467(3).

<sup>491</sup> Hong-Lin Yu Masood Ahmed 'The new French Arbitration Law: an analysis International Arbitration Law Review' (2012) Journal of International Arbitration. Volume 15, p7.

on a request for verification of handwriting or claim of forgery.<sup>492</sup> This provision puts the arbitral tribunal in the equal position to any state court (other than the *Tribunal de Grande Instance*).

Prior to the 2011 Decree, a court could act to prevent the disappearance of evidence, albeit an arbitral tribunal had already been formed.<sup>493</sup> Nevertheless, now this can only happen with the authorization of the tribunal. Under Article 1479<sup>494</sup>, upon the permission of the tribunal, a party who wants to submit either an official or private document that is held by a third party, or a legal act that he or she is not a party, can request the President of *Grande Instance* (not acting as the supporting judge) to help the arbitration by ordering the third party to provide such a document or act. To guarantee expedition, such parties request is conducted in summary proceedings.<sup>495</sup> This type of measures is one of essential provisional measures that should be obtainable from arbitral tribunals. This thesis proposes that this type of measures should be cross-border enforceable within the EU.

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<sup>492</sup> CCP Article 1470.

<sup>493</sup> Jean Francois Poudret , Sebastien Besson *Comparative Law of International Arbitration* (Thomson 2007) p531.

<sup>494</sup> Article 1479: If one of the parties to arbitral proceedings intends to rely on an official or private deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the *Tribunal de Grande instance* for the purpose of obtaining a copy thereof or the production of the deed or item of evidence. Articles 42 through 48 shall determine which *Tribunal de Grande instance* has territorial jurisdiction in this regard. Application shall be made, heard and decided as for expedited proceedings. If the president considers the application well-founded, he or she shall order that the relevant original, copy or extract of the deed or item of evidence be issued or produced, under such conditions and guarantees as he or she determines, and, if necessary, attach penalties to such order. Such order is not readily enforceable. It may be appealed within fifteen days following service (*signification*) of the order.

<sup>495</sup> Guido Carducci, 'The Arbitration Reform in France: Domestic and International Arbitration Law' (2012) *Arbitration International*, Volume 28 p141 142. Laurent Gouiffès, Lara Kozyreff 'Commentary on the new French ...' p51.

### 3.5.3 Powers of arbitral tribunals in case of party's failure to comply with a provisional order

Interim measures granted by arbitrators often take the form of an injunction, addressing one of the parties to perform or stop certain actions.<sup>496</sup> Prior to the decree of 2011, there was a question that whether arbitrators enjoy the power to attach a fine to their injunctions so as to increase the chance of compliance by the addressee. There is an argument that attaching a fine to tribunal-ordered provisional measures is derived from sovereign authority and accordingly cannot be imposed by the arbitration tribunal.<sup>497</sup> Based on this argument, the fine does not form an enforcement measure to the underlying decision and it rather entails a private punishment with the intention of penalizing the recalcitrant party in case of non-compliance by him and this should not be incorporated as a measure which is of sovereign nature.<sup>498</sup>

According to Article 1468 of 2011 Decree, arbitrators can now attach fines to their orders. It seems such a pecuniary penalty is not common in tribunals seated in England at all as this thesis could not find any relevant case in this respect. Under English law, arbitral tribunals could order the party to pay the costs of the arbitration incurred in consequences of the non-compliance (s.41(7)). However, it seems attaching monetary penalty to provisional measures would be a more

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<sup>496</sup> Claude Goldman 'Provisional measures in international arbitration' (1993) International Business Law Journal, Volume 3, p24.

<sup>497</sup> Attaching fine to an order has been used in Belgium as the arbitral tribunal is allowed to impose a fine (*astreinte*) if the opposing party does not comply with the interim measure granted. Olga Vishnevskaya, 'Anti-suit injunctions from arbitral tribunals in international commercial arbitration: A necessary evil?' (2015) Journal of International Arbitration, Volume 32, Issue 2, p212.

<sup>498</sup> Claude Goldman 'Provisional measures in international arbitration' (1993) International Business Law Journal, Volume 3, p24, 25.

effective way to increase compliance with these measures.

The following section will discuss the different forms of tribunal-ordered provisional measures. It will be briefly argued how the grant of provisional measures in the form of award would be necessary for what this thesis will propose as an enforcement mechanism for these measures in chapter four.

### ***3.6 The form of tribunal-ordered provisional measures***

Provisional measures can be awarded in the form of awards, decisions or directions.<sup>499</sup> There has not been consistency in practice of tribunals in this respect.<sup>500</sup> Sometimes, what might be branded as an award is rendered as procedural order and vice versa. For example, the award could be made as a provisional measure and other times as partial award which is final as to the matters dealt with.<sup>501</sup>

Arbitration parties generally can choose the form in which the measure is granted. They are free to exclude or include any form in their agreement. Thus, in the absence of determination by the parties, arbitrators have the discretion to grant a measure in the form that they see appropriate. For example, such a discretion has been given to ICC arbitrators.<sup>502</sup> The Iran-US Claims Tribunal generally granted provisional measures in the form of an award, rather than an order.<sup>503</sup> Given that,

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<sup>499</sup> Article 28 of ICC Arbitration Rules provides: "...Any such measure [provisional measure] shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate".

<sup>500</sup> Marianne Roth, 'Interim Measures' (2012) *Journal of Dispute Resolution*, Volume 2012, p429, 430.

<sup>501</sup> *Ibid.*

<sup>502</sup> Article 28 of ICC.

<sup>503</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p 2507.

granting provisional measures in the form of awards seems to be increasingly common in international commercial arbitration.<sup>504</sup>

French arbitration law does not require any form in which provisional or conservatory measures should be granted.<sup>505</sup> Tribunals can grant provisional orders in the form of interim awards, which can be enforced separately from the award on the merits or in the form of procedural orders. Further, under Article 1484 of NCPC, tribunals can declare these awards provisionally enforceable.<sup>506</sup> In England, s.39 of 1996 Act expressly allows arbitrators to grant provisional awards. Moreover, s.48 which deals with remedies obtainable from tribunals is under the section dedicated to awards.

Practically speaking, the mere form or the term that is used by the arbitrators is not decisive on the enforcement of such an order or award under the New York Convention. Nonetheless, this thesis proposes that granting provisional measures would provide a greater prospect of cross-border enforcement. First, tribunal-ordered provisional measures are not allowed under some Member States' arbitration laws (such as Italy, Spain or Austria) and arbitral tribunals could possibly grant measures under the term of an 'award'.<sup>507</sup> Some other states have extended

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<sup>504</sup> Robert D.A. Knutson, 'The Interpretation of Arbitral Awards When is a Final Award not Final?' (1994) J. Int'l Arb, Volume 11, p 107,108.

<sup>505</sup> Lawrence Newman and Colin Ong(eds), *Interim measures in International arbitration* (Juris 2014) p319.

<sup>506</sup> According to French law, the execution of the interim award is not suspended till the expiration of the time limit for any action for setting aside or till a final judgment in the merits is made. Yves Derains and Laurence Kiffer, National Report for France (in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, (Kluwer Law International 1984 Last updated: May 2013) p98, 99.

<sup>507</sup> William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J.Int'l, Volume 28, p1085.

the regime for the enforcement of awards to provisional measures (France, Scotland) which means they enforce provisional measures when they are in the form of awards.

Third and the most important reason for issuing provisional measures in the form of awards is that all the EU Member States are signatories to New York Convention and they cannot refuse the enforcement of the arbitral awards.<sup>508</sup> Accordingly, any suggestion through the New York Convention would have a higher chance of acceptance and enforcement by the signatories in the current situation.

The following section will discuss the grant of ‘without notice’ (*ex parte*) measures by arbitrators and controversies surrounding it. The section will argue that the authority to grant such measures create the opportunity for arbitrators to award urgent measures rapidly and this would accordingly encourage parties to seek such measures from arbitral tribunals rather than states courts.

### **3.7 *Without notice measures by arbitrators***

This section identifies both opposing and supporting arguments in respect of granting such measures by arbitrators and then explains the approach of UNCTRAL Model Law. Subsequently, it will analyse how problems with the enforcement of such measures can discourage parties from making applications in the first place. Finally, it will be argued that without notice measures should be granted by arbitrators mainly for reasons of weight and expediency.

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<sup>508</sup> Unless they have reasons to do so under Article V of the New York Convention.

As without notice measures do not require hearing from the respondent, this would create the opportunity for arbitrators to award urgent measures rapidly. National courts commonly grant without notice measures in support of arbitration proceedings. Without notice measures are provisional measures granted without granting a prior hearing to the party against whom the measure is directed. Such measures have an element of surprise in order to prevent the respondent to frustrate the objective of the measures by removing assets or property.<sup>509</sup>

While such measures are successfully being used in litigation to protect the interests of parties, there has been much debate in international arbitration circles about granting such measures by arbitrators.<sup>510</sup> It is argued that this type of measure does not need to be awarded by arbitral tribunals as they can always be sought from national courts, particularly because courts have the coercive power to enforce them. In response to that, it is said that courts may not always be completely neutral, trustworthy or efficient. Further, by applying to national courts, parties lose the confidentiality that supposedly exists in the arbitration process.<sup>511</sup>

The most serious argument against such measures is that the respondent of the order would not be heard (at the time the order is made) and this is against the consensual nature of the arbitration proceedings.<sup>512</sup> Even if we accept this concept,

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<sup>509</sup> Marianne Roth, 'Interim measures' (2012) *Journal of Dispute Resolution*, Volume 2012, p430.

<sup>510</sup> Hans Van Houtte, 'Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration', (2004) *Arbitration international*, Volume 20, p85.

<sup>511</sup> Jose Maria Abascal Zamora, 'The Art of interim measures' (2006) *ICCA Congress series*, Volume 13 p757, 758.

<sup>512</sup> Jacomijn J. van, Haersolte-Van Hof, 'Interim Measures of Protection - a European and Continental' (2003) *ICCA Congress Series*, Volume 11 p 155. LCIA has refused to give power to grant without notice(ex parte) measure arbitrators because of such a concern. Maxi Scherer, Lisa Richman, et al, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Kluwer Law International 2015) p267.

when parties agree on the seat of the arbitration, the procedural law of the seat court might allow without notice measures to be granted by national courts anyway (Such as France or England). Accordingly, by doing so, arbitration parties are agreeing on the possibility of without notice measures to be awarded in the arbitration process.<sup>513</sup>

Probably the most progressive international rules regarding without notice measures are UCITRAL Model Law (2006). Article 17B<sup>514</sup> and 17C address without notice measures as 'preliminary orders'.<sup>515</sup> Under these articles, the arbitral tribunal, upon request by the parties, can grant a 'preliminary order prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.' Right after the grant of the without notice measure, the arbitrators shall give notice to all the parties and should give notice to the respondent of the order to present its case at the earliest practicable time. The tribunal should decide promptly on any objection from the respondent. The preliminary order will expire after twenty days from the issuance date. Such an order is binding on the parties but cannot be subject to enforcement by a court and finally the order does not constitute an award.

It should be noted that there is a major difference between without notice measures granted by national courts and the ones obtainable from arbitral

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<sup>513</sup> Kaj Hobér, 'The Trailblazers v. the Conservative ...' (2004) ICCA Congress Series, Volume 12, p274

<sup>514</sup> Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

<sup>515</sup> See Hans Van Houtte, 'Ten Reasons against a Proposal for Ex Parte...', p85.



tribunals (under Article 17 for instance). When state courts issue without notice measures such as freezing orders, such measures are granted and enforced without informing the party against whom a preliminary order is directed to (respondent of the order). As a result, the respondent only has the opportunity to object the order after it is granted and enforced upon him. In the above example, this is after his assets are frozen.

In respect of tribunal-granted orders, arbitrators can grant such measures without hearing the respondent of the order, but such without notice measures cannot be enforced without notifying the other party. This is simply because the tribunal does not enjoy the coercive power of courts. This can be seen as one of the main inefficiencies of granting without notice measures by arbitral tribunals.

Imagine the scenario that arbitrators grant a without notice freezing order and ask the respondent to come and present his/her case. If the respondent could not challenge the granted interim measure, then the measure should be complied with by the respondent. Now imagine that the respondent does not comply with the measure. Given that, because the respondent now knows the intention of the claimant, he/she can frustrate the purpose of the measures by removing his assets from the jurisdiction of the court. Considering the fact the granted measure can have a great significance (otherwise the measure would not have been granted without notice in the first place), the damage the claimant would suffer from such non-compliance (removal of assets) can be very considerable. Claude Goldman rightly addresses this shortcoming as "... the effect of surprise, which is often

indispensable for the effective enforcement of [without notice] provisional measures which have been ordered cannot be achieved.”<sup>516</sup>

The only option for requesting party would be enforcing the measures through national courts which would not make that much sense as parties can obtain such measures directly from courts quicker. Thus, in the above case, the claimant would have had a more effective result, had he gone to courts directly. Even if the claimant could enforce the tribunal-granted measure throughout the court procedure, it seems this would most likely be enforceable only in the jurisdiction of the seat court).<sup>517</sup> Even if arbitrators have such an authority, it appears that arbitrators are generally reluctant to award without notice provisional orders as failure to hear both sides might expose the arbitral tribunal to an accusation of bias.<sup>518</sup> In fact, between 2006 (the year that UNCITRAL suggested the grant of such measures) till 2012, there is no case law in respect of this issue in UNCITRAL Digest of Case Law.<sup>519</sup>

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<sup>516</sup> Claude Goldman ‘Provisional measures in International arbitration’ (1993) International Business Law Journal, Volume 3, p 3, 6.

<sup>517</sup> Beraudo provides: “If [the *ex parte* measure] needs court approbation, as is compulsory to enforce an attachment of assets, another trial will be commenced before the state courts. In theory, the creditor could present another *ex parte* request to the judge. The judge could incorporate in a judgment the substance of the arbitral order. I wonder if a judge would be ready to accept *ex parte* proceedings in court added to *ex parte* proceedings in the arbitral tribunal? If the judge grants such a request, I wonder again whether the judgment could enter into the scope of the Brussels-Lugano system...? Clearly for the type of decision, the enforcement of which needs court approbation, it seems more appropriate to present the request directly in court, saving that stage in the arbitral tribunal” Jean-Paul Beraudo, ‘Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals’ (2005) Journal of International Arbitration, Volume 22, Issue 3.

<sup>518</sup> V.Veeder, ‘The Need for Cross-border Enforcement ...’ [2004] ICCA Congress Series. p 267.

<sup>519</sup> UNCITRAL 2012 Digest of Case Law P89 <<http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>> accessed on 6/12/2015.

This thesis submits that such measures should not only be granted to keep the element of surprise, but also for their weight and expediency. First, parties need the granting of immediate provisional measures in international commercial arbitration. Sometimes hearing both sides in order to grant measures can take too long and arbitrators should be able to conduct such a procedure so they could grant time-effective measures.<sup>520</sup> Secondly, many of arbitration parties could be companies or individuals that have established businesses in the place of their resident and not everyone could or would frustrate the purpose of the measure by, for example, transferring or dissipating their assets. Accordingly, this issue of enforcement of such measures could be trivial and arbitrators, by granting such measures without notice, could be merely emphasising on the fact that the addressee of the order should immediately comply with the order.

In such circumstances non-compliance with such measures could create great adverse inference on arbitrators. This is because issuing without notice measures requires a higher degree of assurance and scrutiny than ordinary measures and when they are granted by arbitrators, they must have clear reasons to do so. Therefore, failure to comply with a granted measure that has such level assurance can cause greater adverse inference than non-compliance with normal measures.

In order to increase the compliance of the respondent, arbitrators, as well as setting a time limit for the respondent to comply with the order, can add a monetary fine if the order is not complied with in the designated period. Such

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<sup>520</sup> Jose Maria Abascal Zamora, 'The Art of interim measures' (2006) ICCA Congress series, Volume 13, p757.

measures should of course be granted in exceptional circumstances with the necessary safeguards.<sup>521</sup> These safeguards include: a) The claimant must be made liable for any damage caused by the without notice measure, should it be decided later that measure should not have been awarded; b) Providing security by claimant must be mandatory and arbitrators must avoid granting such measures without an appropriate security; c) Imposing a time limit on the duration of any without notice measure which is provided in the UNCITRAL Model Law as well; d) The requesting party must show that it is necessary to proceed in that manner in order to ensure that the purpose of the measure would not be frustrated.<sup>522</sup>

### ***3.8 The effect of party autonomy on the grant of provisional measures***

Under most arbitration rules, whether domestic or international, parties are given a lot of freedom in respect of powers of tribunals to grant provisional measures and the types of measures that arbitrators can grant. They can make such an agreement either by an express stipulation in their arbitration agreements or simply consenting to a set of arbitration rules. Given that, such freedom of choice can create complications for tribunals in different jurisdiction. Such problems occur in two phases. First, it can be in the issuance of provisional measures by the tribunal and second, in enforcing such measures by state courts.

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<sup>521</sup> Donald Francis Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' (2003) ICCA Congress Series, Volume 11, p93.

<sup>522</sup> Kaj Hobér, 'The Trailblazers v. the Conservative ...' '[2004] ICCA Congress Series, p274.

In this chapter, we only discuss the first phase. For instance, in Italy, only courts are permitted to grant interim measures.<sup>523</sup> Given that, if the seat of the arbitration is in Italy, can the parties agree that the tribunal could grant any measures that it deems appropriate? It seems that now arbitral tribunals are not limited to the provisional measures available to state courts. This is because of two reasons: One is the fact that arbitration parties have given such powers to tribunals themselves and the second is the issue of privity of orders by tribunals. This means that orders of tribunals can only affect them and not the third party. Thus, parties have agreed that a tribunal to grant orders which only affects them.<sup>524</sup>

Another case would be whether parties can, for instance, agree on granting injunctions and attachments addressing properties in possession of the parties of the arbitration on a controversial issue such as without notice measures (also known as *ex parte*). The same reasoning that we used above would be applicable here. Although UNCITRAL Model Law has expressly permitted the use of without notice measures, in practice arbitrators are very reluctant to award such measures.<sup>525</sup>

It was submitted in the previous chapter that such measures should be granted by the arbitrators, but there is always a chance that granting *ex parte* measures would affect the enforcement of the final award. This is because the enforcing court could possibly rely on the Article VI of the New York Convention to refuse the

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<sup>523</sup> Pierre A. Karrer, 'Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please' (2000) ICCA Congress Series, Volume 10, p98.

<sup>524</sup> Ragnar Harbst, 'Arbitrating in Germany' (2004) *Arbitration*, volume 70(2) p89.

<sup>525</sup> Julian D. M. Lew, Loukas A. Mistelis, et al, *Comparative International Commercial Arbitration*, (2003 Kluwer Law International) 23-50.

enforcement of the award because he could not present his case in the arbitration. This article provides: 'The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. However, it seems that if the without-notice measure does not change the outcome of the case, party should not be able to rely on such basis.<sup>526</sup>

The following section will examine the emergency arbitrator procedure and it will submit that such a procedure should be incorporated in the arbitration laws of Member States. It will argue that this procedure should not require the stipulation of parties in their arbitration agreement. This will create the opportunity for parties to obtain provisional measures before the formation of the tribunal and reduce the need for court-ordered provisional measures.

### ***3.9 Emergency arbitrator procedure***

This section will examine the emergency arbitrator procedure in international commercial arbitration. It will start by introducing this procedure in different international arbitration institutes; it will then examine both English and French systems in this respect. Subsequently, this thesis will submit that such a procedure should be incorporated in the arbitration laws of Member States. This is because it reduces the courts' intervention in the arbitration proceedings by allowing the parties to obtain provisional measures from the emergency arbitrators before the

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<sup>526</sup> This is the approach of German law which seems to be reasonable. Andrés Jana, Angie Armer, et al., Article V(1)(b) 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) p256.

formation of the tribunal. Further, because of the unsuccessful experience of a similar procedure in the past, it will also be proposed that emergency arbitrator procedure be available without the need for stipulation by parties in the arbitration agreement.

In international commercial arbitration, it typically takes some time for the arbitral tribunal to constitute and it not unusual that such a process takes several months.<sup>527</sup> The absence of an effective method of awarding urgent provisional measure prior to the formation of the tribunal was long considered as a disadvantage of the arbitral process.<sup>528</sup> The obvious problem for parties in need of urgent interim measure is that irreparable harm might be suffered while the arbitral tribunal is being formed.<sup>529</sup> The only available option for the parties in such circumstances would be obtaining interim measures from state courts.

This could be a reasonable choice in the jurisdictions that their national courts have a decent reputation in dealing with urgent application for interim measures, such as England or France. However, in some jurisdiction the position of the state courts can be unpredictable or sometimes parties prefer to keep the arbitration process confidential.<sup>530</sup> Such preservations led the different arbitration rules and arbitration institutes to incorporate specialized provision in their rules providing a non-judicial

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<sup>527</sup> Leonie Parkin, Shai Wade, 'Emergency arbitrators and the state courts: will they work together?' (2014) *Arbitration*, Volume 80(1), p48.

<sup>528</sup> Vivian Ramsey, 'National courts and arbitration: collaboration or competition? The courts as competitors of arbitration' (2015) *Arbitration*, Volume 81(4), p449.

<sup>529</sup> Leonie Parkin, Shai Wade, 'Emergency arbitrators and the state courts: will they work together?' (2014) *Arbitration*, Volume 80(1), p48.

<sup>530</sup> Amir Ghaffari and Emmylou Walters 'The Emergency Arbitrator: The Dawn of a New Age?' (2014) *Arbitration International*. Volume 30, Number 1, p155.

mechanism called “emergency arbitrators procedure”. This mechanism provides arbitration parties with recourse to provisional measures on an urgent and interim basis prior the constitution of the arbitral tribunal.<sup>531</sup>

In 2006, ICDR<sup>532</sup> introduced emergency arbitrator as a part of its arbitration rules.<sup>533</sup> This procedure unlike pre-arbitral referee system, introduced by ICC in 1990, does not require opting in by parties. Therefore, parties could seek the appointment of an emergency arbitrator whose the exclusive purpose is awarding provisional measures which were subject to the later revision of the arbitral tribunal.<sup>534</sup> Following such improvement by ICDR, ICC in 2012 incorporated the emergency arbitrators in its rules.<sup>535</sup>

This provision allows parties to an arbitration agreement to apply for urgent measures prior to the transmission of the file to the tribunal, irrespective of whether a request for arbitration has submitted. Proceedings are conducted on an expedited basis with the presence of the parties and end with an order issued within 15 days of the emergency arbitrator’s receipt of the file.<sup>536</sup> Similar to ICDR approach, unless parties agree otherwise, these emergency arbitrator provisions

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<sup>531</sup> Anna Kirkpatrick ‘LCIA Rules 2014 finalised’ (2014) International Arbitration Law Review n31.p1

<sup>532</sup> International Centre for Dispute Resolution.

<sup>533</sup> Article 37.

<sup>534</sup> The ICC rules have been the first of such arbitration rules to provide a specific procedure for provisional remedies granted by a referee appointed exclusively for the purpose of the awarding such remedies before the formation of the arbitral tribunal. While the ICC pre-arbitral Referee Procedure Rules were introduced in 1990, there were used in less than a dozen occasions. This was because parties must include use of this procedure in writing and this cannot often be expected after the dispute has arisen. Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2452.

<sup>535</sup> Article 29. Please see the following for details of Emergency Arbitrators under ICC Rules. Chapter 7 of in Jacob Grierson and Annet van Hooft , *Arbitrating under the 2012 ICC Rules*, Kluwer Law International 2012) pp. 63 – 72.

<sup>536</sup> Thomas Bevilacqua and Ivan Urzhumov, ‘Arbitration procedures and practice in France: overview’ question 23.



apply to ICC arbitration without a need to opting them in and after the formation of the arbitral tribunal, arbitrators can change them if necessary.<sup>537</sup>

All of these rules enable the appointment of a sole emergency arbitrator to decide on an application for provisional measures in the case of urgency before the formation of the tribunal. Because the above mentioned rules do not require the stipulation of the parties, there has been an increase in use of such a mechanism and it is likely to continue to grow.<sup>538</sup> Such a procedure under these rules requires expedited and prompt action by the institution and the emergency arbitrator.

There are some difficulties regarding such a procedure. First, a judge in the court can grant an interim measure almost immediately and often ex parte, whereas for an emergency arbitrator, there still has to be an appointment procedure. Second, some arbitration laws (such as England) allow the court to grant interim measure in support of arbitration where the arbitrators cannot act effectively. The presence of the emergency arbitrator provision may, in itself, prevent a court from granting interim measures.<sup>539</sup>

Finally, most of EU Member States still have not expressly recognised emergency arbitrators as normal arbitrators. For instance, in English law, neither the Arbitration Act 1996 nor the case law has mentioned the emergency arbitrator

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<sup>537</sup> Similar provisions have been introduced by different arbitration rules such as LCIA (Article 9B), 2012 Swiss Rules, Art. 43; 2011 ACICA(Australian Centre for International Commercial Arbitration ) Rules, Art. 28(1); 2010 NAI(the Netherlands Arbitration Institute) Rules, Art. 42; 2010 SCC (Stockholm Chamber of Commerce) Rules, Appendix II, Art. 8 2013 SIAC(Singapore International Arbitration Centre) Rules, Art. 26(2).

<sup>538</sup> Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2452.

<sup>539</sup> Vivian Ramsey, 'National courts and arbitration: collaboration or competition? The courts as competitors of arbitration', 2015 Arbitration Volume 81(4), p449.

procedure explicitly, though some commentators believe such a matter has been recognised.<sup>540</sup> If the 1996 Act, does not recognise emergency arbitrators, then parties cannot enforce the provisional measures granted by them under s.41 and s.42. Although a narrow reading of the 1996 Act would appear to exclude emergency arbitrators from the definition of the Act, it seems that the more reasonable approach would be including such arbitrators in the definition of the Act.<sup>541</sup>

In France, the Paris Court of Appeal has recognised a similar procedure in *Société Nationale des Pétroles du Congo et République du Congo v Total Fina Elf E&P Congo*.<sup>542</sup> This case was in respect of ICC's procedure. In that case the pre-arbitral referee granted an order demanding the Republic of Congo (respondent) to respect its contractual obligations under the contract. The respondent sought to annul an order made by the pre-arbitral referee, on the basis that the order was in fact an arbitral award capable of being set aside by a national court. The court rejected the argument that the order was an award, and ruled that the role of such procedure is to provide urgent measures prior to any decision on the merits and referee's order does not pre-judge the substance of the case. Accordingly, on this basis the court

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<sup>540</sup> Leonie Parkin, Shai Wade suggest that English law in *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm); [2006] 2 Lloyd's Rep. 485 offers the possibility that parties can choose to conduct unilateral truncated procedures, such as emergency procedure proceedings, if the parties have explicitly agreed to it in their arbitration agreement. Leonie Parkin, Shai Wade, 'Emergency arbitrators and the state courts: will they work together?' (2014) Arbitration, Volume 80(1), p53.

<sup>541</sup> Amir Ghaffari and Emmylou Walters 'The Emergency Arbitrator: The Dawn of a New Age?' (2014) Arbitration International. Volume 30, Number 1, p159.

<sup>542</sup> Paris Court of Appeal, April 29, 2003 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (2004 Kluwer Law International) Volume 29, pp. 203 – 205.

ruled that the order was not an award.<sup>543</sup>

This thesis submits that all Member States should recognise emergency arbitrators in their arbitration laws.<sup>544</sup> If emergency arbitrators are recognised as ordinary arbitrators, therefore, the provisional measures granted by such arbitrators should receive the same recognition and enforcement as well. The recognition of the emergency arbitrator would reduce the need to go to courts before the formation of the tribunals. It is also submitted that this procedure should be available for parties without a need for stipulation to that effect. This is because the experience of the ICC pre-arbitral referee procedure shows that such stipulation does not happen often.<sup>545</sup>

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<sup>543</sup> Leonie Parkin, Shai Wade, 'Emergency arbitrators and the state courts: will they work together?' (2014) *Arbitration* volume 80(1), p50,51. Michael Dunmore, 'Interim Measures by Arbitral Tribunals: The Enforceability Conundrum', (2012) *Asian International Arbitration Journal*, Volume 8 Issue 2, p227.

<sup>544</sup> Singapore in its International Arbitration Act (2012) has expressly recognise the emergency arbitrators as in the definition of the arbitral tribunal (section 2a).

<sup>545</sup> While the ICC pre-arbitral Referee Procedure Rules were introduced in 1990, there were used in less than a dozen occasions. This was because parties must include use of this procedure in writing and this cannot often be expected after the dispute has arisen. Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2452.

### ***3.10 Conclusion***

In chapter two, this thesis submitted that all Member States' arbitration laws should restrict the access to national courts for grant of provisional measures after the arbitral tribunal is formed. This is the approach taken by both English and French laws. Consequently, when the tribunal is formed and it has confirmed its jurisdiction, it becomes the main forum to grant provisional measures as parties have less opportunities to obtain such measures from courts. Thus, the role of the arbitral tribunal as the main forum for granting provisional measures becomes very significant.

Nonetheless, such a restriction for courts would be meaningless if arbitral tribunals were restricted in granting provisional measures or would not have the right to grant provisional measures at all. This thesis submits that the best approach for national laws of Member States would be the French approach which recognises the inherent power of arbitrators to grant provisional measures unless parties agree otherwise. Adopting this approach has two key advantages. First, it would encourage arbitrators to use this power in arbitration proceedings. Second, such an inherent power for arbitrators is necessary to what we suggested in chapter one which is granting anti-suit injunctions by arbitrators. This is because the authority to grant anti-suit injunction is predominantly derived from its authority to grant provisional measures. Accordingly, having such an inherent authority is necessary for arbitral tribunals to grant anti-suit injunctions.

It seems harmony in this regard can only happen if international treaties recognise such a power for arbitrators. The first option is adding a protocol to the New York Convention. This protocol should recognise such an authority as an inherent power for arbitrators subject to contrary agreement by the parties. This seems to be the most reasonable and practical solution at the moment. This is because all the EU Member States are signatories to the New York Convention. The less practical option would be adding a similar protocol to the Geneva Convention to which most Member States are signatories. This is because not all of the EU Member states are signatories of this convention.

This thesis also proposes that arbitral tribunals should be able to grant all types of provisional measures throughout the arbitration proceedings. It seems that under English arbitration law, parties cannot obtain such a measure from the tribunal during the arbitration proceedings. This would leave parties with no option rather than requesting them from national courts. If parties have already agreed to the power of the tribunal to grant interim measures, then this triggers the effectiveness test and as a result of that recourse to courts will become more difficult. This would discourage arbitration parties to enable arbitral tribunals to grant interim measures, because not only parties cannot obtain interim injunctions during the arbitration proceedings, but also it would be so hard to obtain such measures from the courts even when the arbitral tribunal is formed.

Arbitral tribunals should be able to order parties to refrain or discontinue certain actions in the arbitration process, regardless enforcement's issues. Again,

recognising such an authority for arbitrators is important for what the thesis suggested in chapter one as it was proposed that arbitral tribunals should have the authority to grant anti-suit injunctions throughout the proceedings. Accordingly, if arbitrators would not be able to grant injunctions at all, they would not be able to grant anti-suit injunctions either.

In respect of attaching pecuniary fines to provisional measures, this thesis suggests that national arbitration laws should expressly allow arbitrators to do so since such an explicit permission would encourage arbitrators to use these penalties to a greater effect. Providing such fines would increase the compliance with such measures and reduce the need to enforce such measures through national courts.

This thesis finally submits that all Member States should recognise emergency arbitrators in their arbitration laws. If the emergency arbitrators are recognised as ordinary arbitrators, therefore, provisional measures granted by such arbitrators should also be recognised and enforced. The recognition of the emergency arbitrator would reduce the recourse to courts before the formation of tribunals.

All the above mentioned propositions are serving one purpose which is providing a better chance for parties to obtain provisional measures from arbitral tribunals and to restrict such the power of courts to very limited measures. This chapter attempted to make propositions which would clarify the power of arbitral tribunals to grant provisional measures and increase the use of and compliance with such measures by arbitration parties before and after of the formation of the tribunal.

# Chapter Four: *Enforcement of arbitral interim measures*

## **4.1 Introduction**

In chapter two, this thesis submitted that all Member States' arbitration laws should restrict the access to national courts to grant provisional measures after the formation of the arbitral tribunal. Consequently, when the tribunal is formed and it has confirmed its jurisdiction, it becomes the main forum to grant provisional measures as parties have less opportunities to obtain such measures from courts.

In chapter three, it was argued that because of such priority of arbitral tribunals, there should be a clarification regarding the power of arbitrators to grant provisional measures and the types of measures available for them to grant. Accordingly, this thesis proposed that tribunals should have an inherent power to grant provisional measures and should be able to grant different types of measures throughout arbitration proceedings, including injunctions. It was also suggested that arbitrators should attach pecuniary fines to increase the prospect of compliance with such measures.

Nonetheless, because arbitral tribunals do not have the authority to enforce an interim measure, compliance with this order is still only voluntary. When arbitration parties do not comply with granted measures, then it becomes necessary to seek assistance of national courts to enforce interim measures. While there have been considerable improvements in international and national arbitration rules regarding the recognition of tribunal-ordered provisional measures, such rules are usually

silent as to the issue of enforcement (particularly on the cross-border enforcement of such measures). Further, the cross-border enforcement mechanism suggested in chapter two for court-ordered measures would not be suitable for tribunal-ordered measures. This is because in that case, parties have to obtain the identical or similar provisional measure from the seat court and then try to enforce it in other Member States which would create a lot of delay and possibly making the award of the measure meaningless.

Consequently, tribunal-ordered provisional measures require their own cross-border enforcement mechanism so they would be directly enforceable in different Member States. If tribunal-ordered interim measures would be cross-border enforceable, arbitration parties would only need to obtain one interim measure from the tribunal and there would be no need to apply to different state courts for a measure under different legal regimes. Accordingly, only enforcement proceedings in different Member States in the EU would be needed.<sup>546</sup>

This chapter, after analysing the approaches taken by England and France and the relevant case law in international arbitration, will answer the third research question namely, *Is it possible to achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?*

It will be proposed that granting provisional measures in the form of awards is the most feasible option to enhance the cross-border enforcement of tribunal-ordered

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<sup>546</sup> J. Schaefer, 'New Solutions for Interim Measures...' p10 .



provisional measures as all Member States are signatories to the New York Convention and they have enforced arbitral awards for many years. This chapter will then explain how the tribunal-ordered measures discussed in chapter three would be enforceable in the form of awards.

## ***4.2 The attitudes towards the enforcement of provisional measures within the EU***

A survey done by Kaj Hober in 2006 shows that arbitrators who awarded interim orders have had positive experiences with parties' desire to voluntarily comply with these orders.<sup>547</sup> However, more recent commentators believe that there is still a significant percentage of parties who refuse to comply with interim measures issued by arbitrators and therefore, parties need to seek the assistance of courts to enforce them.<sup>548</sup> Further, damages may not always be an adequate substitute for failure to comply with an interim measure, particularly in the context of modern international commercial transactions.<sup>549</sup>

Even if parties would normally comply with tribunal-ordered measures and enforcement through national courts was not needed, this could still indicate that when parties need an enforceable interim order, they would very likely prefer to

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<sup>547</sup> Kaj Hobér, 'Interim Measures by Arbitrators' (2006) *International Arbitration*, Volume 13, p731

<sup>548</sup> Peter Sherwin and Douglas Rennie, 'Interim relief under International Arbitration rules and guidelines: A comparative analysis' (2010) *Am. Rev. Int'l Arb*, Volume 20, No.3, p324. Christopher Boog, Chapter 13, Part III: Interim Measures in International Arbitration in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International 2013) p1365. For a different view please see Neil Kaplan, 'Interim Measures- A Practical Experience' (2007) *ICCA Congress Series*, Volume 13, p775.

<sup>549</sup> Zia Mody, T. Arvind, 'Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration' (2001) *ICCA Congress Series*, Volume 10, p132.

obtain that from national courts directly since the enforcement of tribunal-ordered measures could be problematic and lengthy.

The reason for the absence of such enforcement mechanism within the EU (and in the world generally) is the dissimilar systems which exist for enforcing tribunal-ordered measures in different Member States. Such discrepancies can be because of the form of the measure, the seat of the arbitration, denial of the tribunals' power to order provisional measures or finality of the measures. For instance, in Sweden, interim orders granted by arbitrators are not enforceable because they are not final.<sup>550</sup> England permits courts to enforce such measures granted by arbitral tribunals only when the seat of the tribunal is in England.<sup>551</sup> In France, provisional measures can only be enforced through state courts when they are granted in the form of awards.<sup>552</sup>

Within the EU, there are three approaches in this regard: the first approach, which is followed in England, gives the judicial authorities the power to enforce tribunal-ordered provisional measures without any further examination of the measure itself or at least with limited examination.<sup>553</sup> Nevertheless, such an enforcement procedure is only available when the seat is in England.

The second approach is to reorder measures by courts. This system requires the enforcement order or transposition of the tribunal-ordered measure into a

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<sup>550</sup> Neil Kaplan, 'Interim Measures- A Practical Experience' (2007) ICCA Congress Series, Volume 13, p731.

<sup>551</sup> S42 of 1996 Act of England.

<sup>552</sup> Alexis Moure, *Interim measures in International Arbitration*, p315.

<sup>553</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law International 2005) 6.20.

measure which could have been ordered by a court and will be treated accordingly by the national court system.<sup>554</sup> This is the approach followed by the German law in which, upon a party request, the court may allow enforcement of a tribunal-ordered measure. The pre-requisite for initiating the enforcement process is that no prior request for the same measure should be made.<sup>555</sup>

The court has the right to alter the order concerning the relief for the purpose of enforcement. If the measure granted and enforced is “unjustified from the outset”, the harm incurred due to the enforcement may be recovered through arbitration proceedings.<sup>556</sup> This system complements the first approach as it increases court’s assistance to the enforcement of arbitral measures.<sup>557</sup> Nonetheless, this approach permits the recasting of the arbitral decision to make it enforceable, and consequently, exposes the measures to review of courts. German law also allows the enforcement of provisional measures granted outside of its jurisdiction.<sup>558</sup>

The third approach is applied in France, and in many respects is similar to the first approach. The main difference is that the French law allows measures to be enforced in the form of awards even if the seat of arbitration is not in France.<sup>559</sup>

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<sup>554</sup> Pierre A. Karrer, ‘Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please’ (2000) ICCA Congress Series, Volume 10, p107.

<sup>555</sup> Tijana Kojovic ‘Court Enforcement of Arbitral Decisions on Provisional Relief *How Final is Provisional?*’ (2001) J. Int’l Arb. Volume 18, p518.

<sup>556</sup> Ragnar Harbst, ‘Arbitrating in Germany’ (2004) Arbitration, Volume 70(2) p93.

<sup>557</sup> Franz-Jörg Semler, ‘German Arbitration Law - The 1998 Reform and Recent Case Law’ (2001) Journal of International Arbitration, Volume 18, Issue 5, p583.

<sup>558</sup> Tijana Kojovic ‘Court Enforcement of Arbitral Decisions on Provisional Relief *How Final is Provisional?*’ (2001) J. Int’l Arb. Volume 18, p518.

<sup>559</sup> Alexis Moure, *Interim measures in International Arbitration*, p315.

### 4.3 England

When the seat of arbitration is not England, the 1996 Act applies solely to the stay of English legal proceedings in favour of arbitration agreements (s.9-11) and to the enforcement of foreign awards which includes mandatory provisions s.2(2).<sup>560</sup> As discussed in the previous chapter, this means that English courts do not enforce any provisional measure granted by the arbitral tribunal which has its seat outside of England.<sup>561</sup> Moreover, English judges have restricted discretionary powers to support an arbitration occurring outside their jurisdiction. When the seat of arbitration is England, s.42 becomes applicable.<sup>562</sup>

While courts have been given the discretion to implement their power, this does not require the court to revisit the order of the arbitrators that is sought to be enforced. This would cause considerable difficulty for courts as the s.42 hearing would be a lengthy and detailed procedure. In *Emmot v Micheal Wilson* The court provided “...judicial interference with the arbitral process should be kept to a minimum, that the proper role of the court is to support the arbitral process rather than review it and that the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within s.67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral

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<sup>560</sup> (Sect. 66 and Part III of the 1996).

<sup>561</sup> Please see 3.6.4.

<sup>562</sup> S.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.

....

(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.

tribunal, challenges based upon a serious irregularity and appeals on points of law)”.<sup>563</sup>

This chapter submits that this is the right approach towards the enforcement of provisional measures. First, it prevents the interference of courts with the arbitration process and it respects the jurisdiction of arbitral tribunals to grant provisional measures. Second, the full review of provisional measures would take a long time and hinders the arbitration process. Finally, the presence of a speedy enforcement mechanism would increase the prospect of compliance by the respondent of the measure.

S.42 is not included in mandatory provisions of the 1996 Act and parties are free to agree against it or agree to a procedural law which excludes court’s assistance in respect of enforcement of interim measures. Interim measures in England are enforced in the form of measures, orders or awards.<sup>564</sup> S.42(1) provides that court can make an order demanding a party to comply with a peremptory order by the tribunal. Non-compliance with the court’s order could amount to contempt of courts. For instance, the court can fine a party or imprison him for contempt of

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<sup>563</sup> *Emmott v Michael Wilson & Partners Ltd* [2009] Bus. L.R. 723 [58]. Please also see *Patley Wood Farm LLP v Brake* [2013] EWHC 4035 (Ch) [64].

<sup>564</sup> Kelda Groves ‘Virtual reality: effective injunctive relief in relation to international arbitrations’, (1998) *International Arbitration Law Review*, Volume 1(6) p189. S.66 of 1996 Act. Enforcement of the award. (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect....

court.<sup>565</sup> A third party, assisting the arbitration party to break the order can also be held liable for contempt of the court.<sup>566</sup>

Under s.42, the application for enforcement can be made by the tribunal upon notice to the parties or by an arbitration party with the approval of the tribunal (and upon notice to the other party). It is difficult to understand why the tribunal should itself apply and thus exposed itself to risk of costs.<sup>567</sup>

Subs.3 and 4 restrict the intervention of English courts in this respect. Subsection 3 provides that court shall not act unless the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order within the time prescribed (or within reasonable time). This is a reference to s.41 which sets out all powers that arbitral tribunals can have in case of a party's failure to comply. This will preclude a party to seek court's enforcement without trying to deal with the non-compliance within the arbitration context. Additionally, under subs.4, a party cannot apply for the court enforcement until a reasonable time or the prescribed time for the compliance with the order has passed. Above mentioned requirements ensure that court's assistance is only the last resort.<sup>568</sup>

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<sup>565</sup> V. Veeder, *National Report for England (1997)* in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International p258.

<sup>566</sup> Please see *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676.

<sup>567</sup> The provision, 'or, if no time was prescribed, within a reasonable time', initially seems odd since a peremptory order is hardly ever likely to be made without a time limit, and indeed the essence of s.41(5) is that a peremptory order prescribes 'such time for compliance with it as the tribunal considers appropriate'. The provision may be intended to cover a 'forthwith' order. This contains no specific time limit, but because absolutely instantaneous compliance is impossible, *sometime* must be allowed (even if only hours or days); and the effect of the provision is that such time must be reasonable.

<sup>568</sup> J. Schaefer, 'New Solutions for Interim Measures...' p18.

This subsection presents practical difficulty as the application can be itself unsuccessful if the court believes by applying section 42(3), the claimant has not exhausted any available arbitral process regarding the peremptory orders.<sup>569</sup> Kelda Groves believes that as the applicant requires the tribunal's consent to make an application; this makes the provision superfluous from the applicant's perspective. Further, even if the goal of the provision is to make sure that the tribunal does not relinquish responsibility to the courts, this might work in an unjust way in that it can penalise the possible applicant to the court.<sup>570</sup>

In *Kastner v. Jason*, the court held that the consensual jurisdiction of the arbitration tribunal included a power by its final award to make “freezing directions”.<sup>571</sup> Accordingly, in the light of section 39(1), the tribunal had the power by a provisional award to order the “freezing” of the respondent’s sole asset (his house) in England. Due to the fraud allegation against the respondents and the fact that he tried to dispose his assets and move to the United States, the tribunal precluded him from dealing or disposing his house without the written permission of the tribunal. Nonetheless, the respondent sold the house to innocent third parties and moved to the United States. Of course the final award by the tribunal could still be enforced in the United States against the respondent under the New York Convention; however, the freezing order did not have any effect as it did not create

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<sup>569</sup> Kelda Groves ‘Virtual reality: effective injunctive relief in relation to international arbitrations’, (1998) *International Arbitration Law Review*, Volume 1(6), p189.

<sup>570</sup> *Ibid*.

<sup>571</sup> [2004] EWHC 592 (Ch)[30].

any effect. This effect could include charge, lien or other security interest in the property which is the subject matter of the order.<sup>572</sup>

Looking at s.41 and s.42 together, the peremptory orders and enforcement procedure are not appropriate for the subject matter of many provisional measures particularly interlocutory injunctions and they have more of a psychological effect.<sup>573</sup> This is because courts can only enforce peremptory orders and arbitrators may only issue peremptory order only after the party has not complied with the initial order or direction “without showing sufficient cause”.<sup>574</sup> Therefore, the court intervenes only after the recalcitrant party has failed twice to comply with the order, first as a normal order and then as a peremptory one.<sup>575</sup>

As we mentioned in the previous chapter, the arbitral tribunal are unable to grant injunctions throughout the arbitration proceedings and they can only grant them in the final award.<sup>576</sup> Even if the tribunal could grant such injunctions during the arbitration process, such a lengthy procedure is not suitable for many of interim injunctions.

It appears that English arbitration law is still cautious in respect of arbitral tribunal-ordered interim measures. This is clear from the opt-in procedure for s.38 and s.39 and inability of tribunal to grant injunctions during the arbitration proceedings. In

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<sup>572</sup> V. Veeder, ‘National Report for England’ (1997) in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International p256.

<sup>573</sup> As Schaefer Points out, ‘...[section 42] is more like a reinsurance for the arbitrator’. J. Schaefer, ‘New Solutions for Interim Measures...’ p18.

<sup>574</sup> S 41(5).

<sup>575</sup> Tijana Kojovic ‘Court Enforcement of Arbitral Decisions on Provisional Relief *How Final is Provisional?*’ (2001) J. Int’l Arb. Volume 18, p518.

<sup>576</sup> Please see 3.4.



chapter three, it was suggested that English law should recognise the inherent power of arbitral tribunals to grant provisional measures and it also should empower the tribunals to grant injunction throughout the arbitration proceedings.<sup>577</sup> In order to make such changes meaningful, an effective enforcement procedure should be provided as well.

This thesis submits that there should be an expedited procedure in English courts to enforce urgent provisional measures, particularly regarding injunctions. In this procedure, arbitrators should grant the injunction in the form of a peremptory order with a short time limit and if the respondent of the order refuses to comply within that time, then enforcement of the peremptory order would be conducted through courts. In this procedure, the court should enforce the measure without any further examination on the conditions mentioned on subs.42(3)(4).

This means that the court may neither examine whether requesting party 'has exhausted any available arbitral process in respect of failure to comply with the tribunal's order' nor convince itself that 'the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed ...'. Accordingly, the latter decisions should be made by the arbitrators before the grant of the urgent measures and courts should not make such decisions. Of course requesting party should be liable for any damages if the order turned out to be unjustified.

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<sup>577</sup> Please see .3.6.5.

#### 4.4 France

Unlike the English approach, French law does not provide any specific procedure for enforcement of tribunal-ordered provisional measures through courts and instead extends the regime for the enforcement of arbitral awards to the enforcement of tribunal-ordered provisional measures.<sup>578</sup> This means that if the court believes that the award has been made correctly, then it will grant the exequatur (the enforcement order). In French law enforcement judge (Judge d'exécution) is the President of *Grand Instance* or his delegate.<sup>579</sup>

There are two ways to enforce provisional measures in this system. One is grant of provisional measures in the form of an award which can be enforced even if the seat of arbitration is located out of the French jurisdiction.<sup>580</sup> Given that, there are conditions and complications regarding the characterization of awards in French law which will be discussed in the next section. The other option is incorporation of provisional measures into a final award. It seems that the latter is possible when the award is granted in France.<sup>581</sup>

Some commentators believe that French courts must not refuse the enforcement order to a provisional measures incorporated into an award granted outside the jurisdiction of France as long as the measure is permitted within the French legal

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<sup>578</sup> Donald Francis Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' (2003) ICCA Congress Series, Volume 11, p93.

<sup>579</sup> The law of July 1991 and Decree No.92-755 of 31 July 1992.

<sup>580</sup> Alexis Moure, *Interim measures in International Arbitration*, p315.

<sup>581</sup> Tijana KoJovic 'Court Enforcement of Arbitral Decisions on Provisional Relief: *How Final is Provisional?* (2001) J. Int'l Arb. Volume 18, p514.

system.<sup>582</sup> For instance, Besson and Pudret believe that a decision in respect of a temporary or accessory right intended to protect one of the parties awaiting the arbitral proceedings can be assimilated into the final award which then can be recognised and enforced under the New York Convention.

Nonetheless, they believe that the interim order within the final award changes its status as a provisional measure in particular because they cannot be modified or revoked during the course of the proceedings, contrasting the proper provisional measures.<sup>583</sup> This view taken by Besson and Pudret seems to be reasonable as provisional measures within the awards are final and permanent. This is because arbitrators have already decided on the case and the reason of such complementary measure is just to make the final award effective. However, this does not help the enforcement of provisional measures granted throughout the arbitration proceedings which are the subject of this thesis.

#### ***4.5 Grant of provisional measure in the form of awards and its effect on the enforcement of such measures:***

As discussed in chapter three, provisional measures can be granted in the form of awards.<sup>584</sup> There has been a debate on whether provisional measures could be enforced in the form of awards under the New York Convention. However, what really define whether an arbitrators' decision is an enforceable award under the

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<sup>582</sup> Thomas Bevilacqua and Ivan Urzhumov, 'Arbitration procedures and practice in France: overview' question 23.

<sup>583</sup> Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, (Sweet & Maxwell 2007) p528.

<sup>584</sup> Please see 3.7.

New York Convention are state laws.<sup>585</sup> In other words, courts, by applying their national laws, decide whether an award should be enforced under the New York Convention. National laws have taken different approaches to the form under which provisional measures can be enforced. Some arbitration laws allow the grant and enforcement of the measures in the form of awards while others do not permit such a form.<sup>586</sup>

The prevailing view in international arbitration is that decisions on provisional measures cannot be enforced under the New York Convention as awards.<sup>587</sup> The supporters of this view argue that it would be unreasonable from a theoretical point of view for an arbitral tribunal to grant an interim order in the form of an award with the enforcement privilege of a final award which would still be subject to further revision of the merits by arbitrators. Such an approach can be seen in the Australian case of *Resort Condominiums International Inc. v. (1) Ray Bolwell and (2) Resort Condominiums (Australasia)*.<sup>588</sup> In this case, the Supreme Court of Queensland refused to enforce the arbitrator's injunction (in the form of an award) under New York Convention, believing that the measure was interlocutory and had procedural nature and therefore, it does not resolve the dispute. Moreover, it

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<sup>585</sup> Michael Dunmore, *Interim Measures by Arbitral Tribunals: The Enforceability Conundrum*, (2012) *Asian International Arbitration Journal*, Volume 8 Issue 2, p226.

<sup>586</sup> England, France and USA do permit such format, whereas Australian law does not. Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007) p540.

<sup>587</sup> Robert D.A. Knutson 'The Interpretation of Arbitral Awards *When is a Final Award not Final?*' 11 *J. Int'l Arb.* (1994) *J. Int'l Arb.* Volume 11, p107,108 . Kaj Hobér, 'The Trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim Relief (2004) *ICCA Congress Series*, Volume 12, p273. Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007) p633.

<sup>588</sup> Australia No. 11, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.*, Supreme Court of Queensland, 389, 29 October 1993 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, Volume 20 (Kluwer Law International 1995) pp. 628 – 650.

added that an award on a provisional measure is required to decide on one or more of the disputes referred to arbitration.

Arbitration laws of some jurisdictions would consider an award enforceable under the New York Convention providing that it is an enforceable award within the jurisdiction in which is granted.<sup>589</sup> These jurisdictions would enforce such an award subject to two conditions; the measure should be being final and binding.

It is argued that in respect of being binding, according to Article V(1)(e) of the New York Convention, an award on an interim measure is “contractually binding upon parties” either because they expressly consented to the binding nature of the award or because the authority to order such a measure is vested with the arbitral tribunal.<sup>590</sup> In relation to finality of the award, an award, in order to be final, is required to decide of a matter in the dispute. It is asserted that an interim measure is final with regards to the issues deals with as long as these issues are severable from the remaining matters in the case. Thus, if the provisional measure decides on a matter provided in the merits of the case, it can be enforced as an award under the New York Convention.<sup>591</sup>

Although state courts have the final discretion to enforce an award under New York Convention, there are few courts’ decisions in this respect. While this research only

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<sup>589</sup> Nadia Darwazeh, ‘Article V(1)(e)’ in Herbert Kronke, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010) p315,316. Courts of Belgium, France, Italy and Germany apply such approach.

<sup>590</sup> Albert Jan van den Berg, ‘Why Are Some Awards Not Enforceable?’ (2005) ICCA Congress Series, Volume 12, p305.

<sup>591</sup> A substantial majority of U.S. commentary approves this approach, as well as some non-U.S. authorities. Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014) p2513.

concerns all the EU Member States, with the exception of France, there are few cases on this matter in the EU. On the contrary, American courts have provided very useful case law on this matter and accordingly, they will also be discussed below.

#### ***4.6 Case law on the enforcement of provisional measures in the form of awards***

##### **4.6.1 American Case Law**

In *Sperry International Trade v. Israel*<sup>592</sup>, the Court of Appeals for the Second Circuit held that an interim order, upon certain circumstances are enforceable under the New York Convention. In this case parties agreed to a contract requiring Sperry to design and build a communication system for Israeli Air Force. Israel tried to draw down the funds of a contractual Letter of Credit in its favour. Sperry commenced arbitration proceedings and arbitral tribunal made an order in the form of an award which demanded the Letter of Credit to be escrowed into a joint account till the final award on the merit is rendered. Israel argued that the order in the form of an award is not final and therefore, it cannot be enforced under New York Convention.

The court granted the request for the enforcement of the award holding that the award concerned a matter which was clearly severable from the other points in the merit and it is final because the contract provided any award made between the

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<sup>592</sup> 532 F. Supp. 901 (S.D.N.Y.), aff'd, 689 F.2d 301 (2 Cir. 1982) <<http://openjurist.org/670/f2d/8/sperry-international-trade-inc-v-government-of-israel-government-of-israel>> accessed on 12/12/2015, Also followed in *Yonir Technologies, Inc. v. Duration Systems* (1992) Ltd., 244 F.Supp.2d 195 (S.D.N.Y. 2002) <<http://law.justia.com/cases/federal/district-courts/FSupp2/244/195/2287686/>> accessed on 12/12/2015. *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F.Supp.2d 3 62 (S.D.N.Y. 2002) <<http://openjurist.org/344/f3d/255/banco-de-seguros-del-estado-v-mutual-marine-office-inc>> accessed on 12/12/2015.

parties should be held final.<sup>593</sup> Additionally, the court held that the award, because of its nature required “affirmative action” and the award would be rendered a meaningless exercise of the tribunal’s power, if it were not enforced.

In *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp*<sup>594</sup>, the Court of Appeals for Ninth Circuit ruled that awards involving the preservation of assets which are the subject of underlying arbitration proceedings are considered final awards and can be re-examined for confirmation and enforcement by courts. Similarly, the court in *Arrowhead Global Solutions v. Datapath Inc* held that arbitrators must have the power to grant temporary equitable relief and courts must have the power to confirm and enforce that equitable remedy as final ‘in order for the equitable relief to have teeth.’<sup>595</sup>

The case of *Yasuda Fire v. Continental Casualty Company*<sup>596</sup> concerned a number of arbitrated disputes between the parties in respect of responsibility for payment on reinsurance policies. Arbitrators ordered the respondent to post an interim Letter of Credit in an amount needed to cover a potential award. The Court of Appeal of Seventh Circuit ruled that this order amounted to an award under US Arbitration Act and followed the reasoning made in *Pacific Reinsurance v. Ohio Reinsurance*.<sup>597</sup> Because the sole purpose of the interim order in *Yasuda Fire* was the posting of the

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<sup>593</sup> *Ibid* p 909.

<sup>594</sup> 935 F.2d 1019 (9th Cir.) (1991) <<http://openjurist.org/814/f2d/1324/pacific-reinsurance-management-corporation-v-ohio-reinsurance-corporation>> accessed on 12/12/2015.

<sup>595</sup> 166 Fed. Appx. 39 (4th Cir.) (2006) <<http://law.justia.com/cases/federal/appellate-courts/ca4/04-2000/042000.u-2011-03-14.html>> accessed on 12/12/2015.

<sup>596</sup> *Yasuda Fire & Marine Insurance Company v. Continental Casualty Company* .37 F.3d. 345 (7th Cir. 1994). <<http://openjurist.org/37/f3d/345/yasuda-v-continenta>> accessed on 12/12/2015.

<sup>597</sup> Cecil Branson, ‘The Enforcement of Interim Measures of Protection Awards’ (2002) ICCA Congress Series, Volume 11, p3.

Letter of Credit to preserve the effect of a final award, the argument of the court seems to be very similar to the view in the *Sperry International Trade*.<sup>598</sup>

In *Publicis Communication v TRUE North Communication Inc*<sup>599</sup>, the Seventh Circuit Court of Appeals had to determine whether an order granted by the arbitral tribunal to one of the parties to provide the other party with several tax records was an award in the meaning of the New York Convention. The court held that it was an award in the meaning of the New York Convention. It ruled that the arbitrators' decision was final and use of the term 'order' instead of 'award' was not decisive for the qualification of the order.<sup>600</sup>

In *Island Creek Coal Sales Co. v. City of Gainesville*<sup>601</sup>, an interim award ordered the claimant to continue performance of a coal purchase contract until arbitrators rendered a final award (specific performance order). It was held that award disposed of one "separate, discrete, independent, severable issue," namely, "whether the [claimant] is required to perform the contract during the pendency of the arbitration proceedings."<sup>602</sup>

Looking at these cases show that American case law has acknowledged the enforcement of provisional measures in the form of awards where orders preserve the effect of final awards or facilitate the grant of final awards. These orders include injunctions, escrow orders, orders to provide evidence, orders to preserve assets

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<sup>598</sup> 532 F. Supp. 901 (S.D.N.Y.), aff'd, 689 F.2d 301 (2 Cir. 1982).

<sup>599</sup> 206 F.3d 725(7<sup>th</sup> Circuit. 2000) <<https://law.resource.org/pub/us/case/reporter/F3/206/206.F3d.725.99-3424.99-1199.html>> accessed on 12/12/2015.

<sup>600</sup> Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007)p540, 547.

<sup>601</sup> 729 F.2d 1046 (6th Cir. 1984).<<http://law.justia.com/cases/federal/appellate-courts/F2/729/1046/314126/>> accessed on 12/12/2015

<sup>602</sup> *Ibid* p1.



and specific performance orders. In *Arrowhead v. Datapath*<sup>603</sup> the Court of Appeals of the fourth Circuit clearly stated that the reason that provisional orders should be enforced in the form of awards under the New York Convention is to give them enforceability and effectiveness.

This approach of American case law is unique and very progressive. This method lends the enforcement mechanism provided by the New York Convention for final awards to provisional measures; because their objective is to facilitate the grant or preserve the effect of final. This thesis submits that such an approach is exactly what the EU needs to apply to have a better enforcement procedure for tribunal-granted measures.

#### **4.6.2 French case law**

As was provided in the previous chapter, French arbitration law does not require any form in which provisional or conservatory measures should be granted. According to French law, the execution of the award is not suspended till the expiration of the time limit for any action for setting aside or till a final judgment in the merits is made.<sup>604</sup>

The judge considering the enforcement of the order determines whether the granted provisional measure is an award which can be enforced under New York Convention.<sup>605</sup> In 1999, in *Brasoil*<sup>606</sup> a dispute arose on whether a partial award is

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<sup>603</sup> 166 Fed. Appx. 39 (4th Cir.) (2006).

<sup>604</sup> Lawrence Newman, Colin Ong (editors), *Interim measures in International arbitration* (Juris 2014) p.319.

<sup>605</sup> R. Ogilvy, Enforcement of judgement s- France in European Judicial Network in civil and commercial matters, Norton Rose guide 2011, <[http:// www. Nortonrosefulbright.com / files /](http://www.Nortonrosefulbright.com/files/)

enforceable under the New York Convention. In this case, the claimant (Brasoil) contractually agreed to drill a number of wells in the Libyan Desert for the Great Man-Made project. Brasoil initiated ICC proceedings due to the termination of the contract by the defendant (Man-made project). The arbitrators granted a partial award making Brasoil liable for the malfunctioning of the wells that it had built. Brasoil later on requested the tribunal to review the partial award which was rejected by the tribunal. Upon the rejection, the claimant applied to the Paris Court of Appeal and it was held that though the partial award was described as an order by the tribunal, it was in fact an award because it purported finally to dispose of a dispute between the parties.<sup>607</sup>

Nevertheless, in French case law, there have been conflicting decisions in this respect. In *Corrado v Raimbault*<sup>608</sup> (2002) Paris Court of Appeal held that the decisions on provisional measure could not be categorized as an award and an application for setting aside could not be accepted against such a decision.<sup>609</sup> In contrary, in *Otor Participation v. Carlyle*<sup>610</sup>, it was held by Paris Court of Appeal in October 2004 that arbitrators may grant provisional measures in the form of an

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international –arbitration -new-french-arbitration-law-reflects-a-boldly-liberal-approach-pdf-762-kb-34983.pdf > accessed on 06/12/2015, p2,3.

<sup>606</sup> Braspetro Oil Services Company - Brasoil v. The Management and Implementation Authority of the Great Man-Made River Project, Court of Appeal, 1 July 1999 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (1999 Volume 24) pp. 296 – 302.

<sup>607</sup> Redfern and Hunter *Law and Practice of International Commercial Arbitration*, (6th edition Oxford University Press 2015) 9.15.

<sup>608</sup> Paris, January 11, 2005, *Corrado v Rainbault*, Les Cahiers de L'Arbitrage no.2005/1, Gaz, Pal (domestic arbitration) Paris, April 11, 2002, *ABC V Diverseyler*, Les Cahiers de L'arbitrage II. P. 353 as it was mentioned in Poudret & Besson, *Comparative Law of International Arbitration* (Second Edition 2007) p541.

<sup>609</sup> *Ibid.*

<sup>610</sup> Denis Bensaude, 'S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1: 'Interim Awards on Provisional Measures in International Arbitration,' (2005) *Journal of International Arbitration*, Volume 22, Issue 4.

award. Again, in *ABC v Diversylever*<sup>611</sup> (2005) Paris Court of Appeal held that that decision of interim measures could not be considered as an award and an application for setting aside could not be recognized against such a decision.<sup>612</sup>

Finally, in 2011, in *GAT v. République du Congo*<sup>613</sup>, Court of Cassation confirmed the current case law by which in order to be enforced as an award, the arbitral tribunal's decision is required to decide in a final manner all or part of the merits, a matter regarding the jurisdiction or an issue related to the procedure which is such as to put to an end to the proceedings.<sup>614</sup>

What makes the grant of interim measures in the form of awards in France even more significant is the new amendment that makes the enforcement of award even faster than before. Prior to the 2011 Decree, in order to notify an award an enforcement order (*exequatur*) needed to be given from a judicial authority, first which was followed by service by bailiff on the other party. Subject to the country where the respondent of the award is located, notification could take several months. However, under the new Decree the *exequatur* procedure will no longer have to be conducted before the notification of the award. The notification can be done as soon it is made by the arbitrators.

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<sup>611</sup> *ABC International (UK) v. Diverseylever Limited (UK)*, Cour d'Appel [Court of Appeal], 2001/10769; 11 April 2002 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2003-*, Volume 28; Kluwer Law International 2003) p209 .

<sup>612</sup> *Ibid.*

<sup>613</sup> Cour de Cassation, Case No. 09-72439, 12 October 2011 in Bertrand Derains and Yves Derains, '*Groupe Antoine Tabet v. Republic of Congo AS*, Cour de Cassation, Case No. 09-72439, 12 October 2011', *A contribution by the ITA Board of Reporters*, Kluwer Law International.

<sup>614</sup> *Ibid.*

More importantly, the decree permits the foreign arbitral award or an award granted in France in an international arbitration to be enforced immediately. The enforcement procedure can be commenced without waiting for the times to exercise any recourse against the award to expire, or albeit the opposing party has commenced recourse against the award (Article 1526). Finally, parties in an international arbitration can waive, in advance, their right to bring an action to set aside an award made in France (1522 CCP). In other words, this waiver by parties would effectively become permanent and could never be set aside in France.

Looking at French case law in this respect, it appears that even if there is a provisional measure granted in any form which deals with part of the merits of the dispute in a final manner can be enforced as a proper award with all the legal effects. Most scholars and commentators confirm the approach that has been taken by Court of Cassation in this respect.<sup>615</sup> Gaillard and Savage believe that decision of the tribunal on the matters such as jurisdiction, the applicable law, the validity of a contract and the principle of liability should be considered as (final) arbitral awards.<sup>616</sup>

While the French provides the opportunity for enforcement of provisional measures in the form of awards, such approach does not cover many provisional measures which do not deal with matters in the merits in a final manner. This includes injunctions, specific performance orders, orders to produce evidence, etc.

Because French courts can only grant conservatory attachments and judicial

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<sup>615</sup> Yves Derains, Laurence Kiffer, *National Report for France* (Kluwer Law International 2013) p68.

<sup>616</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) p739.

securities before the constitution of the tribunal (unless parties agreed otherwise), this leaves arbitrators with the power to grant many interim remedies. Since only interim remedies which decide part of the merit in a final manner can be enforced in the form of awards, then many of the arbitrators' provisional measures do not enjoy any enforcement mechanism at all. This lack of clear enforcement procedure for provisional can discourage the arbitration parties from applying for provisional measures in arbitral tribunals.

#### **4.6.3 English case law**

There is no case law on granting interim order in the form of awards before granting the final award. Some commentators have argued that because the title of s.39 of the Act is "provisional award", these measures also could be enforced as real awards under s.66 of the Act.<sup>617</sup> Nonetheless, it seems most of the scholars believe that awards only cover the decisions which deal with the whole or part of the merits of the case in a final manner.<sup>618</sup> Similarly, it appears that despite the broad wording of s.48, most scholars agree that this section should be confined to final awards and to substantive remedies on the merits.<sup>619</sup> Based on this approach, in *kastner v Jason*, Lightman J held that s.48 is wide enough to enable the parties to

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<sup>617</sup> David Brynmor Thomas 'Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996' (1997) *Arbitration International*, Volume 13 Issue 4, p407.

<sup>618</sup> D. Mark Cato. *Arbitration Practice and Procedure. Interlocutory and Hearing problems* second edition LLP 1997 P319 320. Also see Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (6th edition Oxford University Press 2015) section 9.

<sup>619</sup> Steven Gee, *Commercial Injunctions*, (5th ed, 2004), at paras 6.045/047; Russell on Arbitration, 22nd ed, 2003, at para 60. Harris, Planterose and Tecks, *The Arbitration Act 1996 : A COMMENTARY* (Fourth Edition Blackwell 2007) [48E].

confer on arbitral tribunals the power by the final award to order freezing directions awaiting satisfaction or securing the final award.<sup>620</sup>

Some English commentators believe that procedural orders such as orders for production of evidence cannot form an award under the definition New York Convention as they just help the arbitration move forward and do not have the status of the award.<sup>621</sup> This is in contrary what was held in the American case of *Publicis Communication v TRUE North Communication Inc.*<sup>622</sup> Given that, it seems that the situation in England is similar to what is held by French law and it does not provide the effective enforcement needed for provisional measures in the form of awards.

#### **4.6.4 Overview of the section**

England, France and many other jurisdictions would enforce the arbitral tribunal's award under the New York Convention subject to two conditions; when it is binding and when it decides in a final manner all or part of the merits.<sup>623</sup> Accepting these requirements for the enforcement of provisional measures in the form of awards would make such measures partial awards which also enjoy the enforceability under the New York Convention. Nonetheless, in many occasions, it is very difficult

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<sup>620</sup> [2004] EWHC 592 [27].

<sup>621</sup> Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (6th edition Oxford University Press 2015) 9.09.

<sup>622</sup> 206 F.3d 725(7<sup>th</sup> Circuit. 2000).

<sup>623</sup> Nadia Darwazeh, 'Article V(1)(e)' in Herbert Kronke, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010) p315,316. Courts of Belgium, Italy and Germany apply such approach.

to distinguish reviewable awards, from purely “interlocutory orders” (i.e., preliminary orders issued in the course of the arbitration proceeding).<sup>624</sup>

In English law, this ambiguity can be seen between s.47 and s.39 in respect of interim payment orders. Arbitrators can grant payment awards under s.47 of 1996 Act as it provides; “the tribunal may make more than one award at different times on different aspects of the matters to be determined”. The tribunal may, in particular, make an award relating... to an issue affecting the whole claim...”. An identical measure called ‘an interim payment’ is also obtainable from arbitrators under s.39(2)(a). Interestingly, grant of the interim payment as a provisional award under s.39 does not have the same weight that it has when it is granted as partial award under s.47, even though they both practically ordering the arbitration party to do same thing which is paying an undisputed money to the other party.<sup>625</sup>

Further, many of arbitral provisional measures are final *per se*, including orders for producing or preserving evidence, orders to continue to perform contractual obligation. Such orders decide on a matter related to the dispute in a final manner. This is because arbitrators will not (or cannot) return from their decisions and revoke them later, therefore, such orders are irrevocable and the order itself will not be changed in the final award.

Considering the approaches in the US, England and France, this thesis submits that the American approach to this matter is clearly the most advanced and pro-

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<sup>624</sup> Alan Scott Rau, ‘Provisional Relief in Arbitration: How Things Stand in the United States’, (2005) Journal of International Arbitration, Volume 22, Issue 1, p3.

<sup>625</sup> Please see the case of *BMBF (No. 12) Ltd v Harland and Wolff Shipbuilding and Heavy Industries Ltd. [2001] C.L.C. 1552* for interim payment` obtained in the form of awards.

enforcement in respect of enforcing provisional measures in the form of awards. In light of such an approach, the most important provisional measures including orders that preserve the effect or facilitate the enforcement of the arbitral award should be recognised and enforced as arbitral awards. This includes measures such as orders for preservation of assets, specific performance order, escrow order.

Thesis submits that there should not be too much concern about the fact that enforcing such measures in the form of award would cause irreparable harm to the arbitration parties. First, because granting provisional measures in the form of award requires the same safeguards for issuance of normal provisional measures. Further, as discussed in chapter three, one of the requirements for grant provisional measures in the first place is a likelihood of success in the merits of the case for the claimant.<sup>626</sup> This means that if arbitrators believe that the claimant (party who seeks the provisional order) would not have a chance to win the case on the merits, they would not grant provisional measures at all.

Moreover, because such measures are granted and enforced in the form of awards, parties can apply to courts to set them aside under Article V of the New York Convention. Donovan provides that “the very purpose of interim measures is to ensure the effectiveness of the final award. It follows that, if states are prepared to lend their enforcement machinery to the enforcement of final awards, they should lend it as well to the enforcement of interim measures. Hence, it is submitted here

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<sup>626</sup> Please see 3.3(a).



that the best approach to the enforcement article is to simply make interim measures subject to the same standards of enforcement as final awards".<sup>627</sup>

This thesis submits granting provisional measures in the form of awards provides an effective enforcement mechanism which has two important effects. First, it increases the request for such measures by the parties from the tribunal. This is particularly significant, given the restriction provided by arbitration laws for parties to apply for such measures after the constitution of the tribunal or for the legal system which do not recognise the provisional measures granted by tribunals. Second, when parties know that there is an effective enforcement procedure for provisional measures, this would increase the parties' compliance with the provisional measure.

It is submitted that the decision of the tribunal in respect of jurisdiction of itself, validity of the arbitration agreement (as both were suggested in chapter one) and applicable law should be expressly given the same enforceability as final awards under the New York Convention. It was proposed in chapter one that arbitral tribunals should have the exclusive power to rule on its own jurisdiction and accordingly should grant anti-suit injunctions in the form of awards which confirms the validity of the arbitration agreement.

As mentioned above, in respect of the provisional orders demanding the party to produce evidence or disclose certain information, this thesis submits that such

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<sup>627</sup> Donald Francis Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' (2003) ICCA Congress Series, Volume 11, p147.

orders should be held as enforceable awards under the New York Convention. This is because an order to produce evidence or information is final *per se*. As it was in *Publicis Communications*, enforcement of such awards during the arbitration process is particularly important when the required information or evidence has a great significance for deciding on the merits.<sup>628</sup>

In relation to interim payment orders, when French courts are able to grant interim payment (in summary proceedings) in respect of a sum that it is unobjectionable (but still subject to the final judgment of the court), it is hard to accept why the arbitrators should not be able to grant such measures in the form of awards so they could be enforceable immediately. In English law, as explained above, there is no reasonable justification that courts should not enforce interim payment order under s.39. This thesis suggests that interim payment orders should be granted and enforced in the form of awards.

For the time being, granting tribunal-ordered measures in the form of awards probably is one of the most practical ways to improve the enforcement of such measures in the EU. One may argue that the enforcement of an award is a lengthy procedure in the domestic context and it can question the effectivity of this method.<sup>629</sup> Nevertheless, this lengthiness is for enforcing any arbitral decision including provisional measures.<sup>630</sup>

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<sup>628</sup> 206 F.3d 725(7<sup>th</sup> Circuit. 2000).

<sup>629</sup> J. Schaefer, 'New Solutions for Interim Measures...' p18.

<sup>630</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law International 2005) 6.27.

Under this enforcement mechanism, with-notice freezing orders and attachment targeting goods and share (when they are in the possession of the respondent) should also be enforced as awards under New York Convention. The measures that do not suit such mechanism are without notice measures or measures addressing immovable property such as land or building as there are closely connected to the sovereignty of states.

In respect of provisional measures granted by emergency arbitrators there are some controversies. Looking at what was discussed in the previous chapter on recognition of the status of the emergency arbitrators; provisional measures granted by such arbitrators should be also enforced under the New York Convention.<sup>631</sup> There is only one case which has looked particularly into the weight of emergency arbitrator's decision. In *Chinmax Medical Systems Inc v. Alere San Diego Inc*<sup>632</sup> the District Court of California had to decide whether a sole arbitrator's interim order granted under Article 37 of ICDR (emergency arbitrator) could be enforced.

In this case , the sole arbitrator granted an interim order demanding Chinamax to conduct certain conservatory measures within ten days, stating that the measure would "remain in effect pending the review of the full arbitration tribunal , once appointed, thereafter as the tribunal may order".<sup>633</sup> The court refused the application of the Chinamax to set aside the interim order and in order to reach its

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<sup>631</sup> Please see 3.10.

<sup>632</sup> Case no. 10cv2467 WQH (NLS). <[https://jenner.com/system/assets/asset\\_s/4287/original/Chinmax\\_v.\\_Alere.pdf?1319838875](https://jenner.com/system/assets/asset_s/4287/original/Chinmax_v._Alere.pdf?1319838875)> accessed on 15/12/2015.

<sup>633</sup> *Ibid.*

decision; it considered the judgment of *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp*<sup>634</sup>, in which court held ‘enforcement of [interim award] , when appropriate is ... essential to preserve the integrity of the arbitral process ’.

Taking on a similar approach, District Court of California stated that ‘temporary equitable orders calculated to preserve calculated to preserve assets or performance needed to make a potential award meaningful... are final award that can be reviewed for confirmation and enforcement by the district courts under the [Federal Arbitration Act].<sup>635</sup> On this approach, the decision of an emergency of arbitrators should be enforceable even though it is not itself ‘final’, as it is designed to prevent the final award of an arbitral tribunal from being meaningless.<sup>636</sup>

This chapter submits that this approach taken by *Chinamax* is the right position in respect of orders granted by emergency arbitrators. This in line with what was proposed in chapter three providing arbitration laws of all Member States should recognise the emergency arbitrator as ordinary arbitrators. Accordingly, the decision of the emergency arbitrator should receive the same recognition. It should be noted that use of emergency arbitrators by arbitration parties is very infrequent as this procedure is still very young and needs time to develop in international commercial arbitration.<sup>637</sup>

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<sup>634</sup> 935 F.2d 1019 (9th Cir.) (1991).

<sup>635</sup> Guillaume Lemenez & Paul Quigley, *The ICDR’s Emergency Arbitrator Procedure in Action*, p3, <[www.adr.org/cs/idcplg?IdcService= GET\\_ FILE&dDocName= ADRSTG\\_ 004355 &Revision Selection Method = LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004355&Revision=SelectionMethod=LatestReleased)> accessed on 15/12/2015.

<sup>636</sup> Baruch Baigel, ‘The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis, *Journal of International*’ (2014) *Arbitration*, Volume 31 Issue 1, p16.

<sup>637</sup> Amir Ghaffari and Emmylou Walters, ‘The Emergency Arbitrator: The Dawn of a New Age?’ (2014) *Arbitration International*. Volume 30, Number 1, p166.

Nonetheless, for now, the fact that the emergency arbitrator is not formally an arbitrator should not prevent the court from enforcing the decision of the emergency arbitrator. Paul Beraudo proposes that in the absence of recognition and enforcement of emergency arbitrators' decisions as an award, provisional measures could be enforced by the ordinary courts as opposed to courts specialized in exequatur proceedings, for instance, through an incorporation or integration mechanism. The court should be required to consider the interim measure in itself and not the dispute settled by the provisional measure.<sup>638</sup>

The next section will explore the effect of party autonomy on the enforcement of provisional measures by courts. It will be submitted that parties should stipulate in their arbitration agreements that every decision of the arbitral tribunal is binding. This would increase the prospect of enforcing provisional measures by courts, particularly in the form of awards.

#### ***4.7 The role of party autonomy in the enforcement of provisional measures***

Unlike national courts which are restricted to their conflict of law rules, arbitration parties and arbitral tribunals enjoy a broad discretion to choose the procedural law of the arbitration procedure.<sup>639</sup> It is argued that arbitral tribunals should be careful

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<sup>638</sup> Jean-Paul Beraudo, 'Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals' (2005) *Journal of International Arbitration*, Volume 22, Issue 3, p253.

<sup>639</sup> Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) *Journal of International Arbitration*, Volume 24(3) p1.

not to impose a provisional measure available under the procedural law of the arbitration that would raise setting-aside problems at the place of enforcement.<sup>640</sup>

Nevertheless, if parties agree on without notice measures to be granted in the arbitration process and arbitrators do so, should courts enforce such measures against the parties as they do in the litigation, considering the fact that they might consider without notice measures against the principle in Article V(b) of New York Convention (according to which all the parties need to present their case in the proceedings)? Equally, if the arbitrators because of parties' agreement or under the applicable law, award any conservatory attachment<sup>641</sup>, should the court enforce such a measure even if its own national law has given such a right exclusively to courts?

In relation to without notice measures, as argued in chapter three<sup>642</sup>, even if arbitrators grant them, enforcement of such orders would have extreme difficulties under the New York Convention. Moreover, UCNITRAL Model Law as the only set of arbitration rules which has recognised these measures does not allow the without notice enforcement of such measures (Article 17).

In respect of attachments and freezing injunctions, if the enforcing court does not find any provision in its national law contrary to the orders, then it should enforce such orders as provisional measures. But, the real problem is when the enforcing

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<sup>640</sup> Filip de Ly, 'Concluding Remarks' in Laurent Lévy and Filip de Ly (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 5, p334.

<sup>641</sup> An attachment is an order by which court seizes a property to ensure satisfaction of a judgment.

<sup>642</sup> Please see 3.7.

court finds a contradiction in its national law. A possible situation could occur in an arbitration which parties agree to be governed under German law (or they can agree to such a power for tribunal). Under the German law, an arbitration tribunal enjoys the same power in respect of provisional measures as a state court including attachment orders.<sup>643</sup> According to French law, conservatory attachments fall within the exclusive jurisdiction of state courts. Now, if one of the parties wants to enforce such an order against the other party through French courts, the judge would face an arbitral provisional measure which is valid according to the governing law of the arbitration, but, it is against its national law.<sup>644</sup>

Contractual agreement of parties on the compliance with tribunal's decision can have a great influence on the enforceability of such orders, regardless of their form. In the *Société Nationale des Pétroles du Congo Et République do Congo v Société Total Tina Elf E & P Congo*<sup>645</sup>, although the court did not accept the decision of pre-arbitral referee as an award, it ruled that the decision of the referee was binding for parties. The court insisted on the contractual nature of the decision delivered by the referee at the end of the proceedings grounded on parties' cooperation. This was because the parties had, in advance, obliged themselves to "carry out the referee's order without delay." While the pre-arbitral referee is not recognised as

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<sup>643</sup> J. Schaefer, 'New Solutions for Interim Measures...' p18.

<sup>644</sup> It should be noted that in the states that their arbitration rules have allowed only the state court to provisional measures, enforcement of ordinary arbitral provisional measures seem to be very unlikely.

<sup>645</sup> CA Paris, 1e ch C (29 April 2003). in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (2004 Kluwer Law International) Volume 29, pp. 203 – 205.

an ordinary arbitrator in the French law, the court still enforced the decision of the referee based on the fact that the parties had agreed to do so in the contract.<sup>646</sup>

Similarly, in *Sperry International Trade v. Israel*<sup>647</sup>, one of the reasons that the court considered the escrow order as final was the agreement of parties in the contract that any arbitration award "shall be deemed final and may be enforced".<sup>648</sup> Such recognition of party autonomy by courts can have a great effect of enforcing provisional measures. If parties agree in their contract that all decisions of the arbitral tribunal should be binding on parties, regardless of being award or provisional measure, this could increase the chance of enforcement by any national court. Accordingly, this thesis submits that such a stipulation in parties' agreement would enhance the enforceability of provisional order either in the form of awards or procedural orders.

The next section will explore the difficulties and hurdles in enforcing arbitral awards and courts' decision. It will be explained how divergent procedure regimes in Member States can prevent the effective enforcement of tribunals and courts' decisions.

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<sup>646</sup> Jean-Paul Beraudo, 'Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals', (2005) *Journal of International Arbitration*, Volume 22 Issue 3) p 254.

<sup>647</sup> 689 F.2d 301 (2d Cir. 1982). < [http:// law.justia.com/cases/federal/ appellate courts /F2/689/301/76335 />](http://law.justia.com/cases/federal/appellate_courts/F2/689/301/76335/) accessed on 14/12/2105 p1.

<sup>648</sup> *Ibid*



#### ***4.8 Enforcement procedures of different courts and their problems***

Knowing that awards enjoy better enforceability in international commercial arbitration can encourage recalcitrant parties to comply with granted provisional measures. Yet, such a method still does not guarantee the enforcement of such measures, if defendants do not comply with the award. In such cases, the claimant needs to enforce such awards through national courts. While the signatory nations of the New York Convention have an obligation to treat awards falling under this convention no less favourably than domestic awards, the fact remains that if a claimant obtains an award, he/she faces 146 different procedural regimes (28 regimes within the EU) for enforcing a foreign arbitral award falling under the New York Convention.<sup>649</sup> It is obvious that such diversity in procedural regimes gives rise to a various obstacles and secondary consideration when enforcing an award under New York Convention.

For example, Under English law, once the court has ordered that the arbitral award to be recognised as a judgment, the arbitral debtor is given a 14 day time period to apply to set the order aside. The judgment cannot be enforced unless that period expires or, where a challenge is made by the defendant within the period has been

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<sup>649</sup> Jarred Pinkston and others 'Jurisdictional requirements for the enforcement of arbitral awards against defendants and their ownership interest in subsidiaries - a comparative review' (2012) International Arbitration Law Review, Volume 3, p98.

disposed of.<sup>650</sup> The court does not have the authority to determine any application for the enforcement proceedings.

Nonetheless, under the 2011 Decree of French law, the foreign arbitral award or an award granted in France in an international arbitration are allowed to be enforced immediately. The enforcement procedure can be commenced without waiting for the time to exercise any recourse against the award to expire, or albeit the opposing party has commenced recourse against the award (Article 1526). Finally, as mentioned earlier<sup>651</sup>, parties in an international arbitration can waive, in advance, their right to bring an action to set aside an award made in France (1522 CCP). In other words, this waiver by parties would effectively become permanent and could never be set aside in France.<sup>652</sup>

It is clear that under the French approach, awards would enjoy the faster enforcement procedure than awards enforced under English law. Earlier, the thesis proposed that tribunal-ordered provisional measures should be enforced in the form of awards, so they would use the enforcement mechanism under the New York Convention for final awards.<sup>653</sup> In light of that, this thesis submits that the French approach provides a better enforcement procedure for provisional measures, as one of the key purposes of provisional measures is expediency in their enforcement.

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<sup>650</sup> CPR 62.18(9)(b). This approach is also followed by German law. Ragnar Harbst, 'Arbitrating in Germany' (2004) *Arbitration*, volume 70(2) p89.

<sup>651</sup> Please see 4.6.2.

<sup>652</sup> Jarred Pinkston and others 'Jurisdictional requirements for the enforcement ...' p98.

<sup>653</sup> Please see 4.6.4.

Some obstacles for enforcing arbitral awards are not just related to the enforcement of arbitral awards or judgments made by Member States' courts which have jurisdictions under the Recast (that now includes provisional measures).<sup>654</sup> For instance, in respect of interim payment orders, sometimes, the charging order or the order for the sale of the claimant's property cannot be granted by the courts.<sup>655</sup>

In English law, if a charging order does not result in payment, it may be possible to enforce the charge by bringing sale proceedings.<sup>656</sup> Nonetheless, enforcing such a power by the court is discretionary and it depends very much on the circumstances which can include: a) the intentions of the person or persons who created the trust; b) the purposes for which the property subject to the trust is held; c) the interests of any secured creditor of any beneficiary; c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home.<sup>657</sup>

In many cases the presence of children in a home would be a powerful argument for delaying a sale as it would make an innocent vulnerable co-owner immediately homeless.<sup>658</sup> Similarly, the enforcement of a judgment could face certain

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<sup>654</sup> Jarred Pinkston and others 'Jurisdictional requirements for the enforcement ...', p112.

<sup>655</sup> A charging order secures debt upon the debtor's properties such as land or securities registered within England. Such orders are frequently granted in relation to real property, including home or business premises of a debtor. Once a final charging order is granted, it holds the same effect as an equitable charge and the arbitral creditor becomes a secured creditor.

<sup>656</sup> CPR 73.10.

<sup>657</sup> S.14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996.

<sup>658</sup> Michael Buckley, 'Enforcing a charging order by way of an application for an order for sale' <<http://www.i-ma.me.uk/QuarterlyAccount/magazines/186/186%2010.pdf>> accessed on 16/02/2015.

restrictions in the French system.<sup>659</sup> French law can prevent the seizure of certain assets, for example: a) When sums are required for maintenance (specially a proportion of the salary which is arranged based on a sliding scale depending on the amount of income and dependents. b) When movable property is required for the debtor's everyday life and work that may not be seized the price is paid or if they are of significant value. c) When the property is necessary for the sick or disabled people in the property.<sup>660</sup>

It should be noted that while above mentioned hurdles in different Member States can create extra difficulties for enforcing provisional measures, they only concern limited types of provisional measures. This is because they concern cases that defendant either owns some money to the claimant or has the claimant's property in custody. In respect of other provisional measures such as orders to produce evidence or document, if the respondent of the order does not comply with the granted measures, he/she would be held by contempt of court which can lead to possible fine or imprisonment.

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<sup>659</sup> Enforcement (which implies the enforcement by force as voluntary enforcement by the debtor does not need proceedings) includes all the proceedings permitting the exercise of "enforceable" obligations against the debtor's will. French law entails three types of civil obligations: to pay, to do something or to refrain from doing something and lastly to return. An enforceable title concerns assets of the debtor and such a title does not address person. Nonetheless, a refusal to comply with certain obligation (maintenance obligation) is a criminal offence which makes the debtor liable to prosecution and to a prison sentence. Report on Enforcement of judgement s- France in European Judicial Network in civil and commercial matters. <[http:// ec.europa.eu/civil justice/enforce\\_judgement / enforce\\_judgement\\_fra\\_en.htm](http://ec.europa.eu/civil_justice/enforce_judgement/enforce_judgement_fra_en.htm)> accessed on 16/02/2015.

<sup>660</sup> *Ibid.*

## **4.9 Conclusion**

International commercial arbitration, particularly in the past decade, has gradually set aside its hesitance and reluctance in respect of recognising arbitrators' power to grant provisional measures. Currently, many laws of Member States, as well as most of the international arbitration rules, allow arbitral tribunals to exercise such an authority and some even recognise it as an inherent power of arbitrators. While such developments have helped to enhance the use of provisional measures by arbitrators, international commercial arbitration still lacks a clear enforcement procedure in this respect. In this chapter, the problems and complications created by the absence of such an enforcement structure were analysed and suggestions were made for the different issues respectively. The propositions of this chapter for creating a harmonised structure for the enforcement of tribunal-ordered provisional measures can be divided into two sections as follows:

### ***a) Enforcement in the form of provisional orders***

It is suggested that the enforcement of provisional measures should be expressed as an additional protocol in the New York Convention.<sup>661</sup> Another option is encouraging all Member States, such as the UK, to join the Geneva Convention and consequently, the same protocol could be introduced in this convention allowing the cross-enforcement of the tribunal ordered provisional measures.<sup>662</sup>

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<sup>661</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law International 2005) 6.44.

<sup>662</sup> This is the approach that Germany has taken toward such measures.

An ideal situation would involve all EU Member States allowing the enforcement of tribunal-ordered measures even when the seat of arbitration is outside of their jurisdiction. Member States' arbitration laws could also provide a provision that the party seeking the enforcement of tribunal-ordered measures must pay damages if the measure proves to have been granted incorrectly.<sup>663</sup> However, making the necessary amendments to the national laws of Member States would likely take years.

***b) Enforcement in the form of awards***

This thesis submits that the more practical and feasible way to increase the enforceability of provisional measures in the EU is granting such measures in the form of awards for three main reasons.

First, there are many differences between the laws of EU Member States with respect to interim measures granted by arbitral tribunals. For instance, there are some Member States in which the arbitral tribunal's power to grant provisional measures is not recognised. This makes the cross-border enforcement of tribunal-ordered measures particularly difficult.<sup>664</sup>

Second, almost all EU Member States either do not allow the cross-border enforcement of tribunal-ordered provisional measures (e.g. the UK – England) or do not have any express provision in this respect (Sweden). On the other hand, some other states have extended the regime for enforcement of awards to provisional measures (e.g. France and the UK – Scotland) which means they only enforce

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<sup>663</sup> J. Schaefer, Jan Schaefer, 'New Solutions for Interim Measures...' p32.

<sup>664</sup> Italy and Spain. William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J.Int'L, Volume 28, p1085.

provisional measures when they are in the form of awards. This latter fact makes any suggestion (in relation to granting measures in the form of awards) more practical.

Third, and most importantly, all the EU Member States are signatories to the New York Convention and they cannot refuse the enforcement of the arbitral awards.<sup>665</sup>

Accordingly, any suggestion through the New York Convention would have a higher chance of acceptance and enforcement by the signatories. Given the above reasons, this chapter submits that the enforcement of provisional measures (in the form of awards) through the New York Convention is the most practical option, which would have a better chance of success in the EU. Provisional measures granted in the form of awards can be divided into three groups:

- i. Decisions of arbitral tribunals on the matters such as jurisdiction, the applicable law and the validity of the arbitration agreement should be considered as (final) arbitral awards. This is because such decisions are final *per se* and arbitrators simply cannot and will not change their decision later on these matters. For instance, arbitrators do not confirm the validation of the arbitration agreement at the outset of the proceedings and later decide that the arbitration agreement is invalid.
- ii. The second category includes measures for preserving the effect of the final award or facilitating the grant of final awards. This includes injunctions (except for without notice freezing injunctions or conservatory attachments), specific performance orders, interim payment orders and orders for the preservation of

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<sup>665</sup> Unless they have reasons to do so under Article V of the New York Convention.

assets. This thesis suggests that the position taken in *Arrowhead Global Solutions v. Datapath Inc*<sup>666</sup> and *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp*<sup>667</sup> is the approach that should be taken by all Member States. Under this system, temporary equitable measures such as orders for preservation assets are considered final as they facilitate the grant of award or make the final award meaningful.

- iii. The third category would include measures for the production of evidence or documents. Such measures are also final *per se* because arbitrators will not change their minds later on when granting an award that evidence should not have been provided and accordingly such orders should be considered as enforceable under the New York Convention.

This thesis submits that the French approach provides a better enforcement procedure for provisional measures granted in the form of awards. This is because under the 2011 Decree of French law, arbitral awards are allowed to be enforced immediately without waiting for the time to exercise any action to set aside the award to expire.

This thesis also proposes that enforcing provisional measures in the form of awards would not be suitable for without notice freezing orders or attachments from tribunals. Even if parties agree that the tribunal should enjoy such powers, it seems that enforcing such provisional measures would face extreme difficulties due to the

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<sup>666</sup> 166 Fed. Appx. 39 (4th Cir.) (2006).

<sup>667</sup> 935 F.2d 1019 (9th Cir.) (1991).



explicit provisions in the procedural laws of Member States, such as Article 1449 of French 2011 or Article 17(C(5)) of UNCITRAL Model Law. Finally, one important point which can increase the likelihood of enforcement of provisional measures by the EU Member States' courts is stipulation by parties in the arbitration agreement that any decision by the arbitral tribunal should be binding for the parties.

# Conclusion

During the last three decades, international arbitration has developed considerably and this is arguably the result of two main factors. The first is the success of the New York Convention in providing the global enforceability of arbitral awards which in turn has given arbitration a great advantage over litigation. The second reason is the globalisation of the world economy in general which created the opportunity for companies and people to transfer their assets from one jurisdiction to another with ease and speed and increased the importance of transnational dispute settlement mechanisms such as international arbitration.<sup>668</sup>

One of the outcomes of the recent prominence of arbitration is the increasing need for provisional measures, within the arbitration framework, so that parties' rights are protected promptly during the arbitration process. This thesis illustrated the problems and difficulties facing provisional measures granted in support of arbitration proceedings within the EU. Such problems include major dissimilarities between the courts of Member States in relation to jurisdictions of courts and arbitral tribunals to grant provisional measures, the cross-border enforcement thereof and recognition of the arbitration agreement. Given such problems and hurdles in employing provisional measures, this thesis asked three questions at the outset, which are now answered respectively.

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<sup>668</sup> Eckhard Hellbeck, Carolyn Lamm, 'The enforcement of foreign arbitral awards under the New York Convention: recent developments' (2002) *International Arbitration Law Review*, Volume 5, p138.

*1. Is it possible to find a solution to deal with the uncertain positions of arbitration agreements and proceedings within the EU and can the suggested solution be utilised to assist the regulation and use of provisional measures?*

Recognising an exclusive jurisdiction for the seat court to make a *prima facie* examination of arbitration agreements (before the tribunal is constituted) would prevent courts of other Member States to examine the same arbitration agreement and would accordingly reduce the occurrence of parallel proceedings. This would create certainty for arbitration agreements within the EU and increase the enforcement of measures granted by the seat court in other Member States. Under this approach, national courts should be required to accept the ruling of the seat court on the validation of the arbitration agreement and accordingly they should principally enforce the measures granted by the seat court in support of that arbitration agreement.

Giving priority to one forum when two courts are dealing with the same subject is compatible with the Recast as the Regulation itself has provided *Lis Pendens* mechanism to prevent of parallel proceedings between national courts (where both of the seizing national courts have jurisdiction). One may argue that this would preclude Member States from their jurisdiction under the Recast and the New York Convention. Nonetheless, this exclusive jurisdiction is recognised for use by every Member State chosen as the seat court, not just for certain Member States.

Further, when commercial parties designate a particular state as the seat court, they have already given consideration to the benefits and advantages provided by the domestic law of the seat court. Therefore, the exclusive jurisdiction of the seat court is closer to the intention of parties, particularly if they have expressly agreed to that in the arbitration agreement.

Recognising an exclusive jurisdiction of the arbitration tribunal for a thorough examination of the arbitration agreement (following its formation) would allow the forum, which decides on the merits of the case, to have a thorough examination of the arbitration agreement. Acknowledging the principle of the Competence-Competence entails the corollary that state courts should not, in parallel and with the same level of examination, decide on the same issue.

Further, giving the primary jurisdiction to arbitrators does not mean that courts relinquish their power permanently. Having examined the arbitration agreement on a *prima facie* basis and confirmed its validity, state courts subsequently leave it to arbitrators to decide on the question and regain the authority to fully examine at the end of the arbitral process. More importantly, any courts would be able to conduct the full scrutiny at the time of the enforcement of the award.

Such authority would also respect one of the main principles of international arbitration, namely, party autonomy. This principle provides that international arbitration is a non-national system and therefore, parties in a private dispute should be able to freely choose every element of their contract, including the choice

of law.<sup>669</sup> The law applicable to the arbitration clause defines the scope of the arbitration agreement and its validity, enforceability, and interpretation.<sup>670</sup> Because of its neutrality and freedom to choose the governing law of the arbitration agreement, the arbitral tribunal - unlike national courts which are restricted to their conflict of law rules - is the most appropriate forum to choose the suitable applicable law and accordingly decide on the validation of the arbitration agreement.<sup>671</sup> In light of this, this thesis submits that assigning the arbitral tribunal as the primary forum to examine the applicability and validation of arbitration agreement is the closest option to the principle of party autonomy.

This thesis submits that such exclusive jurisdictions and the effects thereof should be expressly provided as a provision in the Recast. This provision should include the exclusive jurisdiction of arbitral tribunal to conduct a thorough examination of the arbitration agreement and the exclusive jurisdiction of the seat court to undertake a *prima facie* validation of the arbitration agreement before the formation of the tribunal. Such a provision should expressly require Member State courts to stay the proceedings so the seat court could conduct the *prima facie* examination. Equally, it should oblige Member States' courts to stay proceedings when the arbitration tribunal has been formed so arbitrators could make their examination.

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<sup>669</sup> Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) *Transnational Law*, Volume 15, p329.

<sup>670</sup> The substantive law applicable to the arbitration proceeding, known as the *Lex Arbitri*, is also separate from the substantive law applicable to the arbitration agreement itself.

<sup>671</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) p15-26.

It is also submitted that anti-injunctions should be granted in the form of an award at the outset of the arbitration proceedings after the tribunal confirms its jurisdiction. Such an award should be enforceable under the New York Convention. Considering the recent approach of the CJEU in *Gazprom*<sup>672</sup> allowing the grant of such injunctions by arbitrators, this thesis submits that including a provision in the New York Convention or the Geneva Convention requiring national courts to recognise such awards would render such injunctions an effective means to reduce parallel proceedings.

Implementing all of these primary proposals together would provide the foundation for the remaining proposals of this thesis. This would create certainty for arbitration agreements within the EU and increase the prospects of enforcing the measures granted by the seat court and tribunals in other Member States. This is because Member States' courts need to accept the ruling of the seat court or tribunals on the validation of the arbitration agreement and accordingly they should principally recognise the measures granted by the seat court and the arbitral tribunal. Accepting such exclusive jurisdictions of the seat court and the arbitral tribunal and the grant of anti-suit injunctions by arbitrators would considerably reduce parallel proceedings and prevent their adverse effects on arbitration proceedings.

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<sup>672</sup> [2015] All E.R. (EC) 711

2. *Is it possible to harmonise the different approaches taken by Member States' arbitration rules on the jurisdictions of national courts and arbitral tribunals in respect of granting provisional measures?*

In respect of national courts' jurisdiction to grant provisional measures after the formation of the tribunal, England and France have both considerably limited the exercise of such power by courts. Following this approach, this thesis proposes that courts of all Member States should restrict the grant of court ordered-provisional measures after the formation of the tribunal. This has two major advantages. It would encourage parties to seek provisional measures from arbitration tribunals and would reduce the interference of state courts in the arbitration process.

Nonetheless, such a restriction for courts would be meaningless if arbitral tribunals were restricted in granting provisional measures or would not have the right to grant provisional measures at all. Therefore, this thesis submits that all Member States should recognise an inherent power for arbitrators to grant provisional measures (unless parties agree otherwise). This could be conducted by adding a protocol to the New York Convention. Since all Member States are signatories to the New York Convention, such an approach would be the most reasonable and practical solution at the present time.

Further, this thesis proposes that there should be no restriction on the types of tribunal-ordered measures throughout the arbitration proceedings, particularly in relation to injunctions. It is also proposed that national arbitration laws should expressly allow arbitrators to attach pecuniary fines to provisional measures which would increase compliance with interim measures. It is also submitted that

emergency arbitrators must be expressly recognised as ordinary arbitrators in Member States' laws. This is because the orders granted by them should enjoy the same recognition as the measures granted by ordinary arbitrators so their decisions could be enforced as well.

*3. Is it possible to achieve a cross-border enforcement mechanism for tribunal-ordered and court-ordered provisional measures (in support of arbitration proceedings) in the EU?*

The structure provided in the 2012 Recast, which enables the parties to obtain enforceable provisional measures from the court deciding on the merits, has provided a more clear regime for the use of such measures in litigation within the EU. However, this would remove the chance of obtaining such enforceable measures from the seat court in support of arbitration proceedings. It is submitted that a supervisory role of the seat court should be recognised by the Recast. Such a supervisory role enables the seat court to grant provisional measures, which uses the enforcement mechanism in the Recast. In other words, arbitration parties could obtain provisional measures from the seat court and enforce them in other Member States.

Even though the seat court is not the forum which decides on the merits of the case, it is usually chosen intentionally by the parties because of the judicial support from the seat court and the trust that parties place in such a judicial system. While this role of the seat court should be mainly used before the formation of the tribunals,



it should be continued even after the formation of the tribunal. Nevertheless, in the latter case, the seat court should only interfere when the arbitral tribunal does not have the power to grant the requested measures. When the arbitration proceedings start, the focus should be on the enforcement of tribunal-granted measures in the other Member States. Providing such enforcement mechanism will provide certainty in relation to the enforcement of interim measures and preclude parties from forum shopping.

Because the Recast does not recognise the cross-border enforcement of without notice measures, suggesting the enforcement of similar measures in support of arbitration proceedings would not be reasonable. This thesis submits that without notice freezing orders and conservatory attachments which target bank accounts or shares have a better chance to be enforced outside the jurisdiction of the granting court. It is also proposed that *in personam* orders such as freezing orders should be granted and enforced under the suggested enforcement mechanism. This is because granting one *in personam* order addressing the entire respondent's assets (such as bank accounts, shares and goods) would be more practical and cost effective, as the claimant can enforce the granted order in any Member States against any of the respondent's assets. This removes the need for obtaining different freezing orders for different assets of the respondent.

This thesis submits that escrow orders (which put sums of money or share in an escrow account), orders for preserving status quo including interim injunctions, orders requiring the sale or preserving goods, orders to produce evidence and

probational measures should enjoy the cross-border enforcement. Accordingly, search (and seizure) orders in England and counterfeit attachments in French law should not be enforced out of the jurisdiction of the granting courts. This is because such orders are usually granted without notice and require access to the premises of the respondent which is closely connected to the sovereignty of the enforcing states. Such matters would make the cross order enforcement very difficult. Finally, this thesis submits that interim payment orders should be left to the tribunal to be granted as it has major adverse effects on the arbitration process and even if such a measure is granted by national court, it should not enjoy cross-border enforcement.

In respect of the enforcement of tribunal-ordered measures, this thesis submits that the most practical and feasible way to increase the enforceability of provisional measures in the EU would be to grant them in the form of awards. There are three main reasons for this. First, there are yet many differences within the EU Member State laws in respect of interim measures granted by arbitral tribunals. For instance, there are still some Member States in which the arbitral tribunal's power to grant provisional measures is not recognised and this fact makes the cross-border enforcement of tribunal-ordered measures very difficult.<sup>673</sup>

Second, almost all of the EU Member States either do not allow the cross-border enforcement of tribunal-ordered measures (e.g. England) or do not have any express provision in this respect. On the other hand, some states have extended the regime for the enforcement of arbitral awards to provisional measures (e.g.

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<sup>673</sup> Italy and Spain, William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) Brook J.Int'L, Volume 28, p1085.

France) which means that they only enforce provisional measures when they are in the form of awards. More importantly, all the EU Member States are signatories to the New York Convention and they cannot refuse the enforcement of arbitral awards.<sup>674</sup> Accordingly, any suggestion through the New York Convention would have a higher chance of acceptance and enforcement by the signatories in the current situation.

Based on this approach, provisional measures that should be enforced in the form of an award can be divided into three groups. Decisions of arbitral tribunals on the matters such as jurisdiction, the applicable law and the validity of a contract should be considered as (final) arbitral awards. This is because such decisions are final *per se*, and arbitrators cannot and will not change their decision later on these matters. For instance, arbitrators do not confirm the validation of arbitration agreement at the outset of the proceedings and later decide that the arbitration agreement is invalid.

The second category includes measures for preserving status quo or facilitating the grant of final awards. This includes injunctions (except for without notice freezing injunctions or conservatory attachments), specific performance orders and interim payment orders, and orders for preservation of assets. This thesis suggests that the position taken in *Arrowhead Global Solutions v. Datapath Inc*<sup>675</sup> and *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp*<sup>676</sup>, is the approach that

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<sup>674</sup> Unless they have reasons to do so under Article V of the New York Convention.

<sup>675</sup> 166 Fed. Appx. 39 (4th Cir.) (2006).

<sup>676</sup> 935 F.2d 1019 (9th Cir.) (1991).

should be taken by the all Member States in the EU. In this system, temporary equitable remedies such as orders for preserving assets is considered final as they facilitate the grant of award or make the final award meaningful.

The third category includes the measures for the production of evidence or documents. Such measures are also final *per se* because arbitrators will not change their minds subsequently in final awards that the evidence should not have been provided and accordingly such orders should be considered as award enforceable under the New York Convention.

It is also submitted that the French approach provides a better enforcement procedure for provisional measures granted in the form of awards. This is because under the 2011 Decree of French law, arbitral awards are allowed to be enforced immediately without waiting for the time to exercise any action to set aside the award to expire. This thesis puts forward that proposed enforcement procedure would not be suitable for without notice freezing orders or attachments from arbitral tribunals. Even if parties agree that the tribunal enjoys such powers, enforcing such provisional measures would face extreme difficulties due to the explicit provisions in the procedural laws of Member States, such as Article 1449 of French 2011 Decree. Further, there is always a chance that granting *ex parte* measures would affect the enforcement of the final award.

This is because the enforcing court could possibly rely on Article VI of the New York Convention to refuse the enforcement of the award. Nevertheless, it is proposed that arbitrators, with certain safeguards, should grant such measures in order to

provide expediency and extra weight for them. Finally, one important point which can also increase the likelihood of enforcing provisional measures by Member State courts in the EU is the stipulation by parties in the arbitration agreement that any decision by the arbitral tribunal should be binding on the parties.

To summarise, one of the outcomes of the recent prominence of arbitration is the increasing need for provisional measures, within the arbitration framework, so that parties' rights are promptly protected during the arbitration process. In order for these measures to be effective and fast, a legal framework enabling their cross-border enforcement is required. The presence of such a framework is even more necessary in the EU due to the single market policy of the EU, which permits and promotes free movement of citizens, assets and trade within its borders.

However, there is no such legal framework within the EU. This is principally because of two interconnected reasons. The first is the failure of international conventions to address the issue of the cross-border enforcement of provisional measures and to resolve jurisdictional uncertainties between arbitral tribunals and national courts. The second reason is the EU's attempts to resolve the failings of international conventions through the Recast and the decisions of the CJEU. This has resulted in undermining or overlooking arbitration proceedings, jurisdiction of arbitral tribunals and provisional measures granted in support of arbitration proceedings.

In order to tackle these problems, the thesis proposed recommendations to provide certainty for arbitration agreements in the EU and to reduce parallel proceedings between tribunals and courts, namely: (1) recognising an exclusive jurisdiction for

the seat court to decide on the existence of the arbitration agreement; (2) providing an exclusive jurisdiction for the arbitral tribunal to rule on its own jurisdiction after it is properly constituted; (3) the granting of anti-suit injunctions by arbitrators. These proposals provided the necessary foundation for the remaining propositions of this thesis.

In light of these proposals, this thesis submitted further proposals to provide certainty regarding the jurisdictions of arbitration tribunals and national courts for granting provisional measures (before and after the formation of the arbitral tribunal), namely: 1) restricting the power of courts to grant provisional measures after the formation of the tribunal and 2) providing an inherent power for tribunals to grant these measures. Further, proposals were advanced to create a viable framework for the cross-border enforcement of tribunal-ordered and court-ordered provisional measures, namely: 1) recognition of a supervisory role for the seat court in granting provisional measures and (2) enforcement of tribunal-ordered measures in the form of awards. It is hoped that implementing all of these interdependent propositions together will help harmonise the practice of provisional measures granted in support of arbitration proceedings and will consequently improve the efficiency of arbitration as a valuable form of alternative dispute resolution.

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