INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION- RECENT INTERNATIONAL DEVELOPMENTS AND ARBITRATION LAWS IN PAKISTAN

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INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

Dedicated to

My Mother

And

Barrister Muhammad Ali Saif
Who encouraged and facilitated me
throughout the degree program

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
CEDR	Center for Dispute Resolution
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC established in Paris in 1923
ICC Rules	ICC Rules of Arbitration
ICDR	International Center for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
ICSID Rules	ICSID Rules of Procedure for Arbitration
NAFTA	North Atlantic Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of foreign Arbitral Awards, 1958

Panama Convention	Inter-American Convention on International Commercial Arbitration, 1975
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules adopted on December 5, 1976
UNCITRAL Conciliation Rules	UNCITRAL Conciliation Rules adopted in July, 1980
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965
WIPO	World Intellectual Property Organization

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ABSTRACT

This work would reveal a comparative study of the status of availability and the way in which interim measures are being handled in international commercial arbitration in different legal systems. It identifies and makes an attempt to draw a distinction in handling of interim measures and resultantly recommend a dire need for a harmonized structure by keeping in view the lacunas in the prevailing system. Furthermore, this work would transpire a review of the UNCITRAL Model Law on the touchstone of recent amendments incorporated in the year of 2006.

International Commercial Arbitration has been widely considered as a transnational mechanism of resolving the disputes that involve multilateral conventions, bilateral treaties, national arbitration laws, and principles and norms of private informal dispute resolution. Alternative dispute resolution is a multifaceted mechanism and its commendable facets are: Speedy disposal of disputes, the status of finality of awards, its low cost as compared to litigation and the standards of justice. The four methods are familiar in legal fraternity namely, Negotiation, mediation, conciliation and arbitration. There are several different categories of Interim measures of protection. Preservation of evidence, preserving the *status quo* while the arbitration proceeds, ensuring the ultimate award will be effective (commonly called a prejudgment remedy in the domestic Context). While interim measures of protection are more commonly used in commercial arbitration, they are generally applicable to any kind of arbitration.

It also contains a review of the UNCITRAL Model Law after incorporation of new clauses in terms of interim measures of protection.

The work is divided into Seven Chapters and each chapter deals with a separate issue. Chapter one will introduce the topic, its scope and nexus with International Trade. Chapter two will analyze and make a comparison of some national legislations and Courts. Third Chapter will discuss the various provisions for interim measures under various Institutional rules and International Conventions. Fourth Chapter will throw light on recent developments in the amendment of the UNCITRAL Model Law. Chapter Five highlights the Investor-State arbitration under ICSID that is becoming an increasingly important tool for businesses men seeking to resolve disputes with government entities. It will also focus on the analysis of The World Bank's International Centre for Settlement of Investment Disputes (ICSID) that has announced several important changes to its arbitration rules. Chapter Six is intended to focus on the Arbitration laws prevalent in Pakistan, there scope and extent and recommendations to the Legislature in Pakistan for adoption of Interim Measures that are intensely needed. The last Chapter Seven will conclude the whole discussion following Conclusion and recommendations.

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CHAPTER ONE

1. Introduction—International Commercial Arbitration

The variety of disputes compelled the stakeholders to think about a comprehensive mechanism that can overcome the lacunas of litigation. To understand the actual need of arbitration, one can categorize the disputes in different segments. There are disputes that are entirely fit and proper to be resolved through adjudication. Other disputes could be resolved through negotiation, mediation and conciliation. Keeping in view all these available procedures, the assistance extended by a neutral third party selected by parties to the disputes who may examine the devised procedures would be preferred. This party evaluate the issues appropriately for the purpose to explore interests of the parties to deal with all hidden factors in order to arrive at settlement can facilitate and expedite the process of resolution of the dispute. In a nutshell, the in-depth understanding of the nature and implications of the dispute can assist in selecting the recourse for its settlement.

It has been considered widely that commercial and investment disputes are adequately appropriate to a large extent to be resolved through adjudication. In so far as the domestic disputes are concerned it mostly depends upon the substance of the dispute and the circumstances of each and every particular case on the efficacy of the courts. However, in case of international resolution of dispute, the tilt of the debate always remained in favor of arbitration. The rationale given by the legal scholars is quite cogent and attractive. They reasoned that there have been no international courts to adjudicate the commercial disputes of international nature. In such situation, the businessmen and traders have left with no other option to adopt the course of national courts or international arbitration. When a party opts to take court proceedings, he usually has option to the foreign courts of the respondent's state. He

could not hire the lawyer of his own country rather he has to depend on a lawyer of a foreign country. The proceedings of the court will go on in language not familiar to petitioner. Consequently, all the documents and the evidence will have to be translated with costs, delay and apprehensions of misunderstanding, to make it compatible with the language of that court. Moreover, there is a probability to find it out that the national courts are not familiar with the required knowledge of international business transactions. Ultimately, it can be safely concluded that the recourse to national court of defendant's state is not a decision of a judicious mind. Furthermore, if one of the parties to the contract is a state party, the private party would definitely be reluctant in submitting the dispute before the national courts of the state party. He will usually have no practice in such courts and might consider that the national court of state party is biased. In such type of situations, the neutral and convenient forum of arbitration has been considered as the most acceptable way in order to reach a resolution of international commercial disputes by an arbitral tribunal chosen by the parties themselves or by an institution to which the dispute is referred for arbitration.

2. Nexus between Trade and International Commercial Arbitration

The most noteworthy characteristic of international trade and commerce is that the national Courts do not provide solution for all contractual disputes. The alternative opted by parties is to use an arbitral proceeding. Evolution of arbitration as a method of dispute resolution has a history that starts from the early days of business, when traders used to pass on their disputes to a third party for the solution of dispute

between them[1]. Lot of procedural changes has been introduced, but the basic scenery of arbitration remains the same[2]. The arbitration gains its legitimacy from the contractual agreement incorporated between the parties so parties to the dispute endorse their consent and faith in arbitral tribunal by inscribing their signatures on agreement. The other feature is that the arbitral tribunal is always a non-governmental body and the decision of it is binding for all the parties to the dispute. By the passage of time and the needs of ever-changing world has changed the process to some extent[3]. The widely acclaimed mechanism of arbitration has been boosting the enterprises all over the world and they have started conducting business on an international level. Producers and suppliers from different continents incorporate in their contracts the arbitration clause and produce and sell products in the global market through branches and agents. Because of the increasing trend of resolving the disputes through arbitration, the different firms from all over the world are concentrating to expand their business on transnational borders and looking forward for merger partners, distribution and opening their franchises in order to achieve their objectives. The impetus behind it is the availability of mechanism of arbitration to cope with their counterparts. The present scenario would reflect that it has become the primary method of dispute resolution in international trade issues. It would be pertinent to mention here that arbitration has been playing its role in resolving the disputes between banks and financial institutions and this mark of distinction place it as better than litigation. The improvements in arbitration process are directly linked in maximizing the trade. The businessmen feel secure for expansion of their trade horizons because the dispute resolution through

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[1] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1996) 33-34

[2] See Alan Redfern & Martin Hunter, Supra note 1

[3] *J. Schaefer, New Solutions for Interim Measures of Protection in International Commercial Arbitration:* English, German and Hong Kong Law Compared, vol 2, 77-79.

arbitration has enhanced the level of their faith and proved as security to their investments.

3. Improvements in the Infrastructure of International Commercial Arbitration

Arbitration is a practicable alternative to litigation and extensive debate has been made in this regard and the rest is on its way. Now, the time-saving oriented thoughts have become the integral part of the world of international trade. This feature could be found in arbitration which has been considered much expeditious as compare to litigation. Hence, it has acquired its place of standing in the eyes of business community. Additionally, the neutrality of the decision makers along with expertise in specific area has been marked as icing on the cake.

As the business community is tending towards arbitration and other alternate dispute resolution methods, procedural aspects of arbitration has been focused in order to provide an ultimate mechanism. It has always been a considered view that there is a dire need to evolve an international legal system to springboard the needs of commerce. The ground situation of arbitration is that it is outside the ambit of court structure but it cannot sustain its efficacy and transparency without the assistance of appropriate legislation and courts. It is obligatory on nation states to move a step forward in order to establish a network in order to provide the consenting parties a mechanism of their own choice. Arbitration laws are being considered as imperative when the jurisdictional issues come into field. In the beginning the nation states were reluctant to give the conventional course of resolving the disputes but by the passage of time, sizeable number of states enacted legislations in their jurisdictions to support the arbitration mechanism[4]. The framework for international arbitration has been provided by different

[4] Thomas E. Carbonneau, Arbitral Justice: The Demise of Due Process in American Law (2000) Page 70.

international treaties, conventions, national legislations, and even institutions have been formed in this regard. Apart from that UNCITRAL drafted a model code for countries to follow. So far, more than 40 countries have enacted legislations based on the UNCITRAL model law. In addition from the Model Law, UNCITRAL has provided the Arbitration Rules in order to support the parties who desire to opt for ad-hoc arbitration and many institutions offer arbitration services to parties who govern themselves under ad-hoc arbitration based on the UNCITRAL Arbitration Rules. The most significant move was made by the United Nations when Convention on Recognition and Enforcement of Foreign Arbitral Awards the "New York Convention" was initiated. The prime purpose behind it was to motivate member nations to enter the arena of recognition and enforcement of foreign arbitral awards[5]. This task was endorsed by numerous other conventions including the European Convention on International Commercial Arbitration (the "Geneva Convention") and Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention"). UNCITRAL, the legal body of U.N. in the international trade law has endeavored a lot in order to harmonize the legal set up. UNCITRAL first introduced its Arbitration Rules that are now used for Ad-hoc arbitration and afterward drafted the Model Law, which has been proved as a valuable document[6]. Various institutions, both domestic and International were created for the provision of an organized framework in order to conduct the arbitration efficiently. The most significant being the American Arbitration Association (AAA), International Chamber of Commerce (ICC) and the London Court of International Arbitration. The developments are on their way and various international organizations have been putting their efforts to improve the prevailing arbitration mechanism. There are

[5] Convention on Recognition and Enforcement of Foreign Arbitral Award, June 7, 1959, Article I (1)
[6] Pieter Sanders, *UNCITRAL's Model Law on Conciliation*, International Journal of Dispute Settlement, Vol. 12/2004, (Verlag Recht und Wirtschaft, Heidelberg.

stilly grey areas that need to be addressed despite the efforts of improvements lasted on decades such as provision of interim measures as springboard to arbitration, requirement of written agreements, multi-party arbitration, and the more recent addition, attorney regulation.[7]

4. Scope of Interim Measures in International Commercial Arbitration

In recent years, the international commercial arbitration has experienced a speedy growth in its use. Since the post- World War II era, the dispute resolution by way of arbitration has expanded significantly in the context of international trade and commerce. The General Agreement on Tariffs and Trade (GATT)[8] enormously aided arbitration that lead to a generous reduction in tariff barriers to trade and resulted increase in the level of international trade of goods. As the international trade increased between states, businessmen, private persons and companies the number of disputes was as well increased. The international arbitration institutions noticeably flourished in this era, resultantly, so many countries improved their national arbitration legislations[9] in order to promote consistency. It has also been noted that international commercial arbitration has its advantages and disadvantages like other dispute resolution mechanisms. The advantages include the availability of neutral forum, the speedy disposal of cases, informality, lower cost as compare to litigation, the enforcement of awards like judgments of courts, language and the paramount important issue of confidentiality. On the other hand, the disadvantages are lack of coercive powers, the problem in multi-party disputes and the absence of any provision for

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[7] Richard W. Naimark and Stephanie E. Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief.* Global Center for Dispute Resolution Research, (March 2004) available at uncitral.org

[8] General Agreement on Tariffs and Trade 1994
available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm

[9] *See generally* Clifford Larsen, *International Commercial Arbitration*

appeal. Despite all these disadvantages, it has been seemed that the trend of commercial arbitration is growing rapidly.

4.1 Why interim measures are needed?

It has been considered that the development of a harmonized legal setup for arbitration profoundly depends upon the administration of interim measures of protection and the provision of interim measures. Even in the international litigation and as well in arbitration, the interim measures has its significant role which can not be discarded and it can influence the end result of the issue, for instance, where the questions of preservation of evidence or assets comes into field during the course of proceedings[10]. If we see the litigation on international level we will see that the state courts have rules and procedures which are considered as effective tools in order to enforce their orders. As in litigation, interim measures are the tools to preserve and ensure the usefulness of arbitration. The final decision of an arbitral tribunal could be frustrated if the evidence and property which is subject matter of the arbitration is not fully protected and nothing will be left for the successful party to satisfy its claim. UN Secretary General on settlement of commercial disputes has indicated in its report the importance of interim measures of protection and further endorsed the immense need of interim relief from arbitral tribunals. Arbitration has penetrated into intellectual property and environmental disputes where prompt decision becomes inevitable. Then need for interim measures comes into field hence, the significance of interim measures has been universally accepted[11]. The UN Secretary General on settlement of commercial disputes also highlighted the improvements made in different legislations through amendments

[10] Raymond J. Werbicki, Arbitral Interim Measures: Fact or Fiction. Available at http://findarticles.com/p/articles/mi_qa3923/is_200211/ai_n9339198/pg_9/

[11] Bernardo M. Cremades. , Int'l Arb.; Dr. Francis Gurry, 226

and as well discussed the diversities introduced in model law[12]. He further went on identifying three issues while dealing with interim measures of protection in arbitration. The power of courts to grant interim relief, power of arbitrators to grant interim measures of protection and the enforcement of such interim measures granted by courts and tribunals. He highlighted the dynamics of interim measures when third parties are involved. He pointed out the stance taken by the critics of interim measures that being a contractual relationship, interim measures are not needed and the statistics of enforcements of award reveals that more than 70% awards are executed without any hardships then interim measures are just to slow down the procedure. The critics have also shown their apprehension the tribunal's inability to enforce its own interim measures of protection.

4.2 The Arbitral Proceeding's Legal Framework

To comprehend the very core of international commercial arbitration, one must keep in mind that the parties craft the framework for the arbitration. They are those who set the principles of the proceeding since the arbitration as such is based on an agreement between them[13] Irrespective of the fact whether the proceedings in arbitration is adhoc or institutional the foundation of arbitration remains the same because it is based on the will of the parties which they express in agreement. The mandate of arbitral tribunal has always been accepted by the parties with their own free will in order to resolve their dispute and as well given directions on how to take up the proceedings. In a nutshell, an arbitral tribunal derives its authority from the will of the parties and the center point of its authority is the agreement concluded between the parties[14].

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[12] *Settlement of Commercial Disputes, Report of Secretary General* A/CN.9/WG.II/WP.108 (Jan. 2005)

[13] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 1999), page 1.

[14] Cordero Moss, (2004), page 158-159

The majority of arbitral proceedings transpire that the arbitral tribunal does not go beyond its mandate set by the parties. The agreement itself reflects the different obligations and responsibilities which both the parties are liable to perform. Furthermore, it is imperative to know that an international commercial contract exists within a legal framework. The existed legal framework governs the legal aspects of the contract and as well the rights and responsibilities of the parties. It also focuses on the modus operandi for the performance of contract and figure out the consequences in case of breach of contract concluded between the parties.[15] The questions raised above are of significant importance hence, the importance of recognition of legal framework within which the contract exists, is integral[16]. It has been admitted widely that the arbitration is still effective even when the right of the parties to charge the proceedings of the arbitration. The parties' right to manage the arbitration proceedings within the provided legal framework is far-reaching but cannot be considered as unbridled[17]

Different systems of law may regulate different aspects of the proceeding. The different systems of law regulate the proceedings in arbitration in different manners. For instance, it is possible that the recognition and enforcement of the arbitration agreement is governed by one system of law and the recognition and enforcement of arbitral award might be governed by other system of law. The diversity in arbitral proceedings could be proved from the fact that the proceedings of arbitration can be governed by third system of law and the fourth system of law could be applied to substantive matters of the dispute[18]. Keeping in view the above discussion, it can safely be concluded that the legal framework in arbitral proceedings is multifaceted. If the tribunal does not having

[15] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 1999) page 93.
[16] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 1999) page 94.
[17] Supra note 16.
[18] Ibid.

mandate to determine the application of a specific system of law, the proceedings cannot be continued. So, the determination of applicable law is imperative for both the tribunal and the parties to the dispute.

4.3 Interim measures: Enforceability issues

The question needs to be thrashed out whether enforceability is a limitation on the efficacy of an interim measure ordered by an arbitral tribunal rests mainly on the mechanisms available for enforcement (i) in the arbitration process itself, (ii) under the procedural law of the arbitration, and (iii) in national courts having jurisdiction over the party against whom the interim measure is to be enforced or that party's assets. The issue of enforceability of interim measures was taken up by UNCITRAL as they considered it a question of significant importance. The working group on arbitration composed of all 39 state members had given their input on this issue and classified interim measures of protection in three categories [19]. The first type of interim measure is which facilitate the conduct of arbitral proceedings. The second type identified by the group was aimed to avoid loss or damage and preservation of status quo till the final resolution of the dispute in question. The third type of interim measure which facilitate the enforcement of arbitral award at later stage. The working group on arbitration manifested their priority and considered the improvement of enforcement mechanism for interim measures in order to facilitate the enforcement of the award at later stage, for instance, the orders of attachment or freezing the assets or interim measures for providing security. The working group considered the need of mechanism to enforce the interim measures to preserve the status quo to lesser extent. Furthermore, the working group gave the enforcement support for

[19] Report of the U. N. Secretary General, Settlement of Commercial Disputes, A/CN.9/WG.II/WP.108 (Jan. 2005)

interim measures for facilitating arbitration less importance putting forward the logic that arbitral tribunal vested with powers to order compliance of such measures by way of its final decision on arbitration costs[20]. The perusal of different systems of law reveals that the English Arbitration Act, 1996 has incorporated mechanisms which support the enforcement of orders and awards ordered by arbitral tribunal. For instance, if any party to the dispute fails to comply with the orders of the arbitral tribunal, the Act authorizes the arbitral tribunal to issue preemptory orders specifying the time for compliance of its orders. When the party further fails to comply the preemptory orders the tribunal is authorize to pass further directions keeping in view the circumstances of each and every case. The tribunal would be justified in drawing adverse inferences, proceed to an award or orders as to the costs of arbitration[21]. Eventually, the court might issue an order to comply with the preemption order of the arbitral tribunal. In a matter, where the procedural law of the arbitration is English law, there could be ease in enforcement of interim measures ordered by the arbitral tribunal if the party is in England but if the party is outside the England the enforcement of interim measures would depend on the national law of the place where the arbitration is sought. The English Arbitration Act, 1996 provides a provision that supports arbitral proceedings when the seat of arbitration is outside England. In such case the court would have vested with the power to refuse to act and could take the opinion holding the interference with the arbitration taking place abroad as inappropriate[22].

[20] See Report of the U.N. Secretary-- General. Settlement of Commercial Disputes. A/CN/WG.III/WP.110 at (Para)78
[21] English Arbitration Act, 1996. Article 41
[22] English Arbitration Act, 1996

5. Arbitral Interim Measures: Fact or Fiction?

The question whether arbitral interim measures are needed intensely or it's just an academic debate, depends to a large extent on the governing law agreed between the parties in agreement. The general view is that governing law in most cases depends upon the place of arbitration. If we take up the arbitration laws of Italy or other countries like it, we will come across that the power given to arbitral tribunal to order interim relief is very much limited even when the parties have expressly incorporated rules to do so in their agreement. The arbitration law in Italy supersedes the agreement concluded between the parties. Arbitrators can require a party to provide security for costs or can attach the property of a party by way of preservation of evidence or inspection. Despite the availability of all these types of interim measures, the scope and division of powers between courts and arbitral tribunals is not clear and difficulties can erupt as in Channel Tunnel case.

Section 44(5) of the English Arbitration Act, 1996 has resolved the issue of division of powers to some extent. "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 the power in that regard, has no power or is unable for the time being to act effectively"[23]. This section manifested the intent of the legislature and provides a line to the parties to determine whether interim relief should be sought from the tribunal or the court. It has clearly indicated that interim measures should be sought from arbitral tribunal and not from court unless the arbitral tribunal is unable to grant them effectively, for instance, Section 39 of the English Arbitration Act, 1996 has provided a way out by giving the parties an option to agree in their contract to give power to grant provisional relief to the tribunal. At this juncture, the question arises

[23] http://www.legislation.gov.uk/ukpga/1996/23/section/44

what the provisional relief means in the context of Section 39 of the English Arbitration Act. To figure out the interpretation of provisional basis we have to consult the report of the Departmental Advisory Committee on Arbitration law on the English Arbitration Act. The concept of temporary arrangements has been incorporated here till the final decision of the arbitral tribunal"[24] If we place it in juxtaposition to the interpretation of "provisional measures of protection" adopted by the UNCITRAL working group which is "any temporary measure ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided." In the light of above discussion we can conclude that the description of Report of the Departmental Advisory Committee on Arbitration Law can be applied to most of the interim measures[25]. If the interpretation is in this way then the arbitral tribunal has very limited powers to grant interim measures of protection unless the parties to the arbitration agreed to do so.

6. International commercial Arbitration in India

6.1 Development of Legal Framework

The repealed Indian Arbitration Act, 1899 marked the advent of modern arbitral proceedings in India and had basis on Common law principles. Thereafter, India became party to the Geneva Protocol on Arbitration clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Thus the statute of 1899 was replaced with the arbitration Act of 1940 and two other peace-meal statutes namely, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards

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[24] See Departmental Advisory Committee on Arbitration Law. Report on the Arbitration Bill (DAC Report) (Para) 201

[25] See Report of the Working Group on Arbitration. A/CN.9/487 (2006). at (Para)161-87 and Note by the Secretariat. A/CN.9/WG.II-- /WP.119 (para) 74

(Recognition and Enforcement) Act, 1961. On 13th of July 1961, following the abovementioned developments, India took a major step and ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. However, the significant shift introduced in the Indian Arbitration Act, 1940 in which multiple opportunities were provided to the parties to knock the door of the courts and this development was considered as impairing the efficacy of arbitral process that was an alternative to litigation. The other significant move was made by courts through which they revisited the decisions of the arbitral tribunals and consequently denied the enforcement of arbitral awards and started declaring it against the public policy. Such intense interventions by the courts left a great impact that undermined the arbitration and was being considered as unattractive form of dispute resolution. The Supreme Court of India remarked that "the way in which proceedings were conducted and without an exception challenged in courts, under the Arbitration Act of 1940 had made lawyers laugh and legal philosophers weep"[26]. "In 1991, India ushered in economic liberalization with the adoption of new Industrial Policy of 1991aimed at reviving the economy through privatization and reducing restrictions on private and foreign direct investment.[27] However, the over-burdened and sluggish dispute resolution in India, litigation as well as arbitration, as it then existed were neither compatible nor adequate to meet the need of commercial entities, especially, the foreign investors for efficient and effective resolution of disputes. This situation necessitated introduction of a new arbitration regime, more responsive to contemporary requirements"[28].

[26] Guru Nanak Foundation Vs Rattan Singh & Sons 1981(4) SCC 634

[27] See generally, Bansal, "A.K Towards a New Law on International Arbitration in India," 12.J Int'l Arb.67

[28] "Interim measures in international commercial arbitration" page 102. By Association for International Arbitration

6.2 The Indian Arbitration Act of 1996

Indian parliament had a great concern over the remarks of Supreme Court of India in terms of arbitration. Consequently, the Indian Parliament tabled a bill and enacted the Indian Arbitration and Conciliation Act, 1996 in order to minimize the concerns of International mercantile community and to support the growing volume of international trade in India. Through this legislation it had been considered that India retrieved back the commercial relationship with the rest of the world after holding the liberalization policy of the Government[29]. This act gained the concept and modeled on UNCITRAL Model law of 1985 on international commercial arbitration and the UNCITRAL Conciliation Rules of 1980. If we hold a comparative analysis of the legislation enacted in 1996 and the Indian Arbitration Act of 1940, we will come across that the Indian Arbitration and Conciliation Act, 1996 limits the intervention by the courts and encourage an arbitral process[30], This act further decided once for all that the award of the arbitral tribunal will be enforced as the decree of the court. This really proved an impetus to arbitration in India and the commercial community appreciated this provision to the hilt[31].

The Indian Arbitration and Conciliation Act, 1996 repealed all the earlier peace-meal legislations. The part one of the statute contains comprehensive provisions regarding domestic arbitration and International commercial arbitration. It has clearly been incorporated in the Act of 1996 that no judicial authority shall intervene with the arbitral proceedings specifically in matters governed by Part one of the Act except where the intervention by the court is expressly provided thereby[32], Furthermore, any judicial authority before which an action is brought in terms of subject matter of the arbitration agreement, shall refer the

[29] See Knokan railway corporation V. Mehul construction company 2000 (7) SCC 201
[30] Ibid
[31] See Statement of Objects and Reasons, Indian Arbitration Act, 1996
[32] See Section 5, Indian Arbitration Act, 1996.

parties to arbitration on the application of any party to the dispute provided that the request of such party for the referral of matter to arbitration was made not latter than submission of his first statement before any judicial authority on the substance of the dispute Contrary to this, Model law permits a court to entertain the objection to the effect that the arbitration agreement is null and void, inoperative and incapable of being performed[33]. Four instances have been considered when a judicial authority may intervene in arbitral proceedings, the first one when they being, to consider requests for provisional relief by a party[34], the second when to appoint arbitrators at the application of any party to dispute, Third, when to decide whether the mandate of an arbitrator stands terminated due to its inability to perform his functions or in case of his failure to proceed without undue delay[35], and at last to provide assistance in taking evidence[36].

6.3 Interim measures from courts

Alternatively, a party may approach the court a competent court for interim measures under Section 9 of the Indian Arbitration Act, 1996 before or during the arbitral proceedings or even after the award is pronounced, but before it is enforced. [37] In this case, the court would have to be satisfied that there exists a valid arbitration agreement between the parties. However, the Supreme Court of India held in a case "If a party has approached the court before the commencement of arbitral proceedings, the applicant must send a notice to the contesting party opting to invoke the arbitration clause or alternatively the court would have to be first satisfied that the applicant shall indeed took effective steps for the commencement of arbitral proceedings without any

[33] Article 8, of UNCITRAL Model law of 1985 on International Commercial Arbitration
[34] Section 9, Indian Arbitration Act, 1996
[35] Section 11, Indian Arbitration Act, 1996
[36] Section 14(2) of Indian Arbitration Act, 1996
[37] Section 9, Indian Arbitration Act, 1996

delay"[38]. Furthermore, the vested powers of the courts are being considered as much wider and concomitant with those under the Indian Civil Procedure Code. The other dimension is that non-compliance of the orders would amount to contempt of court. The present dispensation of arbitration law, the non-compliance of orders of interim relief issued by the arbitral tribunal carry no sanctions. In such circumstances, where the New York Convention does not cover interim awards by tribunals, parties in India are keener on availing interim measures from courts under section 9 of Indian Arbitration Act, 1996 rather then from arbitral tribunals under section 17 of the Act.

7. Developments in the field of interim measures in international arbitration

The dependency of interim measures of protection has been largely considered on international conventions, national legislations and rules made by institutions. Interim measures have been frequently issued in arbitration by the arbitral tribunals after the recent amendments introduced to Model law in 2006 but it's very disappointing that no convention had a specific provision regarding the grant of interim measures by the arbitral tribunal. Many of the nations opted to amend their national legislations to bring their national law in line with the UNICITRAL Model law. As it has been discussed earlier, the national legislations has a significant role, keeping in view the above consideration, most of the nations opted to introduce amendments in their national laws or repealed the obsolete legislations. In countries where common law is prevailing opted to establish precedents on one way or the other and addressed the lacunas of legislations. Similarly, the rules of institutions have as well their significant position and have adequate influence on the issue. Most of the institutional rules in their

[38] Sundaram Finance V. NEPC, available at http://indiankanoon.org/doc/507484/

present form, address the issue of interim measures of protection. Chapter II of this thesis has been focused on the handling of interim measures through national legislations and courts. Chapter III deals with the provisions regarding provisional measures that are available in international conventions and institutional rules. The UNCITRAL Model law has to be specifically mentioned. The status of Article 17 of the Model Law before the inception of amendments in UNCITRAL Model law in 2006, which provided the authority to the arbitral tribunals to grant interim relief; but it lacked a provision, that provides the exhaustive procedure for the recognition and enforcement of the interim awards and it has properly been addressed in the amendments to Model law. In Chapter IV, I have discussed the Model Law and proposals of the working group prior to amendments made in 2006. In Chapter V the status of interim measures in investment arbitration has been dilated upon. In conclusion, I have tried to point out the best way of handling all the three issues concerning interim measures. Furthermore, I discussed the amendments and tried to take up the pertinent questions such as whether the amendments made in UNCITRAL Model law in 2006 satisfied the quest or there is still a room for improvement in terms of interim measures of protection. Whether the amendments incorporated in the Model law has vacuumed the gap and which areas are still being considered as grey areas. What kind of further amendments can be introduced in Model law in order to provide efficacious relief to the parties to the arbitration? I have also focused to point out the efficacy of the preliminary orders and their practical implementations as addressed in the amended UNCITRAL Model law.

CHAPTER TWO

COMPARATIVE STUDY OF THE NATIONAL LEGISLATIONS AND COURT RULINGS

International Commercial Arbitration needs an extensive legal set up and mechanism to function such as international conventions, national legislations and institutional rules. As it depends on such a wide varied structure, the way for handling the arbitration process always remains in spotlight. Most of the international conventions have no provision for the issue of provisional measures of protection. But national legislations and institutional rules speak about it and have differing interpretations. The issues of prime importance that are needed to be thrashed out here are the power of the courts to support arbitration, power of arbitrators to provide provisional relief and the enforcement of the orders regarding provisional measures of protection. Enforcement issues regarding interim orders have some interesting areas that were unattended before the advent of amendments introduced in 2006 in UNCITRAL model law, like orders involving third parties and orders by foreign courts.

1. Power of Courts to order provisional measures of protection

It has been immensely accepted that the provision of support by national courts is imperative in order to make arbitration as successful method of resolving disputes. But the issues of paramount importance that need to be addressed are the time of intervention of courts and to what extent the courts should step in[39]. The perusal of the record would reveal that in most cases, the courts interference is either at the start of the process of arbitration for the purpose of enforcement of arbitral agreement or at the end to enforce awards of the arbitral tribunals. The close analysis of

[39] Prathiba M. Singh & Devashish Krishnan, The Indian 1996 Arbitration Act - Solutions for a Current Dilemma, Journal of International Arbitration.

the system transpires that there are some other stages in which courts have to play their role by using its authority to support the arbitral process. For instance, the involvement of third parties could give rise to such circumstances. The other intervention of court could be before the formation of arbitral tribunal[40]. In order to resolve the issues like appointment of arbitrators and other jurisdictional issues, appropriate time has always been required to initiate such processes. During this span of time, parties have always available with recourse to knock the doors of national courts for the purpose of maintaining status quo and for the preserve the property and evidence in question. The rationale behind is to avoid the frustration of subsequent arbitral award and its enforcement. It has been widely seen that the courts intervene in extraordinary circumstances even during the progress of arbitration proceedings. The pre-requisite for it is when a party to the arbitration takes the plea of misconduct of arbitrators in shape of evidence of partiality or corruption of arbitrators. In fact, this power of the courts have always been measured so important because it is a stipulated fact that without the support of the court the future of the arbitration would be gloomy as the people will not opt to choose arbitration due to this uncertainty. The national position in reality depends a lot on the legislations and court rulings. Most of the countries in the world have their own national legislations dealing with arbitration. In the United States, Federal Arbitration Act was legislated to administer the conduct of arbitration. But unfortunately, this issue has not been focused in it as there is no provision in FAA either allowing or prohibiting provisional measures of protection. So the only way out left is the court rulings in which precedents are available to analyze the status of interim measures ordered by courts. In contrast, United Kingdom Arbitration Act of 1996 contains a specific provision that expounds the powers of the courts to

[40] Charles N. Brower & W. Michcal Tupman . *Court-Ordered Provisional Measures Under The New York Convention*, 80 Am. J. Int'l L. 24, 25 (2005)

support arbitration[41]. The provision contains a list of the matters where the Courts can exercise powers for granting provisional measures of protection. The words used in the provision suggest that the list of interim measures is quite exhaustive. The extent of interim measures ordered by courts reckons where the arbitral tribunal's jurisdiction fall in grey area and the duration of interim measure will remain alive till the taking of any action of arbitral tribunal on such issue. The most unique feature of this section is the 'opting-out' clause incorporated for the parties during the drafting the arbitration agreement but reading from the Arbitration Act as whole including Sections 38 & 39, when the parties opt-out of Sec. 44, they would oust the availability of 'Mareva injunctions[42]'. This is because when they restrict the authority to grant interim measures to the arbitrators, the range of the powers will be confined to this listed in 38 & 39.

Prior to the Arbitration and reconciliation Act, 1996 the arbitration law in India was governed by three different legislations. The Arbitration Act 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961[43]. The present Indian Arbitration Act, 1996 is intended to model on the UNCITRAL Model Law as followed by many other countries; it has provision for court intervention in commercial arbitration for purposes of provisional measures of protection[44]. There is another specific provision as well regarding court support for the tribunal in taking evidence[45]. Section 9 of this Act provides a list of issues on which Court can intervene in order to provide interim relief. The authority to grant such interim measures has been given in Section 9 (e) of this Act which the court deem fit and proper. The in-depth analysis of Section 9 would reveal that the courts

[41] Arbitration Act, 1996, 23 - 44 power to act in relation to the subject-matter of the order.

[42] A temporary injunction that freezes the assets of a party pending further order or final resolution by the Court.

[43] AIR 1999 Supreme Court 565 at 567, 568

[44] Arbitration and Conciliation Act, 1996 - Interim measures by court. Article 9

have been given a wide range of powers to order interim relief. In France, the national legislation for arbitration is very similar to United States. It does not contain any provision that enable courts to order interim measures of protection but parties are vested with the right to invoke the jurisdiction of French courts to order interim relief[46]. Article 809 of the French New Civil Procedure Code[47] is being used by the courts to order protective measures in ordinary circumstances. Additionally, this provision can also be used during the pendency of arbitration proceedings for the purpose of seeking interim relief. Similarly, German Civil Procedure Code contains a provision which states that court ordered interim measures are not incompatible with the agreement between the parties in issues involved in the dispute in question[48]. This provision of German Civil Procedure Code is somewhat identical to the Indian Arbitration and Reconciliation Act, 1996. The provision in German Civil Procedure Code seems to declaratory in nature and does not assign any authority to courts to act effectively.

In matters of recording evidence, German Civil Procedure Code has provided a provision for court assistance[49]. This view is consistent with the German stance that interim measures of protection can only be granted by courts and not by the arbitral tribunal. German law does not even require the place of the main arbitral proceeding to be in Germany. Even when the arbitration has not been commenced at the when interim relief was sought, if the parties are succeeded in convincing the court that the final award by the tribunal will be enforceable in Germany and the urgency be shown for the grant of interim measures, the interim relief would be granted[50]. It is pertinent to mention at this point that there are two types of interim relief which the German courts have

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[46] Richard H. Kreindler, Court Intervention in Commercial and Construction Arbitration, Construction Law, 12, 16

[47] N.C.P.C. Art. 809 -

[48] 1033 Book Ten ZPO

[49] 1050 Book Ten ZPO

[50] Eric Schwartz & Jurgen Mark, Provisional Measures in International Arbitration - Part II

mandated to grant. The first one is the functional relief which is similar to Mareva Injunction in United Kingdom and the other one relates to conservation of evidence, etc. if the pre-requisites set in the code are met, the German courts could order required relief. Conversely, Switzerland is in another extreme position, where most of the powers to grant interim relief are vested with the arbitral tribunals[51]. Furthermore, the local courts have powers to assist in taking evidence; assist in the establishment of arbitral tribunal and as well rule on the challenge of the arbitrators. The courts can do these entire functions only if the parties or the tribunal requests the courts to do so and these powers have not specifically been taken away by the parties in the arbitration agreement.

We can see a provision in Netherlands Arbitration Act [52] Article 1022 that provides for interim measures ordered by courts. According to aforesaid provision, the parties have right to approach the District Courts of Netherlands for necessary orders. it has been specifically mentioned in the provision that such approach to the District Courts by the parties to the arbitration is not contrary to the arbitration agreement. Furthermore, it goes on providing that the provisional measures can be granted even the seat of arbitration is outside the jurisdiction of Netherlands[53]. Having seen the legislation, the study of the interpretations of these legislations would be interesting. United States courts held the different views and did not follow the uniformity. The opposing views have given birth to confusions. If we have a look on the provisions of Federal Arbitration Act of United States on the issue of handling the domestic and international arbitration, we will come across that Circuit Courts held the differing opinions. The Courts in United States have drawn a significant distinction between cases arising out of Chapter one of Federal

[51] Charles Poncet & Emmanuel Gaillard. *Introductory Note on Swiss Statue on International Arbitration III*
[52] Available at http://www.ccarb.org/news_detail.php?VID=1723
[53] Article 1074 FOREIGN ARBITRATION AGREEMENT AND SUBSTANTIVE CLAIM BEFORE DUTCH COURTS.

Arbitration Act which has concern with domestic arbitration while the international arbitration has been addressed in Chapter two of this Act. Section 3 of Chapter one of Federal Arbitration Act has empowered the courts to stay the proceedings till the final disposal of the arbitration. While majority of the courts interpreted this section in a different way and held that this provision has given jurisdiction to courts to interfere. When the New York convention had not been incorporated in Federal Arbitration Act, the only court who addressed this issue in international arbitration was the second circuit court. In Murray Oil case[54], the attachment granted by the lower court was upheld by judge Learned Hand and stayed the proceedings.[55]. The other court which took up this issue was the third Circuit in McCreary. It supported the arbitration clause and granted stay and liquidated the attachment granted by the state court. The court put forward the reason that the words "refer the parties to arbitration" incorporated in New York convention took away the jurisdiction of this court in order to grant interim measures of protection. The court marked a distinction between section 3 of Chapter one and proceedings under chapter two and held that section 3 has sufficiently given powers to courts to grant interim measures of protection, as the stay of the proceedings is required under this section whereas the proceedings under chapter two require to refer the parties to arbitration. This court further elaborated that if the state law is exposed to the parties in granting attachments then the purpose of the convention would definitely be defeated. Furthermore, the court took the view that attachment would be deem as an attempt to frustrate the arbitration. Court of Appeals in New York upheld this decision in Cooper. The Court of Appeals introduced an innovative reasoning by interpreting that the attachment in enforcement of awards had been specifically

[54]Murray Oil Prods Co. v. Mitsui Co., 146 F.2d at 384

[55]Judge Learned Hand: "...an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable."

provided by New York Convention and omitted to address the issue of interim measures. The rationale behind it must be that kind of intervention could only be allowed after the final disposal of arbitration[56]. District Court for the Northern District of California was the first Federal Court who rejected the rationale given by the third circuit. In Carolina powers case, the District Court flatly refused to act in pursuance of McCreary and introduced a new interpretation of the New York Convention. In the light of above discussion, various courts held the two differing views.

Some circuits took the inconsistent view during the last couple of decades by supporting McCreary views. In a case[57] before the Fourth Circuit, the Judge supported the McCreary decision when a United States buyer brought a suit in South Carolina on the issue of breach of a contract and he sought attachment from the court, the court ordered to liquidate the attachment on appeal referring the decision in McCreary. There after the First Circuit cited both McCreary and I.T.A.D Assoc. to support its decision in Ledee v. Ceramiche Ragno[58]. The Fifth [59] and Sixth Circuits[60] in different cases more or less supported the Carolina Powers lines. On the contrary the Seventh circuit court has also recognized the power of courts to grant interim relief during the pendency of arbitration proceedings. However, the court reversed the earlier decision of the District Court regarding the grant of interim measures after the constitution of arbitral tribunal. The decision in Borden, Inc. v. Meiji Milk Prods Co on the issue of granting interim injunction in order to aid arbitration, the court held "We do agree with Borden, however, that its rights would be unduly prejudiced if it were forced to wait years or even months to have a Japanese court review its

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[56] Charles H. Brower II-8: Cooper, 442 N.E. 2d. at 1242.

[57] I.T.A.D. Assoc. v. Podar Bros., available at http://cases.justia.com/us-court-of-appeals/F2/636/75/26719/

[58] Ledee v. Ceramiche Ragno, available at http://openjurist.org/684/f2d

[59] E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA, 876 F.2d 1168

[60] Tennessee Imports, Inc., v. Filippi, westgroup.com/store/relatedpdfdownload.aspx?file=135231_200645_103741.pdf

application for some measure of temporary relief. The district court ordered that Borden may move to restore this action if preliminary injunctions prove to be unavailable in Japan. In dismissing the action only conditionally, the court sought to protect Borden's rights. Calavo Growers v. Belgium, In order to provide a further interim measure of protection to Borden, we modify the district court's order so that Borden may reapply for a preliminary injunction in the Southern District of New York if the Japanese court does not decide Borden's application within 60 days after it is submitted. Meiji agreed to this modification of the district court's order at oral argument"[61].

Whereas the courts of United Kingdom endorsed their power to order interim measures of protection during the pendency of arbitral proceedings. Prior to the coming into force of the English Arbitration Act of 1950, the courts granted interim injunctions and supported their view on the basis of Nippon Yusen Kaisha v. Karageorgis[62] and Mareva Compania Naviera, S.A v. International Bulkcarriers cases[63]. But, Rena K has been considered as the first case in which the English court took up the issue of availability of interim measures of protection in arbitration. In Rena K[64], the court decided that "while staying the litigation in favor of arbitration, it had powers to attach the assets of the party. This position was in conformity with the Arbitration Act of 1975, which incorporated Article II (3) of the New York Convention"[65]. It was held at a later stage in Evmar Case "Therefore, the position in England prior to Section 26 was that no security could be given for an arbitration award unless the situation falls within the principle set out in *The Rena K*. That was a case

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[61] available at http://openjurist.org/919/f2d/822/borden-inc-v-meiji-milk-products-co-ltd
[62] available at http://www.uniset.ca/other/cs4/19801AER213.html
[63] available at http://www.uniset.ca/other/cs4/19801AER213.html
[64]RenaK,1Lloyd'sL.R.availableat
http://www.questia.com/googleScholar.qst;jsessionid=KnNT3N9n2hpKnwNvv1H2Bx6vs5KY7TlHcpvTnck4QJSrd86NWfs1!2095189978!130818994?docId=95192872
[65] Ibid

where the court had no discretion to ask for alterative security as a condition for a stay as the case came within Section 1 of the English Arbitration Act, 1975 and a stay must be granted. Nevertheless, Brandon J held that, where it was shown by the plaintiff that an arbitration award in his favour was unlikely to be satisfied by the defendant, the security available in the action in rem might be ordered to stand or alternative security could be ordered in substitution thereof so that, if the plaintiff might have thereafter to pursue the action in rem, because the arbitration award was not satisfied, the security would remain available in that action"[66]. "*The Rena K* principle was approved by the Court of Appeal in *The Tuyuti.* However, for *The Rena K* principle to apply there must be evidence before the court that the satisfaction of award by the defendant would be unlikely on the face of the record"[67]. The Channel Tunnel case[68] is as well a landmark precedent though the decision came before the inception of the Arbitration Act of 1996. It was held therein "The court has the power to stay an action which pursued a remedy which was outside the terms of the arbitration agreement determining the dispute. The contract between the parties provided for disputes to be settled by arbitration in Belgium. The plaintiff sought injunctive relief from an English court. The defendant requested a stay. The 1950 Act did not give power to a court to provide injunctive relief operative over a foreign arbitration, but such was available under the 1981 Act, but the effect here would be to pre-empt the arbitration and relief was not appropriate"[69]. As to the Siskina case: "the doctrine of The Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not

[66] [1989] SLR 474; [1989] SGHC 40 available at http://www.singaporelaw.sg/rss/judg/9532.html
[67] Ibid
[68] [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] AC 334 available at http://webcache.googleusercontent.com/search?q=cache:http://www.swarb.co.uk/lisc/Arbit19931993.php
[69] Channel Tunnel Case

invariably takes the shape of a cause of action"[70]. The judge Lord Browne held further "Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction. In my judgment that submission is not well founded." and "... the court has power to grant interlocutory relief based on a cause of action recognized by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or abitral body". Dispute between Trans-Manche Link, the contractor, and the Eurotunnel, the owner is the classic precedent on the issue of arbitration clause incorporated in the Agreement. Both the parties with mutual consent had incorporated an arbitration clause according to which in case of arising of any dispute, Dispute Resolution Board will be the competent authority to settle the dispute within ninty days. When the dispute arose Trans-Manche Link contrary to that clause directed to stop the work on the project. Responding to such threat, Eurotunnel invoked the jurisdiction of the English court seeking to direct Trans-Manche Link refraining the suspension of work. The House of Lords ruled and agreed that the English Courts had jurisdiction to grant interim measures of protection during the pendency of arbitral proceedings but the case in question is not a fit case for such measures. The decision by Mr. Justice Brendon in Rena K case granted a Mareva Injunction and pointed out that "if a party is eligible to obtain an order for security in cases that do not involve arbitration clause, there should be no reason for the party to obtain such order here the litigation is

[70][1993] 2 WLR 262; [1993] 1 All ER 664; [1993] AC 334 available at http://webcache.googleusercontent.com/search?q=cache:http://www.swarb.co.uk/lisc/Arbit19931993.php

stayed pending arbitration. Citing some unreported cases, he said there have been many occasions when the commercial courts have granted such injunctions. There are not many English case laws regarding this issue because as seen by the preceding cases it is clear that the English Courts do not consider interim measures as incompatible with the arbitration agreements or the New York Convention. This position is clearly in contrast to the position adopted by some of the US Courts"[71]. In India, the Supreme Court in R. McDill & Co. (Pvt) Ltd v. Gouri Shanker case held that "the parties to arbitration have recourse to all the interim measures available under the Civil Procedure Code of 1908[72]". Later in M/s. Sundaram Finance Ltd. V. M/s. NEPC India Ltd, "the Supreme Court considered the question whether a party can approach a court for injunction even before arbitration process has actually started and answered in the affirmative. This Court rejected the reasoning's given by the lower Court and held that interim measures of protection can be granted even prior to the initiation of arbitration proceedings. The court referred to the Arbitration Act of 1940, the UNCITRAL Model Law, Arbitration Act of 1996 of England and two English cases viz. The Channel Tunnel Case and France Manche S.A. v. Balfour Beatty Constructions Ltd. The Supreme Court in its decision points out the relevant sections of the Arbitration Act of 1940 that permit interim measures during arbitration"[73]. "The Delhi High Court followed this decision in M/s. Buddha Films Pvt. Ltd. V. Prasar Bharati. Even though it finally rejected the petition for interim injunction on the merits of the case, it held that a petition for interim relief is maintainable pending arbitration proceedings"[74]. On the contrary some recent cases, especially by Delhi High Court have raised concerns among the practitioners of

[71] Rena K [1978] 1 Lloyd's L.R. 545 available at http://www.questia.com/googleScholar.qst?docId=95192872

[72] available at http://www.indiankanoon.org/doc/1115741/

[73] M/s. Sundaram Finance ltd., v. M/s. NEPC India Ltd., AIR 1999 Supreme Court 565

[74] AIR 2001 Delhi 241 available at http://indiankanoon.org/doc/808468/

arbitration in India[75]. While deciding the question, whether the courts in India under Indian Arbitration and Conciliation Act are empowered to order interim relief when the place of arbitration is outside India?, it was held that the courts retain no power to order such interim measures in case when the place of arbitration is outside the territorial jurisdiction of Indian courts. Section 9 of the Indian Arbitration and Conciliation Act empowers the courts to order interim measures of protection and conservatory measures and Section 2(2) of the Act limits the application of Part one of the Act, hence, it was held in a case Marriott International Inc.[76] before Delhi High Court that section 2(2) would be considered as redundant if Section 9 of the Act had been interpreted as it apply to cases in which place of arbitration is outside India. This confusion was being overcome in a subsequent case in which Supreme Court of India cleared the foggy picture. In Bhatia International vs. Bulk Trading S.A. and Another[77], Supreme Court of India interpreted that Section 2(2) is not an embargo to the application of Part one of the Indian Arbitration and Conciliation Act. It held further that Section 2(2) do not limit the international arbitration inside India. It reasoned that if the rationale given by Delhi High Court were upheld then the objective of the Act would be frustrated. Furthermore, it will give option to the parties to opt out of Part one of Indian Arbitration and Conciliation Act when an arbitration is held outside India. In a nutshell, the present position is that if the parties do not opt out the operation of Part one in their agreements then the Indian courts would be competent to order interim or conservatory measures as provided in Section 9 of the Act when the place of arbitration is outside India.

The tendency of the French Courts to order interim relief during the pendency of arbitration proceedings was manifested in the case of

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[75] Zia Mody & Shuva Mandal, *Case Comment, India*, Int. A.L.R. 2001. 4(3). N19-20: V.Giri: East Coast Shipping Limited Vs. M. J. Scrap Pvt. Ltd. (Calcutta High Court).

[76] Marriott International Inc. v. Ansal Hotels Ltd, AIR 2000 DEL 377

[77] Bhatia International vs. Bulk Trading S.A. and Another, 2002 (4) SCC 105

Atlantic Triton v. République populaire révolutionnaire de Guinée in which the Court of Appeal in a matter concerning ICSID arbitration, interpreted Article 26 and 47 of the Washington Convention establishing exclusive jurisdiction of arbitral tribunal to grant interim relief. At a later stage, de Cassation court reversed the decision of earlier court and interpreted Article 26 of the Washington Convention as this Article was not meant to prohibit the powers of courts to grant interim measures rather aimed at enforcing of the forthcoming award. In a case, Paris Court of Appeals held that it has vested with powers to order interim relief during the pendency of arbitration on substantive issue. The other court which ruled on the same issue was Rouen Court of Appeals[78]. The court held that it retains the jurisdiction to order interim measures of protection irrespective to the constitution of arbitral tribunal. It is crystal clear from above discussion that most of the State Courts of United States tend to grant interim measures of protection in order to support arbitration despite the difference on procedural aspects.

2. Interference by court should be limited or not?

If we minutely analyze the judgments rendered by Courts, the incorporated provisions in National legislations and the comments passed by the commentators on the issue of "grant of interim measures by courts" We will come up with the considered opinion that these all quarters supported the powers of courts to grant interim relief. Conversely, the opponents of such powers of courts hold that when the courts decide the interim issue, most of the courts transgressed and invaded the main issue in question which is purely the domain of arbitrators[79]. Most of the national courts while granting the interim injunctions [80] adjudge the probability of success of the party seeking

[78] CA Rouen, Sept. 7, 1995, Rotem Amfert Negev v. Grande Paroisse, 1996 REV. ARB. 275
[79] Alison C. Wauk, Preliminary Injunctions in Arbitrable Disputes: Rev. 2061, 2073, 2074, 2075 (2005)
[80] Michael E. Chionopoulos, Preliminary Injunction Through Arbitration: (2006)

interim relief and this practice has been considered as the threshold to invade the issue on merits. The critics hold the view that such practice of national courts tantamount to undermining the mandate of the arbitrators. The concern showed by opponents seems legitimate, but on the other hand there are situations in which the need for interim measures outweighs the refrain for granting interim relief. It has also been the issue of immense debate that most of the countries recognize the powers of arbitral tribunal to grant interim relief then exercise of such powers by courts are considered as overlapping and superficial. But the other issue of prime concern is that there are many cases where the grant of interim measures has been considered as imperative. The grant of interim measures is an urgent matter and could arise even before the formation of arbitral tribunal. In such situations, if the mandate of the court to grant interim relief is restricted it would definitely harm the efficacy of the arbitration. The other vital issue is the availability of Appeals against orders of the courts and the cumbersome delaying procedures that could effect the expedition of the resolution of the dispute. The parties always opt for arbitration to get rid of court hurdles but this practice can undermine the diversity of international commercial arbitration. Necessary amendments should be introduced in national legislations to make it a viable course for enforcement of court-ordered interim relief.

3. Power of Arbitrators to grant Interim measures of protection

The power of arbitrators as that of the courts regarding grant of interim measures of protection depends upon the national legislations, international conventions and the agreement concluded between the parties to the arbitration and finally the rules adopted by the parties. Most often parties pay no heed while concluding the agreement, ultimately, the national law and the rules of the institutions come in

picture to select it. The impact of national law on the powers of arbitrators to grant interim measures of protection will be in focus in this section. In past, the tendency of arbitrators to grant interim relief was not appreciated but most of the states have now recognized such nature of powers to arbitrators[81]. Now, the time has come when legal scholars agree that the arbitral tribunal has power to order interim measures of protection unless parties agreed otherwise. Many states had adopted different stances on this significant issue.

The power of arbitrators to grant interim relief was restricted at times by some nations like Argentina and Italy. They had incorporated provisions in their national arbitration laws that used to restrict the arbitrators to grant interim measures of protection. Whereas, some countries like Switzerland had given express authority in their national legislations to arbitrators to grant such kind of interim relief. If we had a look on Federal Arbitration Act of United States, we would came across that this legislation had no provision that enable arbitrators to grant interim relief. Consequently, it can be safely concluded that national stance mostly depends on court's rulings. The dilemma is also there when the different courts held differing judgments and manifested their division on this crucial issue. Some courts held that they would only recognize the arbitrator-ordered interim measures if the parties have expressly agreed to do so in their agreements while other courts recognized the interim measures granted by arbitrators if such measures are not inconsistent with the agreement between the parties.

Section 38(4) of the English Arbitration Act 1996 specifically entitles the arbitral tribunal to order interim relief on the request of any party to the arbitration unless the parties have expressly agreed otherwise. Section 38(4) was newly introduced in latest English Arbitration Act 1996. According to Section 38 the arbitrators will automatically have certain

[81] Tijana Kojovic, Court Enforcement of Arbitral Decisions on Provisional Relief, Journal of International Arbitration 18 (5), p. 511

powers to order interim relief and the only embargo is where the parties have agreed to the contrary. If we analyze this provision we will come up with the conclusion that this power is discretionary in its nature. It transpires that Civil Procedure Rules or case law is not binding on arbitrators as to when and how the court will exercise such powers. One should keep in mind that third parties are outside the ambit of interim measures ordered by arbitral tribunal. So invoking the jurisdiction of court under Section 44 of the English Arbitration Act 1996 would be the better recourse for concerned party in such cases[82].

3.1 Nature of Powers under Section 38(4) of English Arbitration Act 1996

To analyze this provision we have to reproduce it here "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"[83].

It has become crystal clear that "Section 38(4) empowers arbitrators to give directions in respect of 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. In this respect, 'property' includes an identifiable fund of money, but does not include security or damages claimed. Arbitrators will exercise the powers granted to them by this section in order to protect or preserve the property of one of the parties, which is a subject of the dispute. It is

[82] Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd [2008] 1 Lloyd's Rep. 371
[83] Available at http://www.jus.uio.no/lm/england.arbitration.act.1996/38.html

clear that arbitrators may only give directions in respect of property which is a subject of the proceedings and is either owned by or possessed by one of the parties. Such directions will be appropriate where one of the parties to the reference requires immediate assistance or where the circumstances of the case demand that the arbitrators take action in order to protect or preserve the property that is the subject of the proceedings. Such a direction will not be final and is reversible at a later date. An order under section 38(4) is provisional in nature. It does not finally decide any issue between the parties. Section 47 deals with partial awards, ie final decisions on part of a claim. The arbitrator cannot use section 47 to make a provisional conservatory order. This creates problems with the enforcement abroad of such an award"[84].

4. Comparative Analysis of Legislations

Article 17 of the UNCITRAL Model law contained an identical provision before the amendments introduced in 2006. Swedish (Arbitration Act) and section 1041(1) of the German ZPO reproduced that provision of UNCITRAL Model law in their national legislations.

"Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure[85]"

Article 183(1) of the Swiss LDIP is identical terms[86]. Neither the US Federal Arbitration Act nor the French NCPC gives give any such powers expressly to the arbitrator. However, there has never been much doubt

[84]Chartered Institute of Arbitrators. Available at http://www.ciarb.org/information-and-resources/2010/06/14/2.%20Interim%20measures%20of%20protection.pdf

[85] German ZPO 10th Book, available at http://www.pf.uni-mb.si/files/kerestes/ZPO.PDF

[86] available at https://www.sccam.org/sa/en/rules.php

that an arbitrator has them. In France, this is due to Article 1494(2)[87] which gives the arbitrator to power to fix his own procedure in the absence of any agreement by the parties. It states "Where the agreement is silent, the arbitrator shall lay down the procedure, to the extent that the same is necessary, either directly, or by way of reference to a law or to a rule of arbitration"[88].

By contrast, Article 818 of the Italian Codice di procedura civile forbids arbitrators from issuing attachments or other interim measures of protection.

Article 23(1) of the ICC rules operates in a very similar way to the UNCITRAL Model Law:

"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate[89]"

Similarly Article 26 of the UNCITRAL Rules states that:

"At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures"[90].

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[87] French New Civil Procedure Code, available at http://www.legifrance.gouv.fr/html/codes_traduits/ncpcatext.htm#TITLE_V_INTERNATIONAL_ARBITRATION

[88] Ibid

[89] ICC Rules of Arbitration, available at http://www.iccwbo.org/court/arbitration/id4093/index.html

[90] UNCITRAL Arbitration Rules, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

The detailed provisions of rule 28 of ACICA (Australian Centre for International Commercial Arbitration) entitle the arbitrator to make an order to "(a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm; and ... (d) preserve evidence that may be relevant and material to the resolution of the dispute[91]".

Rule 28 further elaborates how the arbitrator should cope with such an application. "The party requesting the measure must show that irreparable harm is likely to result if the measure is not ordered that substantially outweighs the harm likely to result to the party affected by the proposed measure and that the requesting party has a reasonable possibility of succeeding on the merits. The requesting party must promptly disclose in writing to the tribunal any material change in the circumstances on which the application or its granting was based. The tribunal can modify, suspend or terminate any of its own interim measures at any time upon the request of any party and in exceptional circumstances, on its own initiative. The arbitrator can subsequently make orders for costs or damages with respect to any measure that he or she subsequently decides should not have been ordered"[92]

5. Enforcement of Interim Measures Ordered by Arbitrators

Dispute resolution through arbitration is considered as voluntary submission of dispute to an arbitral tribunal based on agreement between parties. So, the enforcement of interim relief ordered by arbitral tribunal depends upon voluntary compliance of the parties to arbitration and the problem arises when a party denies such compliance. The

[91] Australian Centre for International Commercial Arbitration Rules, available at http://www.acica.org.au/acica-services/acica-arbitration-rules

[92] Ibid

inability to enforce its orders of interim relief has persistently been considered as a major lacuna in tribunal based resolution mechanism[93]. The national legislations of most of the countries do not give any such powers to arbitrators to enforce their orders granting interim relief. The arbitrators have derived certain ways to enforce their orders, for instance, matters relating to evidence; the tribunal has power to draw adverse inference if a party refuses to produce sought evidence before the arbitral tribunal. Similarly, the tribunal can also impose sanctions in order to force the compliance of its orders and if a party has control over any property which is the subject matter of the dispute in question, the tribunal has power to possess it till the enforcement of its orders. These all techniques are conventional in their nature and do not have much force because these techniques are subject to be challenged in national courts. There are certain provisions that enable the parties and as well the arbitral tribunal to seek the assistance from national courts for the purpose of enforcement of their orders.

Therefore, the inference can be safely drawn that the enforcement of interim orders granted by arbitrators highly dependent on the position of national courts and national legislations. Furthermore, the other significant issues in terms of enforcement are the scope of review of such orders and the grounds available to refuse the enforcement. The question arises that whether courts have power to refuse the enforcement of an exparte order. At this juncture, the enforcement mechanism is further divided in two topics. A system which consider the order of interim relief as an award and comply with its execution and the other where it is deemed as an order to which the courts provide assistance to enforce. In case of former, the scope of judicial review is limited while in case of latter, the scope of judicial review is extended. Netherlands, United States, France and Belgium adhere to the former approach where as

[93] David Brynmor Thomas. Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 2003. Arbitration International 2004

Swiss and German law stick with the latter. In Netherlands, it is binding upon courts to enforce the interim order passed by arbitrators because a specific provision (Article 1051) has been incorporated in Netherlands Arbitration Act. It is binding upon courts to enforce both global and partial award. While in United States and other similar countries that deem the interim relief as an award, has considered the interim award as final in relation to that matter. In Island Creek case [94] the Sixth Circuit during the enforcement of interim award granted by the arbitral tribunal has taken this view. In United States, the landmark case on this point was the Sperry Case[95]. The US Company Sperry International Trade, Inc. entered into a contract with the Government of Israel and incorporated an arbitration clause in the contract. A dispute arose and Sperry International Trade, Inc invoked the jurisdiction of District Court to refer the dispute for arbitration and sought preliminary injunction in order to restrain Government of Israel from drawing on a letter of credit during the pendency of arbitration. The District court not only compelled arbitration but also issued direction to refrain from drawing on the letter of credit. Israel opted to approach the Court of Appeals who reversed the decision of District Court of issuing preliminary injunction and reasoned that Sperry International had not shown apprehension of irreparable injury that warrant the injunction. Israel found opportunity to draw on letter of credit but before the dispersal of money, Sperry approached the Supreme Court of New York State and obtained an attachment order. Israel approached Federal Court and resorted to vacate the attachment. Sperry responded and a cross motion was moved in order to confirm the order of attachment. Sperry also took the plea to issue directions to Israel not to draw on letter of credit. The arbitral tribunal agreed with the Sperry's arguments and ultimately passed an interim award. Sperry

[94] Island Creek Coal Sales Co. v. City of Gainesville,
available at http://cases.justia.com/us-court-of-appeals/F2/729/1046/314126/
[95] Sperry Int'l Trade, Inc. v. Israel,
available at http://ftp.resource.org/courts.gov/c/F2/816/816.F2d.854.86-7745.438.html

submitted it to Federal Court and as well moved an motion for the confirmation of award. Consequently, the District Court confirmed the preliminary award. The Court of Appeals subsequently on appeal, recognized the powers of the arbitrators to grant interim award and as well powers to enforce it[96].

Arbitration law of Germany has also authorized the courts to provide assistance in order to enforce interim orders subject to condition that there should be no application for interim relief pending before any court of law[97]. It goes on providing the powers to courts to remodel the interim relief ordered by arbitral tribunals to make it compatible with the German Civil law. Same kind of issue came before a German court during the enforcement of Mareva Injunction. The court had to face complications when opting to enforce the Mareva injunction and ultimately enforced it after remodeling and making it compatible with German courts Civil law system[98]. Where the German courts refused the grant of interim measures at the first instance and subsequently the arbitral tribunal on the application of the party granted interim measures. In such cases, it was held imperative on German courts to enforce the interim orders ordered by arbitral tribunals. The question of enforcement of interim orders by the arbitral tribunal outside the jurisdiction of German Courts has not been properly addressed in the German Statue. Section 1025 has specified the provisions which are applicable if the seat of arbitration is outside the jurisdiction of Germany. Section 1062 of the German arbitration Act addresses the issue of enforcement. This section designated the Regional court where the respondent has its place of business or habitually resides or where the subject matter of the dispute is located. Conversely, English law has an

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[96] Ibid

[97] *See* Art. 1041(2) Book Ten of ZPO (GCP)

[98] Kojovic ; Schafer "A translation of a Mareva injunction into German law; 2005, 221

entirely different view on the above subject. As discussed in earlier chapters, Section 39 of the English Arbitration Act, specify the power of arbitrators to grant interim relief. Though, the nomenclature of such relief created some confusion in terms of enforcement of such orders. Now, the question arises whether the relief granted by the arbitral tribunal should be enforced under Section 66 of the English Arbitration Act or Section 42 read with section 41 of the said Act. If we analyze, we will come up with the conclusion that Section 66 specifically address the enforcement of awards made by the arbitral tribunal.

In so far as pre-emptory orders are concerned, the English Arbitration Act has also provided some additional measures. It includes adverse inference drawn by arbitrators if compliance of its orders is denied and further the costs of arbitration due to such failure[99]. But there is also a lacuna in this provision because it is not mandatory on the parties to follow prior to approach the courts of England. Where the pre-emptory orders made by the arbitral tribunal has not been complied with, the option for arbitral tribunal as well as for parties with prior permission of the arbitral tribunal, to approach the court for the purpose of enforcement of orders made by the arbitral tribunal is open. This is subject to a condition where they have not agreed to impede the application of Section 42 of the English Arbitration Act. If we place both the sections 42 and 66 in juxtaposition, we will come across that section 66 is more effective in issues related to the enforcement.

[99] *See* Arbitration Act, 1996, available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1

CHAPTER THREE

SPECIFIC PROVISIONS FOR INTERIM MEASURES IN VARIOUS INSTITUTIONAL RULES AND INTERNATIONAL CONVENTIONS

International Commercial Arbitration has been mostly conducted under the umbrella of International institutions. The most notable institutions are International Chamber of Commerce (ICC), International Council for Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA) and American Arbitration Association (AAA). Some of the agreements concluded between the parties opt for ad-hoc arbitration for which the UNCITRAL has provided its ad-hoc arbitration rules. When the parties to the agreement has chosen one of the above-said institutions for the resolution of their disputes, the rules of that particular institution would govern the arbitral proceedings regarding procedural matters. So in the light of above discussion, the inference can safely be drawn that the grant of interim relief highly depends on the rules of the institutions[100]. International convention has their own influence on such type of matters. This chapter will focus on the effect of international conventions and the institutional rules. The proposed provisions of UNCITRAL Model law that were considered, being analyzed in the following chapters.

1. Scope of Court-ordered relief under Institutional rules and Conventions

The in-depth analysis of the institutional rules would reveal that the provisions have been incorporated regarding aid of courts to support

[100] Hunter, Redfern: Law and Practice of International Commercial Arbitration vol 2: 2005, 231

arbitration[101]. The issue of prime concern for the parties at that juncture is that the recourse to courts for interim relief might be taken as breach of contract. However, some institutional rules have expressly provided that such recourse would not be deemed as violation of agreement[102]. The instances are ICC, AAA and World Intellectual property Organization. LCIA and the ICSID rules have not specifically incorporated such kind of provision rather concentrated on a general provision which allow the parties to the dispute to knock the doors of courts to seek interim relief[103]. The perusal of institutional rules transpires that they are not at much variance in order to recognize the power of the courts to grant interim relief during the pendency of arbitration proceedings, except for a few instances. For example, the LCIA rules require 'exceptional circumstances' for courts intervention after the constitution of the arbitral tribunal, whereas the ICC rules just require 'appropriate circumstances'[104]. It would be also pertinent that LCIA rules put an embargo on parties to approach national courts for interim measures of protection on the basis of security for costs which can be sought from arbitral tribunal[105]. The condition imposed by ICSID Rules is to approach the national courts if the parties to the dispute have already established it[106]. The issue became paramount when Federal Sovereign Immunities Act (FSIA) came into force[107].

Despite, the different views of the Courts, there is no specific provision provision that prohibits the courts to issue interim measures in New York Convention. The New York convention is not the only convention

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[101] Gregoire Marchac. *Interim Measures in International Commercial Arbitration Under the ICC, AAA,* LCIA and UNCITRAL Rules. Pp. 263-265

[102] ICC Rules of Arbitration Art.23 (2).

[103] LCIA Arbitration Rules Art.25.3

[104] Jan Paulson ; THE FRESHFIELDS GUIDE TO ARBITRATION AND ALTERNAT, 124

[105] Ibid

[106] Ibid

[107] MINE v. Republic of Guinea, 693 F.2d 1094; Paul D. Friedland, *Provisional Measures and ICSID Arbitration*, 2 Arb. Int'l 335 (2006)

that ignored the issue of provisional measures but the others like Inter-American Convention, Geneva Convention, etc are as well silent on this issue. The said conventions not only ignored but did not bother to discuss the issue their texts. The only convention which has a specific provision regarding interim measures is The European Convention on International Commercial Arbitration (Geneva Convention, 1961). The important provision in this convention is Article IV which states that "it is not incompatible with the agreement to arbitrate if the national courts are approached for the purpose of grant of interim measures"[108]. The Convention for Settlement of Investment Disputes (ICSID) between States and Nationals of Other States also has a specific provision[109].

2. Power of the Arbitral tribunal to grant Interim Relief under Institutional Rules and Conventions

There is no place for doubt that arbitration offers many benefits to the parties to the arbitration for instance, a quicker, less formal and less expensive resolution of the dispute as compare to litigation, the ability to choice of their decision maker and secrecy of the proceedings. A view has been penetrated widely that one cannot obtain provisional relief during the course of arbitration. The ability to obtain such relief, for example a preliminary injunction, can be highly significant in certain kinds of disputes, especially issues relating to protection of Intellectual property rights. This observation is not true because the major institutions that provide arbitration allow in their rules for provisional relief in arbitration. The (UNCITRAL) Model Law on International Commercial Arbitration previously had a very limited scope and some specific provisions on interim relief; the Commission has recently amended the Model Law in 2006 to allow for much more interim measures.[110] The International

[108] EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION Art. VI (4)

[109] *See* European convention: Art.IV

[110] See UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments adopted in 2006 (UNCITRAL Arbitration Rules 2006), art. 17.1. www.uncitral. org.

Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association (AAA), has also incorporated into its rules a provision that allow parties to obtain emergency relief from an arbitrator before the selection of the penal of arbitrators.[111] The International Chamber of Commerce (ICC) has a distinctive pre-arbitration procedure for a referee to entertain urgent requests for interim relief, but the condition precedent to opt for this is that the procedure has to be expressly stated in the parties' arbitration agreement.[112] Another significant aspect is that orders for interim relief and emergency orders are not self-enforcing. Thus, there will always remain a concern over whether such orders will be enforced in a meaningful manner.

3. When Interim Relief will be sought?

The purpose of seeking preliminary injunction or other type of interim relief by a party is that it will have to suffer imminent harm due to any irreparable shift of the status quo. Examples are the constant violation of copyrights by the adverse party or patent rights or misappropriation of trade secrets; danger to the property in the custody of the adverse party; and danger that the adverse party will further alienate its own property, to frustrate the chance of recovery in the arbitration.

The UNCITRAL Rules on International Commercial Arbitration (1976) had a specific provision regarding interim measures; Article 26 of the UNCITRAL Rules on International Commercial Arbitration (1976) allowed the arbitration panel to entertain a request for interim measures

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[111] American Arbitration Association, International Dispute Resolution Procedures, available at www.adr.org/sp.asp?id=28144# Interim Measures. See art. 37.

[112] International Chamber of Commerce, Rules for a Pre-Arbitration Referee Procedure

provided appropriate circumstances.[113] The availability of interim relief had become in the limelight, the UNCITRAL formed a working group in order to make a comprehensive research and sort out the issue of interim measures. Consequently, in 2006 a new chapter was added in UNCITRAL model law[114] that deals with issue of interim relief and introduced a new form of relief called a "preliminary order." It contains provisions that throw light on the type of relief, the pre-requisites for obtaining it, and other related issues. The gist of the provisions added to facilitate the issue of interim measures is hereunder;

Article 17(1) has been introduced that aims at allowing the arbitrator to grant provisional measures at the request of a party to arbitration, unless the parties agree otherwise. Article 17(2) provide the definition of the term "interim measure" to mean a "temporary measure that has one or more of the following purposes: to preserve either the status quo, assets from which the final award may be satisfied, or evidence, or protect the arbitration proceeding".

Article 17A gives some conditions which the moving party must have to meet in order to invoke the panel of arbitrators to grant a request for an interim measure of protection. In fact, this standard is very similar to the one United States courts used to rule on requests for the grant of preliminary injunction. That is, the party who request to grant interim relief will have to show that in the event of not granting the interim relief it will have to suffer irreparable loss as well as a reasonable possibility of success on the merits of the claim. However, the discretion of the

[113] UNCITRAL Arbitration Rules (1976). available at http://www.jus.uio.no/lm/un.arbitration.rules.1976/toc.html

[114] UNCITRAL Amended Arbitration Rules . ch. IV

tribunal is absolute to apply these two requirements when interim measures are requested for the purpose of preserving evidence.

Article 17B has introduced a new type of relief which is analogous to a temporary restraining order which is known as preliminary order in United States law; the purpose of preliminary order is to preserve the position of status quo till the arbitrator gives its decision on the request for interim relief. While making request for an emergency relief, the request for grant of preliminary order can be made exparte along with the request to grant of interim relief simultaneously.[115] Article 17C (4) gives the duration of preliminary order for twenty days. The same conditions for granting a request for interim relief apply to applications for an emergency order.

The peculiar feature of a preliminary order is that it can be granted without issuing notice to the party against whom the order is sought but the condition precedent is if the arbitrator concludes that the disclosure of the request for interim relief would defeat the purpose of the interim measure. Article 17H (1) discusses the ability of courts to enforce an order of interim measure. It provides that courts retain power to enforce an order or award of interim measures just as they would enforce any other arbitration award. In contrast, the preliminary order for emergency relief has not the same case. Article 17C (5) provides that a preliminary order, although binding on the parties, is not enforceable by a court. Article 17J directs that a court has the same power to issue interim relief in an arbitration proceeding as it would have to issue such relief in a court proceeding.

[115] Ibid., Art. 17B (1).

4. Amended UNCITRAL Model Law, International Arbitration Act and Arbitration laws in Singapore

The surge in applications in context of international arbitrations for interim relief to both arbitral tribunals and courts compelled to amend the arbitration laws prevalent in Singapore. UNCITRAL model was substantially amended in 2006 and as well recently, the International Arbitration (Amendment) Act of Singapore came into force on 1 January 2010, which extended and clarified the powers of the courts in Singapore. As the need for parties seeking for interim measures has been growing constantly, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has also opted to amend the SCC Rules in order to come in line with UNCITRAL Arbitration Rules and to enable the parties to arbitration to make applications for the appointment of an Emergency Arbitrator.

5. Model Law of 1985 and the previous status of International Arbitration Act

International Arbitration Act (IAA) of Singapore in fact traces its basis from the original UNCITRAL Model Law of 1985. The Model law did confer wide range of powers to arbitral tribunals to grant interim relief sought by a party to arbitration[116]. In so far as the powers of the courts to order interim relief are concerned, Article 5 of the Model law principally precluded the court intervention unless expressly permitted by the Model law itself. While on the other hand Article 9 of the Model Law, has enabled the parties to arbitration to apply for interim measures of protection, there has been a state of vagueness as to what extent the courts have jurisdiction to order relief.

The Model law has been enacted in the arbitration law of Singapore with additional options to resort to interim measures of protection. There has

[116] Article 17 of UNCITRAL Model Law of 1985

been mentioned a list of interim measures that the tribunal could grant.[117] Furthermore, an additional power has been provided to the High Court by giving it the concurrent jurisdiction to order same interim measures in international arbitration proceedings which the High Court has power to make in the proceedings in Civil Court[118].

5.1 Revision of Model law in 2006 and the Swift Fortune judgment

The amendments introduced in 2006 in Model law has replaced the old Article 17 by a new Chapter IV A addressing the issue of interim measures of protection and preliminary orders. This chapter has shifted the paradigm and introduced more exhaustive provisions with regard to the powers of a tribunal, and for the first time, some specific and explicit provisions concerned with the powers of the courts to order interim relief has been incorporated. The newly introduced Article 17J provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in court". This provision clearly transpires the intention of the law maker to endorse beyond doubt the powers of the competent court to grant interim measures of protection.

In a case[119], the court of Appeal of Singapore held that court's power in Section 12(7) under International Arbitration Act (IAA) has limited jurisdiction to Singapore-seated international arbitration and it does not extend to foreign-seated arbitrations, and therefore having a strict construction of section (12(7) held that interim measures of protection could only be granted if the ancillary claim is in question and that would be heard by the Singapore Courts and not otherwise.

[117] Article 12(1) of International Arbitration Act
[118] Article 12(7) of International Arbitration Act
[119] Swift-Fortune v Magnifica Marine SA [2007] 1 SLR 629

On the other hand, the High Court of Singapore made a flexible construction[120], holding that the courts of Singapore can grant injunctions in support of foreign seated arbitrations under its general statutory powers. The court held further that there is no need to establish that the substantive claim will ultimately be heard in Singapore, if the applicant has a reasonable cause to show that cause of action arises in Singapore. The respective decisions of the two Court of Appeal and the High Court are at variance with one another.

5.3 International Arbitration (Amendment) Act

The amendments introduced in International Arbitration Act (IAA) subsequently has a substantial effect for the resolution of conflicting decisions made in swift fortune and Multi Code case by way of adoption of certain significant changes introduced in Model law and its alignment with the ratio decidendi of court of Appeal. International Arbitration Act has not adopted each and every amendment of Model law and still its basic legislative framework is based on UNCITRAL Model law of 1985.

So far as the interim measures are concerned, the amendments retain the powers of arbitral tribunal as mentioned in Section 12. While on the other hand it removed section 12(7) and inserted a new section 12(A) regarding court ordered interim measures of protection.

5.4 Effect of the International Arbitration (Amendment) Act

The amendments introduced in International Arbitration Act has dusted off the ambiguity for the parties to arbitration involved in international arbitration and when invoking the jurisdiction of Singapore court seeking interim measures. The basis of procedural rules in Section 12A reflects tried and test principles while the language and words used in this

[120] Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others [2009] 1 SLR 1000

Article have a resemblance with Section 44 of English Arbitration Act: so it can be safely presumed that the courts of Singapore will pay regards in their interpretations. The court's discretion to grant an order for interim relief on the basis of seat of arbitration not within the boundaries of Singapore has still been considered as a thorny area of concern. In the application of such discretionary powers, the court has to strive a lot to uphold the essence of the policy introduced in amendments for the purpose of supporting foreign seated arbitral proceedings and have to be careful in excessive interference in the arbitral process.

6. Comparative Analysis of International Rules

6.1 International Center for Dispute Resolution (ICDR) International Rules

The ICDR in its rules specify two different types of provisional relief, the first one is interim relief[121] and the second one is emergency relief that can be availed prior to the constitution of the tribunal.[122]

"Article 21(1) of the ICDR explicitly authorizes the penal of arbitrators to entertain requests for interim measures of protection, including relief in shape of injunctions and interim measures for the protection or conservation of property. Further, the ICDR rules has stated in its rules that applying to a court for interim relief is not incompatible with these rules.

Article 37 of the ICDR deals with the situation when parties to the arbitration need but the parties are not sure who the arbitrator will be. This article has provided a comprehensive mechanism for such type of

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[121] See ICDR Rules, Art 21.

[122] Ibid, Art 37.

requests to be made and resultantly ICDR appoint an "emergency arbitrator" to hear this type of requests"[123].

The pre-requisites for the application for emergency relief must contain the nature of relief requested, the reasons the reasons for seeking such type of relief on emergency basis and why the applicant consider him to be entitled for such relief. Further, the applicant has to send notice of such application to the party against whom such relief is sought. Article 37 requires the party seeking emergency relief to attach a certificate that all the concerned parties have been notified of the steps taken by him to give notice in good faith. This Article has provided a mechanism of expedited nature and one can imagine it that the appointment of the emergency arbitrator has to be made within one business day of the receiving of the request; prompt disclosure by the arbitrator of potential conflicts of interest, if any; and the setting of a schedule for the emergency hearing within two business days. There is a distinctive option for hearing that it may be conducted on telephone or by written submissions. The emergency arbitrator has a mandate to modify or vacate the relief on the basis of good cause.

6.2 International Chamber of Commerce (ICC) Rules of Arbitration

Article 26 of the UNCITRAL Arbitration Rules allows the arbitral tribunal to make interim awards same as Article 23 of the International Chamber of Commerce (ICC) Rules of Arbitration also have left room for arbitrators to make interim awards in appropriate cases, unless the parties have agreed otherwise. Such interim awards include conservatory measures and requiring security.[124]

[123] ICSID Rules of arbitration

[124] International Chamber of Commerce, Rules of Arbitration, Art. 23.

There is also a provision in ICC Rules that allow a party to the arbitration to seek interim relief from court and refer applications submitted for grant of interim relief to a judicial authority if needed, prior to the formation of the arbitral panel, though the applications to the court are as well permitted after formation of arbitral tribunal. These rules also reiterate that making an application for interim relief to a court does not mean to waive the right to arbitrate.

The ICC also has a procedure which allows the appointment of a referee to cope with urgent issues prior to the tribunal seizing jurisdiction over the dispute. The ICC pre-arbitral referee procedure can be resorted if it has been incorporated in the agreement by the parties. If the reference been made as discussed , then the referee could have mandate to order a conservatory or restorative measure that is needed right away to prevent looming harm to the rights or property of a party and as well measures to protect or establish evidence in order to save the frustration of arbitral awards. The referee has discretion to compel a party to make a payment, or order to take steps required by the agreement including the signing or delivery of any document.

6.3 London Court of International Arbitration (LCIA) Arbitration Rules

London Court of International Arbitration (LCIA) also authorizes its arbitral tribunal to make interim orders as envisaged in (LCIA) Arbitration Rules.[125] Article 25 of (LCIA) Arbitration Rules authorizes three types of interim orders. The first is an order that requires from a party who is responding to a claim or counter claim to ensure security for all or part of the amount claimed by the party seeking interim relief. This rule also discusses the nature of security sought by the party for

[125] LCIA Arbitration Rules, available at www.lcia.org.

instance cross-indemnities, bank deposits and bank guarantees are included. The second type of order requires the interim preservation of property in question in the arbitration. The third type is quiet exhaustive and it includes any order it would have the power to grant as part of a final award.

Article 25 as well addresses a situation in which a party fails to fulfill with an interim order issued by the tribunal. In such situation, the panel has discretionary powers to stay the enforcement of the non-observing party's claims or counterclaims or even to such extent order them dismissed. It has also discretion to require security from the non-complying party.

As discussed above, the LCIA rules contains a provision that allow a party to apply to a court for an appropriate judicial order, but the condition attached to avail this right to those cases in which interim relief is required before the arbitral panel can be formed and generally, judicial intervention can only be resorted after the panel has been formed in "exceptional cases." It is pertinent to mention here that there is a specific provision in LCIA Rules that allows its court to expedite the formation of the panel if an exceptional emergency has been shown by the party applying for such relief.

7. Arbitration Laws, Treaties and Interim Relief

7.1 The Position of English law The law regulating the arbitration in Britain is known as English Arbitration Act 1996. This Act authorizes English Courts to grant interim measures of protection to aid arbitration. It is permitted under this Act that courts can issue orders for the preservation of evidence and as well can grant interim injunctions. This Act also authorizes Courts to make orders regarding the property at question during the pendency of the proceedings. Keeping in view the

contractual nature of arbitration, the Courts can exercise these powers unless the parties to the arbitration agreed otherwise.

The English Arbitration Act contains a provision that allow the parties to mutually agree and give the mandate to the arbitral tribunal to grant interim relief which be consistent with the power given by the English Arbitration Act. To ascertain whether the courts could grant interim relief before the coming into force of English Arbitration Act is a difficult question to answer.[126]

7.2 Arbitration law in United States

The law regulating the arbitration in United States is known among the practitioners and legal fraternity as Federal Arbitration Act,[127] A very peculiarity of this law is that it has no specific provision that address the issue of interim measures of protection.

The situation is still foggy in United States and it remained the matter of immense debate whether a Federal District Court would have mandate to entertain an application seeking interim measures of protection during the pendency of arbitral proceedings or before the commencement of arbitration proceedings and whether it is compulsory for the parties to incorporate in their agreement an arbitration clause to resort to arbitration

The Federal Arbitration Act and New York Convention 1958 which is almost a part of FAA and both expressly provided a power to court to issue an order that compel the parties to arbitrate. So in can be concluded safely that both the Federal Arbitration Act and New York

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[126] See Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., [1993] A.C. 334 (House of Lords).

[127] See Section 9 of United States Code

Convention 1958 relies upon an arbitration clause in the agreement between the parties. This has been held by different courts of United States that the courts posse only this single power tills thc arbitral tribunal enters an award.[128] Other courts have criticized this holding, ruling instead that federal district courts do have thc power to issuc interim orders in aid of arbitration.[129] In contrast, some other courts of United States have expounded the other view that Federal District Courts have power to order interim relief to aid arbitration.

The countries holding the position that panel of arbitrators do no possess power to issue interim measures of protection are Italy and Argentina but the support of this view is very small in number.[130]

7.3 Predictive response of the Court

If we assume for the sake of arguments that court has power to grant interim relief to aid arbitration then we come across that the two courts of United States refused to do so in arbitration issues despite the fact that the courts had mandate to grant interim relief. In the first case[131] the court upheld the decision of the lower court who denied issuing preliminary injunction.

By giving the reference of Swiss arbitral tribunal who was operating under the International Chamber of Commerce rules and the court ruled that the grant of interim measures amounted to inappropriate stepping in the issue.

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[128] McCreary Tire & Rubber Co. v. CEAT, Spa. 501 F.2d 1032 (3rd Cir. 1974).

[129] Carolina Power & Light Co. v. Uranex, 451 F. Supp.1044 (D. Cal. 1977).

[130] See Wang, William, "International Arbitration: The Need for Uniform Interim Measures of Relief," Brook J. Int'l L. n. 240, 241 (June 12, 2004)

[131] Simula Inc. v. Autoliv, Inc

In the second case[132] the court's ruling was very much similar to earlier discussed. The court denied to issue writ of attachment and observed that the arbitration rules of the China International Economic and Trade Commission that were the applicable rules to that arbitral proceedings had incorporated a specific procedure to request for interim relief from the Peoples court of China and the parties to the agreement has agreed upon the applicable rules to arbitration so they should follow the rules to resort to any kind of interim relief. This court should not step in and rule on the issue which has already agreed upon by the parties. Another important question arises at this juncture, whether a court has power to enforce the decision of an arbitrator. This question also remained opened for debate in the United States and a view which has been widely accepted that to some extent, it depends on the nature of granting interim relief and the jurisdiction of the courts on the place where the enforcement of the award is sought.

The issue is integral to this debate because it is a stipulated fact that arbitrators have very limited powers to enforce their orders directly without the intervention of the courts. Even while some institutional rules explicitly provided powers to arbitrators to grant interim measures of protection but the question of enforcement of the orders of the arbitrators is still there.

The question of court assistance to enforce the interim awards of the arbitrators is still vague and the cases in which the courts reviewed related issues are found divergent.[133] Some United States courts held that whether the assistance amounted to interference or bypass of

[132] China National Metal Products Import/Export co v. Apex Digital, Inc

[133] Compare McCreary Tire & Rubber Co. v. CEAT. Spa, 501 F.2d 1032 (3rd Cir. 1974)

arbitration process or whether the assistance truly meant for aiding arbitration.[134]

8. Enforcement of Interim Measures Ordered by the Arbitrators

The area of enforcement of interim measures ordered by the arbitrators has not been properly addressed both in the institutional rules and the international conventions. The legal fraternity has put forward various proposals for the improvement. The idea of a supplementary to the New York convention has a significant position in this debate[135].

As the issue of enforcement of interim measures ordered by the arbitrators is complex but on the other hand English law provides a solution which has been found useful for the resolution of this issue. The procedure adopted in English law clearly reflects the policy of court subsidiary. The provision itself transpires the concept by providing teeth to interim measures granted by arbitrators. This concept has to be place in juxtaposition with sections 38 and 39. The interim measures granted under these sections have provided a systemized mechanism. It envisages that the orders of the arbitrators granted under section 39 could be enforced as an award as given in section 66 this provision has given a ray of hope that the interim measures ordered by arbitrators could be enforceable in the light of section 66. In the end, he himself declared it a doubtful practice as section 42 could likely to prevail over this section as it has been considered a the more specialized rule.

Section 42(1) of English Arbitration Act, 1996 state that Unless otherwise agreed by the parties, the court may make an order requiring a party to

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[134] Ibid.

[135] Symposium, *40 Years New York Convention: Past, Present and Future* 2 Vindobona J. 55 ,Cremades

comply with a peremptory order made by the tribunal.[136]. The order of the court is fortified from the threat of contempt of court. Furthermore, it can be concluded that any third party aiding a party to the arbitration to frustrate the order may liable for contempt of court.[137] But there is as well an obstacle because the jurisdiction of the arbitrators over third parties is also a question of debate. The words in the subsection "Unless otherwise agreed by the parties" makes it possible for the parties to opt out of the enforcement mechanism.

Section 42(2) of English Arbitration Act, 1996 specifically mentions who can seek court's support. Three different ways have been discussed in this provision. The first one points out that the application can either be made by the tribunal after giving notice to the parties, by a arbitration party with the prior permission of the arbitral tribunal and after giving notice to the other party in arbitration. If the parties have already agreed upon that the court under this section shall have power then there would be no need to give prior notice. So what is imperative at this point is that the parties to the arbitration should consider this important point at the time of drafting the arbitration agreement.

Section 42(3) of English Arbitration Act, 1996 discusses the subsidiary approach in this provision. It states that "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"[138]. This approach would refer towards section 41 in which it has been spelled out the whole remedies available to arbitral tribunal if a party to the arbitration defaults. It has been expounded in the provision that at first, the court must have to be satisfied that the party to the arbitration has

[136]Section 42(1) of English Arbitration Act, available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_3#pt1-pb8-l1g42

[137] In line with *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*

[138] available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_3#pt1-pb8-l1g42

exhausted every possible available mechanism. This procedure precludes a party to directly apply to the court for enforcement without having recourse within the arbitration.

Section 42(4) of English Arbitration Act, 1996 states that "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". This provision supports the above discussed notion with regard to time. The gist of this provision is that a party to the arbitration could not be able to seek help from the court unless the expiry of reasonable time in which the other contesting party has been given a chance to comply the said order. These two impediments discussed above ensure that the court support could only be available as a last resort.

The territorial jurisdiction has also been identified in the English Arbitration Act, 1996 and in-depth analysis would reveal that the territoriality principle of the model law has been followed in this Act. Section 2(1) clearly states that "the provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland"[139]. It transpires that all the mandatory provisions mentioned in the schedule have to be observed.[140] (List is attached in Schedule 1). It means that neither sections 38, 39, 41 and 42 nor section 44 meet the qualification of being as mandatory provisions. However, the parties to the arbitration are free to depart from any non-mandatory provisions incorporated in this Act. This does not only pass on to opting-in or opting-out potential as provided in the provisions themselves, but also given an opportunity to agree upon a set of arbitration rules or choice of

[139] Section 2(1) available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_2#pt1-pb1-l1g2
[140] compare *Union of India v. McDonnell Douglas Inc*

substantive law which would be a clear departure from the provisions mentioned as fall back provisions. Institutional rules for Arbitration mostly provide for an arbitrator's power to grant interim relief. If we follow this concept then the access to the court would be restricted.

It is pertinent to mention here that the jurisdiction of the courts cannot be extended by way of agreement between the parties or by concept of party autonomy. This means that any institutional rules of arbitration that provides a choice of a law provision in accordance with party autonomy concept would not have any consequences. In so far as they are inconsistent with section 44. It is still binding for English courts to ground their jurisdiction on the matters specifically listed in section 44 (2) and to follow the tests laid down in section 44 (3), (4) and (5). The upshot of the discussion would yield that it would be impossible to bypass the impediments erected in section 42 by way of agreeing on a law that provide a mechanism for court assistance directly as given in the Swiss law.

CHAPTER FOUR

UNCITRAL MODEL LAW AND RULES – Evolution and Current Status

UNCITRAL has proved its importance enormously in cases of international trade law since its inception; similarly, even in the area of international commercial arbitration. It has now been well established that UNCITRAL's work has rendered worthwhile services to the international business community. UNCITRAL Model Law and the Rules have been proved as an impetus to the development and projection of International commercial arbitration and the infrastructure concerned. UNCITRAL Model law was introduced in United Nations in the year of 1985. The rationale behind the adoption of the Model Law was to provide guidelines to the nation states that were planning to implement legislations on arbitration. UNCITRAL introduced Arbitration Rules for parties who desire to proceed under Ad-Hoc Arbitration. It was considered as a great achievement. UNCITRAL arbitration rules have provided rules for parties who wish to adopt ad-hoc arbitration. Apart from it, the institutions providing institutional arbitration have also been consistently following UNCITRAL arbitration rules. When the permanent court of arbitration was drafting its rules, it kept following the principles of UNCITRAL Rules. Most of the regional institutions and National arbitration centers have incorporated the guidelines of UNCITRAL Model law in their rules such as the Australian Institute of Arbitration, Iran-United States Claims Tribunal, Singapore International Arbitration Center, Hong Kong International Arbitration Center even the NAFTA contains a provision in which it has provided a way out to investors by using the rules of UNCITRAL in case of erring the governments[141]. In the light of influence that the UNCITRAL Model law and its rules had on the

[141] *See* Article 1120 of NAFTA

International Commercial Arbitration, the only question of uniformity was integral. The need for uniformity of UNCITRAL Model law and its rules was felt at the broader level. One of the great efforts conducted by UNCITRAL was to review the Model law in order to figure out the lacunas in terms of interim measures of protection and the will to strengthen the Model Law by overcoming the issue of interim measures which was materialized in the amendments introduced in the year of 2006. This chapter will focus the UNCITRAL Rules and the Model law right from the stage when the working group addressed this issue in his recommendations and before the inception of changes introduced in 2006.

1. UNCITRAL Model Law and Rules on Interim Measures

1.1 The Pre-amended position

The UNCITRAL Model Law prior to the incorporation of Chapter IV in 2006 had a simple provision considering the right of the parties to arbitration to knock the doors of the courts for the issuance of interim measures of protection. Approaching the courts was subject to the compatibility of the agreement to arbitrate[142]. The stakeholders declared this provision as "Inadequate" which left very important aspects unattended. The UNCITRAL working group discussed that this provision did not address the scope of powers of courts to order interim measures of protection. The arbitrator-ordered interim measures were discussed in Article 17 of UNCITRAL Model law but this provision as well had a very limited scope to the extent of subject matter of the dispute. There arose so many questions, for instance, whether the limitation imposed on the courts was imperative in its nature, the preconditions for issuing of interim measures and the types of interim measures. The provision dealing with the power of arbitrators to order interim measures was as well not speaking and found as inadequate in its nature. These questions

[142] UNCITRAL Model Law Article 9

were unanswered in the UNCITRAL Model law[143].The status of exparte orders was also missing in the said provision which caused to emerge as a problem at the time of enforcement of such orders that enhanced apprehensions towards frustration of award. Courts had power to refuse to recognize such orders if the party to arbitration had not been given of the arbitral proceedings. Another deficiency of Model law was the missing provision for the enforcement of interim orders made by the tribunal.

The UNCITRAL Rules contained a specific provision regarding the power of arbitrators to issue interim measures and same was the case in Model law. It expressly provided to make the request to judicial authorities to issue interim measures of protection subject to compatibility with the arbitration agreement. The provision in Article 26 of the UNCITRAL Rules[144], authorized the arbitrators to order interim relief, only in matters concerning the subject matter of the dispute. This provision had also provided orders for conservation of property in question by way of order of deposit with third persons such as in case of sale of perishable goods etc. There always remained a doubt whether the conservation of property was just an instance or it be considered as a limit to the scope of interim measures of protection.[145] The plain reading suggests that it was meant as just an example. Even the restriction imposed in the UNCITRAL Rules to order interim measures in matter relating to the subject matter of the dispute and the conservation of property had been considered as a nasty limitation on the provision. Furthermore, it had not provided any pre-requisites that need to be met for the arbitrators in order to issue interim measures of protection. The Article authorized the arbitrators to require security from the party seeking interim relief in order to grant interim measures. There was another lacuna in the

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[143] UNCITRAL Model Law Article 17

[144] UNCITRAL Rules Article 26 1.

[145] Marchac; John D. Franchini. International Arbitration Under The UNCITRAL Arbitration Rules: A Contractual Provision For Improvement. 62 Fordham L. Rev. 2223. 2240 (2001)

UNCITRAL Rules which was identified immensely, the silence of Rules regarding the issue of enforceability of interim measures. Article 26(2) provided that the interim measures should be in the format of awards. At this juncture, the applicability of the New York convention to the interim awards issued by the arbitral tribunal became so much important. It was a consensus that the provisions for the enforcement of awards in the convention had no application regarding interim measures. The shortcomings discussed above compelled UNCITRAL to amend the Model law in order to harmonize the national legislations regarding interim measures of protection.

2. Analysis of Proposed Draft for UNCITRAL Model Law

Task to introduce uniformity in the rules was entrusted to a working group. The mandate to discuss and propose the amendments included the way outs to widen the scope of interim measures of protection, the deficiencies in conciliation procedure and to cope with the issues regarding written form of arbitration agreement between the parties etc[146]. The working group held several meetings and analyzed the status of interim measures of protection and came across with viable proposals to harmonize the national legislations, improvements to enforce the interim awards and at a later stage the working group extended its scope to other vulnerable provisions concerning interim measures of protection needed to be changed[147]. The working group also discussed drafts variants of Article 17 which authorized the arbitral tribunal to grant interim measures of protection.[148] At some later stage, the working group opted to extend its scope to other provisions relating to interim

[146] UNCITRAL Working Group on Arbitration Thirty-second session Vienna, 20-31 March 2000 Provisional Agenda A/CN.9/WG.II/WP.107

[147] Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20 – 31 March 2000), A/CN.9/468, p.14, 15

[148] www.uncitral.org

measures of protection[149] The changes suggested for court-ordered interim measures were also the subject of the discussion. United States was the first country who submitted its draft proposal for the consideration of the group. The working group in its session held in 2003 took into account the proposals submitted by the United States and as well the other enforcement issues was also discussed in that session. Here, we will try to have a succinct analysis of the draft proposal submitted to working group in its thirty eighth sessions.

2.1 Power of arbitral tribunal to grant interim measures:

The draft provisions almost covered every aspect of the issues connected with the interim measures of protection. The working group in its thirty eighth sessions extensively discussed each and every aspect of the issue in order to figure out the lacunas. The review of the proposal of the provision is as reproduced under:

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection[150].

(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute ,in order to ensure or facilitate the effectiveness of a subsequent award;

(b) Take action that would prevent, or refrain from taking action that would cause, current or imminent harm, in order to ensure or facilitate the effectiveness of a subsequent award];

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[149] See generally Reports of the Working Group on Arbitration from various sessions available at www.uncitral.org

[150] available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

(c) Provide a preliminary means of securing assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute". [151]

The draft language of Article 17 gave power to parties to the arbitration to mutually agree and oust the power of arbitrator to order interim measures of protection. The draft proposal at variance authorized the arbitrators to order interim measures directly. Likewise, the working group addressed the specific words 'In respect of the subject-matter of the dispute' in the original text of the provision which limited the scope of ordering interim measures. The same phrase had been used in Article 26 of the UNCITRAL Arbitration Rules[152] and ultimately the amendment introduced coped with both the provisions. The UNCITRAL working group took the view that the phrases used in both the provisions amounted to limiting the powers of arbitrators to order interim measures of protection. After extensive deliberations the working group introduced changes to these phrases at the later stage of deliberations. The ultimate outcome proved to enlarge the scope of powers of arbitrators to grant interim measures of protection.
The proposal of the working group in its second paragraph resorted to define the term "Interim measures of protection". The proposal defined it as "a temporary measure granted by the arbitral tribunal prior to its final award. The paragraph further provided the list of interim measures that the arbitral tribunal may have power to resort"[153]. The final list provided by working group identified various purposes for which the interim measures could be granted and it oust the type theory of interim

[151] Peter Binder, IInd Edition, International Commercial Arbitration and Conciliation in UNCITRAL Model law Jurisdictions (Sweet & Maxwell) P.158 available at http://daccess-dds-zzny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement
[152] *See* UNCITRAL Arbitration Rules Article 26
[153] Report of working group, Second Paragraph

measures. The final list of interim measures was quite exhaustive and it covered the broader purposes that covered almost every possible aspect for which the interim measures could be sought from the arbitrators. The working group extensively discussed the effect of these wordings at later stage.[154] The deliberations gave rise to question that whether there would be a situation in which the acts of any party to the arbitration could interfere with the proceedings rather than the adjudging of the efficacy of the final award. The group showed as well the concerns over these wordings by holding that it may allow a party to approach the arbitrators to issue interim measures of protection in order to frustrate the ordinary business of the adverse party. But the group reached the conclusion that this apprehension had been properly addressed in third paragraph that spoke of preconditions to be met by the seeking party before the issuance of interim measure. Paragraph three is reproduced under[155]:

"(3) The party requesting the interim measure of protection shall demonstrate, show, prove, establish that:

(a) Irreparable harm will result if the measure is not ordered, and such harm substantially outweighs the harm that will result to the party affected by the measure if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determinations[156]"

The preconditions that were imperative for the arbitrators to issue interim measures were laid down in paragraph three. If we took up the previous status we will come across that there was not guiding principle available to the arbitrators to follow while taking decision on the

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[154] Id

[155] available at http://daccess-dds-zny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

[156] Peter Binder, IInd Edition, International Commercial Arbitration and Conciliation in UNCITRAL Model law Jurisdictions (Sweet & Maxwell) P.159

availability of interim measures of protection. The draft proposal of the working group put forward a vital requirement for the party who seek interim measure of protection. That party will have to show the proportion of irreparable harm that outweighs substantially the harm resulted to the adverse party in case of grant of interim measure. The party who sought interim relief will also have to demonstrate the chances of success on merits but it was cautioned that such decision on the possibility of success will have no effect on the subsequent findings at any later stage. If we keenly have a look on the current status of the UNCITRAL Model law we will come up with the conclusion that the endeavors put by the working group in shape of its draft recommendations, has been now incorporated in the UNCITRAL Model law during the changes made in the year of 2006.

Paragraph 4 is reproduced under:

"(4) Subject to paragraph (7) (b) (ii), except where the provision of a security is mandatory under paragraph (7) (b) (ii), the arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection. Even the current provision gives discretionary power to the tribunal to require security for granting interim relief[157]. The only difference being the reference to the provision of (7)(b)(ii), which deals with exparte interim measures"[158].

[157] *See* UNCITRAL Model Law Article 17

[158] available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

Paragraph 5 and 6 are reproduced under:

"(5) The arbitral tribunal may modify or terminate an interim measure of protection at any time in light of additional information or a change of circumstances."[159]

"(6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection."[160]

One other lacuna which was not addressed in the UNCITRAL Model law was the duration of the validity of interim measures granted by the arbitral tribunal and the powers of the arbitrators to correct them in case of changing circumstances and additional information of the matter in issue. The group did not finalize the phrase 'in light of additional information or changing circumstances'. The provision in the draft itself transpired that the arbitral tribunal had the suo moto power to modify their order in accordance with changing circumstances of the case and the request of the party to do so was not required. This provision granted the wide range of powers to arbitral tribunal and it considered that the tribunal could modify and change the nature of interim measure granted at earlier stage even it could happen after the initiation of the measures by courts. The liability to inform the changing circumstance of the case rested to the party who sought for the interim measure of protection from the tribunal and it specified in the paragraph six of the draft proposal.

Paragraph 7 is reproduced hereunder:

"(7) (a) Unless otherwise agreed by the parties, the arbitral tribunal may 'in exceptional circumstances', grant an interim measure of

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[159] available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

[160] available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

protection, without notice to the party [against whom the measure is directed (affected by the measure), when:(i) There is an urgent need for the measure;(ii) The circumstances set out in paragraph (3) are met; and (iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted.(b) The requesting party shall: (i) Be liable for any costs and damages caused by the measure to the

party (against whom it is directed) (affected by the measure) (to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits); and (ii) Provide security in such form as the arbitral tribunal considers appropriate ,for any costs and damages referred to under subparagraph (i), as a condition to granting a measure under this paragraph[161]; (c) For the avoidance of doubt, the arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to subparagraph

(b) above;(d) The party against whom the interim measure of protection is directed] affected by the measure granted] under this paragraph shall be given notice of the measure and an opportunity to be heard by the arbitral tribunal [as soon as it is no longer necessary to proceed on an ex parte basis in order to ensure that the measure is effective within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];] [

(e) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which

[161] Peter Binder, IInd Edition, International Commercial Arbitration and Conciliation in UNCITRAL Model law Jurisdictions (Sweet & Maxwell) P.159

period cannot be extended. This sub-paragraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by the measure] has been given notice and an opportunity to be heard;]

(f) A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;"[162]

The prevalent rules had never been taken into account this aspect except WIPO emergency relief rules, American Arbitration Association (AAA) Rules and International Chamber of Commerce (ICC) optional Rules. The draft provision took up this issue and had a detailed analysis of all the aspects concerned. In addition to the requirements given in paragraph three, the party who seek such relief will have to demonstrate the urgent need for issuance of such kind of interim measures and as well the party will also have to put forward some reasons that support the plea that if notice be given to other party then such measure would be frustrated.

3. Analysis and prospects of 2006 amendments

Article 17 has been transformed in quite an exhaustive provision on interim measures as the result of amendments materialized in 2006. The power of Arbitral has been expounded and reproduced here for the purpose of reference:

*"**Article 17** Power of arbitral tribunal to order interim measures (1) unless otherwise agreed by the parties, the arbitral tribunal may, at the request of*

[162]Draft available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/827/26/PDF/V0382726.pdf?OpenElement

a party, grant interim measures. (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself[163]*;*

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

(d) Preserve evidence that may be relevant and material to the resolution of the dispute"[164].

UNCITRAL Model law overcame its deficiencies and vagueness of the model law, in its thirty-ninth session in 2006 and laid down the conditions for granting interim measures.

"**Article 17A 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.[165]

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[163] http://www.ciarb.org

[164] UNCITRAL Model Law

[165] UNITED NATIONS PUBLICATION Sales No. E.08.V.4 ISBN 978-92-1-133773-0

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate"[166].

Furthermore the amended UNCITRAL Model law explains the provisions applicable to interim measures and preliminary orders in its Articles as under:

"Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative"[167].

"Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so"[168].

"Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the

[166] Inserted in 2006 amendments in UNCITRAL Model Law
[167] Inserted in 2006 amendments in UNCITRAL Model Law
[168] Inserted in 2006 amendments in UNCITRAL Model Law

order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply"[169].

"Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The Arbitral tribunal may award such costs and damages at any point during the proceedings[170]".

The amendments made at its thirty ninth session in UNCITRAL Model law caused to incorporate the provisions for recognition and enforcement of interim measures as reproduced below:

"Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties"[171].

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[169] Inserted in 2006 amendments in UNCITRAL Model Law
[170] Ibid
[171] Inserted in 2006 amendments in UNCITRAL Model Law

"Article 17 I. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)*(a)*(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance[172]; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure"[173].

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[172] Ibid

[173] Inserted in 2006 amendments in UNCITRAL Model Law

A new Article has been inserted in order to explain the court-ordered interim measures. The Article is reproduced here as under:

"Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of their place. The conditions set forth in article 17-I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused, the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration"[174].

4. Salient Features of the post-amended Model Law

The revision of the Model Law was materialized in 2006 in which Article 2A was inserted. The purpose of this Article aimed at facilitation of interpretation in accordance with the standards which have been internationally accepted and focused on principle of uniformity in order to provide comprehensive understanding of UNCITRAL Model law. It is also interesting that the working group had the focal point of incorporating the provisions in Model law that can promote uniformity. The other notable amendments introduced in 2006 were related to the dynamics of the arbitration agreement and interim measures of protection. If we have a look on the original UNCITRAL Model law of 1985, we will come across a provision which addressed the form of arbitration agreement. The provision was Article 7 which was

[174] Inserted in 2006 amendments in UNCITRAL Model Law

incorporated by keeping in view the language of the Article II(2) of the New york Convention. This article was not fulfilling the needs of the hour. Keeping in view the inefficacy, Article 9 was reviewed in order to make it effective and consistent with the modern international trade and technological developments. Furthermore, the modification of Article 17 was also proposed by the working group suggesting that the interim measures of protection has been proved their paramount importance in International commercial arbitration and the modification of Article 17 would provide an impetus to commercial arbitration. The tendency of seeking interim measures was also proved from the previous record and it was concluded that reliance on interim measures of protection is increasing among the traders. The issue of enforcement of such interim measures was also been addressed and it was taken into account by the working group in its priorities. It was held that the effectiveness of interim measures greatly depends upon the enforcement of such interim measures and the required results could not be acquired unless and until the enforcement regime of interim measures is not improved. The newly introduced provisions had been incorporated in a new chapter[175] of the Model Law addressing the interim measures and preliminary orders.

The question of territorial scope of jurisdiction and application has also been addressed in Article 1(2) which states that the UNCITRAL Model law will come into field only when the place of arbitration will be within the territorial jurisdiction of that state. There are certain exceptions to this rule which has been embodied in Article 1(2) which states that some specific articles could be enforced irrespective of whether the place of arbitration is within that state or elsewhere to the extent that even the place of arbitration had not been determined. The question of recognition

[175] Chapter IV of the amended UNCITRAL Model law in 2006

of arbitral agreements was also been addressed in Article 8 and 9 which includes to adjudge their compatibility with interim measures ordered by courts. Article 17-H and 17-I took up the issue of recognition and enforcement of arbitral awards. Consequently, the commission opted to adopt a separate Chapter IV-A in this regard. Article 17 was the part of the original version of UNCITRAL Model law of 1985. Section 1 of Chapter IV-A replaced the obsolete Article 17 and provides the definition of interim measures. It further contains the conditions for issuing interim measures of protection. In the old version of UNCITRAL Model law, there was no provision for the recognition and enforcement of interim measures of protection and the revision of the Model law yielded in establishment of a regime for the recognition and enforcement of interim measures of protection.

Section 2 introduced the conditions in which preliminary orders could be granted and the scope of its application. Preliminary orders have been defined as to preserve the status quo till the time of any adoption or modification ordered by arbitral tribunal.

Article 17 B (1) provides that "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[176]". "Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if "it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure[177]". "Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case at the

[176] Chapter IV-A, Amended version of UNCITRAL Model law, 2006
[177] Ibid

earliest practicable time[178]". In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term "preliminary order" is used to emphasize its limited nature. "Section 3 sets out rules applicable to both preliminary orders and interim measures. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts. That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures[179]".

[178] Chapter IV-A. Amended version of UNCITRAL Model law. 2006
[179] Ibid

CHAPTER FIVE

ROLE OF INTERIM MEASURES IN INVESTMENT ARBITRATION

1. Interim measures in Investment Arbitration:

1.1 Introduction

The mechanism of arbitration for the settlement of International Investment disputes is still facing the stages of evolution. The transnational jurisdiction of institutional arbitration has given a boost to businessmen and proved as an impetus to international business and the fact that the parties have power to decide their disputes outside the jurisdiction of host state and through an autonomous body promoted growth of business. The principle of party autonomy and the freedom given to parties to decide the terms of contract has been considered as the epitome of success of international trade and business.

In historical perspective the Investment relations existed between natural or juristic persons as well as between persons and sovereign states. Arbitration played its role in most of the disputes that arose between states and natural persons and dispute between state and Bilateral Investment Treaties (BITs) and other Multilateral Conventions proved as a springboard like the convention for the Settlement of Investment Disputes.[180] Such type of agreements often concludes between the states and natural persons but they contain provisions that endorse the protection of investment by foreign persons and agreement to provide adequate security and as well fair treatment. The aggrieved investor[181]

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[180] International Convention for the Settlement of Investment Disputes between States and the National of Other States, 1965. This established the International Centre for the Settlement of Investment Disputes (ICSID) being an arm of the World Bank.

[181] *See* Dolzer. R. and Schreuer. C.. Principles of International Investment Law (New York: Oxford University Press. 2008). pg. 46.

has been empowered to resort to initiate arbitral proceedings directly against a state in the light of Bilateral Investment Treaty's or MIT's or Multi-lateral Agreements and as well the trade agreements.

The problems and hostilities usually occur whenever an investor-state dispute has been referred to the arbitral tribunal. In order to overcome such situation, there has always been a need for intervention in order to reduce tensions between the parties so that the integrity and credibility of the tribunal can be ensured.

The decision for granting interim measures of protection becomes difficult because of the involvement of a state party and the respective rights of the parties. At this juncture, the prime consideration will be balancing the rights of the parties, especially, when a state exercises its powers on account of its sovereign rights.

2. Role of Interim Measures in Investment Arbitration Disputes

2.1 Scope and purpose of Interim measures

In a nutshell, it has been universally accepted that the most arbitral tribunals possess power to grant interim measures of protection[182]. If we specifically focus the types of interim measures which the arbitral tribunal can grant include interim measures for the preservation of evidence and the regulation of relationship of parties during the pendency of the arbitral proceedings. Interim measures may as be ordered for the payment of money or for security for costs. The rationale behind these interim orders is the preservation of the rights of the parties and the subject matter in question. This ensures the enforceability of the

[182] Fortier, L. Y., *Interim Measures: An Arbitrators Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation. New York. June 16th 2008. at www.arbitration-cca.org/media/0/12232952989920/1115001.pdf

final award of the arbitral tribunal and protects the arbitral tribunal to face a state of frustration at the stage of final determination[183].

2.2 Prevalent Legal Framework of Investment Arbitration

The parties to arbitration have invested powers to choice the rules of procedure at the time of entering into the agreement. The universal practice shows that the parties often specify the range of powers given to arbitral tribunal to grant interim relief or it may be specified in the applicable law that governs the proceedings[184]. On the contrary, the investor-state arbitration specify such range of powers given to arbitral tribunal for granting the interim relief in Multilateral Convention and in case of adhoc arbitration, it is specified in the applicable rules adopted by the parties. The ICSID Convention provides that:

"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party."[185]

The ICSID Arbitration Rules also provides that:

"1. At any time during the proceeding a party may request that provisional measures for the presentation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

2. The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

3. The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations."[186]

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[183] Ibid.; see also Pivavatnapanich, P., Provisional Measures in the Practices of the ICJ and ICSID Tribunals, at www.tulawcenter.com/publish/file432.pdf

[184] S. 39 of the English Arbitration Act, 1996.

[185] Article 47 of the ICSID Convention

Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (As amended), 2006 explicitly acknowledges the powers conferred on the tribunal by aforesaid provisions. The significance of discretionary powers vested by the provisions on the arbitral tribunal can be noticed. UNCITRAL Arbitration rules as well provide to the arbitral tribunal, powers to grant the interim relief. It is stated that:

"1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement"[187]

The conferred discretion on the tribunal to grant interim relief in this provision if not identical but similar to those contained under the ICSID provisions. The mode of the enforcement of interim measures should be noted here briefly.

2.3 Enforcement issues in interim measures

If we have an in-depth analysis of the word 'Recommend' that has been used in the ICSID Convention we will come across that there is no binding force to comply on the parties rather it transpires to impose a moral obligation. The stakeholder authorities collectively agree that despite the use of word 'recommend' in article 47 of the ICSID

[186] Rule 39 of the ICSID Arbitration Rules (As amended), 2006.
[187] UNCITRAL Arbitration Rules

Convention, the interim measures should be considered as 'Orders' meant for compliance[188].

2.4 Pre-requisites to grant Interim Measures

There are so many precedents involving the issue of meting with the pre-conditions for the grant of interim relief[189]. A detail legal analysis will transpire that the tribunals have not applied the same set of principles while exercising their discretionary powers. The range of discretion which the tribunal can exercise is wide same as the wide discretionary powers vested by common law[190]. We will come up with the conclusion that the tribunals have resorted to different principles as they deemed fit and proper[191] according to the circumstances of the case. The existence of a prima facie case has been considered as one of the pre-condition out of general pre-conditions. The others may be urgent need and proportionality.

2.4.1 Prima Facie Case

Prima facie case is one of the pre-conditions discussed above, which have to be met by the party seeking interim relief. The party seeking interim measure first has to prove that he has made out a prima facie case before invoking the jurisdiction[192]. The cases presented in ICSID do not face any problem due to this requirement and the reason being the case is to be scrutinized by the secretary general when presented for registration. The secretary general before registering the case with ICSID

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[188] Mavrogordato, Z., & Sidere, G., *The Nature and Enforceability of ICSID Provisional Measures*, Vol. 75, The International Journal of Arbitration, Mediation and Dispute Management, (2009) No. 1, pg. 38 @ 41-42

[189] *See* for example, Maffezini v. Kingdom of Spain, Burlington Resources v. Republic of Ecuador (ICSID Case No. ARB/08/5)

[190] *See* Saipem S.P.A v. The People's Republic of Bangladesh (ICSID Case No ARB/05/07), 21st March 2007, par. 175.

[191] *See* generally Garcia, J. A., *Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations against the Republic of Ecuador*, TDM, Vol. 6, Issue 1, March 2006 at www.transnational-dispute-management.com

[192] See generally Fortier, L. Y., at page 8 to 9.

adjudge from the contents of the case whether the party presenting it has made out a prima facie case or not.

2.4.2 Urgency and Necessity

The party invoking the jurisdiction of any tribunal for grant of interim measures has to show the urgency in its matter. The pre-condition of urgent need for issuance of interim relief has been considered as the most important criterion and imperative. The tribunal has to minutely scrutinize the plea of the party as it is the question of fact and the circumstances of each and every case are different in their nature. At this point, the tribunal has to determine whether the interests of the seeking party will compromise if the sought interim measure is refused or to direct the party to wait till the passing of final award. The similar type of order had been passed in Burlington Resources case[193] in which the tribunal concluded that there was an urgent need and imminent danger that can cause irreparable loss to the applicant and consequently, ordered interim measures of protection. The requirement of necessity and urgency has a very close nexus. The prime concern before the tribunal remains the imminent danger likely to cause the applicant to befall if the sought interim measures are refused. The rationale is to prevent the applicant from harm.

2.4.3 Balance of Convenience

The term "Balance of Convenience" has also been referred as 'proportionality' in legal parlance. The tribunal discretionary powers become wide while deciding the question of proportionality. It has to adjudge that which party will have to suffer more if the interim measures sought are refused. The party seeking interim measure from the tribunal

[193] Availableat http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1110_En&caseId=C300

will have to prove that he will have to suffer more harm as compare to other party if the interim relief will not be granted.

The pre-conditions discussed above are which a arbitral tribunal will have to consider in order to grant or refuse interim measures. These pre-conditions are not exhaustive and it is the discretion of the arbitral tribunal to emphasis on a specific pre-condition out of them which it consider more appropriate to be met. The arbitral tribunal will also have to keep in mind the different circumstances of each and every case in order to reach a logical conclusion.

2.4.4 Paramount importance of "Consent"

It has been universely accepted and has become a well settled law that the provision of interim measures in international commercial arbitration is imperative. The power of arbitral tribunal and its jurisdiction to order interim relief has been recognized as arbitration agreement between the parties itself and as a parites consent funtion. It is clear now that when parties opt for arbitration whether in the context of commercial disputes or in investor-state arbitration, the parties will have complete freedom to shape the jurisdiction of arbitral tribunal in respect of ordering interim relief, due to this availability of freedom the parties are always been advised to draft their agreement with great care and caution. Parties always remain free to shape out the concurrent jurisdiction of the courts regarding such relief.

The operation of the parites's consent has been expressely addressed in ICSID convention and as well in its arbitration rules. In fact, ICSID convention and arbitration rules have represented a systemized mechanizm for investor-state arbitration. Article 26 of the convention provides that "Consent of the parties to arbitration under this convention

shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy"[194] on the other hand, Article 47 states "Except as the parties otherwise agree, the tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party"[195]

The above-said provisions have been focused much by the legal scholars because both are aimed at deeming the scope of jurisdiction of ICSID arbitral tribunal to order interim measures. The parties are liable to expressely indicate otherwise. Rule 39 of the ICSID arbitration rules clearly stated "Nothing in this rule shall prevent the parties, provided that they have so stipulated in the agareement recording their consent from requesting any judicial or other authority to order provisional measures prior to or after the institution of the proceedings for the preservation of their respective rights and interests"[196]

The exclusive powers of ICSID arbitral tribunal's to order for interim relief has been widely considered as a unique feature of ICSID arbitration. On the other hand other arbitration frameworks presume that courts are vested with such powers to order interim measures[197]. In constrast, the drafters of NAFTA in its early version in 1992 stated that an arbitral tribunal has no power to order interim measures[198]. Chapter eleven of NAFTA has been focused on investor-state arbitration. Provision of interim measures has been incorporated specifically in Article 1134 of NAFTA. Subsequently, the article was reviewed and at present it states "A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is

[194] available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp
[195] available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf
[196] available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf
[197] See E.Gaillard and J. Savage (eds). Fouchard Gaillard Goldman on International Commercial Arbitraiton (The Hague: Kluwer Law International, 1999) at para 1320
[198] See Meg Kinnear et al. Investment Disputes Under NAFTA: An annotated Guide to NAFTA Chapter 11 (Alphenaan den Rijn, The Netherlands: Kluwer Law International, 2006 at PP. 1134-1

made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction."[199]

Another unique feature has been provided in Rule 39 of ICSID arbitration rules. It talks about the recommendatory powers of the tribunal regarding provision of interim relief. The first paragraph of Rule 39 states " At any time after the institution of proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the tribunal."[200]

It can be safely concluded that once the parties have given their consent in the context of ICSID arbitration, the arbitral tribunal would be deemed fit and proper to order interim measures in purview of Rule 39 of ICSID arbitration rules. If we compare the tribunal's power to order interim relief of both ICSID and NAFTA, we will come across that the jurisdiction of ICSID's arbitral tribunal to order interim measures is far more and wide-reaching. Another mark of distinction is that an ICSID arbitral tribunal has recommendatory powers while this feature has no place to stand in NAFTA. Furthermore, the ICSID arbitral tribunal retains the power to modify or revoke its own recommendation. Rule 39 of the ICSID arbitration rules has been amended recently in 2006 in order to allow the requests for interim measures expeditiously as soon as a dispute is registered even before the constitution of an arbitral tribunal[201].

The scope of ICSID's arbitral tribunal to grant interim relief has widened with the passage of time. It is pertinent to mention here that the drafters

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[199] available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/chap11.aspx?lang=en#article_1134

[200] Article 39 paragraph 1 of ICSID arbitration rules. available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

[201] Paragraph 5 of Rule 39 of the ICSID Arbitration Rules provided as follows: "If a party makes a request pursuant to (1) before the constitution of the Tribunal, the Secretary General shall, on the application of either party, fix time limits for the parties to present observation on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

of the ICSID arbitration rules had enough in their mind, the issue of state sovereignty. The indepth analysis of Rule 39 transpires that the word 'recommend' was intentionally used, keeping in view the respect of sovereignty of states. As noted by Redfern and Hunter " The use of the word "recommend" in this context stems from the concerns of the drafters of the ICSID Convention to be seen as respectful of national soverignty by not granting powers to private tribunals to order a state to do or not to do something on a purely provisional basis[202]." Schreurer also took the view that "a conscious decision was made not to grant the tribunal the power to order binding provisional measueres[203]." However the concerns of the drafters' have been thrown away by some arbitral tribunals of ICSID. For instance, in the case of Emilio Agustin Maffezini v. Kingdom of Spain, the tribunal held that the authority of the tribunal to rule to grant interim measures is not less binding than that of a final award. Accordingly, for the purpose of this order, the tribunal deems the word "recommend" equavalent value as the word "order[204]".

The similar issue was long debated in the International Court of Justice (ICJ). The question for determination was whether the interim measures are binding on soverign states. In LaGrand case, this was intiated by Germany against United States. It was argued there by United States that order of provisional measures issued under Article 41 of the statue of ICJ was not binding. The plea was rejected by ICJ and held:

" The context in which Article 41 has to be seen within the statute is to prevent the court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the court

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[202] Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th ed. (London: Sweet and Maxwell, 2004) at paras 7-12

[203] The ICSID Convention: A Commentary (Cambridge UK, Cambridge University Press, 2001) at P. 758. As cited in A.Redfern and M. Hunter. eds. Law and Practice of International Commercial Arbitration, 4th ed. (London: Sweet and Maxwell, 2004) at paras 7-12

[204] Decision on Request for Provisional Measures (28 October 1999), 16 ICSID Review- Foreign Investment Law Journal (2001) 212 at paragraph 9, as cited in Law and Practice of International Commercial Arbitration, 4th ed. (London: Sweet and Maxwell, 2004) at paras 7-12.

are not preserved. It follows from the object and purpose of the statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that the provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article[205]."

3. Interim measures in Investor-State arbitrations: Precedents

The availability of interim measures in investor-state arbitration has been well-established. The following examples will explain different circumstances in which interim measures were actually ordered or denied. If we analyze Rule 39 of the ICSID arbitration rules we will find out that it does not specifically mention the kinds of interim measures that the tribunal has power to order. It has been simply stated in Paragraph 1 of Rule 39 that "a Party may request that provisional measures for the preservation of its rights be recommended by the tribunal and that any such request specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require the measures"[206].

In contrast, Rule 26 of the UNCITRAL arbitration rules provides that the tribunal may have power to order any interim measures."It deems necessary in respect of the subject-matter of the dispute, including for the conservation of goods forming the subject-matter in dispute, such as ordering their deposit with third person or the sale of perishable

[205] LaGrand Case (Federal Republic of Germany v. United States) 2001 ICJ. Rep. 104 (June 27) at para 102
[206] http://www.arbitration-icca.org/media/0/12232952989920/1115_001.pdf

goods[207]" Similarly, it has been provided in NAFTA Article 1134 that an arbitral tribunal constituted for the purpose of hearing a investment dispute may have power to order interim measures in order to preserve the rights of the disputant party. It is stated that "Including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction"[208].

As held in the Fisheries jurisdiction case in ICJ, an arbitral tribunal retains the prima facie jurisdiction when "the provision in an instrument emanating from both parties to the dispute, appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded[209]". "Judge Schwebel has pointed out that the precise meaning of "might" in this context, whether "might" means "possibly might" or "might well" or "might probably" is subject to contraversy. Nevertheless, whatever "might" might mean this threshold falls far short of requiring a party to demonstrate a likelihood of success on the merits"[210].

As discussed above, it has been mentioned in Rule 39(1) of the ICSID arbitration rules that a party to arbitration may request interim measures for the purpose of preservation of its rights. The language of the provision as interpreted by the tribunal was that the rights in question esist at the time when the application was made out. The arbitral tribunal in Maffezini and Spain stated precisely that the use of the present tense by the law maker implies that such rights exist at the time of making the request and it can not be treated as hypothetical[211].

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[207] Rule 26 of the UNCITRAL arbitration rules

[208] Article 1134 also contains an important exclusion precluding a tribunal from ordering attachment or enjoying the application of the measure alleged to constitute a breach of the NAFTA.

[209] See also Armed activities on the territory of Condo(New Application: 2002) (Democratic Republic of Congo V. Rwanda), Provisional Measures, Order of 109th July 2002. P. 241, Para 58;

[210] Lawrence Collins, Essays in International Litigation and the Conflict of Laws (Oxford: Clarendon Press, 1994), at p. 175

[211] Maffezini V. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 at para 13.

If so, then the party who seeks for interim measures will have to submit a guarrantee or bond equivalent to the amount in terms of costs that is expected to incurr by respondent in defending the case. "The tribunal rejected the application on the ground that the alleged grounds are based on "hypothetical situations" namely whether the respondent would win the case and whether the tribunal would deem the Claimant's case to be of such nature as to require the claimant to pay the Respondent's costs and expenses"[212]. "The tribunal concluded that granting the requested relief in those circumstances would have risked the Pre-judging Claimant's case[213].

The rationale behind the granting of interim measues is the protection of rights of the party who seeks such relief and the existence of such right might be jeoperdiazed if the measures are refused. This does not mean that the rights which are needed to be protected need all out proven[214] but it is crystal clear that at the stage of dealing with the interim measures, the tribunal will have to judge the nature of rights claimed by the party and not to adjudge the actual existence of such rights or the merits of violations made. The approach discussed above has been appreciated in Victor pey Cassado and Chile, whereby it was stated by the tribunal:

"For its part, the tribunal can neither pre-judge nor even, to put it correctly, 'assume in an anticipatory fashion' it must therefore reason, at this preliminary stage of the arbitration process, on the basis not of 'assumption' but of hypothesis, in particular that it may come to recognize it own jurisdiction on the substance of the case, and in such a case, the hypothesis whereby the rights that the decision may recognize

[212] Ibid at paras. 15-21.
[213] Ibid at para. 21.
[214] LaGrand Case (Federal Republic of Germany v. United States) 2001 ICJ. Rep. 104 (June 27) at para 102

for one or the other of the parties in question could be placed in danger or compromised by the absense of provisional measueres"[215].

The rights for which the interim measures of protection are sought must be relevant to the rights in dispute and nexus has been considered as imperative. The arbitral tribunal in Plama Consortium Limited case held in this regard as:

"The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out"[216].

In Plama Consortium Limited case, the claimant sought an order for inerim relief stating that a direction be issued to respondent to discontinue all pending proceedings pending before the courts of Bulgaria, and refrain from bringing any fresh proccedings in future against the claimant related to arbitration in question[217]."The tribunal determined that because the claims and relief sought by the claimant in the dispute were limited to damages, the scope of the rights relating to the dispulte which deserved protection by way of provisional measures was necessarily also limited to the damage claims"[218]. The tribunal held in response to the request made by the claimant that the respondent be discontinue all proceedings as follows:

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[215] Victor Pey Casado V. Chile, ICSID Case No. ARB/98/2, Decision, 25 September 2001 at para 46. The English Translation of the original French and Spanish Language versions of this decision is available in 6 ICSID Reports 375 (2004)

[216] See Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24, order 6 September 2005 at para 40.

[217] Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24, order 6 September 2005 at para 40.

[218] Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24, order 6 September 2005

"The tribunal is reluctant to recommend to a State that it order its Courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have power to impose it will on an independent judiciary. While under general prinicples of public international law, a state is responsible for action of its Courts.Claimant's request for urgent Provisional measures is not based on a claim of denial of justice by those courts for which relief is sought"[219].

Although, the use of UNCITRAL arbitration rules in investment arbitration is increasing during the last few decades in disputes arising out of bilateral investment treaties but it ranks below to the usage of ICSID arbitration rules as the investor-state arbitration used these rules more frequently[220]. The reason behind it, is that former include public offers to arbitrate while the later involves adhoc arbitration under UNCITRAL arbitration rules.

In addition to all that, the UNCITRAL promulgated adhoc arbitration rules which the parties select in their arbitration agreement to govern the arbitration in case of arising of dispute as compare to those of an institutional arbitration that administer arbitrations.

Article 26 of the UNCITRAL arbitration rules authorizes the arbitral tribunal to order interim relief as well recognizes that the requests made to courts for seeking interim measures does not implies of the waiving the right of arbitration and it further require the security for costs before granting provisional measures. The notable Latin American Arbitration institutions have incorporated very similar provisions. For instance, the

[219] Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24, order 6 September 2005. at para 41.

[220] United Nations Conference on Trade and Development (UNCTAD), November 2005, at http://www.unctad.org/en/docs//webiteiit20052_en.pdf

rules of the Arbitration Centre of the Lima Chamber of Commerce in its Article 56 provide that:

"At any stage of the proceeding, at the request of any party and at the requesting party's account, cost and risk, the Arbitral Tribunal may adopt interim measures it considers necessary to protect the assets that are the object of the dispute or to guarantee the effectiveness of the same, the interim relief provisions of the Code of Civil Procedure being applicable in cases of exceptional application. There shall be no appeal against the Arbitral Tribunal's decision. To enforce such measures aid may be sought from the Juez Especializado en lo Civil of Lima or the place where it is necessary to enforce such measures. The Judge, based solely on a certified copy of the arbitration agreement and the decision of the Arbitral Tribunal, without further procedural steps, may proceed to enforce the measure without admitting appeals or opposition[221]".

Furthermore, Lima chamber of commerce rules provides that seeking an interim measure from any judicial authority before the initiation of arbitration proceedings is not an incompatibility with arbitration and can not be considered as an waiver of arbitration. Same view has been taken in Ecuadorian rules on arbitration and mediation and in Colombian arbitration law holding that most of the institutional rules and national laws for arbitration give choice of forum to a party requesting interim relief either from the tribunal itself or from the national court. The International Center for the settlement of Investment disputes (ICSID) in its Article 38 has extended the right to an arbitral tribunal to grant interim measures of protection, unless the parties have agreed otherwise. Irrespective of whether the applicable rules have provided the choice of forum option to the party requesting interim relief, it is recommended that the concerned party should always resort to the substantive law of

[221] Article 56 of Lima Chamber of Commerce Rules

the jurisdiction pending arbitration, in order to avail confirmation that the power to order interim measure from the courts in which the arbitration is pending is available and as well to confirm that such kind of application does not consider it as a waiver to right of arbitration in the local law of that jurisdiction. The next point of concern is that whether the adverse party will comply with the interim order of the tribunal. In most of the jurisdictions, the courts does not legally enforce the arbitral award unless confirmation of award by a court. Consequently, the party who has succeeded in obtaining order of interim relief will have to face an additional step of obtaining the judicial confirmation of the award in order to enforce that order of interim measure. In a nutshell, a party that has obtained an order for interim relief from the tribunal will also have to knock the door of the court for enforcement, so keeping in view such practice; the option to resort the courts directly would be preferably expedient. The situations in which before the constitution of an arbitral tribunal, it remained difficult for parties to wait for such a long period for the constitution of an arbitral tribunal which save them from imminent harm. This was a longstanding problem in ICSID arbitration rules and it was addressed in revisions took in 2006 and authorized the Secretary-General of ICSID to fix time limits for the parties in which they have to submit their observations on such request of grant of interim measures in order to enable the arbitral tribunal to take up promptly after its constitution, both the request of interim measures along with list of observations made by the parties.

The in-depth analysis of this procedure transpires that it will not tend to provide protection to the party in time. Ultimately, the party will leave with no other option except to invoke the jurisdiction of the court at first instance. Conversely, the Panama Convention contains no provision for grant of interim relief. Similarly, the New York convention has only one provision that impliedly addresses the issue of interim relief. The Article II (3) states that:

"The court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed"[222].

4. Analysis of ICSID Arbitration Rules as amended in 2006

Several amendments have been introduced to International Centre for Settlement of Investment Disputes (ICSID) arbitration rules with having their effect from April, 2006. The business community making investments in States consider it a very important tool against government entities. The bulk of Bilateral Investment Treaties has been exploded to ICSID arbitration. At present, approx 2200 BITs have confirmed their existence. Numerous Multilateral Investment Treaties MITs and as well multilateral agreements such as North Atlantic Free Trade Agreement, the Energy Charter Treaty and newly concluded Central American Free Trade Agreement (CAFTA) contain provisions for investors to invoke the jurisdiction of ICSID in their claims against sovereign states[223].

The rationale of the modifications and amendments made in ICSID arbitration rules is to enhance the confidence of stakeholders in their arbitral process and to manifest the streamlined proceedings and transparency. In spite all this, they were focused to expedite the process of seeking interim measures. Consequently, they have provided a unique mechanism in order to counter frivolous claims. The mechanism comprises provisions that give right to third parties to present amicus submissions, the attendance of public has been allowed during oral hearings, publishing of awards for public reading and clarifying the rules

[222] Article II (3) of the Convention on Recognition and Enforcement of Foreign Arbitral Awards
[223] available at http://www.wilmerhale.com/ealert_4_14_06/

that govern disclosure of arbitral penal and their fees in this regard. The modifications made to ICSID arbitration rules were the result of eighteen months immense debates and consultations with contracting States. The amendments have been immensely greeted as great improvements to ICSID arbitral process.

CHAPTER SIX

INTERIM MEASURES IN ARBITRATION LAWS OF PAKISTAN

1. Arbitration laws of Pakistan--Evolution

The history of the enactment of any statue in relation with arbitration begins from the issuance of regulations by East India Company. The regulations were specifically being made for the presidency of Bengal, Madras and Bombay. The regulations got expansion at a later stage in shape of Civil Procedure Act, 1859. Furthermore, an arbitration act was enacted in 1940 for the whole of British India. With some exceptions, it was further extended to the whole of India. India has replaced the arbitration Act, 1940 with Arbitration and Conciliation Ordinance, 1996 while Arbitration Act, 1940 still holds the field in Pakistan.

According to Arbitration Act, 1940 "it is imperative for arbitrators to give award within four months and the court has powers to extend the time specifically given upon plausible reason by the Arbitrator and the parties. The Arbitrator is not bound by the rules or evidence or the procedural code, has the power to summon the witnesses, record evidence but the award given by the arbitrators should be a speaking award as required under Section 24-A of the General Clauses Act. Arbitration has also been provided in number of Pakistan laws, such as Societies Act, Companies Ordinance, 1984"[224].

"The status of foreign arbitration, foreign award and enforcement of foreign arbitral award had been provided in the Arbitration (Protocol & Convention) Act based on The Hague Convention, in which section 3 of

[224] Section 283 of Companies Ordinance. 1984

the Act ousted the application of the Arbitration Act, 1940 of Pakistan and the Civil Procedure Code of Pakistan. Section 4(2) provided that the foreign arbitral award is enforceable under this Act of 1937 and shall be considered as binding on the parties to the arbitration. Section 7 further set out the conditions to be met for enforcement of foreign arbitral award, which must have been made in pursuance of an agreement, made by the tribunal provided for in the agreement, has been made in conformity with the laws governing arbitration procedure, became final in the country it was made, is in respect of a matter which may lawfully be referred to arbitration under Pakistan law and its enforcement must not be contrary to public policy or the laws of Pakistan. However, section 7(2) provides, when a foreign award shall not be enforceable, if it has been annulled in the country it was made or the party against whom it is sought to enforce the award was not given notice of arbitration proceedings or was under some legal incapacity or award does not deal with all the questions referred or contains decisions beyond the scope of the agreement for arbitration[225]". Supreme Court of Pakistan interpreted different provisions of the Act of 1937 relating to enforcement of foreign arbitral awards and on different occasions held as:

"Requirements to be met and fulfilled by person seeking enforcement of a foreign award, as laid down in Rule 297 of the Sindh Chief Court Rules, if deficient in any material particular, application for enforcement be returned for removing deficiency within time allowed by the court"[226].

"No notification declaring USA to be a party to the Convention set forth in 2nd Schedule to the Act, 1937 shown to have been issued – award on dispute arising out of Treaty of 1959 between person domiciled in

[225] Arbitration (Protocol & Convention) Act of 1937
[226] 2002 CLD 1121

Pakistan and person domiciled in USA cannot be termed as foreign award and cannot be enforced"[227].

"Necessary notification, as required under section 2(b) and (c) of Act, 1937 not having been issued by the Federal Government in respect of China, award could not be treated as foreign award[228]"

"Requirement that there should be an agreement in writing, except by both the parties – such acceptance can be in writing or oral – agreement containing terms can be in form of a document signed by the parties or signed by one and acceptable by others either by signing the agreement or showing acceptance by conduct[229]".

"Award made in England against a party residing in Pakistan, held good is a foreign award enforceable in Pakistan. Such award was ordered to be filed in High Court and judgment and decree passed in accordance therewith[230]".

"Case of IPP (WAPDA v. Kot Addu Power Company) – Provisions of section 290 of the Companies Ordinance, 1984 vested statutory jurisdiction in High Court to take certain measures described there and ordered to resolve dispute inter-se shareholders or directors of a company – High Court dismissed the petition made under section 3 of the Arbitration (Protocol & Convention) Act, 1937 for reference of the dispute under the Act of 1937[231]".

[227] 1982 CLC 2302
[228] 2005 CLD 1577
[229] 2002 CLD 1191
[230] 1987 CLC 83
[231] 2002 MLD 829

"Foreign award enforcement – applicability of Arbitration Act, 1940 excluded in respect of foreign awards under the Act of 1937[232]".

"Enforcement of foreign award – plaintiff had not filed authenticated copy of the award, held section 8 provided for producing either original award or its authenticated copy. Original award having been produced, condition fulfilled, and award enforceable[233]".

"Defendant contended arbitrator had no jurisdiction; award was contrary to law and public policy in Pakistan and arbitrator guilty of misconduct. No material in that respect produced by the party and the objection that award was contrary to law and public policy not established. Objections had no merit and the award was enforced[234]".

"Court, while considering the enforcement of a foreign award, merely acts as an executing court and while doing so it cannot go behind the award and sit as an appellate court and make reappraisal of evidence[235]".

Pakistan ratified the Convention on recognition and enforcement of foreign arbitral awards (New York Convention) through enacting a legislation known as "Recognition and enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005" in which jurisdiction to enforce the foreign arbitral award was conferred on High Court. In this regard, the High Court will exercise powers in the same manner for the recognition and enforcement as a judgment or order of the court. Except the specific Article V of the Convention, the recognition and enforcement shall not be refused on any ground.

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[232] 1987 CLC 1299
[233] 2006 CLD 153
[234] 2006 CLD 153
[235] 2006 CLD 153

The discretionary powers vested in court under the Act of 1937 to refer the dispute to arbitration or to stay the proceedings has been discarded in "Recognition and enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005" and it is mandatory for court to refer the dispute to arbitration in view of section 4 of the Ordinance and the court have to stay the proceedings in a case wherein the arbitration agreement is governed by Ordinance of 2005. In a recent case, it has been held:

"Provision of section 4(2) of the Ordinance, 2005 has taken away any discretion of the court whether or not to stay proceedings in terms of arbitration agreement on any ground including the ground of inconvenience, except where the arbitration agreement itself is null and void, inoperative or incapable of being performed[236]".

New York Convention 1958 has achieved wide spread acceptance by the international community. The fact that the signatories are from both the East and the West, representing developed as well as developing countries is the best testimony for international satisfaction with and the recognition of the benefits available under the convention. Member states have almost developed a harmonized legal system of recognition and enforcement of foreign arbitral awards through the convention. Thus the business persons throughout the trading world can provide for prompt dispute settlement mechanisms that can function no matter what system of national law might encumber them domestically. The member states give business persons much more flexibility in planning their foreign transactions. Instead of attempting to tie the settlement of disputes to the favorable law of one country, the drafters of International agreements provide for much greater play in the selection of the place of settlement of disputes, confident of enforcement in all the contracting states.

[236] 2006 CLD 497

Pakistan is a signatory to all the conventions. It gave effect to the Geneva Protocol and convention by implementing "the Arbitration (Protocol and Convention) Act, 1937 and after a long time came "Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards Ordinance, 2005 to give effect to the New York Convention of 1958.

This Ordinance was to give effect to the 1958 Convention so it embodied the provisions relating to it. It repealed the Arbitration (Protocol and Convention) Act, 1937 but this repeal was not for the Awards made before the application of the Ordinance and for the awards which are foreign according to the definition given by the Arbitration (Protocol and Convention) Act, 1937 and not foreign according to the definition given by the Ordinance. The Ordinance defined foreign arbitral awards as awards made in the states which are signatories to the New York Convention 1958. Under Section 3 of the Ordinance the Court was given exclusive jurisdiction to adjudicate and settle the matters relating to or arising from the Ordinance. The procedure for the stay of legal proceedings was also given in this section. The application for the stay of legal proceedings was to be filed according to Article II of the Convention of 1958 and the Court was to follow the procedure and exercise the powers provided by the Code of Civil Procedure, 1908. The Ordinance also provides for the enforcement of arbitration agreements. Section 4 of the Ordinance provided that a party to an arbitration agreement against whom legal proceedings have commenced in respect of a matter which is covered by the arbitration agreement can apply to the Court to stay the proceedings concerning that matter and after receiving such an application the Court shall enforce the arbitration agreement and refer the party to arbitration.

2. Scheme of Arbitration Act, 1940

The scheme of the Arbitration 1940 has been extensively elaborated by Honorable Supreme Court of Pakistan.[237] The Scheme of Arbitration Act is that the dispute between the parties who entered into an agreement of arbitration should be decided by one or more persons who are called to be Judges in the said dispute and not by a regular or ordinary Court of law. The scheme further envisages that the decision of the said Arbitrators is binding upon the parties whether they agree to the decision or not and they cannot object to the decision either upon law or fact if the award is good on the face of it. Further the arbitration in substance oust jurisdiction of Court except for purpose of controlling Arbitrator and preventing misconduct and for regulating procedure after award. The Honorable Supreme Court Pakistan held that:

> "The general principle underlying the concept of arbitration as translated in the scheme of the Arbitration Act is that, as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot when the award is good on the face of it, object to his decision, either upon law or the fact. In other words arbitration in substance ousts the jurisdiction of the Court, except for the purpose of controlling the arbitrator and preventing misconduct and for regulating the procedure after the award. It is well-settled that the Court has no right to review the award or to consider it[238]."

A perusal of Arbitration Act, 1940 reveals that there are 3 modes of arbitration: (1) Arbitration without intervention of Court; (2) Arbitration

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[237] 2005 Y.L.R 2709 Mujtaba Hussain Siddiqui VS Sultan Ahmed

[238] National Construction Co. v. WAPDA, PLD 1987 SC 461

with intervention of Court where there is no suit pending; and, (3) Arbitration in a suit is pending before Court. The first category of arbitration is provided under Chapter II of the Act, which contains sections 3 to 19. The second category of arbitration is available in Chapter III which contains only one section, that is, section 20; and, Chapter IV of the Arbitration Act deals with the 3rd category of arbitration which contains sections 21 to 25. Section 20 of the Act is available in Chapter III, which along with its heading reads as under:

"**Chapter Three of the Arbitration Act, 1940"**

Arbitration with Intervention of a Court where there is no suit pending

20. **Application to file in Court arbitration agreement**

"(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court"[239].

"(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants"[240].

"(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants,

[239] section 20 of Arbitration Act, 1940
[240] Ibid

requiring them to show cause within the time specified in the notice why the agreement should not be filed"[241].

"(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator, appointed by the Court"[242].

"(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by the other provisions of this Act so far as they can be made applicable"[243]

A perusal of above provisions of law reveals that section 20 is complete code in respect of moving an application before the Court for appointment of arbitrator, grounds on which the application can be filed, form of application so as to make it a suit, issuing notice to parties interested or claiming to be interested to be plaintiff or defendant, procedure of filing an arbitration agreement before the Court, manner in which arbitrator or arbitrators are appointed, for arbitration proceedings; after appointment of arbitrator or arbitrators, applicability of other provisions of the Act so far as they could be made applicable to the arbitration proceedings[244].

Before moving the Court for appointment of arbitrator certain conditions are required to be fulfilled they are; (1) There should be an arbitration agreement between the parties executed between them before the institution of any suit with respect to the subject-matter of the agreement, (2) There should be dispute between the parties of such

[241] Ibid
[242] Ibid
[243] section 20 of Arbitration Act, 1940
[244] 2005 Y.L.R 2709 Mujtaba Hussain Siddiqui VS Sultan Ahmed

agreement, and (3) the parties have not invoked the provisions of Chapter II viz. sections 3 to 19. If above three conditions are fulfilled then the party may move an application in writing before the Court which shall be registered as a suit and then notice is required to be issued to the parties interested or claiming to be interested to be plaintiff or defendant. After registering the application as suit, a notice is required to be issued to all the parties to the agreement other than the applicant requiring them to show cause within the time specified in the notice as to why the agreement should not be filed. After serving the notice if no sufficient cause is shown to the Court then an order is to be passed that the agreement be filed and then the Court is required passed an order of reference to the arbitrator appointed by the parties or where the parties cannot agree upon any Arbitrator to appoint an Arbitrator. Once such orders are passed then arbitration proceedings start which should be governed by the other provisions of the Arbitration Act so far as they could be made applicable. Once the above conditions are fulfilled, then the purpose of section 20 of Arbitration Act is achieved and the application stands disposed of.

After passing the award by the Arbitrator then the same is required to be filed in the Court within the meaning of section 14 of the Arbitration Act and then further proceedings would be conducted by the Court under the other provisions of Chapter-II.

"It will be noticed that the heading of the Chapter-III reveals that provisions of section 20 are applicable when there is no suit pending. However, perusal of section 20 reveals that no such impression can be gathered from the wordings of the said section. If that is so then what was the need of giving such heading to the section 20. I am conscious of the fact that the heading of the Chapter would not govern the clear and unambiguous words appearing in the section. However, there is conflict

of opinion in the authorities of various superior Courts on applicability of c heading. One set of the authorities is to the effect that heading of the Chapter is like preamble of a Statute where as the other opinion is contrary to the above proposition by taking the plea that the heading of the section or Chapter is given by the draftsman of the statute and it is not voted in the Parliament. Nevertheless, the heading of the section or Chapter can be taken into consideration while interpreting the actual meaning of the section or heading of the Chapter under which various sections are enacted. For that, purpose entire scheme of the Arbitration Act is required to be examined to arrive at the conclusion whether it is essential that for invoking the provisions of section 20 of the Arbitration Act no suit should be pending in any Court of law"[245].

The scheme of the Arbitration Act is that the parties should refer their disputes to the arbitrators for decision out of Court where the technicalities of law, evidence and other procedural hurdles are not applicable to the proceedings before the arbitrator. These proceedings are summary in nature with a view to quickly dispose of and settle the disputes between the parties without going into detail procedural hurdles. Through this enactment, the parties have been encouraged to settle their disputes without intervention of Court and for that purpose sections 3 to 19 have been made in Chapter-II of the Arbitration Act. If the parties do not agree on any arbitrator, arbitrators, or empire, only then the Court has been given power to settle that dispute and to appoint arbitrator, arbitrators or empire or to remove such persons in the circumstances mentioned under various provisions of Chapter-II. The Courts function starts when award is passed by the arbitrator to make it a rule of the Court. The Arbitration Act further facilities the parties to get their disputes settle through the Arbitrator even if they file the suit when there is no agreement of arbitration between the parties by making

[245] 2005 Y.L.R 2709 Mujtaba Hussain Siddiqui VS Sultan Ahmed

provisions in Chapter-IV and its heading has been given "Arbitration in suits". If the parties of arbitration agreement did not go to arbitrator and if the party of the said agreement files a suit then in such case under section 34 of the Arbitration Act the other party has been given right to move the Court to stay the proceedings of the suit so that the parties may take the dispute to the arbitrator under the arbitration agreement. Thus, if a suit is filed by a party to the arbitration agreement then the other party has been given right to get the matter stayed under section 34 of the Arbitration Act. In such a situation if the said party is allowed to move an application under section 20 of the Arbitration Act then there will be duplication of the proceedings. It is the intention of the Legislature that the matter in dispute of the arbitration agreement, should be decided by the parties agreed arbitrator or in case their disagreement on the arbitrator then the Court has been given power to appoint such Arbitrator within the meaning of section 8 of the Arbitration Act. If the situation is examined in the above manner then there will be no hesitation in holding that if a suit is already pending then the parties have been given right to approach the said Court under section 34 of the Arbitration Act. The purpose of section 34 and section 20 of the Arbitration Act is one and the same i.e. to refer the matter to the arbitrator. As such, the provisions of section 20 would not be applicable to such case as alternate, adequate and efficacious remedy has already been provided to the parties in the shape of section 34 of the Arbitration Act. This can further be visualized from the position when the parties have initiated proceedings under Chapter-II of the Arbitration Act then the provisions of section 20 are not applicable for the simple reason that the purpose of invoking the provisions of Chapter-II and section 20 is identical and similar in nature i.e. appointment of arbitrator. A Division Bench of Andhra Pradesh in the

case of Venkata Surya Rao v. Venkata Rao[246] has observed that "In order to attract the provisions of section 20, apart from other conditions, it was found necessary that the proceeding under Chapter-II must not have been started. This Court in the case of C.T.I., Corpn. v. Trading Corporation, Pakistan Limited[247] has also formed same opinion by holding that one of the requirements of maintainability of application under section 20 is that the proceedings under sections 3 to 19 of the Act had not commenced"[248]

"After considering the various provisions of the Arbitration Act, it has been adequately established that the section 20 will not be applicable in the situation where a suit is pending before the Court of law between the parties of arbitration agreement. Reference is invited to the case of Venkata Surya Rao (supra). As such the heading of the section correctly interpret the intention of the Legislature. Thus, in the peculiar circumstances of the law a benefit can be taken from the heading of the Chapter-III. Thus, apart from above three conditions, if a suit is pending between the parties to arbitration agreement then section 20 of the Arbitration Act will not be attracted"[249].

3. Power of court to order interim relief

The perusal of the Arbitration Act, 1940 reveals a provision which has been specifically incorporated to describe the powers of court to order interim measures of protection. The courts can pass the preservation, interim custody or sale of any goods that forms part of the subject matter of the arbitration. The courts may also order the detention, preservation or inspection of any property or thing that may form the

[246] AIR 1963 AP 286
[247] 1987 CLC 2063
[248] 2005 Y.L.R 2709 Mujtaba Hussain Siddiqui VS Sultan Ahmed
[249] 2005 Y.L.R 2709 Mujtaba Hussain Siddiqui VS Sultan Ahmed

part of the subject matter of the arbitration. The above-said provision is reproduced as under:

"Power of Court to pass interim order. (1) Notwithstanding anything contained in Section 17, at anytime after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just[250]".

5. Power of Arbitrators to make interim award

Power of arbitrators to make interim awards has been discussed in a provision which has been incorporated in Arbitration act, 1940. To analyze this provision reference to the case law established in Pakistan, we reproduce it as under:

Power of arbitrators to make an interim award.

"(1) unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award. (2) all references in this Act to an award shall include references to an interim award made under sub-section (1)"[251].

[250] Section 18 of Arbitration Act, 1940
[251] Section 27 of Arbitration Act, 1940

"The Supreme court held while deciding the issue of setting aside of interim award passed by arbitrators "Interim award Setting aside of Arbitrators to whom matter war referred according to agreement between parties, made interim award in favor of plaintiff who was holding insurance policy from defendant insurance company, on ground that defendant company had itself admitted its liability to pay disputed amount of policy to plaintiff Defendant company applied for setting aside interim award which was filed in Court for making rule of Court Defendant company contended that arbitrators were guilty of legal misconduct as they misconstrued provision of S. 173 of Cr.P.C. and shifted burden of obtaining final investigation report from plaintiff to defendant Contention of defendant company was repelled in view of the fact that defendant company was not entitled to insist upon production of final investigation report before making payment when it had itself admitted claim of plaintiff Award which was made on basis of admission of defendant itself, even though it was interim, was enforceable and could not be termed as tentative Award was made rule of the Court"[252]

"The Honorable Supreme Court of Pakistan held that the arbitrators have power to make interim awards. It was, therefore, not necessary for the arbitrators to arrive at any finding in respect of the amount payable by the defendant. Indeed, as stated in the award itself, the only question for determination was whether under clause 5 (c) of the policy it was necessary for the plaintiff to produce final investigation report for verification of the claim to the extent of the amount of the admitted liability; and the findings of the arbitrators are, obviously, in that context"[253]. In this case Burjorjee VS New Hamisphire Insurance Company, the New Hampshire Insurance Company, the defendant herein had issued a policy of insurance in favor of Burjorjee Cowasjee &

[252] Section 27 of Arbitration Act, 1940
[253] Burjorjee VS New Hamisphire Insurance Company

Company. The plaintiff herein in respect of money in transit and cash in safe. The plaintiff having lodged a claim under the policy and dispute between the parties having arisen it was referred to arbitration in terms of clause 9 of the policy. Along with the claim, the plaintiff made an application under section 27 of the Arbitration Act, 1940, for interim award for Rs.17, 03,097 on the ground that the defendant had admitted its liability to that extent. The arbitrators allowed the application and made an interim award, dated the 30th August, 1990, for Rs.17, 03,097 in favor of the plaintiff. After the signing of the award, one of the arbitrators died and the award was filed in Court by the surviving arbitrator. The defendant made an application under section 33 read with section 30 of the Arbitration Act to set aside the award. The defendant's objects to the award being made rule of the Court, firstly, on the ground that the arbitrators were guilty of legal misconduct in so far as they misconstrued the provisions of section 173 of the Criminal Procedure Code and shifted the burden of obtaining the final investigation report, from the police, from the plaintiff to the defendant. The arbitrators came to the conclusion that since the claim of the plaintiff, to the extent of Rs. 17,03,097, had been admitted by the defendant, no further document was required under clause 5 (e) of the policy for verification of the claim to that extent. They further held under section 173, Cr.P.C. it was not in the power of the plaintiff to obtain final investigation report from the police; and that, in any case, the plaintiff had tried to obtain the final investigation report but to no avail. Assuming, for the sake of argument, that the findings of the arbitrators are erroneous, I asked Mr. Nomani; whether there was any precedent to the effect that merely arriving at erroneous conclusions of law or fact would amount to legal misconduct on the part of the arbitrators. He was not able to cite any such precedent. I have, therefore, not been pursuaded to accept Mr. Nomani's contention that there was any legal misconduct on the part of the arbitrators in holding that the defendant

was not entitled to insist upon production of final investigation report before making payment of the admitted part of the claim. The counsel on behalf of the defendant contended that the interim award is not valid because in terms of clause 9 of the Insurance Policy the arbitrators were not entitled to make an interim award. The argument is that the use of the expression "an award" in clause 9 implies that the arbitrators will make only one award and, therefore, amounts to "different intention" within the meaning of section 27 (1) of the Act. Clause 9 of the policy, after providing that all any right of .action against the defendant. It is, therefore, clear that the' expression an award" in the clause occurs in the context of the defendant's liability and the plaintiffs right of action and cannot be construed to mean that the arbitrators were debarred from making an interim award. The contention, thus, has no merit. In addition to the above objections, which are set out in the application under sections 33 and 30 of the Arbitration Act, 1940, Mr. Nomani submits that the findings m the interim award are only tentative and are subject to the final award. He, therefore, submits that this award is unenforceable and not valid. Mr. Qazi Faez Isa, the learned counsel for the plaintiff, went through the entire award for the purpose of showing that as far as the claim of the plaintiff to the extent of Rs.17,03,097 is concerned, it was based on the admission of the defendant and that there was no issue regarding the liability of the defendant to pay that amount to the plaintiff. According to Mr. Isa the only issue at this stage was whether or not the plaintiff was liable to produce, and the defendant was entitled to insist upon, production of the final investigation report and that the word "findings" in the last sentence of the interim award does not affect the award of the amount in the claim. It appears that the contention of Mr. Isa has substance, particularly, in view of the language of the last paragraph of the award which reads as follows:-

"In view of this we do hereby make an interim award for the sum of Rs.17, 03,097 in favor of the claimant to be paid forthwith by the respondent on furnishing loss voucher, subrogation receipt subject to award and Special Power of Attorney to collect Final Report if asked by the respondent. The above findings are only tentative and are subject to final award. It is an admitted position that. the defendant had admitted liability to pay the plaintiff's claim to the extent of Rs.17,03,097 and it was, therefore, not necessary for the arbitrators to arrive at any finding in respect of the amount payable by the defendant. Indeed, as stated in the award itself, the only question for determination was whether under clause 5 (e) of the policy it was necessary for the plaintiff to produce final investigation report for verification of the claim to the extent of the amount of the admitted liability; and the findings of the arbitrators are, obviously, in that context. In so far as the interim award directs payment of Rs.17, 03,097, there is nothing tentative about it and the payment is directed to be made "forthwith", subject only to furnishing of certain documents by the plaintiff. Mr. Isa submits that if there is any vagueness in the last sentence of the award, it has to be construed so as to give effect to the award and relies on Ishfaq Ali Qureshi v. Municipal Committee, Multan[254]. In the circumstances, the application of the defendant is dismissed and the interim award is made rule of the Court"[255].

[254] 1985 SCMR 597 at 602
[255] ibid

CHAPTER SEVEN

CONCLUSION AND RECOMMENDAITONS

Interim measures of protection have become an issue of paramount importance in international commercial arbitration and it has gained the focus of stakeholders. The use of interim measures on such a large scale and the increasing trend is evident to this fact. Despite all this, there always remains a room for improvement to make them compatible with the ever-changing world of commercial activities. To make it more effective and useful, there is a dire need to establish a mechanism that can ensure the grant and enforcement of interim measures. The national court systems, institutional rules and the endeavors of international legal fraternity have already contributed much to enhance the status of interim measures of protection. Besides these improvements, there is still room for improvement even after the amendments introduced in UNCITRAL Model Law in 2006.

It has been widely observed that hurdles are mostly encountered at the preliminary stages of the proceedings i-e before the formation of the arbitral tribunal. After extensive perusal of ICC Pre-Arbitral Referee Procedure I have come across that it should be declared as "Compulsory to follow" for all arbitration institutions to adopt procedures similar to the ICC Pre-Arbitral Referee Procedure, which ameliorates this problem and ensure the efficacy of arbitration. The arbitration agreements involving contracts have an impact to enforce these procedures as mandatory. On the other hand, it should be imperative for institutions to give proper weightage to this provision being added in the agreement. The legal fraternity should also encourage their clients to include this provision in their agreements so that their valuable claims and rights could be protected in the arbitration proceedings.

We already have discussed the status of availability of interim measures in different legal systems and as well in institutional rules and court rulings. After the inception of amendments introduced in 2006, there is a clear difference which leans in favor of granting the interim measures of protection. Despite all these mighty developments, it has been felt that there is still room for further developments. There is a dire need to harmonize international structure regarding international commercial arbitration in order to meet the changing circumstances and to ensure the efficacy of arbitration to international trade issues and to prove it an effective alternative dispute resolution mechanism. For instance, if we have a glance of Federal Arbitration Act of United States of America we will see that the availability of interim measures in this Act is still vague. The dilemma is that a party before entering into the agreement to arbitrate has to analyze the position of different circuits in order to figure out the exact position on interim measures by different courts. This is because, the courts of different circuits have taken different views on the issue of interim measures of protection regarding the measures granted by courts and as well by the arbitrators. Resultantly, a party before entering the arbitration agreement with the party of United States has to analyze the status of courts of different circuits. It has been seen that the time has come to amend the Federal Arbitration Act of United States in order to synchronize and to meet the requirements of the hour.

If we analyze the status of availability of interim measures in English Arbitration Act, 1996, it would be amazing to find out that this legislation probably the only legislation which can be deemed as up to the mark law that addressed all the concerned issues comprehensively. The bare reading of English Arbitration Act, 1996 and the precedents in this regard would reveal that both have highly appreciated the grant of interim measures by courts as well by the arbitral tribunal. Despite all

these wonderful provisions, English law is lacking on the subject of enforcement of provisional measures ordered by the arbitrators or the power to approach the courts. Hence, there is a need for a more harmonized international setup to address this issue.

The work done by UNCITRAL on the issues of interim measures is commendable because the stakeholders had a great concern on the lacunas in this regard. Both developed and developing countries are now curious to bring their national legislations in line with the post-amended UNCITRAL Model law in order to acquire the effective use of interim measures of protection. These guidelines will have long lasting effects on setting up a comprehensive mechanism and harmonized structure on the issue. The amendments made by UNCITRAL would certainly prove as a successful attempt to vacuum the gap in terms of interim measures of protection.

Unlike before, the grant of interim measures of protection from the arbitral tribunal had been taken up by the international institutions and incorporated in their rules. Despite this attempt, it has been learned from such rules that there are lacunas and shortcomings. For instance, World Intellectual Property Organization (WIPO), AAA and International Chamber of commerce have given an option to the parties to incorporate their optional rules in their agreements which they describe as specifically designed to provide relief of urgent nature. It is advisable that these international institutions will have to amend their rules in order to provide a harmonized structure to the arbitral tribunals. Furthermore, the issues like pre-requisites to grant interim relief and the extent of interim relief that the arbitral tribunal may have power to grant have not been addressed in such rules and these lacunas could create a dilemma for arbitrators to arriving at a logical conclusion and they could think that whether the interim measures of protection is necessary and whether they have power to grant it or not. I would suggest that

UNCITRAL should keep on working on the UNCITRAL Arbitration Rules to make it in consonance with the amendments to the Model Law, so parties using the Rules for ad-hoc arbitration and also other institutions can take advantage of it.

In India, the Arbitration and Conciliation Act, 1996 has conferred powers to courts in order to provide interim relief and such kind of power has also been conferred to arbitral tribunals as well. Despite all these initiatives, there is still variation in the degree and effectiveness of such kinds of interim relief. If we conduct an in-depth analysis, we will come across that arbitral tribunal has very limited vested powers to order interim measures of protection. For instance, power to grant interim measures to protect the subject-matter in the dispute, provision of security in this regard and lack of any mechanism to enforce the directions issued by the arbitral tribunal. The power exercise by international tribunal to order interim measures of protection is as well enjoyed by arbitral tribunal. The rationale behind it is that the arbitral tribunal has to take all necessary measures in order to reach at a conclusion because arbitral tribunal has to ensure that the award would not be frustrated after passing of it. Preservation of the subject-matter of the dispute is an issue of paramount importance in the eyes of arbitral tribunal. The dilemma is that neither the ICC Rules nor the arbitration act of India has given any express power to the arbitrators to order interim relief.

The perusal of the English Arbitration Act, 1996 reveals that it has focused the competence of arbitral tribunal to grant interim measures of protection. Furthermore, it has an express provision that gives the arbitral tribunal power to give direction to party to furnish security. It is also pertinent to mention here that arbitral tribunal has vested power in support of arbitral proceedings as mentioned in Section 44(3) of the same

Act and the procedure to exercise such power has also been laid down. The modern trend reveals the resort to intervention of the courts and one can easily comprehend that the provisions like Section 44(3) of English Arbitration Act are not disruptive. Such type of provision is also lacking in the national arbitration laws of Pakistan. The legal fraternity has been urging for the incorporation of such a provision in arbitration laws of Pakistan in order to improve the status of commercial arbitration. Furthermore, the incorporation of such provision will entitle arbitral tribunals to order interim and conservative measures with the authority of national courts and to endorse an effective mechanism. The current scenario of national arbitration laws are retarded and does not give powers to arbitral tribunal to order interim relief, hence, these provisions should be amended in order to achieve effective dispensation.

The lacunas on interim measures of protection in Model law ultimately compelled UNCITRAL to introduce amendments in this regard. The inadequacies in Model law finally recognized by UNCITRAL and paved the way towards the amendments introduced in 2006. The new version of Article 17 was introduced but the majority of states has not incorporated the amended version of Article 17 in their national laws, thus, remain still disintegrated. Despite all this, the benefits of amended version cannot be ruled out. There is a dire need to convince these states that the efficacy of commercial arbitration largely depends upon the use and enforcement of interim measures of protection and the amended version would prove as an impetus to arbitration. Furthermore, arbitration has been widely considered as efficient forum to order interim relief and if the amended version of Model law be adopted, it would provide harmonization in the national laws of these states. This will also strengthen the survival of commercial arbitration and will yield in a reliable dispute resolution mechanism.

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